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On The Cover

Only see trees and fallen leaves on the cover? Closer inspection reveals three morel mushrooms. Prized by gourmet cooks, hunting morels is a common springtime activity for Alabama mycophiles.

—Photo courtesy of Taylor Hara, Lee County

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The ASBVLP, the MVLP, and the Young Lawyers Section partner to help disaster victims in Selma.

Lawyers Provide a Lifeline in Disaster Response

Unfortunately, Alabamians are all too familiar with devastation caused by severe weather. Whether it's a hurricane, tornado, or some other significant weather event, I'd submit that every person in our state has been affected in some way by a weather-related disaster.

When severe thunderstorms swept across Alabama in January, residents in more than a dozen counties were impacted by tornadoes, straight-line winds, or flooding. Central Alabama and Selma were particularly hard hit, where a tornado cut a widespread path of destruction. Lives were lost, homes and businesses were destroyed, and city landscapes were changed forever.

In times of disaster, we are reminded of the important role lawyers have in post-storm recovery. After necessities

and safety concerns are taken care of, affected residents often face a bevy of legal questions with insurance, FEMA claims, and landlord/tenant issues. There is also the work of helping survivors clear title to their homes and replace or create vital documents like wills, trusts, and powers of attorney.

While storms don't discriminate, the path to recovery is often hardest for the poor, and pro bono legal assistance is a lifeline for many disaster survivors and a critical component of disaster response.

In Alabama, we are blessed with a successful, well-organized mechanism for pro bono disaster assistance. Each time a disaster declaration is made for any Alabama county, the Young Lawyers Section of the Alabama State Bar activates its disaster hotline.



Attorneys lend a helping hand to victims during the Selma Disaster Clinic.

The toll-free hotline allows low-income residents to ask legal questions through a dedicated voicemail system housed at the Alabama State Bar. The messages are then triaged and sent to an available volunteer lawyer to respond within 24 hours. Hotline volunteers, all young lawyers, have a manual to help guide them through the more technical questions, so they are armed with the best information to assist victims.

In addition, our Volunteer Lawyers Program (VLP) also partnered with local VLPs and bar associations to host several in-person clinics last month in Selma, on top of the regular monthly legal-aid clinics in Selma, Tuscaloosa, and via Zoom.

Lawyers provide services that no one else can, and I'm so proud of the work being done to help those facing some of their darkest days. Our commitment to pro bono service unites us in our profession, whether it's disaster-related or one of the many other areas of pro bono representation.

We have a lot to be proud of in Alabama. Our state has one of the highest lawyer enrollment rates in pro bono programs in the country, and we also have one of the highest numbers of cases closed annually. This hallmark of the legal professional is consistent with a true sense of professionalism – offering our unique skill set to help those unable to afford representation.

I believe that lawyers are advocates and advisors for our communities

outside of the legal professional as well. I have said it many times before that you'd be hard-pressed to find a civic organization, volunteer board, Little League team, or non-profit fundraising arm that doesn't have a lawyer leading it.

Most of us would say that we became lawyers to help others, and volunteer and pro bono service is one of the most meaningful ways to accomplish that.

If time prevents you from volunteering at an in-person clinic, I hope you'll sign up for Alabama Free Legal Answers at alabama.freelegalanswers.org/. This service, which is coordinated through our bar's VLP, lets you do pro bono work anywhere and anytime you have a few minutes free. Volunteers are anonymous to the site's users and are covered by malpractice insurance. Low-income residents of Alabama submit their questions regarding their civil legal issues to the website. You can choose any question you want and respond on your own time.

To the attorneys who regularly and selflessly volunteer with our VLPs, thank you. To those considering joining a program, there is no better time than now. Alabama needs you. While the recent storms highlighted an urgent need for volunteers, the demand is always great. *Lawyers Render Service* is our motto here at the bar, and I can think of no better way to render service than using our professional talents to help those most in need. ▲



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Pursuant to the Alabama State Bar's Rules Governing the Election of President-Elect, the following biographical sketch is provided of Taylor T. Perry, Jr., who was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 2023-2024 term and will assume the presidency in 2024.

Taylor T. Perry, Jr.

Tom Perry is a 1983 graduate of the University of Alabama School of Commerce and Business and a 1998 graduate of the University of Alabama School of Law, where he was a member of the Trial Advocacy Board.

He has practiced with Manley, Traeger, Perry, Stapp & Compton in Demopolis for 35 years, after starting his career at Simmons & Ford in Gadsden.

In 1988, Tom returned home to practice in the west Alabama Black Belt area, concentrating on representing those who received serious personal injuries or wrongfully lost their life, as well as those who are the victims of insurance fraud and other abuses.

He has handled substantial cases in the 17th Judicial Circuit, where he is a longstanding member of its local bar association; the 1st Judicial Circuit; and the 4th Judicial Circuit.

Tom is admitted to practice in the United States District Court for the Southern District of Alabama, the Northern District of Alabama, and the Middle District of Alabama; the 11th Circuit Court of Appeals; and the United States Supreme Court.

His service to the Alabama State Bar includes several terms as a bar commissioner (from 1996 until 2005 and again from 2014 to the present), as vice president during Taze Shepard's term, and as a member of the Executive Council for



Perry

Presidents Taze Shepard, Sam Irby, and Augusta Dowd. Tom served as a member of the MCLE Commission, as co-chair of the ASB Finance Committee, and as president of the Solo & Small Firm Section. He served on a disciplinary panel and as a disciplinary hearing officer and is a member of the Disciplinary Commission.

The Legal Network recognized Tom as a Top Lawyer in Alabama, and he is a Top-Rated Lawyer in Litigation by Martindale-Hubbell. He is a member of the Alabama Association for Justice.

Tom is married to Melinda Cooper Perry, and they have two children – Eugenia “GiGi” Compton Perry Mitchell (Chase) and Taylor T. “Tripp” Perry, III, who practices with Smith, Spires & Peddy in Birmingham. ▲



EXECUTIVE DIRECTOR'S REPORT

Terri Lovell
terri.lovell@alabar.org



March Madness Leadership Lessons: Our Playbook for Success

This time of year, it seems almost everyone is talking about college basketball. Even if you're not into sports, it's easy to get caught up in the pageantry and bracket-building excitement of March Madness – after all, the stakes are high, and the wins are big.

Every time March rolls around, it seems like a handful of teams are consistently ranked at the top. Those programs are strong year after year, and it's often because the teams are united in their purpose, their vision, and their resolve to succeed. Yes, it's about talent, but there is usually something more that elevates a team to a championship.

Being the wife of a college basketball coach and having two children who play basketball in school, I frequently find myself using a coaching philosophy in my leadership approach.

Much like a sports team, the Alabama State Bar staff has a shared mission and vision. We come to work every day with the purpose of serving lawyers and helping

them succeed. I consider it part of my role in fulfilling the bar's mission to motivate, educate, and inspire the staff to be and do their best.

As we look to set our playbook of success for the next several months and years, General Counsel Roman Shaul and I worked alongside our department heads to develop goals and initiatives that align with our soon-to-be-completed strategic plan. The commitment and hard work of the members serving on our Long-Range Planning Task Force play an invaluable role in ensuring we are on a path of success, stability, and strength in the coming years. We look forward to sharing that with you when the work of the task force is concluded.

One exciting new addition to our staff is Chad Coker, our director of operations. He recently retired from the bench after more than 12 years as a district court judge in Colbert County. Chad (as he asked us all to call him) not only has a keen understanding of leadership and service in the profession of law, but also a unique perspective on the issues lawyers face around our state. His data-driven and people-focused approach to problem-solving allows him to serve our staff and our members well in this new role.



Coker

He will oversee the day-to-day operational functions of the Alabama State Bar, including organizational structure, personnel management, compliance, and internal policy implementation. I hope you get the opportunity to meet him soon.

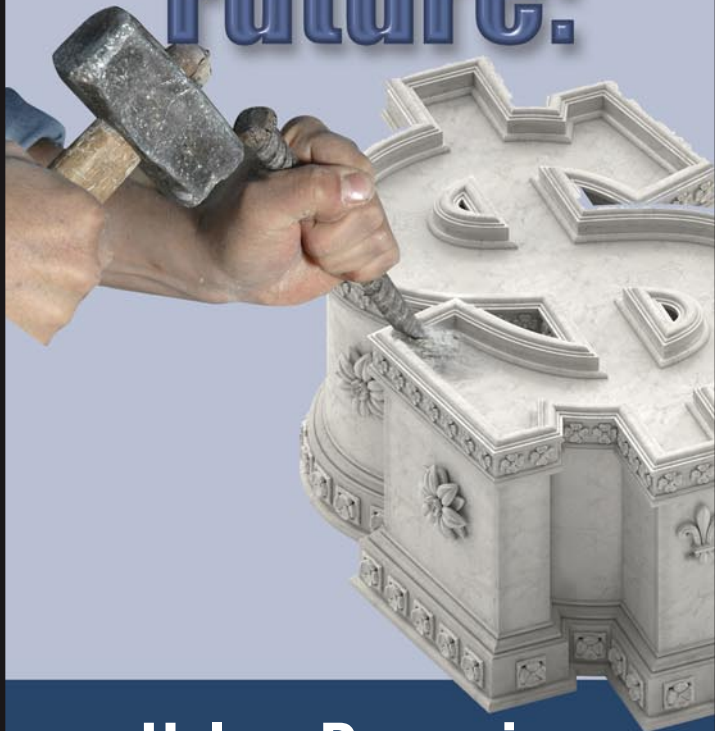
The staff has heard me tell them on a number of occasions what I often hear my husband say to his team – that *pressure is a privilege*, and I will leave that with you as well.

Being a lawyer is not easy work. It often requires long hours, deadlines, and demands that can feel emotionally and physically heavy. However, the work we do is an honor. Just as I tell the staff, I believe in our collective ability to respond to problems well and create opportunities from challenges. I also encourage you to think like a coach by having a robust vision of the future – your own future, your firm's future, and the profession's future.

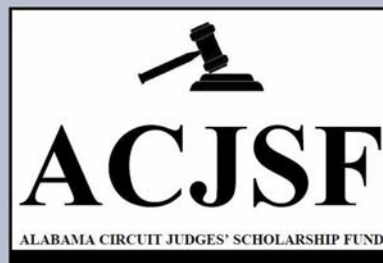
What can we do now to set ourselves up for victory? What nudge can you, as a leader, give to the team around you to succeed?

At the bar, we know you're counting on us, and we count it as a privilege to serve you with a winning mindset. ▲

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EDITOR'S CORNER

W. Gregory Ward
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Welcome to the March Issue of *The Alabama Lawyer*

I think you are going to enjoy it.

Those of you who attended the bar conference this summer likely attended a seminar by Jan Hargrave. Jan is an expert in nonverbal communication – a dull way of saying that she can often tell what people mean by looking at the cues they use when they speak or move. I watched an entire hall of people who were mesmerized (yes, I chose that word on purpose) by her insights and her presentation. There are more practical uses for this sort of thing than I can count. I bought a couple of her books, and the more time I spent with her ideas the more interested I became. I was meeting with a bar commissioner a while back, and he mentioned how much he enjoyed her presentation. I told him that we were considering publishing something by her. He liked the idea.

What I didn't tell him was that I approached Jan after the seminar and discussed the possibility of an article. She had me stop, stand still, and she told me all of the non-verbal cues she picked up as I was walking towards her. And she was spot on (page 78).



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Larry Childs and Brand Biddle give us a terrific legal article wrapped up in a fable based on a made-up-from-whole-cloth lawyer, Atticus Darrow, Esq. Atticus received the email that we've all received. You know the one – it involves a foreign dignitary who for some reason wants to put some money in our account so we can pay it out. What could go wrong with that? Plenty. I was quite surprised at the intricacies and interplays of the UCC banking laws and just how badly things can go in short order (*page 86*).

Should you read this article? After all, you are not likely to get involved with a scam. Oh, really? Do you put money in a bank? If you do, you should read this one. It includes some good lessons for all of us.

And let's end with some fun. As pretty much everyone on the planet knows, Harper Lee wrote *To Kill a Mockingbird*. She was born in April, and since we don't have an April issue we are going to call this edition close enough and celebrate her birthday with an article.

One of our own, Rebecca Patty, found out what nursing home Harper Lee was in. What did she do? With her dog (she had the temerity to name her dog Harper Lee and then take the dog to meet the human Harper Lee) and a federal judge, she announced herself at an unannounced visit. She finagled her way in, and as a reward she got to spend some time with her hero, the great author. Read the story. My poor writing does not do it justice. I laughed out loud as I read it (*page 94*).

You all take care. Enjoy the articles. Email me at wguard@mindspring.com if you have questions or comments or want to write for us. We are always on the lookout for our next group of excellent writers.

And just wait until you see what we have planned for you in our next issue. ▲



IMPORTANT NOTICES

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

▲ Notice of Election and Electronic Balloting

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

Pursuant to 28 U.S.C. § 2071(b), notice and opportunity for comment is hereby given of proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit. The public comment period is from Wednesday, April 5, 2023, to Friday, May 5, 2023.

A copy of the proposed amendments may be obtained on and after Wednesday April 5, 2023, from the court's website at <http://www.ca11.uscourts.gov/rules/proposed-revisions>. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., NW, Atlanta, Georgia 30303. Phone (404) 335-6100.

Comments on the proposed amendments may be submitted in writing to the Clerk at the above address or at <http://www.ca11.uscourts.gov/rules/proposed-revisions>, no later than Friday, May 5, 2023.

Notice of Election and Electronic Balloting

Notice is given here pursuant to the Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners that the election of these officers will be held beginning Monday, May 15, 2023, and ending Friday, May 19, 2023.

On the third Monday in May (May 15, 2023), members will be notified by email with instructions for accessing an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 5, 2023) requesting a paper ballot. A single written request will be sufficient for

all elections, including run-offs and contested president-elect races during this election cycle. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 19, 2023) immediately following the opening of the election.

Nomination and Election of Board of Bar Commissioners

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

- 8th Judicial Circuit
- 10th Judicial Circuit, Place 4
- 10th Judicial Circuit, Place 7
- 10th Judicial Circuit, Bessemer Cut-off
- 11th Judicial Circuit
- 13th Judicial Circuit, Place 1
- 13th Judicial Circuit, Place 5
- 15th Judicial Circuit, Place 5
- 17th Judicial Circuit
- 18th Judicial Circuit, Place 1
- 18th Judicial Circuit, Place 3
- 19th Judicial Circuit
- 21st Judicial Circuit
- 22nd Judicial Circuit
- 23rd Judicial Circuit, Place 1
- 23rd Judicial Circuit, Place 4
- 28th Judicial Circuit, Place 2
- 30th Judicial Circuit
- 31st Judicial Circuit
- 33rd Judicial Circuit
- 34th Judicial Circuit
- 35th Judicial Circuit
- 36th Judicial Circuit
- 40th Judicial Circuit
- 41st Judicial Circuit

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits

will be determined by a census on March 1, 2023, and vacancies certified by the secretary no later than March 15, 2023. All terms will be for three years.

A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 28, 2023).

Submission of Nominations

Nominating petitions or declarations of candidacy form, a high-resolution color photograph, and biographical and professional data of no more than one 8 ½" x 11" page and no smaller than 12-point type must be submitted by the appropriate deadline and addressed to Secretary, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101-0671.

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 6 and 9. Petitions for these positions, which are elected by the board of bar commissioners, are due by March 31, 2023. All terms will be for three years.

Submission of Nominations

Nominee's application outlining, among other things, the nominee's bar service and other related activities must be submitted by the appropriate deadline and addressed to Executive Council, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101-0671.

All submissions may also be sent by email to *elections@alabar.org*.

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

Election rules and petitions for all positions are available at <https://www.alabar.org/about/board-of-bar-commissioners/election-information/>. ▲

No.



DO YOU SPEAK BODY LANGUAGE: Mastering the Art of Nonverbal Communication

By Jan Hargrave

What are your thoughts
when your client asks,

“Do you really think that a person like me could commit such a horrible crime?” Is this projective sentence a simple statement, or is it an evasive response that she’s using as a defense mechanism? According to research on nonverbal communication, this question, and the answer, are quite complicated.

The basic elements in any face-to-face human communication are words, tone of voice, and body language. The first element, the words, known as verbal communication,

comprise seven percent of the message when communicating information. The last two categories, tone of voice and body language, known as nonverbal communication, make up 93 percent of the intent that a communicator communicates. When applying all of these psychological statistics on “silent messages” into the context of legal communication, stay mindful that while your intellectual content may be delivered entirely verbally, your nonverbal cues are more than 10 times as important in getting your audience to accurately perceive the messages that you are creating in your mind and speaking with your voice.

*At times nonverbal
messages are conveyed
through deliberate,
conscious gestures;
other times, a person's
body language will
"talk" without him
even realizing it.*



Your lips say, “Yes, yes, yes,” but your eyes say, “No, no, no.” Body language covers an infinite range of facial and body movements, including the countless ways in which you smile, you walk, you manipulate your eyes, and you move your hands and arms. Whether it’s the “no” that a shake of the head conveys, the “I’m not interested,” or the “keep talking, I’m listening” that a slight side tilt of the head implies, we draw messages from decoding body language.

At times nonverbal messages are conveyed through deliberate, conscious gestures; other times, a person’s body language will “talk” without him even realizing it. It’s common knowledge that people who stand erect are noticeably more confident and more comfortable than those who slouch or shift their body weight from one foot to another. But conscious or not, our body language gestures help us to portray a wide range of feelings, including confidence, enthusiasm, boredom, amusement, impatience, fatigue, concentration, interest, puzzlement, and embarrassment.

Three Cs of Nonverbal Communication

An article discussing nonverbal communication cannot be complete without first emphasizing the three fundamental Cs of body language.

For accuracy in decoding an individual’s nonverbal behaviors,

meticulous attention must be collected as to the *context* (setting) in which a specific gesture appears, *congruence* of specific gestures with the individual’s spoken words, and the appearance of several gestures (*clusters of gestures*) within a family of gestures should be noted for achieving accurate conclusions.

Context

Note the environment, setting, or surrounding in which a person displays each specific gesture. A person who crosses his arms over his midsection as he walks outdoors on a chilly winter evening is doing so because he is cold. A completely different message is conveyed when your client crosses his arms over his midsection as he sits across from you in a business meeting.

Congruence

To produce effective and meaningful messages, the words, the sounds, and the body need to support one another; they need to be in harmony. Congruence of words with gestures is paramount to creating an aura of genuineness of a person.

Clusters of Gestures

It is a mistake to interpret a solitary gesture in isolation from other gestures or other circumstances around it. Observing and interpreting gesture clusters, rather than basing data on one single observed gesture by itself, is crucial to an accurate interpretation of an individual’s body language.

Three Steps To Increased Nonverbal Reading Power

Reading an individual's body language is not the only goal in increasing nonverbal reading power. Understanding your own body language, and its impact on others, is of pivotal importance. Awareness of your own behaviors and the behaviors of others – expertise which is usually gained in phases, with time and practice – leads to success in people-reading skills. Competence in the following three stages of awareness and skill are necessary in achieving accurate nonverbal conclusions.

Awareness of the Other Person

Briefly scan the client's five major nonverbal communication channels (body angle, face, arms, hands, and legs). Do they demonstrate openness and receptiveness, or do they demonstrate defensiveness and boredom. Make a quick note of these overall general gesture clusters, and they will alert you as to whether you proceed as originally intended or redirect your approach entirely.

Awareness of Self

Your own nonverbal movements and expressions can make or break an encounter. Ask yourself, "How

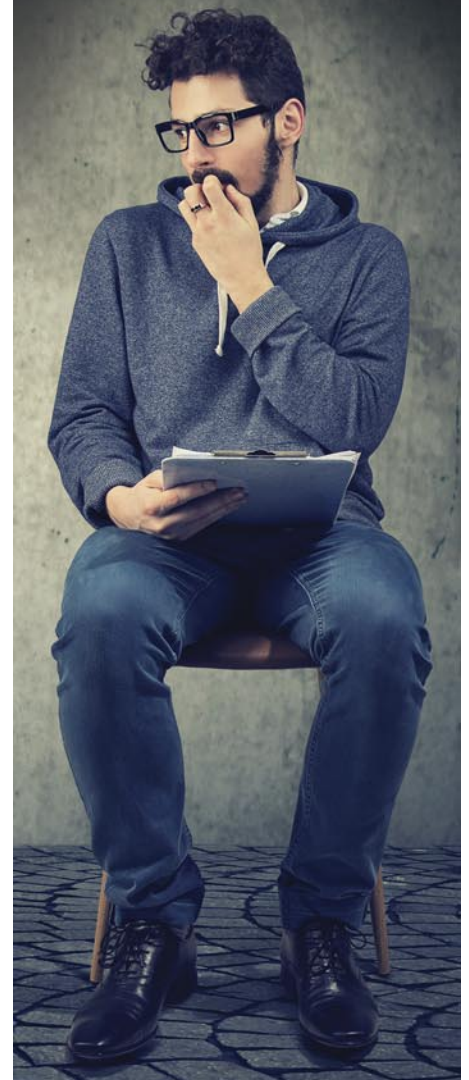
can I communicate to display confidence in myself?" "How does the other person see me?" "How can I avoid communicating nervous or negative nonverbal signals?" Once you acknowledge your own nonverbal behaviors, and how you use them to interact with others, you become more consciously aware of your impact and habits during conversations. Evaluating and knowing when to present yourself in a dominant mode or when to retreat in any given situation is an integral step in mastering nonverbal communication.

Management of Self and Others

Management and awareness of your client's body language and your own body language allows you to guide the conversation for a more positive outcome. For example, if you notice that your client is displaying negative, defensive body language gestures during your discussion, counteract his negative gestures by only displaying open, positive nonverbal gestures. Optimistically, the client will begin to mirror your deliberate, open, positive gestures, and the conversation will redirect itself into a more favorable outcome. Getting the client to relax and become more communicative aids him in revealing what's actually troubling him.

Once management of self and of another person's nonverbal signals becomes second nature to you, you have fully absorbed the concept of "nonverbal people reading."

Awareness of your own behaviors and the behaviors of others – expertise which is usually gained in phases, with time and practice – leads to success in people-reading skills.



Any excessive eye-blocking behavior (blinks, squints, eyelids delayed in opening, or compressed eyelids) represents discomfort and signals that the person has received disturbing news or is uttering unpleasant information.



Baseline Behaviors

Baseline behaviors are the natural, normal movements that an individual utilizes when he is comfortable speaking or listening. Recognizing and recording a person's baseline gestures are imperative to later assessing his levels of discomfort, stress, or deception when he's asked a particular topic.

Begin the client interview with soft, easy questions to help him feel at ease. By first asking simple, straightforward questions, you are able to observe and gain information on his nonverbal behaviors when he's participating in a relatively comfortable conversation. When the individual is later faced with tough questions that might cause him discomfort or stress, you are better equipped to identify any observable deviations from his normal initial baseline behaviors. These behavioral gesture deviations reveal the areas of discomfort for the client, and they show specific areas where persistent further questioning should occur to get to the true story.

Body Language Basics

Eyes

Upon greeting a person, eye contact is the strongest of the nonverbal gestures. In most cases direct eye contact indicates that a person is intently listening. It's definitely a clear way to show interest in another person and it's a good test of honesty. If someone cannot intermittently look another person dead

in the eye while telling his story, he is probably not playing straight. When the eyes are in congruence with other parts of the face (smiling eyes, smiling mouth), communication becomes increasingly unambiguous. When there is no synchronization between the eyes and other the facial expressions, ambiguous messages are sent. Pleasure widens the eyes and is usually accompanied by a smile. Surprise sends the eyebrows skyward and widens the eye gaze.

Despair and sadness hood the eyes, make the mouth droop, and often cause the entire body to slump. Any excessive eye-blocking behavior (blinks, squints, eyelids delayed in opening, or compressed eyelids) represents discomfort and signals that the person has received disturbing news or is uttering unpleasant information.

Smile

Like the eyes, the smile is remarkably varied. The authentically happy smile involves the entire face. It flashes both upper and lower teeth, is accompanied by open eyes (crinkles and all) and relaxed brows and is a strong indication that the person is friendly and willing to communicate. An insincere smile, also known as the "false smile," is accomplished when the upper lip is drawn tightly across the face and there's minimal engagement of the eyes. Frowns are visible when the corners of the mouth turn downward. When decoding facial nonverbal communication remain aware that as stress increases, lips tighten, and at times actually disappear.

Hand Movements

Hand movements, highly expressive of our internal state, are another area where there is common understanding of the action.

Shake your fist, and everyone realizes that you're angry. Rub your palms together, and you're probably anticipating something good. Rub your palms and the back of your hands, and you're probably just cold. Pointing your finger toward the exit will suggest that you are signaling a direction but pointing your finger directly at someone will usually specify that you are making an accusation.

Pacifying hand movements (hand-rubbing, hand-scratching, handwringing) are indicative of a person who is experiencing low confidence, nervousness, or fright. Finger-steepling (outstretched fingertips touching together) is opposite of wringing hands and demonstrates confidence and focus. Confident people tend to keep their hands visible and utilize gestures that are smooth and deliberate. For our own safety purposes, we are trained to keep a close eye on the hands of others; therefore, to establish comfort and trust, always keep your hands visible. Make certain that you engage your hands. Use them to demonstrate, to persuade, and to make your messages more memorable.

A person who brings his hand up to his mouth while talking is conveying an unconscious admission of doubt and uncertainty. He is either attempting to conceal information or he is doubting something that he's hearing. A hand placed to the vulnerable throat or neck area is common when a person is feeling insecure, confused, or threatened.

A back-and-forth chin stroke is typical of a person who is in a reflective, meditative state. It's an evaluative touch that represents a person who is deep in thought and typically appraising facts, numbers, or suggestions.

Handshakes

One of the most clearly recognized expressions of body language is the handshake. There's more to a handshake than a firm grip and a dry palm.

A person can deliver three messages with his handshake – cooperation, domination, or submission.

The “I’m-equal-with-you grip” is accomplished by shaking hands with the same pressure as your companion and by keeping the hands in a vertical position during the handshake.

The “take-charge grip” is accomplished when your palm faces down or is downward relative to the other person's hand. To convey a willingness to give in, a person should offer his hand with his palm facing upward.

This “give-in upward grip” lets another person know that you are eager to act on his orders and that you are prepared to help in any way that you can.

Anchoring

Anchoring – touching another person on his forearm during the handshake – is most acceptable in our culture. It represents a person who is signaling that he is fully present in the conversation and willing to spend time getting better acquainted. Always be the first one to extend your hand in greeting. Add this anchoring gesture to a friendly *hello*, a nice smile, and your name, and you have accomplished the first steps to opening positive channels of communication.

Openness vs. Defensiveness

Open posture is demonstrated by keeping your arms uncrossed and placing your body within proper communicating distance of the other person. Open posture sends out clear signals of confidence,

For our own safety purposes, we are trained to keep a close eye on the hands of others; therefore, to establish comfort and trust, always keep your hands visible.



Feet shout out when a person is feeling confident, happy, nervous, shy, or threatened, but since they are the furthest part of the body from the face and brain, they are often overlooked when decoding body language.



receptivity, and concern. A person who crosses his arms in front of his body and places his hands in a fist position is signaling that he is opposed to or not interested in what he's hearing. His crossed arms across his midsection serve as a partial barricade protecting him from receiving someone else's information.

The only allowable midsection arm-cross, which should only be used sporadically during a discussion, is when a person's hands and fingers are visible over his crossed arms. This hands-and-fingers-visible arm-cross position is commonly referred to as a "coach's position" or a "resting position."

A slight forward body lean, displaying attentiveness, is another component of an individual's seated open posture. Contrastingly, a person who leans back in his chair and interlaces his hands behind his head is signaling powerful signs of judgment, dominance, and skepticism.

Shoulders

Square, even-placed shoulders imply alertness, strength, and confidence. Unevenness of shoulders exhibits indecisiveness of person. High, even-placed shoulder shrugs convey doubt, whereas a single shoulder shrug suggests deception and a misrepresentation.

Legs and Feet

Feet speak loudly. They turn in when a person is expressing shyness, they jiggle when someone is happy, and they point toward the exit of the room when a person wants to flee a situation.

Feet shout out when a person is feeling confident, happy, nervous, shy, or threatened, but since they are the furthest part of the body from the face and brain, they are

often overlooked when decoding body language.

Professional behavioralists label the feet as most honest part of the body and bring special attention to them in their nonverbal assessments.

Crossing your leg toward your client during a discussion gives the impression that you are including him in your conversation. Crossing your leg away from your client might give him the message that you want to quickly end the conversation and exit the room. Notice the person who, while seated, tightly crosses his ankles or locks his feet around the legs of his chair. These "leg freeze" behaviors reveal his level of stress, concern, or anxiety over what's being discussed.

Deceptive Body Language

People lie with their words, but you can detect deception by realizing that the human body and its many signals don't know how to lie.

The untruthful person's mindset about a questioner's topics, considering he knows that he does possess knowledge (which he must hide), causes him to reveal this stress in particular nonverbal gestures. Luckily for body language analysts, a deceptive individual will monitor and try to control his words and face (the areas he knows others will focus upon), but neglect to control his voice and body. Falsifying with words is much easier than falsifying with facial expressions.

Words can be rehearsed, facial expressions cannot.

When relaying a story, not only is the timing of the facial expressions

or emotion important, so is the type of emotion. An obvious incongruence between emotion and speech (smiling while relating a story pertaining to another person's death) will designate the speaker's extreme discomfort and deceptiveness. Extremely crooked facial expressions, ill-timed facial expressions, mismatched facial expressions, and expressions that last too long are all likely to be deception clues.

Inspect for deceptiveness by attentively looking for displacement gestures and any sudden significant change in an individual's baseline behaviors. Discomfort is released by a variety of displacement gestures:

- Hands that constantly touch the face, the nose, the eye, the ear
- Hands that disappear under or between the thighs
- Rubbing hands, wringing hands, fingers interlacing
- Eye blinking, eye blocks, touching the eye
- Lip compression, lip licking
- Clothing adjustments, fiddling with watch, necklace, earrings
- Torso faces away from you, hunched shoulders, half-shoulder shrugs
- Crossed arms with hidden hands and fingers.

If, during a discussion, you observe signs of displacement or discomfort, do not address it immediately. The best approach is to note the fact in your mind and continue with the conversation, constantly trying to extract more information.

Later in the conversation, to reverify your initial findings, circle back to the topic that caused the person any discomfort. Ask your

question a second time. If discomfort manifests again and again when discussing a particular topic, you can be certain that this area needs further probing and investigation.

Summary

In answer to the initial question that I asked at the beginning of this article, "Do you really think that a person like me could commit such a horrible crime?", this evasive, projective response is a psychological defense mechanism in which a person voices his own fears while attributing those fears to someone else. In other words, your client is being deceptive and possibly has some knowledge of the crime being discussed. Dig deeper – she'll reveal everything!

This article gives you the groundwork and some of the rules for beginning your journey to successful people-reading skills. You've already been playing the game of body language unconsciously all of your life. Now, equipped with these new skills, you can begin playing it consciously. ▲

Jan Hargrave



Jan Hargrave has appeared on ABC, NBC, CBS, Fox News, *The Steve Harvey Show*, *The Montel Williams Show*, *E! Entertainment*, and *The Maury*

Povich Show. She has written for the New York Post, The Forensic Examiner, and Redbook. She holds a bachelor's, master's, and education specialist degree from the University of Louisiana in Lafayette and is a member of the American College of Forensic Examiners.

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Duck, You Sucker!

Avoiding the Nigerian Check Scam

By Larry B. Childs and Brant J. Biddle

On a typical Monday morning,

Atticus Darrow, Esq. receives an atypical email that sends his pulse racing. A businessman from Nigeria has run into some trouble collecting a debt from an American corporation, and he needs Mr. Darrow's help. Mr. Darrow is thrilled – he's always longed to break into the international debt collection scene, and now he has his chance!

The requested assistance sounds simple enough. The businessman needs Mr. Darrow to draft a letter to the debtor, demanding payment of the debt. If the debtor makes good, Mr. Darrow will assist in transferring the debt funds to the businessman's bank account.

Barely a week after mailing the demand letter, Mr. Darrow receives a response from the debtor in the form of a cashier's check for the full debt amount of \$500,000 drawn on a Canadian bank. Mr. Darrow deposits the check into his firm's client trust account in a local Alabama bank. A few days pass as Mr.

Darrow waits for the check to clear. Maybe Mr. Darrow is careful enough even to ask his bank whether he is free to use the funds. The bank representatives answer that the funds are available, and, indeed, Mr. Darrow can see that the funds appear in his firm's account. Satisfied, Mr. Darrow deducts his reasonable fee and wires the remainder to the businessman's bank in Nigeria.

Time passes as Mr. Darrow turns to other matters. Soon enough, however, he receives a message from his firm's bank that sends his pulse racing all over again: the cashier's check was counterfeit, and the bank has charged back the firm's account for the \$500,000 proceeds and charged an overdraft fee to boot. The firm immediately moves to reverse the transfers, but the funds are long gone. With no other options, Mr. Darrow's firm turns to litigation – it will sue its bank for failing to prevent the fraud and for incorrectly assuring Mr. Darrow that the funds were available. Mr. Darrow's firm has two key chances for success – *slim* and *none*. Because, as Mr. Darrow's firm will soon learn, the depositor of a counterfeit check almost always bears the risk of loss.

Foreign Check Scams Targeting Law Firms

Some have called it a “Nigerian check scam.”¹ The scammer poses as a foreign business and contacts a law firm to request legal assistance. Whatever the assistance may entail, the scam itself will involve the firm’s receipt of a check that is drawn on a foreign bank but is, in fact, counterfeit. After the oblivious firm deposits the check into a trust account at its bank, the scammer requests that the firm transfer the proceeds to a separate account.

The crux on which the scammer relies is that there will be sufficient delay between the time that the law firm deposits the check and the time that it will take for the check to bounce.² Within that window, the scammer can exhaust the funds before anyone is the wiser.

Far too often, this scam succeeds, and the funds become irrevocably lost. Under such circumstances, the law firm will have little choice but to bear the loss for the reasons described below.

The Depositor’s Burden of Risk for a Counterfeit Check

In a typical check scenario, a bank customer deposits a check at its own bank, which the Uniform Commercial Code (“UCC”) calls the “depository bank.”³ If the depository bank is not the bank ultimately responsible for honoring the check – i.e., the “payor bank”⁴ – then the depository bank will act as a “collecting bank,”⁵ either

presenting the check to the payor bank for final settlement or transferring the check to an “intermediary bank”⁶ for an intermediary settlement. This process will continue until the payor bank finally determines whether to pay the check, return the check, or give notice of “dishonor” or nonpayment of the check.⁷ In the meantime, pursuant to the Expedited Funds Availability Act,⁸ the depository bank must make funds from the deposited check available to the depositor soon after the deposit. This quick availability of deposited funds, when coupled with the potential delay in the check’s final settlement

with the payor bank, could easily lead a depositor to assume (wrongly) that the check has already cleared.

But suppose that a bank customer – perhaps a law firm – deposits a check drawn on a foreign bank and then spends or transfers the funds in the mistaken belief that the check has cleared. What loss might the law firm risk if the check is later revealed to be counterfeit?

Quite a bit, actually.

First, in depositing a check at its bank and thereby receiving a settlement for the proceeds, a law firm makes certain “transfer warranties.”⁹ For example, the firm warrants

that “all signatures on the item are authentic and authorized” and that “the item has not been altered.”¹⁰ The law firm’s knowledge or ignorance is irrelevant: if the check is counterfeit or otherwise unauthorized, the law firm has breached the transfer warranties.

A law firm cannot disclaim transfer warranties,¹¹ and a breach could render the firm liable for the value of the deposited check.¹² Moreover, the transfer warranties run not only to the firm’s bank, but also to any intermediary banks to which the check is later transferred before its final settlement with the payor bank. If the payor bank dishonors the check because it is counterfeit, the firm faces liability to its bank or any subsequent transferees for breach of warranty.

Second, a law firm’s bank can likely saddle the firm with the loss for a dishonored check without ever resorting to litigation. The UCC makes clear that an initial



The law firm’s knowledge or ignorance is irrelevant: if the check is counterfeit or otherwise unauthorized, the law firm has breached the transfer warranties.

settlement of a check after deposit is *provisional*; the depository bank only temporarily credits the law firm's account for the value of the check while the depository bank seeks its own settlement either from the payor bank or an intermediary bank.¹³ If the firm's bank cannot – for any number of reasons including dishonor of the check – collect its own settlement, the bank can simply “charge back the amount of any credit” it previously gave to the law firm upon deposit of the check.¹⁴ In short, if a law firm deposits a foreign check at its bank, the firm runs a risk that the payor bank will later dishonor the check, leading the firm's bank to charge back the check's value from the firm's account.

Through these mechanisms, the UCC allocates the risk of loss for a dishonored check to the depositor.¹⁵ In effect, a law firm that deposits a foreign check is offering up a hand grenade without a pin. Only the payor bank holds the pin. Down the line the grenade goes, moving from the depositor to its own bank to intermediary banks, until finally it reaches the payor bank. If the payor bank honors the check, it plants the pin, and every prior transferee can breathe easier. But

if the payor bank dishonors the check, someone else will have to bear the loss. Someone else will be left holding the grenade. Almost without fail, the grenade will begin moving back up the line until it finds its way back into the hands of the law firm.

And then...KABOOM!

The Limited Recourse Available to Law Firms that Deposit Counterfeit Checks

As the dust clears, the law firm may seek to redirect the losses to its bank. Often, that plan comes too little, too late.

To reiterate, the UCC allocates the loss of a counterfeit check to the depositor. To that end, the UCC enumerates only a handful of duties owed by the depositor's bank to

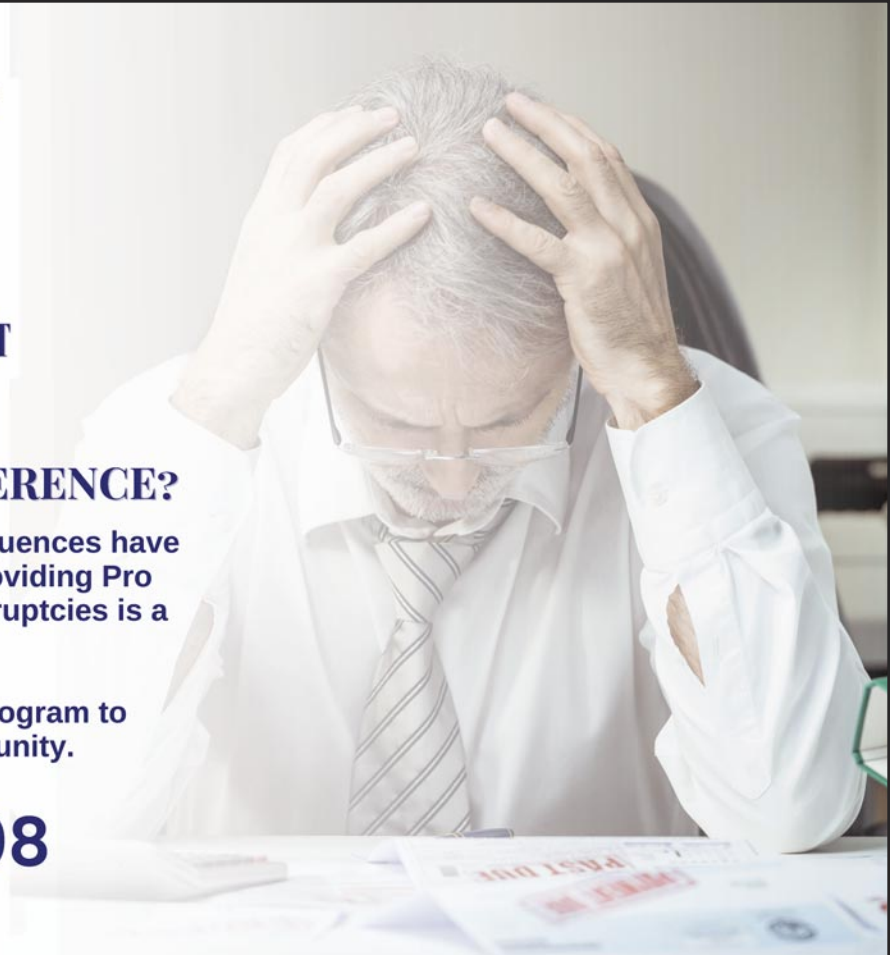


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the depositor.¹⁶ Nevertheless, many a hapless depositor has attempted to establish that its bank owed some duty to prevent the fraud and that the bank's failure to save the depositor from its own mistake constitutes negligence or a breach of contract. A depositor might raise such a defense if sued for breach of transfer warranties.¹⁷ Or a depositor may assert this theory as a claim in litigation to recover what its bank charged back against its account. In either case, courts have proven reluctant to recognize that a depositor's bank owes a depositor any duty to detect fraud.

For example, in *Sarrouf Law LLP v. First Republic Bank*,¹⁸ a lawyer with the plaintiff firm received an email from someone purporting to be the chief executive officer of a Dutch company called Big Machinery. The CEO requested that the lawyer assist in drafting an agreement to sell a piece of heavy equipment to a purchaser in Massachusetts. He later advised that the purchaser's broker would deliver to the lawyer a check for the initial purchase deposit. Soon enough, the lawyer received two checks from

the broker, one to cover a \$3,000 retainer fee and the other for \$337,044 to cover the initial deposit. The lawyer arranged to deposit the check into his firm's IOLTA account with First Republic Bank. Upon deposit, bank representatives informed the firm's bookkeeper that the check funds would be available immediately. Two days later, the CEO requested that the firm transfer the funds to two separate foreign banks by 11 a.m. that same day. Although the lawyer's retainer check had just been returned as non-payable, the lawyer nevertheless arranged for his firm to transfer the funds. Later that day, the payor bank returned the check as counterfeit. First Republic Bank then charged back the firm's IOLTA account, resulting in the IOLTA account being overdrawn by nearly \$260,000. By then, the firm could no longer recall the transferred funds from the foreign banks.

The firm sued First Republic Bank for negligence and breach of California's UCC, seeking to recover

some \$311,550 that it had deposited into its IOLTA account to restore its previous balance. However, the trial court granted First Republic Bank's motion for summary judgment, and the Massachusetts Court of Appeals affirmed. In rejecting the negligence claim, the court of appeals explained that the firm had failed to establish that the bank owed any duty to "discover that the deposit check was counterfeit" or to "refrain from making a true statement . . . that the check proceeds were immediately available" or to "refuse to

execute [plaintiff's] valid and duly authorized wire transfer instructions."¹⁹ Turning to the firm's UCC claim, the court of appeals explained that the firm had not established any failure of the bank to perform in good faith. Nor had the firm challenged the bank's exercise of ordinary care as to any duties enumerated in the UCC. Rather, the firm sought to establish the bank's "obligation to detect the counterfeit nature of a check drawn on another bank, deposited by [the firm]," a duty not present in either the UCC or the parties'

agreements.²⁰ Because the firm, not First Republic Bank, was in the best position to detect fraud by its client, the court of appeals affirmed dismissal of the claims.

More recently, in *Cadence Bank, N.A. v. Elizondo*,²¹ a lawyer received a cashier's check for \$496,850 from a scammer who posed as both creditor and debtor in a purported debt-collection action. At the scammer's insistence, the lawyer deposited the check into his IOLTA account with Cadence Bank and then quickly wired \$398,980 to a third party in Japan. In the process, the lawyer signed an International Outgoing Wire Transfer Request ("IOWTR") provided by Cadence. When the payor bank dishonored the cashier's check, Cadence sued the lawyer to collect the overdrawn funds. The lawyer filed several counterclaims, including a claim for breach of contract. He argued that Cadence's damages stemmed from Cadence's own breach of the IOWTR, which directed Cadence



Because the firm, not First Republic Bank, was in the best position to detect fraud by its client, the court of appeals affirmed dismissal of the claims.

employees to verify that the lawyer’s “collected balance” held sufficient funds before approving a transfer. This argument swayed a state district court, which granted summary judgment for the lawyer on his breach of contract claim. The Texas Supreme Court, however, concluded that the IOWTR served primarily “to facilitate Cadence’s internal processing of the wire transfer” and did not impose any contractual obligations sufficient to overwrite Cadence’s rights to charge back the overdrawn fees under the UCC and the lawyer’s deposit agreement.²²

In *Perlberger Law Associates, P.C. v. Wells Fargo Bank, N.A.*,²³ a law firm agreed in June 2020 to represent an individual purporting to be the president of a Florida tool company in collecting a \$199,550 debt. The law firm contacted the supposed debtor and subsequently received a signed Citibank cashier’s check in the amount of the debt owed. The law firm’s president then deposited the check into the firm’s trust account at Wells Fargo. Upon determining that the funds were “available,” the firm’s president returned to Wells Fargo with a copy of wire instructions that the law firm had received from the client.²⁴ After the firm’s president con-

firmed the wire instructions with Wells Fargo, the transfer proceeded per the client’s instructions. Unfortunately for the law firm, the client’s instructions, in fact, directed the funds to a bank in Nigeria. Within days, Citibank returned the check unpaid to Wells Fargo. Wells Fargo, in turn, notified the law firm that the cashier’s check was forged, and it charged the firm’s operating account in the amount of \$199,500, resulting in an overdraft.

The law firm promptly brought suit against Wells Fargo in federal district court for its failure to detect the fraudulent check. The firm asserted numerous

statutory and common law duties, including a novel claim that the firm qualified as a third-party beneficiary of Wells Fargo’s transfer warranties under the Pennsylvania Commercial Code. Early in the case, the district court granted Wells Fargo’s motion to dismiss in part, finding that Wells Fargo owed no fiduciary duty to the firm and that all claims under the Pennsylvania Commercial Code were inapposite.²⁵ The court left the proverbial door open only as to the firm’s claims for breach of contract, allowing the parties to

proceed to discovery to determine whether Wells Fargo owed any implied contractual duty to discover the fraud.²⁶ However, the district court later closed off that claim as well, granting summary judgment for Wells Fargo on the grounds that the parties’ relationship was “governed by the terms of express contracts which Wells Fargo did not breach” and that there was “not legal or factual basis on which [the firm] can prevail under a theory of implied contract.”²⁷

But what if a law firm’s bank does more than merely perform its duties in accepting the deposited check? Often, whether in response to a customer’s question or on their own volition, bank representatives may comment that check funds are available

without clarifying that the available funds are provisional. As a result, law firms have also asserted varying theories of misrepresentation or estoppel, arguing that they relied on those comments in choosing to disperse the funds. All the same, courts have proven reluctant to allow recovery.

For example, in *Greenberg, Trager & Herbst, LLP v. HSBC Bank USA*,²⁸ a partner at the plaintiff law firm fell victim to a check scam that began with an email from a Hong Kong company called Northlink Industrial Limited (“Northlink”). Northlink representatives requested help in collecting debts owed by



The firm asserted numerous statutory and common law duties, including a novel claim that the firm qualified as a third-party beneficiary of Wells Fargo’s transfer warranties under the Pennsylvania Commercial Code.

some of the company's North American customers. Once the plaintiff firm agreed, Northlink informed the firm that one of Northlink's debtors would provide the firm with a check for \$197,750. Northlink instructed the firm to wire the funds – minus the firm's \$10,000 retainer – to Northlink's account with Citibank in Hong Kong. Six days after depositing the check into its attorney trust account with HSBC Bank USA ("HSBC"), the firm contacted HSBC to ask whether the check had "cleared," to which HSBC representatives responded "that the funds were available."²⁹ Satisfied, the firm wired \$187,750 to Northlink's Hong Kong account. However, the check was counterfeit, and HSBC charged back the firm's account for the full \$197,750. Unable to cancel the wire transfer to the Hong Kong account, the firm sued HSBC, asserting theories of negligent misrepresentation and estoppel based on HSBC's statements that the funds were available.

The appellate division of the New York Supreme Court determined that the firm did not have a claim against HSBC absent a fiduciary relationship, which the court explained "does not exist between a bank and its customer."³⁰ Even if the principles of estoppel governed the allocation of loss, the appellate division concluded that the law firm was "in the best position to guard against the risk of a counterfeit check by knowing its 'client.'"³¹ The New York Court of Appeals affirmed, concluding that the firm's reliance on an ambiguous oral statement that the check had "cleared" was "unreasonable as a matter of law."³² It further explained that "[t]he UCC is clear that, until there is final settlement of the check, the risk of loss lies with the depositor," and it concluded that, because no final settlement of the check occurred under the UCC, "the risk remained with [the firm] and HSBC retained the right to charge back plaintiff's account."³³

Similarly, in *Law Offices of Oliver Zhou v. Citibank N.A.*,³⁴ a lawyer received a call from a woman in Japan who requested help in a post-divorce matter concerning her ex-husband. The lawyer agreed and received a cashier's check from the client for \$297,500 to cover the cost of an emergency surgery for the couple's child. The lawyer deposited the check into his firm's trust account at Citibank, deducting \$10,000 as a retainer fee. The next day, the lawyer asked a Citibank clerk whether the check "was valid and

equivalent to cash," to which the clerk responded that the money was available and that "the fund was good."³⁵ At the direction of the client, the lawyer then requested a wire transfer of \$287,450 from the trust account to an account in Japan. However, the payor bank returned the check as a fake, and Citibank subsequently charged back the firm's account for the full value of the check. By then, the lawyer could not reverse the wire transfer.

The lawyer's firm sued Citibank in federal court, arguing that it should bear the firm's loss. The firm

asserted, among other theories, that Citibank had negligently failed to detect the fraudulent nature of the check until it was too late. However, the district court dismissed the firm's negligence claim, explaining that Citibank's alleged "failure to identify the check as fraudulent . . . would not constitute a breach of ordinary care as a matter of law."³⁶ The court further dismissed the firm's claim that Citibank employees had misrepresented the status of the check when they indicated that the funds were available. Relying on the *Greenberg* case, the court concluded that the lawyer's reliance upon such an ambiguous statement was "unreasonable as a matter of law."³⁷

Time and again, courts have rebuked depositors who attempted to make an end run around the UCC's allocation of risk for counterfeit checks. As a result, the time for a law firm to take action to protect itself from counterfeit checks comes well before litigation arises.



And if the law firm deposits the check, under no circumstances should the firm act quickly to transfer or otherwise exhaust the funds.

The Need for Utmost Caution When Handling Foreign Checks

So, what of Mr. Darrow and his law firm? As evident from this article, there may be no means for the firm to recover what it has already lost. Perhaps all Mr. Darrow’s firm can do – as any good law firm should – is learn from past mistakes and take greater care in the future.

A law firm that receives a check drawn on a foreign bank should proceed with utmost caution. Does the check come from a known and trustworthy source? If not, the law firm should hesitate before depositing it. Even if the check appears to come from a known and trustworthy source, the law firm should verify with the source that the check is good. And if the law firm deposits the check, under no circumstances should the firm act quickly to transfer or otherwise exhaust the funds. If possible, the law firm should reach out to the payor bank directly for clear confirmation of a final settlement. Ultimately, a final settlement on the check will take time, and patience, even in the face of an impatient client, could make all the difference in protecting a law firm from the risk of loss. ▲

Endnotes

1. See, e.g., *Simmons, Morris & Carroll, LLC v. Capital One, N.A.*, 49,005, p. 1 (La. App. 2 Cir. 06/27/14), 144 So. 3d 1207, 1209.
2. The use of a foreign check only aggravates that gap in time. Because the check is drawn on a foreign bank, it must be sent out for collection, and U.S. return item deadlines and policies do not apply. See *Foreign Check User Guide*, THE FEDERAL RESERVE, <https://www.frb.services.org/resources/financial-services/check/foreign-check-processing/foreign-check-user-guide.html> (last visited Feb. 17, 2023). For example, the Federal Reserve warns “[s]ome foreign institutions take longer than twenty [20] business days to pass credit.” *Id.*
3. See Ala. Code § 7-4-105(2) (1975).
4. See *id.* § 7-4-105(3).
5. See *id.* § 7-4-105(5).
6. See *id.* § 7-4-105(4).
7. See *id.* §§ 7-4-301; 7-4-302.
8. See 12 U.S.C. § 4001 *et seq.*
9. See Ala. Code § 7-4-207(a) (1975).
10. See *id.*
11. See *id.* § 7-4-207(d).
12. See *id.* § 7-4-207(b), (c).
13. See *id.* § 7-4-201(a).
14. See *id.* § 7-4-214(a).
15. The U.C.C.’s allocation of risk to the depositor will often find additional support in the deposit agreement between a bank and its customer. Such agreements typically include deposit warranties and a provisional crediting mechanism consistent with those found in the U.C.C.
16. For example, the depositor’s bank “must exercise ordinary care” in carrying out certain specified duties – e.g., presenting a check for settlement or giving notice of dishonor or nonpayment to the depositor – and provides that timely performance of such duties constitutes ordinary care. See Ala. Code § 7-4-202(a), (b) (1975). Additionally, the depositor’s bank also has a duty to perform any of its obligations in good faith. See *id.* § 7-1-304.
17. Unfortunately, negligence by the depositor’s bank may not provide a strong defense. See *Lucas v. BankAtlantic*, 944 So. 2d 1031, 1035 (Fla. Dist. Ct. App. 2006) (noting in dicta that “the bank’s negligence is no defense” to a claim for breach of transfer warranties).
18. 148 N.E. 3d 1243 (Mass. App. Ct. 2020).
19. *Id.* at 1248.
20. *Id.* at 1253 (footnotes omitted).
21. 642 S.W. 3d 530 (Tex. 2022).
22. *Id.* at 534–35.
23. Case No. 2:21-cv-02287, 2022 WL 2819136 (E.D. Pa. July 19, 2022).
24. *Id.* at *4.
25. *Perlberger Law Assocs., P.C. v. Wells Fargo Bk., N.A.*, 552 F. Supp. 3d 490, 494–97 (E.D. Pa. 2021).
26. *Id.* at 498.
27. *Perlberger*, 2022 WL 2819136, at *1.
28. 958 N.E. 2d 77 (N.Y. 2011).
29. *Id.* at 80.
30. *Greenberg, Trager & Herbst, LLP v. HSBC Bk. USA*, 73 A.D. 3d 571, 572 (N.Y. App. Div. 2010).
31. *Id.*
32. *Greenberg, Trager & Herbst*, 958 N.E. 2d at 85.
33. *Id.* at 86–87.
34. 15 Civ. 5266 (ER), 2016 WL 2889060 (S.D.N.Y. May 17, 2016); see also Martha Neil, *Law firm loses bid to hold banks accountable for its \$287K loss in cashier’s check fraud*, ABA JOURNAL, May 23, 2016, (providing additional information regarding case facts), https://www.abajournal.com/news/article/law_firm_loses_bid_to_hold_banks_accountable_for_its_287k_loss_in_cashiers (last visited Feb. 17, 2023).
35. *Oliver Zhou*, 2016 WL 2889060, at *1.
36. *Id.* at *5.
37. *Id.* at *6.

Larry B. Childs



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“Harper” the Labrador retriever



Nelle “Harper” Lee

Stolen Moments with Nelle “Harper” Lee

By Rebecca E. Patty

The young lady at the desk greeted me warmly as I entered The Meadows,

the assisted living facility, in Monroeville, Alabama. “Can I help you?” she asked. I flashed my sweetest smile and cleared my throat. I was at the pinnacle moment of a journey that had started months, even years earlier and I was going to savor every nerve-racking moment of truth, no matter how poorly it could all end. My beloved Labrador retriever, Harper Lee, waited patiently outside The Meadows on a leash held by a federal judge, and the plan was to get us in to meet our literary hero.

If you had ever told me that I would be standing at the front desk of Harper Lee’s assisted living facility in Monroeville, with sun-blond hair and a deep tan from days in Gulf Shores, with a plan to get in to see Harper Lee, I would have told you that you were crazier than our plan was.

This story really begins with a middle schooler assigned to read the classic novel *To Kill a Mockingbird*. The book changed my life and set me on a course of lifelong admiration for its author and a career of public service, forever yearning to be an attorney like Atticus Finch. Atticus Finch’s willingness to support social outcasts and victims of prejudice is the epitome of true jurist.

After spending the first 18 years of my life as an Army brat and crisscrossing the United States and Germany, I settled on returning to my parent's home state of Alabama to attend college and law school. I had been to Monroeville and stood in the courthouse and experienced that captivating feeling of standing humbly on that hallowed ground. I continued to pass the Monroeville exit off Interstate 65 on many trips to Gulf Shores over the ensuing 18 years. My parents moved to Craft Farms in Gulf Shores in 2007 and my trips past Monroeville became even more frequent.

On May 17, 2008, also known as Law Day, Harper Lee received an honorary special membership in the Alabama State Bar. At that time, I was struggling under the weight of summarizing a landfill appeal transcript and drafting a brief for a hearing completed a few weeks earlier. I had hit the proverbial wall of legal exhaustion and reverted to the time-honored tradition of the carrot-and-stick approach, promising myself that I would send my hero a congratulatory card after I filed my brief.

On May 23, 2008, with the brief complete, I penned that congratulatory card to my icon. The text read, "Congratulations and welcome to the bar. I am ready to move on from environmental law and would love to have you hang out your shingle with mine. I like Patty & Lee, but if you insist on Lee & Patty, it has a nice ring to it too." I also imparted to her that her "prose had changed the course of my life, and that just merely attempting to be 'like' Atticus as an attorney has guided my moral compass and driven my passion for justice to be tempered with mercy."

I smiled as I mailed the card. Maybe she would get a laugh about hanging a shingle out with me. I had heard that she possessed a wickedly witty sense of humor. After I sent the card, I did not think about it again. Mission accomplished, or so I thought.

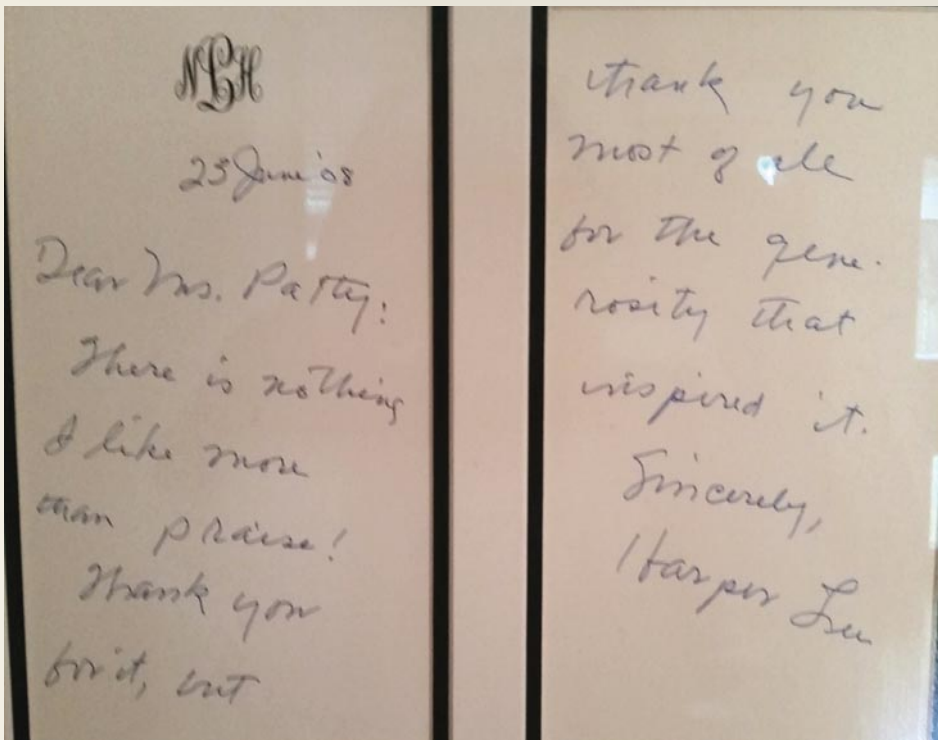
During all the days
of our trip, my dad
kept bringing up
that elderly people
in assisted living
facilities often had
their moods
brightened when
folks brought dogs
by to visit the
residents.

About eight days later, a beautiful stationery envelope showed up in my mailbox. I remember thinking someone must be getting married as I hurried with the rest of the mail into my house. Harper Lee, Boo Radley, and Scout met me at the door as my pack of rescue Labs always did. I played frisbee with Scout and Boo Radley off the back deck, while Harper Lee always faithfully remained by my side.

I opened the envelope without really looking at the address. However, you could not mistake the NLH embossed stationery. My heart skipped a beat. The beautiful note began, "Dear Ms. Patty there is nothing I like more than praise!" Unbelievably, she had read my card and had written me back! Her note continued, "Thank you for it but thank you most of all for the generosity that inspired it." She signed it, "sincerely Harper Lee."

I excitedly showed the handwritten note to Judge Karon Bowdre, my former law professor, who had become a family friend years before she was appointed to the federal bench. She taught me insurance law and forced me to become a better legal writer during my time at Cumberland School of Law. She also has always been an amazing friend and mentor. I played tennis with her husband and her, babysat their kids a time or two, and went on some vacations together. We both shared a love of *To Kill a Mockingbird* and had even seen the play performed in the town square in Monroeville.

The Judge and I planned a girls' trip that August to see my parents and play at the beach in Gulf Shores, Alabama. I had the prized letter framed and was bringing it to show my folks. My dad, JW Patty, III, was astonished that Nelle had written me back, and I swear he hatched the plan I now found myself in the middle of executing. During all the days of our trip, my dad kept bringing up that elderly people in assisted living facilities often had their moods brightened when folks brought dogs by to visit the residents. He worked this angle for three days until I capitulated. Of course, just



Thank-you note from Harper Lee to the author

dropping in unannounced with a Labrador retriever on a return trip from Gulf Shores to Nelle Harper Lee’s assisted living facility seemed perfectly sane and not at all threatening to my law license, career, et cetera.

The young lady at the desk repeated my statement back to me, “You and your dog are here to see Ms. Lee?” “Yes ma’am,” I grinned. “My dog’s name is Harper Lee, and...” Surprisingly, without hitting some bank type of silent alarm to Monroeville’s finest, she said, “Go on down and the room marked N. Lee is where you will find her.” And just like that, I began to walk toward my iconic hero’s room and would soon be face to face with greatness.


I took a deep breath and tapped on the door that was half open. “Come in,” an older but very strong voice intoned. I stepped into her very modest room, and there she was sitting in her wheelchair looking a bit impatient with me.

“Hi, my name is Rebecca Patty, and you are the reason I became a lawyer. My dog is named after you and is outside with a federal judge and they both want to meet you!” Well dang! I thought to myself, for all the pretty awesome opening and closing arguments I have ever given, that introduction had to have been the lamest. Nelle sat there for what seemed like a painfully long eternity before answering, saying, “I remember your card, you wanted to practice law together.” I nodded and smiled an impish grin. She continued, “Don’t blame me for your becoming a lawyer. I would like to meet your dog, but the federal judge will have to stay outside.” Her wit hung in the air about blaming her for my becoming a lawyer, which made me chuckle. However, she was serious about not wanting to meet the judge.

As I dashed out the door, I noticed her combing her short hair with just the standard black barber’s

pocket comb. I raced down the hallway to the exit quicker than most criminal arraignments take and decided to go full steam ahead. It had been great up to now being such good friends with Judge Bowdre, but this was Harper Lee after all! I mean what would you do? Well, you would never leave your dear friend or a federal judge behind and neither did I. I had a lawyer’s hunch, so I acted on it. Without even telling Judge Bowdre, I ran to the bench they were waiting on, took Harper’s leash, and said, “Come on, follow me.”

As we made our way back to the entrance to The Meadows, I could



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almost hear the joke if any of the rest of the plan went awry: A lawyer, a judge, and a Labrador retriever walk into a nursing home...

We found ourselves back in front of the first lady I met. She looked up, remained unflappable as if this type of thing happened daily, and asked me if my dog bites. I said no and continued down the hall to Nelle's room. Outside the door, I told Judge Bowdre, who until the date of this publication did not know that Harper Lee did not want to meet the federal judge (but I know in the end she did) that day, to hang outside while I took my dog in first. My furry Harper Lee was the most amazing dog and if anyone could help me successfully complete the adventure, she could.

We strolled into the room together and Nelle's face absolutely melted into the warmest of smiles. She leaned down in her chair to reach toward Harper Lee. My girl moved very sweetly toward my icon, in front of her wheelchair,

My girl moved very sweetly toward my icon, in front of her wheelchair, and in a scene that could not be replicated even by Hallmark on their best day, placed her face in Nelle's outstretched hands.

and in a scene that could not be replicated even by Hallmark on their best day, placed her face in Nelle's outstretched hands. Nelle rubbed her face and ears as she stroked her neck. "I presume this beautiful creature is Harper Lee?" "Yes ma'am," I replied. Harper the Furry, as if on some type of divine cue, moved herself to the right side of Nelle's chair and ever so gently placed her paw onto her knee. My heart melted. Nelle's must have too because a moment

or two later she said, "You go get the judge. I will meet her but leave your dog while you go."

I told Judge Bowdre that we should wait a few minutes outside the door because Nelle seemed to really like Harper. Finally, we returned to the inner room and Harper the Furry had not left Harper the writer's side. Nelle did say hello to Judge Bowdre but not too much more to either of us as she spent the rest of the time enjoying Harper the Furry's company and attention. It was hilarious and so like Nelle Harper Lee to ignore the lawyers fawning over her and pay attention to what really mattered, the beautiful creature.

A few moments later we decided to allow Nelle to enjoy the rest of her Sunday afternoon in solitude. We said our goodbyes and Nelle imparted to me that my dog was welcome back anytime. Nothing about me, just my dog! It was terrific. I will not disclose whether there were other letters or cards or visits to Monroeville before my beloved Harper the Furry died, followed nearly a year later by my literary hero, Nelle Harper Lee. It suffices to say though that no story that good could ever end right there. ▲

Rebecca E. Patty



Rebecca Patty has 30 years of experience as an assistant attorney general for the Alabama Department of Environmental Management. She also has 25 years of experience teaching paralegal and law school courses. She has taught at the University of Maryland, Samford University, Troy University, Birmingham School of Law, and the University of Alabama at Birmingham.

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- ▲ Reinstatements
- ▲ Transfer to Inactive Status
- ▲ Surrender of Licenses
- ▲ Disbarments
- ▲ Suspensions
- ▲ Public Reprimands

Reinstatements

- Montgomery attorney **Michael Aaron Fritz, Sr.** was reinstated to the practice of law in Alabama by order of the Supreme Court of Alabama, effective September 14, 2022. Fritz petitioned for reinstatement to the practice of law in Alabama on January 28, 2022 and was subsequently reinstated by order of the Supreme Court of Alabama. [Rule 28, Pet. No. 2022-193]
- Birmingham attorney **Mattie Neal Newell** was transferred to inactive status by order of the Supreme Court of Alabama, effective July 24, 2017. The Supreme Court of Alabama entered its order based upon a petition filed on July 11, 2017, with the Disciplinary Board of the Alabama State Bar, requesting Newell be transferred to inactive status. On November 2, 2021, Newell petitioned the Disciplinary Board of the Alabama State Bar to transfer to active status. The Disciplinary Board of the Alabama State Bar granted the petition and issued an order transferring Newell to active status. On December 1, 2022, the Supreme Court of Alabama ordered that a notation be made on the roll of attorneys, reinstating Newell to the practice of law in Alabama. [Rule 28(a), Pet. No. 2021-1143]

Transfer to Inactive Status

- Montgomery attorney **Michael Dickerson Fascell Winter** was transferred to inactive status, effective October 4, 2022. The Supreme Court of Alabama entered a notation on the Supreme Court of Alabama's roll of attorneys based upon the October 4, 2022, order of the Disciplinary Board of the Alabama State Bar, in response to Winter's petition filed with the office of general counsel requesting he be transferred to inactive status. [Rule 27(c), Pet. No. 2022-1028]

Surrender of Licenses


- On November 28, 2022, the Supreme Court of Alabama issued an order accepting the voluntary surrender of **Samuel Mark Hill's** license to practice law in Alabama, with an effective date of November 28, 2022.
- On November 18, 2022, the Supreme Court of Alabama issued an order accepting the voluntary surrender of **Frederic Lamar Washington's** license to practice law in Alabama, with an effective date of October 25, 2022.

Disbarments

- Oklahoma attorney **James Darrell Reedy** was disbarred from the practice of law in Alabama, effective October 3, 2022. The Supreme Court of Alabama entered its order based on the order of the Disciplinary Commission of the Alabama State Bar, disbarring Reedy after he was convicted of manslaughter in the Baldwin County Circuit Court on March 21, 2018. [Rule 22, Pet. No. 2022-578]
- Bessemer attorney **Lonnie Anthony Washington, Sr.** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective November 23, 2022. The Supreme Court of Alabama entered its order based upon the November 4, 2022, order of Panel I of the Disciplinary Board of the Alabama State Bar. The Supreme Court of Alabama entered its order based on the Disciplinary Board's acceptance of Washington's consent to disbarment based on pending disciplinary matters. [Rule 23(a), Pet. No. 2022-1027; ASB No. 2019-811]

Suspensions

- The Alabama Supreme Court issued an order suspending Birmingham attorney **Trenton Rogers Garmon** from the practice of law in Alabama for 91 days, effective November 9, 2022. The suspension order was based on the conditional guilty plea submitted by Garmon, in which Garmon pled guilty to violating Rules 8.4(b) and (g) [Misconduct], Alabama Rules of Professional Conduct. In ASB Nos. 2019-797 and 2020-502, Garmon was arrested on or about October 25, 2019, for public intoxication and disorderly conduct. After being found guilty of both offenses, Garmon appealed the matters to circuit court. On March 14, 2022, Garmon pled guilty to both offenses. Garmon was arrested on April 30, 2020, in Gainesville, Florida for disorderly intoxication and resisting officer without violence. Garmon was given deferred prosecution and placed on probation with fines and conditions for six months. After completing deferred prosecution, the charges against Garmon were nolle prossed. Garmon pled no contest to a criminal charge of stalking in Lee County, Florida on July 12, 2021. The charge was related to Garmon's harassment of his ex-wife. Garmon was granted probation for one year with a number of conditions to satisfy. [ASB Nos. 2019-797 and 2020-502]
- Illinois attorney **Matthew Ryan McCormick**, who is also licensed in Alabama, was ordered by the Disciplinary Board of the Alabama State Bar to receive reciprocal discipline of a two-year suspension from the practice of law in Alabama, effective October 25, 2022, pursuant to Rule 25, Alabama Rules of Disciplinary Procedure. McCormick was found guilty of failing to diligently represent his clients, for failing to adequately communicate with his clients, and for engaging in dishonest and misleading conduct. [Rule 25(c), Pet. No. 2022-1055]



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THE ALABAMA LAWYER

(Continued from page 101)

Public Reprimands

- On July 13, 2022, the Disciplinary Commission of the Alabama State Bar issued a public reprimand without general publication to **John Michael Aaron** for violating Rules 1.3 [Diligence]; 1.4 [Communication]; 3.2 [Expediting Litigation]; 8.1 [Bar Admission and Disciplinary Matters]; and 8.4 [Misconduct], Alabama Rules of Professional Conduct. On December 2, 2021, the Office of General Counsel (“OGC”) received from Kelly Fitzgerald Pate, United States Magistrate Judge, United States District Court for the Middle District of Alabama, motions and orders in *Carla Capps v. InMed Group, Inc.*, case number 2:19-CV-1058-KFP. The motions and orders detailed that the *Capps* matter was dismissed with prejudice due to Aaron’s failure to submit documents to the Court as ordered, Aaron’s failure to respond to opposing counsel and Aaron’s failure to respond to the defendant’s motion to dismiss. On December 9, 2021, and March 3, 2022, the Alabama State Bar OGC corresponded to Aaron, requesting he submit a response in the matter. Aaron failed or refused to respond to the OGC. On March 24, 2022, Aaron was directed by the OGC to file a response in the matter within seven days. Aaron failed or refused to respond to the directive. On March 29, 2022, Aaron confirmed with the OGC his receipt of an email memorializing the phone conversation of March 24, 2022, yet still failed or refused to submit a response in the matter. On April 8, 2022, Aaron’s response in the matter was finally received by the OGC. Aaron admitted that he misunderstood the status of the *Capps* matter when he received the electronic notices but failed to read them, ultimately resulting in the matter being dismissed with prejudice.
- Montgomery attorney **Kynesha L. Adams-Jones** was issued a public reprimand with general publication on November 4, 2022, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rules 1.15 [Safekeeping] and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. On or about May 25, 2021, the Office of General Counsel received an insufficient funds notice from Wells Fargo Bank regarding Adam-Jones’s trust account. The notice indicated the trust account was overdrawn as a result of a \$300 online transfer of funds. This was the third overdraft notification received in the Office of General Counsel concerning Adam-Jones’s trust account since 2018. Upon submission of the unredacted trust account statements, Adam-Jones admitted that she had been improperly depositing earned fees and personal funds into her trust account. Adams-Jones admitted to making numerous personal payments directly from her trust account. Adam-Jones also admitted to failing to maintain a general ledger as required by Rule 1.15(e) [Safekeeping], Alabama Rules of Professional Conduct. A review of Adam-Jones’s trust account did not reveal any indication of misappropriation of client funds. [ASB No. 2021-661]
- On November 4, 2022, the Disciplinary Commission of the Alabama State Bar issued a public reprimand without general publication to **Monica Gay Mann** for violating Rules 1.3 [Diligence], 1.4 [Communication], 8.1(b) [Bar Admission and Disciplinary Matter], and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. In March 2020, Mann was retained to represent a client in a quiet title action for \$503. After executing an “Affidavit of Quiet Title,” the client sent it to Mann on March 20, 2020. The client heard nothing further from Mann. On August 7, 2020, the client telephoned Mann and was informed that the necessary paperwork was on file and the next step would require a judge to approve or deny the advertisement to be placed in the paper. The client heard nothing further from Mann until October 12, 2020, when she asked the client to have a third party sign an “heirship affidavit.” The client had the affidavit signed, notarized, and returned. The client later contacted Mann’s office on November 6, 2020 and learned that no action had been taken. In April 2021, the client requested Mann return her original deed. Mann failed to respond, and the client filed a bar complaint.
- On November 4, 2022, the Disciplinary Commission of the Alabama State Bar issued a public reprimand without general publication to **Burton Wheeler Newsome** for violating Rules 8.4 (a), (d), and (g) [Misconduct], Alabama Rules of Professional Conduct. In January 2015, Newsome sued attorney Clark A. Cooper, John W. Bullock, attorney Claiborne Seier, and Don Gottier, alleging that the defendants combined to have him arrested on a false charge with the intent of damaging his reputation and law practice. The court ultimately entered judgments in favor of the defendants and awarded the defendants attorney fees and costs under the Alabama Litigation Accountability Act. The Supreme Court of Alabama upheld the award against Newsome, finding that he subjected the defendants to protracted litigation even though his claims were without “substantial justification.” ▲



MEMORIALS

Robert Austin Beckerle

Mobile

Died: December 24, 2022

Admitted: 1961

Gregory Scott Berry

Huntsville

Died: December 12, 2022

Admitted: 2006

William Don Eddins

Auburn

Died: January 10, 2023

Admitted: 1995

William Thaddeus Haynie, Jr.

Mobile

Died: May 6, 2022

Admitted: 1960

James Gordon House, Jr.

Mobile

Died: November 26, 2021

Admitted: 1960

Ralph Edward Massey, Jr.

Mobile

Died: January 16, 2023

Admitted: 1972

Shirley Irene McCarty

Birmingham

Died: January 1, 2023

Admitted: 1972

Hon. James Taylor Patterson

Mobile

Died: January 10, 2023

Admitted: 2001

Francis Anthony Poggi, Jr.

Mobile

Died: December 21, 2022

Admitted: 1969

Robert Glenn Saunders

Murphy, NC

Died: February 28, 2022

Admitted: 1983

Gary Robert Seale

Birmingham

Died: December 22, 2022

Admitted: 1996

Lewis Vastine Stabler, Jr.

Birmingham

Died: January 4, 2023

Admitted: 1961

David Winn Stephenson

Birmingham

Died: January 5, 2023

Admitted: 2004

Jerome Tucker

Birmingham

Died: January 16, 2023

Admitted: 1973

Taylor Dovetion Wilkins, Jr.

Bay Minette

Died: February 12, 2022

Admitted: 1966

Karen Livingston Williams

Bessemer

Died: November 10, 2022

Admitted: 2011



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

For more information,
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David A. Kimberley
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LEGISLATIVE WRAP - UP

Alabama Law Institute 2023 Proposed Legislation

The council and membership of the Alabama Law Institute met on January 17, and because of the meeting, a new slate of proposals is being put forward for consideration in the 2023 Legislative Session.

These bills represent 4,500 hours of intense effort by more than 132 lawyers who are volunteering their time on drafting committees to improve the laws of our state. We deeply appreciate their efforts.

Also deserving of our appreciation are the legislative members of our Executive Committee who will work to see these efforts through to enactment: Senator Arthur Orr, Senator Rodger Smitherman, Senator Will Barfoot, Representative Chris England, and Representative Jim Hill.

In addition to the new proposals, there is also a bill that was approved by the council and membership last year being presented in this upcoming legislative session (Uniform Guardianship, Conservatorship, and Other Protective Arrangements). The bills for this session are:

Real Estate Tax Sale Redemption Statutory Revisions Bill

The Alabama Law Institute (ALI) Real Estate Standing Committee proposes changes to Ala. Code § 40-10-82, which governs rights for a judicial redemption by a landowner following a tax sale of real estate. Nothing in the proposed changes diminishes the three-year minimum initial redemption rights provided for in Ala. Code §§ 40-10-120, -121, and -122.

There are inequities in current law regarding: (1) conditions required for redemption; (2) the timing and procedure for redemption; and (3) the ability and timing of a tax sale purchaser to obtain possession and clear title to property not ultimately redeemed. These inequities render the process of redemption more difficult and confusing for those who want to redeem, and when no party is seeking to redeem, increase the complexity and costs associated with seeking to clear title so that the property can be used, taxed, and/or developed.

The difficulty in interpreting and applying the current structure of the above referenced statute resulted in the holding of *Rioprop Holdings, LLC v. Compass Bank*, 256 So. 3d 674 (Ala. Civ. App. 2018). *Rioprop* held that when a tax sale purchaser fails, within three years from the date when the purchaser is entitled to receive a tax deed, to obtain possession or file suit for possession of the property sold for taxes, the tax sale purchaser's title to property automatically reverts to the owner at the time of the tax sale. *Rioprop* also held that the purchaser's lien for the taxes paid is eliminated under those circumstances. A purchaser is entitled to receive a deed three years from the date of the tax sale, Ala. Code § 40-10-29, or if the purchase is from the state, at the time of purchase if the state has held the property for at least three years. Ala. Code § 40-10-132 and -135.

The ALI proposes to alleviate these and other inequities by: (1) providing that, following the statutory redemption period, anyone with an interest in the property may bring suit to determine and establish all rights and interests in the property sold; (2) establishing, with certain exceptions, an absolute six-year deadline for an owner/lienholder to redeem; and (3) eliminating the time limit identified in *Rioprop* for a tax purchaser to obtain possession or file suit for possession of the property.

Further, the proposed changes confirm that the holders of mortgages and liens recorded at the time of the tax sale have a minimum of one year to redeem from written notice of the tax sale given by the purchaser.

The proposed changes are intended to provide greater certainty with respect to resolving the effects of a tax sale and the right to redeem, while continuing the protections allowed under the current law, which include: the six-year deadline to redeem does not apply to an owner who remains in actual possession of the property; the protection of the right of minors and incompetent persons to redeem is maintained; and the six-year deadline to redeem does not apply to the state or to owners of property where taxes had been paid at the time of sale or were not subject to taxation.

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Hon. James E. Hill, Jr.
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Hon. Charles "Chuck" R. Malone
 chuck@malonenelson.com
 (205) 349-3449

Hon. Lucie U. McLemore
 lucie.mclemore@icloud.com
 (334) 603-9987

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

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

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

Hon. James M. Russell
 mack@mackrussell.com
 (334) 399-2558

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

Hon. Ron Storey
 ron@wiregrasselderlaw.com
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Nonprofit Entities Code Revisions Bill

The Business Entities Committee continues to review and update Alabama's Business and Nonprofit Entities Code (Title 10A)(the "Code"). Since inception, members of the committee have incorporated technological advances into the Code. The first focus was allowing electronic name reservations which was codified during the 2013 Legislative Session. During the 2014 Legislative Session, amendments were passed regarding mergers and conversions for all entities. The committee drafted and the Alabama Law Institute presented (1) the Alabama Limited Liability Company Law in 2014 which passed the Alabama Legislature that year; (2) the Alabama Limited Partnership Law in 2016 which passed the Alabama Legislature that year; (3) the Alabama Partnership Law in 2017 which passed the Alabama Legislature in 2018; and (4) the Alabama Business Corporation Law in 2019 which passed the Alabama Legislature that year. In 2020 and 2021, the committee drafted and the Alabama Law Institute presented a number of changes to the Code which allowed for benefit corporations, provided for simplified filing procedures to allow all Code entities to file their various documents with the secretary of state electronically, provided procedures to allow for remote meetings for business corporations and nonprofit corporations in light of the pandemic, and took the first steps in updating the Alabama Nonprofit Corporation Law as an interim measure. These changes passed the Alabama Legislature in 2020 and 2021. In 2021, the committee drafted, and the Alabama Law Institute presented, a minor change to prevent business corporations from issuing certificates in bearer form to comply with the Corporate Transparency Act, which minor change passed the Alabama Legislature in 2022.

The committee continues its work by preparing proposed changes annually, or as needed, so that the Code: (1) stays current with the rest of the country; (2) provides Alabama businesses with the tools to conduct business quickly and efficiently in the state; and (3) encourages Alabama businesses to use Alabama entities rather than being forced to utilize Delaware or another state's entity laws.

This year, in preparation of the upcoming session, the committee reviewed the Alabama Nonprofit Corporation Law. In doing so, the committee recognized that, except for the first steps taken in 2021, the Alabama Nonprofit Corporation Law

had become outdated and out of step with the other states and with the Model Nonprofit Corporation Act. The committee began its work on the Alabama Nonprofit Corporation in 2021 and continued that work throughout the year in 2022. The committee purposefully included the leading nonprofit lawyers in Alabama and consulted the drafters of the Model Business Nonprofit Act as well as leading lawyers in Delaware regarding their act.

FEATURES

- Effective January 1, 2024.
- Applies to all nonprofit corporations incorporated on or after that date.
- Applies to nonprofit corporations incorporated before that date which elect to be governed by the new law.
- Applies to all nonprofit corporations on and after January 1, 2025.
- Harmonizes the Alabama Nonprofit Corporation Law with the provisions of Chapters 1 (the "Hub"), 2A (the Alabama Business Corporation Law), 5A (the Alabama Limited Liability Company Law), 8A (the Alabama Partnership Law), and 9A (the Alabama Limited Partnership Law) of the Alabama Business and Nonprofit Entity Code.

MAJOR CHANGES

- The addition of certain procedures providing for the ratification of defective corporate actions.
- The addition of a requirement that electronic transmission of notices or other communications must be consented to by the recipient under certain circumstances.
- The addition of a provision that authorizes the certificate of incorporation to limit or eliminate the duty of a director or other person to bring a business opportunity to the corporation.
- The addition of a provision that authorizes the certificate of incorporation or bylaws to create an exclusive forum for the adjudication of internal corporate claims.
- The elimination of the requirement that special meetings of members may be called by holders of one-twentieth of the votes entitled to be cast at any such special meeting.
- Action may be taken by members by written consent without a meeting if the consents are signed by members having not less than the minimum number of votes that would be required to take action at a meeting.

- The addition of a provision authorizing the appointment in advance of a members' meeting, of one or more inspectors of election.
- The addition of provisions allowing for the designation, appointment, or approval of directors.
- The elimination of prior restrictions on the power of the board of directors to fix or change the number of directors.
- Revision of the requirements regarding a "classified" or "staggered" board of directors.
- Revision of the methods of removing directors.
- Revisions to the standard of conduct for directors and the addition of provisions regarding the standard of liability for directors.
- The addition of a new Article 13, providing for the conversion of another organization to a nonprofit corporation or a conversion of a nonprofit corporation to another organization.
- The addition of a provision allowing the board of directors to adopt certain amendments to the certificate of incorporation without member approval.
- The reduction in the required member vote on approval of a plan of merger or on certain dispositions of the nonprofit corporation's assets, from two-thirds to a majority.

- The addition of provisions that allow for the certificate of incorporation to provide for a person or group of persons to approve certain nonprofit transactions, such as amendment of the certificate of incorporation, certain dispositions of the nonprofit corporation's assets, and the dissolution, merger, and conversion of the nonprofit corporation.

CHAPTERS 1, 2A, 5A, 8A, 9A CHANGES

Most of the changes made to Chapters 1, 2A, 5A, 8A, and 9A were made to allow for the proper implementation of Chapter 3A, to conform those chapters to new Chapter 3A and to clarify certain issues regarding conversions and mergers.

UCC 2022 Amendments Bill

The Uniform Commercial Code (the "UCC") has long provided reliable commercial law rules for broad categories of transactions such as the sale or lease of goods, secured transactions, and transactions involving negotiable instruments, bank deposits and collections, funds transfers, letters of credit, documents of title, and securities. As the backbone of United States commerce, its adoption in every state (Alabama's version of the UCC is Title 7 of the Code of Alabama

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1975) has allowed the development of strong interstate markets, reducing transaction costs and giving Alabamians confidence in their everyday commercial transactions.

The ALI proposes the latest updates from a joint effort of the American Law Institute and the Uniform Law Commission employing a three-year drafting effort using over 350 experts to accommodate newly emerged and still emerging technologies including distributed ledger technology (blockchain). These proposed updates will bring Alabama's UCC statutes into the digital age by providing needed commercial guardrails and delivering legal clarity where existing legal structures presently either inhibit these newly emerging technologies or increase their cost.

Some of the innovations and needed updates are:

- **The amendments promote commercial activity involving new types of property.** A new UCC Article 12 deals with a category of intangible digital assets referred to as “control-able electronic records” (“CERs”) such as virtual currencies, non-fungible tokens, and electronic promises to pay. The amendments provide rules to determine the rights of a person who receives a CER and for the perfection and priority of a security interest in a CER, based on who has control (the power to receive the benefits, prevent others from receiving the benefits, and transferring the benefits) of the CER. The updated law will stimulate economic activity by providing legal certainty to these increasingly common transactions.
- **The amendments will reduce transaction costs and the cost of credit through uniformity.** The UCC has been successful because of its adoption by states on a substantially uniform basis, creating greater certainty and thereby reducing the cost of credit as well as transaction costs. The need for uniformity is especially important to minimize forum shopping for disputes concerning digital assets, which by their nature cross state borders.
- **The amendments are narrowly focused to avoid stifling innovation.** The UCC amendments only address the rules that govern consensual transactions. They do not regulate the use of CERs, whether as a security or a commodity, address the taxation of CERs, alter the law governing tangible money transmitters, or revise anti-money laundering rules. The regulation of these matters continues to be left to laws outside of the UCC.
- **The amendments preserve uniformity of state commercial law.** Interstate commercial markets developed in the United States because the UCC provided standard default rules to govern transactions between parties in different jurisdictions. Adopting the latest amendments will preserve the uniformity that benefits businesses and consumers in every state.
- **The amendments clarify rules for money in electronic form.** Some governments and central banks are experimenting with digital currency. The amendments (along with a corresponding amendment to the Alabama Monetary Transmission Act – Ala Code §§ 8-7a-1 through 8-7a-27) contain clearer rules for transactions involving electronic money than exist under current law, which generally contemplates that money exists only in tangible form, such as bills or coins.
- **The amendments update UCC terminology for the digital age.** The language of many current UCC rules assumes parties still use paper documents. The amendments ensure that the law applies equally to electronic transactions. For example, “sign” is redefined to include electronic signatures, the term “record” is substituted for “writing” to encompass electronic documents, and the term “conspicuous” is redefined to apply more broadly to the terms of both paper and electronic documents.
- **The amendments apply to future technologies.** The new amendments facilitate transactions using distributed ledger technology but are drafted using technologically neutral language, i.e., they are not wedded to any particular technology. Consequently, the updated UCC will accommodate technologies known today as well as technologies yet to be invented.
- **The amendments incorporate existing Alabama law in connection with hybrid transactions and bring clarity to other legal rules.** A hybrid transaction is a transaction where services or licenses of information are supplied in connection with the sale or lease of goods. Alabama case law has long followed the predominant purpose test which is now formally adopted in the amendments. In addition, chattel paper is properly recognized as a right to payment as opposed to the record evidencing the right to payment, the roles of assignee and assignor are clarified, certain ministerial terms within an instrument will not affect

the instrument's negotiability, and images of certain instruments are allowed to be substituted for the instrument in accordance with federal banking regulations.

- **The amendments handle conflict of laws issues unique to digital assets.** Because digital assets have no physical location, conflict of laws questions often arise. The amendments' clear conflict of laws guidance alleviates this concern.
- **The amendments include a grace period to preserve pre-established priorities.** The amendments contain transition provisions designed to protect the expectations of parties to pre-effective-date transactions. For example, a secured lender who has a priority security interest in collateral under the prior law will retain its priority through a transition period, giving parties to preexisting transactions plenty of time to revise their agreements and, if necessary, to obtain control to comply with the updated law.
- **The amendments are thoroughly vetted.** The UCC amendments reflect the efforts of the American Law Institute and the Uniform Law Commission in conjunction with approximately 350 knowledgeable advisors and stakeholder observers who met dozens of times over a three-year period to reach consensus on updates to this crucial area of state law.

Since the UCC is the law in every state, these amendments are expected to be rapidly adopted in every jurisdiction Alabamians will be doing business. At least 30 states will take it up just this year. Therefore, the more expeditiously our state can get these new rules adopted, the better it will be for Alabama's commerce and economic growth in connection with new technologies.

Modification or Termination of an Uneconomic Trust Statute Revisions Bill

Under existing law (Ala. Code § 19-3B-414), the trustee of trust property, after notice to the qualified beneficiaries, has been able to terminate a trust having a value of less than \$50,000 without the expense of a judicial termination proceeding if the value of the trust property was insufficient to justify the ongoing cost of trust administration. The trust property is then distributed by the trustee in a manner consistent with the purposes of the trust.

The initial threshold value (\$50,000) has been the same since the statute's inception in Alabama in 2006. Given the significant passage of time and the inevitable effects of inflationary pressures, the initial threshold sum now is impairing the statute's ability to accomplish its economical and beneficial purposes.

Therefore, the Standing Trust Committee of the Alabama Law Institute (ALI) proposes what has already been undertaken in several other states – the raising of the threshold amount to the more workable figure of \$100,000. Additionally, to ensure no further need to adjust this figure statutorily, there is a proposal to statutorily tie any future adjustments to the Federal Consumer Price Index (CPI).


With \$100,000 set as the initial amount, the state treasurer from that point will have the authority to monitor the CPI for the purposes set out in this bill and annually publish his or her computation of the value determination as having increased, decreased, or remained the same. If any increase or decrease produced by the computation is not a multiple of \$100, the increase or decrease shall be rounded up or down for that year to the next multiple of \$100.

Alabama Adoption Code Bill

With concern for enhancing the integrity of the system while also modernizing it, the ALI Adoption Committee proposes the first major change to the Alabama Adoption Code in over 30 years.

This proposal considers the need to streamline the process while still maintaining safety and confidentiality. One innovation to facilitate the process is the ability of multiple courts handling an adoption matter to communicate and coordinate with one another. The new Code also considers technological advances in communications, service/notification procedures, and document transfers.


This proposal establishes prompt deadlines for action. It also clarifies and specifies expectations upon petitioners regarding qualifications for adoption along with the documentation to be completed and provided to the court.



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(Continued from page 109)

Some of the updates and innovations in this new Adoption Code are:

COURT PROCEDURE

- Allows courts to communicate with one another as in proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).
- Allows a juvenile court hearing a contest to transfer the adoption case back to probate court for final dispositional proceedings.
- Adds putative father to the notice list if he has complied with the Putative Father Registry requirements (§ 26-20C-1).
- Adds a grandparent of a deceased parent to the notice list unless there has been a termination of parental rights.
- Enables service by posting if personal service is not successful or available.
- Requires proof of service to be filed with the court.
- Allows guardian ad litem fees to be estimated in advance and payable by the petitioner(s) and any contestant(s) proportionately.
- Awards contempt power for failure to comply with payment of fees.
- Specifies application of the Alabama Rules of Civil Procedure, the Alabama Rules of Evidence, and the Alabama Rules of Appellate Procedure.
- Clarifies that contest and termination orders are final judgments.
- Allows DHR to place the minor child pending investigations, home studies, or subsequent orders of the juvenile court.
- Allows a minor 14 years of age or older to elect to retain his or her current legal name.
- Adds clarification of jurisdiction in response to court ruling *K.L.R. v. K.G.S.*, 264 So. 3rd 65, 69 (Ala. Civ. App. 2018). (This case put in doubt a probate court's ability to enter a protective order in an adoption case).
- Adopts the policy expressed in Ala. Code § 38-7-13 (identification provided only upon biological parent consent with the court's option available for weighing interests).
- References Ala. Code § 38-7-12 and the ICPC (§§ 44-2-20, et. seq.).

COURT RECORDS CONFIDENTIALITY

- Allows for the anonymity of the natural parent where the parent executing the document desires it – also allows for its waiver.
- Sets ground rules and parameters for the confidentiality and sealing of records and procedures to petition for the release of those records.
- Adopts an assumption of confidentiality regarding minor adoption records and an initial assumption of availability of adult adoption records.
- Provides for both in-state and out-of-state confidentiality procedures.

INVESTIGATION FACILITATION

- Adds to the investigation requirements reference letters, tax returns, or financial worksheets of the petitioner, Adam Walsh Act clearances/letters of suitability, divorce decrees of the petitioners, if any, and agency/social worker licenses.
- Mandates completion of report within 60 days of receipt of the petition notification.
- Sets 120-day maximum from time the petition and all necessary documentation is filed to the dispositional hearing.
- Scales back the full battery of investigations for stepparents, unless the court thinks they are necessary, but requires at least investigation into suitability of the stepparent and the home place.
- Accelerates requirement of the filing of any investigations (30 days) for stepparents.

PROTECTIONS ENHANCED

- Contains provisions for mandating all protections/procedures in adoption proceedings to remain in place even if the case is transferred to juvenile or circuit court.
- Adds fraud and subsequent sex abuse convictions to kidnapping as grounds for post-adoption collateral attack.
- Eliminates the preplacement investigation waiver except for stepparent or relative.
- Adds more information to the notifications.
- Requires legal custody to be retained by DHR or a licensed child-placement agency until final judgement, so adopting parents' custody is subject to the court continuing supervision pending entry of the final judgment.

- Grants ability to order follow-up investigation by a court designee if current file investigation deemed insufficient.
- Requests proof of licensing for a placement agency.
- Establishes a list of specific background checks.
- Requires an order of custody pending appeal by the final judgement court.
- Requires proof of de facto parent/child relationship in stepparent adoptions.
- Excludes a former spouse who has divorced a living parent from definition of "stepparent."
- Requires a report on fees and charges with stepparent and qualifying family member adoptions.
- Requires that, unless a relative or stepparent adoption, any previous grandparent visitation order is no longer of any force once the adoption is final. Also, clarifies parents of an adoptive parent will be treated as the grandparent of the adoptee (per recent Alabama case law).
- Limits the number of parents who can be listed on new birth certificate to two and mandates that if two parents are listed, they must be married to one another.
- Makes placing a child by any other person or entity than those specifically authorized a crime.
- Makes "baby selling" and "baby buying" crimes while still making proper provisions for necessary expenses and professional services.
- Guardrails promotional practices for those engaging in adoption services.

PLEADING IMPROVEMENTS

- Establishes a rebuttable presumption for implied consent requiring a preponderance of the evidence to overcome.
- Reduces the period for when the presumption is established from six months to four months.
- Incorporates the Putative Father Registry (§ 26-10C-1) into the Adoption Code by determining the failure to comply with the Registry Act as an irrevocable implied consent in the Adoption Act.
- No longer requires consent from a person whose parental rights have been terminated.
- Allows the court to determine if clear and convincing evidence is present for the allegation of the sexual assault for purposes of adoption related decisions.
- Provides for the waiver of further notice of the adoption proceedings of one executing a wavier or relinquishment.
- Allows five business days to withdraw express consent, ensuring the last day will not occur on a weekend or holiday.
- Requires specific documents to be attached to the petition, including the preplacement investigation.

- Anticipates contests on three grounds: availability of adoption, qualifications of petitioner to adopt, and obtaining of necessary consents and their validity.

GENERAL APPLICATION

- Repeals the current adoption chapter and reorganizes minor and adult/incapacitated person adoptions into separate sections.
- Allows transfer of some documents by electronic means. Also updates the names of state offices and agencies.
- Specifies judgments entered under the previous adoption code will remain in effect. However, any further proceedings in existing cases will be governed under the new adoption statutes.
- Applies to petitions filed January 1, 2024, and after.

Uniform Guardianship, Conservatorship, And Other Protective Arrangements Bill

The details concerning this bill were previously provided in "Legislative Wrap-Up," *The Alabama Lawyer*, January 2022, at 64, 65. ▲

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margaret.murphy@alabar.org.

About Members

C. Brian Davidson announces the re-establishment of **Davidson Law** at 101 Riverchase Parkway E, Ste. 203, Hoover 35244. Phone (205) 358-7867. The firm also has a Panama City, Florida office.

Bressler, Amery & Ross PC announces that **Lorrie L. Hargrove** joined as a principal and **Michael C. Guarino** joined as counsel, both in the Birmingham office.

Compton Jones Drescher LLP of Birmingham announces that **Hayes Arendall** is a partner in the firm.

Cunningham Bounds of Mobile announces that **Joseph F. McGowin** joined as an associate.

Frazer Greene Upchurch & Baker of Mobile announces that **Jarod J. White** joined as a partner.

Lightfoot, Franklin & White LLC announces that **Amie A. Vague** is a partner in the Birmingham office.

Loftin Holt LLP of Huntsville announces that **Angela Schaefer** is now a partner.

Manley, Traeger, Perry, Stapp & Compton of Demopolis announces that **Hillary Fisher** joined as an associate.

McDowell, Faulk & Shirley of Prattville announces that **Joshua M. Pendergrass** joined as a partner.

Among Firms

Armbrecht Jackson LLP of Mobile announces that **David Kirkwood Palmer, Jr.** joined as an associate.

Baker Donelson of Birmingham announces that **Michael A. Catalano** joined as counsel.

Balch & Bingham LLP announces that **Irving Jones** and **Michael Taunton** are partners in the Birmingham office.

Bradley Arant Boult Cummings LLP announces that **John Howard** joined the Huntsville office as counsel.

McGlinchey Stafford of Louisiana announces that **Jon-Kaden Mullen** joined as an associate in the Birmingham office.

Michel | King of Birmingham announces that **Mitch Allen** joined as an attorney and **Megan Corcoran** joined as an associate.

Miller, Christie & Kinney PC of Birmingham announces that **Madison N. Vacarella** joined as an associate.

Sasser Sefton and Brown PC of Montgomery announces the retirement of its founding partner, **Robert Sasser**, effective December 31, 2022.

Stites & Harbison PLLC announces that **T. Dylan Reeves** joined as a partner in the Nashville office.

The **City of Tuscaloosa** announces that **Erin Hardin** joined as an assistant city attorney.

Watkins & Eager PLLC announces that **Anthony R. Anello** and **Karmen E. Gaines** joined the Birmingham office as associates.

Webster, Henry, Bradwell, Cohan, Speagle & DeShazo PC announces that **Caitlin Malone** is a shareholder in the Montgomery office, and **David S. Terry** is a shareholder in the Birmingham office. ▲

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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.



J. Thomas Richie

J. Thomas Richie is a partner at Bradley Arant Boulton Cummings LLP, where he co-chairs the class action team. He litigates procedurally-complex and high-stakes matters in Alabama and across the country. Richie is a 2007 summa cum laude graduate of the Cumberland School of Law and former law clerk to the Hon. R. David Proctor of the United States District Court for the Northern District of Alabama.

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Taxation

Gulf Shores City Bd. of Educ. v. Mackey, No. 1210353 (Ala. Dec. 22, 2022)

After the Gulf Shores Board of Education was created and separated from the Baldwin County Board of Education, a dispute arose over whether that board was entitled to any share of a tax allocated by local law. The Alabama Supreme Court determined that the Gulf Shores Board of Education lacked standing because the judicial branch lacked the power to rewrite the local tax act. It also found the board to lack standing to bring a challenge under Section 105 of the Alabama Constitution, a decision that drew lengthy concurring opinions. The court also affirmed the dismissal of an individual taxpayer's claim. The circuit court found the taxpayer to lack standing, but the Alabama Supreme Court disagreed. Instead, it ruled against the taxpayer on the merits, holding that a tax levied by a county for county purposes (as it found the challenged taxes to be) does not violate the rule against taxing the citizens of one locality for use in another locality.

Vicarious Liability

Madasu v. Shoals Radiology Assocs., P.C., No. 1210334 (Ala. Dec. 22, 2022)

The court held that a medical practice employing a radiologist was entitled to summary judgment on a claim of vicarious liability for the actions of a physician who was moonlighting for another employer at the time of alleged malpractice and the court found no record evidence that the physician's moonlighting benefitted the practice.

Arbitration

Communications Unlimited Contracting Servs., Inc. v. Clanton, No. 1210120 (Ala. Dec. 16, 2022)

The court reversed a circuit court's decision to remand an arbitration award to the arbitrator after more than three months had passed from the award. The Alabama Supreme Court determined that the subject matter of the remand (in this case, ownership in an entity) was beyond the original arbitration award which dealt exclusively with monetary claims, and so clarification was not warranted.



Alabama
State
Bar

Valerio's Auto Sales, Inc. v. Audriana Flowers, No. 1210295 (Ala. Oct. 21, 2022)

After plaintiff sued car dealer for unlawful repossession, the circuit court denied car dealer's motion to compel arbitration pursuant to a provision in the contract that plaintiff signed at the time of purchase. The Alabama Supreme Court held that the trial court erred in denying the motion because the plaintiff had not submitted any argument or evidence opposing enforcement of the arbitration agreement and the court did not provide its rationale for denying the motion to compel arbitration. Accordingly, the Alabama Supreme Court reversed the trial court's judgment and remanded the case for the trial court to enter an order compelling arbitration in accordance with the parties' contract.

Discovery

Ex parte CSX Trans., Inc., No. SC-2022-0518 (Ala. Oct. 7, 2022)

The Alabama Supreme Court determined that the contents of the defendant's risk management system were protected work product when (1) the plaintiff's counsel had notified the defendant within three days of an accident that the plaintiff had retained counsel, giving the defendant a basis to reasonably anticipate litigation; and (2) the system contained mental impressions related to the defense of a case, which enjoy almost absolute protection. It issued a writ of mandamus to protect this information. But the Alabama Supreme Court did not issue mandamus regarding disclosure of similar accidents, more general challenges to the trial court's discovery order, and a dispute regarding verification of interrogatory responses.

Workers' Compensation

In re Varoff, No. 1210235 (Ala. Dec. 2, 2022)

In a 5-4 vote, the court issued a writ of mandamus directing the circuit court to enter an order finding a co-employee of the plaintiff to be immune under Alabama's Workers' Compensation statute because, the court determined, the injury at issue occurred when the machine that caused the injury had its lid removed for purposes of repairing the machine and so could not have been caused by willful conduct under Section 25-5-11(c). The dissenting justices disagreed that this section raised an issue of immunity.

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Forum Selection

***Ex parte Sunset Digital Communications, Inc.*, No. SC-2022-0422 (Dec. 2, 2022)**

Where a contract provided that actions arising under that contract “may” be brought in either the state or federal courts of a particular state and further provided that the parties consented to the exclusive jurisdiction of those courts over such disputes, the Alabama Supreme Court viewed the clause as a mandatory outbound forum selection clause and issued a writ of mandamus requiring the Alabama trial court to dismiss the action.

Probate

***Drinkard v. Perry*, Nos. SC-2022-0700, SC-2022-0701 (Ala. Dec. 2, 2022)**

Because administration of the decedent’s estate had been removed from the probate court to the circuit, the Alabama Supreme Court found that the probate court lacked jurisdiction over a later petition to probate a will of the decedent, and it dismissed the appeal arising from that petition. As to the other appeal, the Alabama Supreme Court determined that the prospective intervenors had not demonstrated an interest sufficient to render the trial court’s decision to deny intervention an abuse of discretion. It found that the purchasers’ contract with the decedent had expired.

Termination of Parental Rights

***Ex parte Bodie*, Nos. 1210248, 1210250, 1210251 (Ala. Oct. 14, 2022)**

The Alabama Supreme Court reversed the court of civil appeals’ ruling that reversed a juvenile court’s determination that it was unlikely that a mother would be able to care for her children in light of drug use issues. The Alabama Supreme Court found that the court of civil appeals incorrectly applied a less-deferential standard of review to the juvenile court’s ruling. It also found that the court of civil appeals erred in rejecting the possibility that the juvenile court could have reasonably determined that the evidence demonstrated that no viable alternative to termination of parental rights existed.

Preclusion

***Burkes v. Franklin*, No. SC-2022-0649 (Ala. Nov. 18, 2022)**

The Alabama Supreme Court held that a second action related to dispute over holding of a public office was not precluded by prior action, reasoning that the petitioner in the

prior action had failed to give security for costs, so the court in the prior action had lacked jurisdiction. A judgment from a court lacking jurisdiction cannot give rise to issue or claim preclusion.

Free Speech

***Young Americans for Liberty v. St. John*, No. 1210309 (Ala. Nov. 18, 2022)**

Reversing the circuit court’s decision to dismiss the action, the Alabama Supreme Court found that a university’s policy designating certain areas for spontaneous speech violated Alabama Code § 16-68-2(3)’s restriction on the creation of “free speech zones,” and it determined that the plaintiff’s claim challenging the time, place, and manner restrictions in the policy should not have been dismissed under the Rule 12(b)(6) standard. It specifically left unresolved all issues regarding the application of Alabama Constitution Section 264. While the result was unanimous, no opinion received the votes of a majority of the court.

Insurance

***Progressive Direct Ins. Co. v. Keen*, No. SC-2022-0466 (Ala. Nov. 18, 2022)**

The court reversed partial summary judgment for the plaintiffs in an insurance coverage action relating to an under-insured motorist claim, reasoning that discovery responses demonstrated that there were disputes of material fact as to coverage provided by a separate insurance policy that could impact the coverage available on the under-insured motorist policy.

Contracts

***Clay v. Chavis*, No. 1210362 (Ala. Nov. 18, 2022)**

Differences the Alabama Supreme Court found between the written terms of a contract and the parties’ understanding of the scope of the agreement and their course of performance caused the court to reverse summary judgment in this contract action.

Immunity

***Gaines v. Smith*, No. 1210304 (Ala. Nov. 18, 2022)**

The Alabama Supreme Court affirmed the dismissal of all legal and equitable claims against law enforcement officers by a plaintiff asserting that his bond hearing was delayed. The court agreed that the officers were immune from damages claims in their official capacities and that the equitable claims were moot because the plaintiff had been released

on bond. The court likewise affirmed the dismissal of the damages claims against the officers in their individual capacities, reasoning that, because the officers had neither the obligation nor the authority to scheduling bond hearings, separation of powers principles precluded the plaintiff from obtaining relief.

Inconsistent Verdicts

***T&J White, LLC v. Williams*, No. SC-2022-0480 (Ala. Nov. 10, 2022)**

After agreeing with the trial court that the plaintiff had produced substantial evidence of wantonness, the Alabama Supreme Court determined that the defendant had failed to make a proper objection to the jury charge that left open the possibility of the jury returning both a negligence and wantonness verdict. The court determined that the record reflected that defense counsel knew of the possibility of inconsistent verdicts, and the failure to object in a timely manner made the unchallenged instructions law of the case such that the verdict, though inconsistent, could not be reversed.

Judicial Ethics

***Jinks v. Alabama Judicial Inquiry Commission*, No. 1210133 (Ala. Oct. 21, 2022)**

The Alabama Supreme Court affirmed the judgment of the Alabama Court of the Judiciary removing a probate judge from office for violating the Alabama Canons of Judicial Ethics. The court held that sanctions imposed by the Court of the Judiciary are reviewable by the Alabama Supreme Court, thus overruling *Hayes v. Alabama Court of the Judiciary*, 437 So. 2d 1276 (Ala. 1983), and that the sanctions imposed against Judge Jinks were supported by clear and convincing evidence.

Preliminary Injunction

***City of Helena v. Pelham Bd. of Educ.*, No. SC-2022-0554 (Ala. Oct. 21, 2022)**

The court held that a circuit court exceeded its discretion by issuing a preliminary injunction in favor of the Pelham Board of Education without including in its order the specific reasons for the issuance of the injunction as required by Alabama Rule of Civil Procedure 65. Because the circuit court failed to follow the mandatory requirements in Rule 65(d)(2), the court reversed the order issuing the injunction and remanded the case.

***Cochran v. CIS Financial Services, Inc.*, No. 1210060 (Ala. Oct. 28, 2022)**

The Alabama Supreme Court held that it lacked power to hear appeal of preliminary injunction that had already expired and therefore dismissed the appeal as moot. Although

the issues of whether the circuit court should have issued the injunction and whether the appellant was damaged as a result were not moot, those issues had not yet been addressed by the circuit court and could not be entertained by the Alabama Supreme Court in the first instance.

Land-Use Development

***Barnes et al. v. Town Council of Perdido Beach*, No. 1210072 (Ala. Oct. 21, 2022)**

Several landowners brought suit against the Town Council of Perdido Beach, seeking an injunction to prevent plans to build a public boat launch and pier and establish a public park on the subject property. After a bench trial, the circuit court entered a final order and judgment ruling in favor of the town council on all issues. The Alabama Supreme Court affirmed, holding that: (1) the project did not divert the surrounding area from its dedicated public purpose, (2) because the project was a governmental function, the town council was immune from wetland restrictions in zoning ordinances and subdivision regulations, and (3) the town council's zoning amendments were not arbitrary and capricious.

Real Property

***Matherly v. The Citizens Bank*, No. 1210396 (Ala. Oct. 28, 2022)**

The wife, who had not signed mortgage agreement with bank, contended that the agreement was void because it was executed without her signature or assent. The Alabama Supreme Court affirmed the circuit court's holding that the mortgage was valid and enforceable, but that the wife was entitled to a \$5,000 homestead interest pursuant to Alabama Code § 6-10-40.

***The Citizens Bank v. Matherly*, No. 2022-0443 (Ala. Oct. 28, 2022)**

The court affirmed the circuit court's grant of a \$5,000 homestead interest to defendant wife pursuant to Alabama Code § 6-10-40. The court held that, although the wife had previously filed a homestead declaration for a different property, she resided at the subject property at the time the mortgage agreement was executed and did not waive any right she had to void alienation of her homestead under Alabama Code § 6-10-3 or to claim a homestead interest under Alabama Code § 6-10-40.

***Penn Waters, LLC v. The Citizens Bank*, No. 2022-0520 (Ala. Oct. 28, 2022)**

The court affirmed the circuit court's grant of summary judgment against mortgage holder because it found that the mortgage at issue had previously been satisfied prior to foreclosure by bank.

(Continued from page 117)

From the Alabama Court of Civil Appeals

Garnishment

Townsquare Media Tuscaloosa License, LLC v. Moore, No. 2210386 (Ala. Civ. App. Oct. 7, 2022)

Affirming the trial court in full, the court of civil appeals held that a defendant against whom a conditional judgment has been entered under Alabama Code Section 6-6-457 is not entitled to have the conditional judgment set aside by appearing. The court held that the trial court has discretion in deciding whether to set aside a conditional judgment. The court found that the defendant had not provided sufficient evidence in the record to establish that it was not indebted to the plaintiff.

Jurisdiction

Johnson v. Tuscaloosa, No. 2200956 (Ala. Civ. App. Nov. 4, 2022)

The court determined that the filing of a bond under Alabama Code Section 11-53B-4 is procedural, not jurisdictional, and, in the alternative, that the filing of an affidavit of substantial hardship within 10 days (even if not ruled upon) satisfies that requirement. Barring both of those considerations, the court held that it would find the plaintiff's bond timely under principles of equity: the clerk of the circuit court accepted the notice of appeal and affidavit of hardship without setting an amount of the bond, effectively placing paying a bond beyond his control.

Guardian Ad Litem

Alabama Medicaid Agency v. Wiggins, No. CL-2022-0550 (Ala. Civ. App. Nov. 4, 2022)

The court found that an order requiring the Alabama Medicaid Agency to pay a guardian ad litem fee was barred by Section 14 of the Alabama Constitution, and, further, that the appointment of the guardian ad litem was not required by contract or authorized by statute. The award was reversed.

Education

B.P. v. Oneonta City Bd. of Educ., No. CL-2022-0559 (Ala. Civ. App. Nov. 4, 2022)

Claims for equitable relief and declaratory judgment challenging a school board's rule regarding student suspensions were found moot because, the court determined, the student had served the suspension. The appeal was dismissed.

Dependency

A.D.W.H. v. C.L., No. 2210394 (Ala. Civ. App. Nov. 4, 2022)

The court held that a parent's alleged drug use is not sufficient, standing alone, to support a determination that the child is dependent, and it reversed the trial court.

Termination of Parental Rights

A.R.H.B. v. Madison Cty. DHR, No. CL-2022-0541 (Ala. Civ. App. Dec. 16, 2022)

Because the court determined that the record lacked evidence that any relatives of the parents became aware of the child's placement in foster care as required by Alabama Code Section 12-15-319(c), it reversed the trial court's termination of parental rights.

C.C. v. C.T, No. 2210356 (Ala. Civ. App. Oct. 28, 2022)

The court reversed termination of a mother's parental rights because it reasoned that leaving the child in the custody of relatives or relative foster parents (in this case, an aunt and uncle) can be a viable alternative to terminating parental rights. It therefore held that the juvenile court's determination that no viable alternative to terminating parental rights existed was not supported by clear and convincing evidence.

Contempt

Ex parte Oden, No. CL-2022-1156 (Ala. Civ. App. Dec. 9, 2022)

The court issued a writ of mandamus and found that a trial court abused its discretion in failing to stay, under Alabama Rule of Civil Procedure 62(b), the sentences of incarceration imposed by the trial court upon finding a father in violation of a child custody order when the father had filed a post-judgment motion directed at the contempt finding. The court reasoned that the refusal to stay the sentence would moot the father's appeal and deprive him of the opportunity to challenge the contempt judgment.

J.N.M.-R. v. M.D.L.-C., Nos. 2210294 and 2210304 (Ala. Civ. App. Oct. 21, 2022)

A mother was required to pay a separate filing fee for her contempt action against a father, and her failure to do so

caused the court to reverse the contempt judgment entered against the father and remand with instructions to dismiss the contempt proceeding. However, the court affirmed the trial court's decision denying the father's motion to set aside the custody judgment under Rule 60(b)(1), finding that the father had not demonstrated that his failure to respond was the result of excusable neglect.

Personal Jurisdiction

***In re Sperry*, No. CL-2022-1036 (Ala. Civ. App. Dec. 9, 2022)**

The court issued a writ of mandamus to dismiss for lack of personal jurisdiction a father's action to modify a child support and custody. The mother's sole alleged contact with Alabama – a 2022 arrest in Montgomery – was not, in the court's view, sufficient to give rise to specific jurisdiction over her for purposes of modifying custody, and the Uniform Interstate Family Support Act's ("UIFSA") jurisdictional provisions (§ 30-3D-611) would not permit an Alabama court to modify the child support order because the father resided in Alabama. The UIFSA's "away game" rule does not permit a resident parent to modify a child support order from another state absent consent.

***Ex parte Moultrie*, No. CL-2022-0864 (Ala. Civ. App. Oct. 21, 2022)**

The court issued a writ of mandamus directing the court to dismiss the case for lack of personal jurisdiction over the father because his only alleged contacts with Alabama were related to arranging visitation for the child and discussing the child with the mother and others in Alabama. Under those circumstances, the court found that the father could not reasonably anticipate being hauled into court.

Alimony and Child Support

***Turney v. Turney*, No. 2201007 (Ala. Civ. App. Dec. 2, 2022)**

The court affirmed the award of child support and alimony and found that the court had discretion to award the wife periodic alimony that, when combined with her own income, exceeded her anticipated monthly expenses. It rejected the husband's argument that the alimony award was punitive, finding instead that the circumstances surrounding the former spouses' finances and the causes of the breakup of the marriage justified the trial court's award. However, the court reversed the requirement that the husband maintain life insurance to secure the periodic alimony award, finding

that periodic alimony does not survive the death of the payor spouse and therefore life insurance may not be used to fund it.

Child Custody

***Ex parte V.M.*, No. CL-2022-0930 (Ala. Civ. App. Dec. 2, 2022)**

The court reversed the award of pendente lite custody to the presumed father because there was no evidence in the record establishing that such custody was in the best interest of the child and the mother, who legally held the superior right to custody of the child, did not have the chance to submit evidence.

***Ex parte Dukes*, No. CL-2022-1012 (Ala. Civ. App. Nov. 18, 2022)**

Though a Tennessee court had exercised emergency jurisdiction to protect a child, Alabama courts retained jurisdiction over the custody of the child under the Uniform Child Custody Jurisdiction and Enforcement Act because one custodial parent continued to reside in Alabama, even though the child's principal residence had changed to Tennessee. The court denied the mother's mandamus petition.

***J.N.S. v. A.H.*, No. 2210273 (Ala. Civ. App. Oct. 21, 2022)**

The circuit court lacked subject matter jurisdiction to hear a father's action seeking to modify a paternity and child-custody judgment entered by a juvenile court.

***M.C. v. Lee Cty. DHR*, No. 2201009 (Ala. Civ. App. Oct. 14, 2022); *M.B. v. Lee Cty. DHR*, No. 2201046 (Ala. Civ. App. Oct. 14, 2022)**

The court affirmed judgments placing a child in the custody of foster parents over challenges from an aunt and uncle and a father. As to the aunt and uncle, the court determined that the juvenile court had found that the child's being with the foster parents was in the child's best interest, a finding sufficient to outweigh the presumption in favor of awarding custody to a relative. As to the father's arguments that the child should have been placed with the aunt and uncle, the court likewise determined that the mere availability of the aunt (to whom the father was related) as a fit and able alternative to foster care did not require that the aunt receive custody. The best interests of the child were enough to outweigh the preference in favor of the aunt, even though the aunt and the foster parents were both fit and able and the aunt enjoyed a statutory preference.

(Continued from page 119)

Adoption

***Ex parte C.D.*, No. 2210248 (Ala. Civ. App. Nov. 18, 2022)**

A parent or contestant in an adoption proceeding who is given notice under Alabama Code § 26-10A-17 and who has suffered an adverse conclusion to his or her adoption contest remains a party to the adoption proceeding and is entitled to notice of the entry of the final adoption judgment under Rule 77(d), so that he or she may exercise the statutory right to take an appeal as provided in § 26-10A-26. The court therefore found the mother's mandamus petition to be untimely as coming too late after the final judgment in the adoption proceeding, even though the record demonstrated that she did not receive notice of the entry of a final judgment despite active inquiry. The court characterized its ruling as a "harsh result," and two concurring judges noted the possibility that the mother could use Alabama Rule of Civil Procedure 60(b) to seek to have the judgment set aside.

***A.C.B. v. A.B.B.*, Nos. 2210259, 2210260 (Ala. Civ. App. Oct. 21, 2022)**

The court affirmed a judgment of adoption and ruled against all of the mother's arguments on appeal. It first rejected the mother's preclusion arguments arising from actions brought by the maternal grandparents for custody, noting in particular that it found that the parties were not substantially the same when the mother was not a party to the custody actions. The court likewise determined that the mother had impliedly consented to the adoption by allowing the adoptive parents to take on financial responsibility for the children and did not maintain a significant parental relationship with them.

Prenuptial Agreements

***Ayers v. Ayers*, Nos. 2210318 and 2210376 (Ala. Civ. App. Nov. 10, 2022)**

The court affirmed partial summary judgment enforcing a prenuptial agreement, rejecting the wife's arguments that the purpose of the agreement was to protect her assets (as opposed to her husband's) and that the husband had made assurances that he would always take of his wife that, in her view, made the agreement unenforceable. The court likewise found as a matter of law that adultery by one spouse does not give that spouse "unclean hands" that render the spouse unable to enforce a prenuptial agreement. The court reasoned that

prenuptial agreements contemplate the possibility of divorce, and the absence of provisions relating to the effect of adultery suggests that the parties expected the agreement to be enforced in the event of adultery. The court also found that the prenuptial agreement barred the trial court from requiring the husband to provide medical insurance to the wife: it found that insurance was a form of spousal support, and the agreement disclaimed such support.

From the Eleventh Circuit

Anti-Injunction Act

***United States v. Meyer*, No. 21-12024 (11th Cir. Sept. 26, 2022)**

The court held that the Anti-Injunction Act which did not apply to a Florida resident seeking a protective order to restrain the government from using his responses to requests for admission when assessing a tax penalty in a separate administrative proceeding. The defendant, who had previously settled with the government in a tax action in 2019, sought to protect his admissions from that case after receiving notice from the IRS that he owed millions of dollars in penalties in July 2020. The court held that moving for a protective order in an action filed by the government does not amount to maintenance of a suit, and thus was not barred by the Anti-Injunction Act.

Insurance

***Westchester Gen. Hosp., Inc. v. Evanston Ins. Co.*, 48 F.4th 1298, 1300 (11th Cir. 2022)**

An insurance company appealed the grant of summary judgment in favor of the plaintiff, a hospital, challenging the holding the defendant had to defend the plaintiff in a lawsuit alleging negligence stemming from a sexual assault at the hospital's facility. The hospital sought defense coverage under an insurance policy issued by defendant providing coverage against third-party claims. Applying Florida rules of contractual interpretation, the Eleventh Circuit agreed that the defendant's alleged negligent conduct did not fall under exclusions in the policy for "Professional Services" or "Bodily Injury" and, thus, the insurance company owed a duty to defend the hospital.

Products Liability

***Kneffle v. J-Tech Corp.*, 48 F.4th 1282, 1286 (11th Cir. 2022)**

A Florida resident appealed a district court's grant of summary judgment in favor of a mixed group of domestic foreign corporations in a products liability action stemming from an allegedly defective motorcycle helmet. Plaintiff contended the district court erroneously excluded the testimony of her expert witness on the basis that his testimony was based on novel and unreliable theories. Applying the three factors of expert testimony admission under Rule 702 of the Federal Rules of Evidence, the Eleventh Circuit affirmed the decision of the district court, holding that the expert witness failed to demonstrate that his testimony was based on generally accepted practices in his field and also noted that the expert failed to conduct a singly study on the helmet's safety under "real-world conditions."

Tax

***Kroner v. Commissioner*, 48 F.4th 1272, 1274 (11th Cir. 2022)**

The IRS appealed a Tax Court ruling, arguing that the Tax Court misinterpreted 26 U.S.C § 6751(b) in disallowing penalties assessed to a delinquent taxpayer. The Tax Court held that the penalties were invalid because the supervisor of the examiner proposing the penalties was untimely because the approval was not made before the first notice of the owed penalties was sent by the examiner to the taxpayer. The Eleventh Circuit reversed, holding that § 6751(b) regulates assessments of penalties but not communications to the taxpayer. Thus, because the IRS did not assess the taxpayer's penalties without a supervisor's approval of an "initial determination of assessment," the court determined that the IRS did not violate § 6751(b).

Choice of Law

***Jane Doe 8 v. Chiquita Brands Int'l*, No. 21-10211 (11th Cir. Sept. 8, 2022)**

The families of victims allegedly targeted and killed by a Colombian paramilitary group sued the defendant asserting various claims under New Jersey law and violations of Colombian civil and criminal law based around the defendant's alleged funding of the paramilitary group. The district court dismissed the claims brought under Colombian law as time-barred, holding that the filing of the complaint in a previous action brought by the same plaintiffs did not toll the 10-year statute of limitations. Plaintiffs appealed that decision as well as the district court's denial of their request to

amend and the addition of Alien Tort Statute claims. The Eleventh Circuit ruled that Colombia should be considered a "state" for choice-of-law purposes, and affirmed that Columbia law, which does not recognize equitable class tolling, should be recognized. However, the Eleventh Circuit also affirmed in part, and reversed in part, the denial of plaintiff's request to amend for tolling and addition of claims. The court held that the denial of amendment for tolling was an abuse of the district court's discretion but agreed that the addition of claims would be futile.

Standing

***Hunstein v. Preferred Collection & Mgmt. Servs.*, No. 19-14434 (11th Cir. Sept. 8, 2022) (en banc)**

A Florida resident filed suit against a debt collection agency, alleging that the collection agency's transmission of his personal information to a third party, a mail vendor, was in violation of the Fair Debt Collection Practices Act. Sitting en banc, the Eleventh Circuit rejected the plaintiff's argument that the creditor's transmission of his information to a mail vendor caused him concrete injury because it was analogous to the common-law tort of public disclosure. The Court held that plaintiff's theory of reputational injury lacked the requirement of a public disclosure tort, "that the disclosure be public." Because the plaintiff's comparison to public disclosure of private facts was the plaintiff's sole basis for alleged concrete harm, the failure of that comparison resulted in the dismissal of his complaint.

Copyright

***Campbell v. James*, No. 21-10978 (11th Cir. Sept. 7, 2022)**

A musician filed a copyright infringement suit against other artists, on which he was granted default judgment. After the entry of default judgment, the musician filed an amended complaint, requesting actual damages "jointly and severally," from the infringing work. The court denied the motion of one of the infringing artists to set aside the default, concluding that he was properly served with the initial complaint and that because the amended complaint did not allege or request new additional relief from either artist, it was not required to be served under Federal Rule of Civil Procedure 5(a)(2). The Eleventh Circuit reversed, reasoning that the Copyright Act did not put the artist on notice in the initial complaint that he could be subject to joint and several liability and thus, the amended complaint constituted a new claim for relief. Therefore, service of the amended complaint was required.

(Continued from page 121)

Summary Judgment

Does 1 Through 976, et al. v. Chiquita Brands Int'l, Inc., No. 19-13926 (11th Cir. Sept. 6, 2022)

Chiquita was granted summary judgment against a series of bellwether plaintiffs consolidated by an MDL panel from plaintiffs claiming that their respective loved ones were killed by a Colombian paramilitary group that Chiquita funded. Summary judgment was granted against the bellwether plaintiff because much of their evidence supporting the allegation that the paramilitary group killed each of the bellwether decedents was inadmissible hearsay. As to the evidentiary rulings, the Eleventh Circuit affirmed in part and reversed in part, while also holding that “most of the bellwether plaintiffs” presented evidence sufficient to survive summary judgment as to whether the paramilitary group was responsible for the deaths of their decedents.

Aviation

North Miami v. Federal Aviation Administration, No. 20-14656 (11th Cir. Sept. 2, 2022)

A group of municipalities, individuals, and a nonprofit organization filed a petition for review against the Federal Aviation Administration for various constitutional and environmental violations based on the FAA's newly implemented navigation procedures for flights taking off from and landing in the South-Central Florida Metroplex. Deferring to the FAA “in defining the aims of their projects,” the Eleventh Circuit did not find the FAA's regulations “arbitrary or capricious,” because they were in line with Congress's objectives specified in the Vision 100-Century of Aviation Reauthorization Act of 2003. Additionally, the court held that the FAA defeated alleged violations of the Clean Air Act and the Department of Transportation Act. Lastly, the court rejected the argument that the FAA deprived the petitioners of a constitutionally protected right to sleep.

Maritime; Negligence, Actual or Constructive Knowledge

Holland v. Carnival Corp., No. 21-10298 (11th Cir. Oct. 4, 2022)

The plaintiff sued after slipping on a substance spilled on the stairs of its cruise ship. The court held that the plaintiff's vicarious liability claims were actually direct liability claims because the plaintiff failed to identify any specific employee's action that caused him to slip. The plaintiff alleged that the hazard had occurred on a highly trafficked staircase

that was potentially visible to many crewmembers and was subject to the regulation of safety agencies. The court held that these allegations were insufficient to show constructive knowledge. At most, they showed only that his claims were possible, not that they were plausible, as Twombly and Iqbal require. The court affirmed the Rule 12(b)(6) dismissal.

Ex Post Facto

McGuire v. Marshall, No. 15-10958 (11th Cir. Oct. 3, 2022)

The court held that the Alabama Sex Offender Registration and Community Notification Act does not violate the Ex Post Facto clause of the U.S. Constitution. The Act requires adult sex offenders to make certain notifications and reports to law enforcement as they occur and on a quarterly basis (or weekly if homeless). The Act further imposes certain residency and employment restrictions and requires law enforcement to notify community residents of the presence of a sex offender via a website and physical notices. The court determined that the plaintiff had not shown by “the clearest proof” that the Act was intended to punish, despite its stated objective to protect the public.

First Amendment, Government Speech

Gundy v. Jacksonville, Fla., No. 21-11298 (11th Cir. Sept. 30, 2022)

The court held that a pastor's legislative invocation before a city council meeting was government speech and thus not subject to attack on free speech or free exercise grounds. The pastor sued the city after his microphone was cut during his legislative invocation when he began criticizing the city's executive and legislative branches. The Court held that legislative prayer occupies a unique place in our history and tradition under the Establishment Clause, and that under the Free Speech Clause the history, endorsement, and control factors indicated that legislative prayer was government speech. As government speech, it was not subject to challenge under the Free Speech or Free Exercise clauses.

Bankruptcy; Florida Securities Law

1944 Beach Boulevard, LLC v. Live Oak Banking Co., No. 21-11742 (11th Cir. Sept. 29, 2022)

A bankruptcy trustee may avoid any lien not properly perfected under state law. Under Florida law, a security interest cannot be perfected without a creditor filing a financing statement that, among other things, lacks any “seriously misleading” errors. Because the filing statement identified the debtor as “1944 Beach Blvd., LLC” instead of its legal name,

“1944 Beach Boulevard, LLC,” the lien could not be searched using the filing office’s standard search logic, so the court determined that the statement was seriously misleading and could not perfect a security interest under Florida law.

Immigration

***Danglar v. State of Georgia*, No. 19-15042 (11th Cir. Sept. 29, 2022)**

The court held that an ICE civil detainee was not a “prisoner” under the Prison Litigation Reform Act, so the district court’s application of that Act to dismiss the plaintiff’s complaint was error.

Civil Conspiracy

***Chance v. Cook*, No. 20-11699 (11th Cir. Sept. 28, 2022)**

Noting that a plaintiff cannot maintain a civil conspiracy claim against an attorney under 42 U.S.C. § 1985(2) unless that attorney acted outside the scope of the representation during the alleged violation, the court ruled that any unethical conduct by an attorney should be addressed in the underlying case being litigated and not in a subsequent § 1985(2) claim. The court held that the defendant attorneys were acting within the scope of their representation in the underlying case when they reported to law enforcement that plaintiff had recorded various conversations without consent, potentially in violation of Florida law.

Qualified Immunity

***Christmas v. Harris Cnty.*, No. 21-11187 (11th Cir. Oct. 28, 2022)**

The Eleventh Circuit affirmed the district court’s grant of summary judgment based on qualified immunity. The plaintiff filed a civil rights action alleging that a deputy sexually assaulted her during a traffic stop, and that the sheriff was liable for the assault as supervisor. The district court granted summary judgment to the sheriff, concluding that he did not violate clearly established law or show deliberate indifference to the risk that a deputy might assault a detainee. The Eleventh Circuit affirmed, holding that prior isolated instances of misconduct by the deputy were not enough to put the sheriff on notice of a need to take corrective action as required for a supervisory liability claim.

FTCA

***Kordash v. United States*, No. 21-12151 (11th Cir. Oct. 21, 2022)**

The Eleventh Circuit affirmed the district court’s Rule 12(b)(6) dismissal of a Federal Tort Claims Act claim, holding that an individual’s claims against federal officers were barred by determinations in an earlier Bivens action. After a series of airport security screenings, plaintiff filed a Bivens action against the officers who detained him. The district court dismissed that action based on qualified immunity. The plaintiff then filed an FTCA claim. The district court dismissed that action for failure to state a claim, and plaintiff appealed. The Eleventh Circuit held that the determination in the previous Bivens action that the officers acted lawfully in furtherance of federal policy precluded plaintiff’s FTCA claim, and that, under the Supremacy Clause, lawful federal actions do not give rise to state-law tort liability.

Vaccine Mandate

***Norwegian Cruise Line Holdings Ltd v. State Surgeon Gen.*, Fla. Dep’t of Health, No. 21-12729 (11th Cir. Oct. 6, 2022)**

A cruise line challenged a state statute prohibiting adoption of a Covid-19 vaccination mandate for vessels departing from Florida, alleging that the law violated the First Amendment, Dormant Commerce Clause, and Due Process Clause. The district court granted the cruise line’s motion for a preliminary injunction on the grounds that the statute was likely unconstitutional. The Eleventh Circuit vacated the preliminary injunction, holding that Florida’s law is a regulation of economic conduct that only incidentally burdens speech and that any burdens on interstate commerce were outweighed by the benefits of furthering Florida’s substantial interest in protecting its citizens from discrimination and invasions of privacy.

Arbitration

***Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, No. 20-13039 (11th Cir. Oct. 5, 2022)**

The Eleventh Circuit ordered rehearing en banc, vacating a prior panel decision affirming a district court’s order denying a company’s motion to vacate a foreign arbitral award. A Guatemalan company brought an action challenging an arbitral award issued by the International Court of Arbitration on the grounds that the arbitration panel exceeded its powers. The district court denied the company’s motion to vacate the arbitral award, and the company appealed. The Eleventh Circuit panel held that, under existing precedent, the district court correctly applied both the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral

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Awards, concluding that it lacked the ability to vacate a foreign arbitral award on the grounds that an arbitral panel exceeded its powers.

Voting Rights

***Curling v. Raffensperger*, Nos. 20-13730 and 20-14067 (11th Cir. Oct. 5, 2022)**

A voter advocacy organization and its members brought an action alleging that Georgia's new voting system burdened its members' right to vote. The district court issued a preliminary injunction barring the state from printing hard-copy, backup voter lists until early voting had concluded. It granted preliminary injunctive relief requiring the state to calibrate its ballot scanners to recognize slight marks but took no further action. The state appealed. The Eleventh Circuit held that the district court abused its discretion when it determined that printing hard-copy voter lists before early voting ended burdened the right to vote. And it held that the district court's ballot scanning order did not grant injunctive relief, and thus was not a reviewable judgment.

ADA

***L. by and through D.L. v. Walt Disney Parks and Resorts U.S., Inc.*, No. 20-12720 (11th Cir. Oct. 4, 2022)**

A guardian sued a theme park operator on behalf of a disabled guest, alleging that the operator's policy of allowing disabled guests to wait in line "virtually," but not allowing them to go on rides without waiting at all, violated the Americans with Disabilities Act. The district court ruled in favor of the operator after determining that plaintiffs' requested modifications to the park was neither necessary to accommodate disabled guests nor reasonable under the ADA, and concluding that the request, if granted, would fundamentally alter the operator's business model. The Eleventh Circuit affirmed, finding no clear error in the district court's factual findings regarding the necessity of the requested accommodations, and no legal error in its fundamental-alteration analysis.

Recent Criminal Decisions From the Alabama Supreme Court

Confrontation Clause; Masked Witness at Trial

***Ex parte Rodriguez* (In re: *Rodriguez v. State*), No. SC-2022-0845 (Ala. Jan. 13, 2023)**

The Alabama Supreme Court denied certiorari review of the Alabama Court of Criminal Appeals' memorandum opinion rejecting the defendant's claim that the trial court violated the Confrontation Clause by requiring witnesses to wear masks during his trial. While the trial was held during the COVID-19 pandemic, the Alabama Supreme Court's previously declared COVID-19 state of emergency ended three weeks before trial. Dissenting from the denial of review, Chief Justice Parker observed that "the Confrontation Clause protects a defendant's right to have witnesses' faces visible to the defendant and the jury[.]" and that the provision applies in all cases, "even during a pandemic[.]"

Ineffective Assistance of Counsel

***Ex parte Smith*, No. 1210322 (Ala. Dec. 9, 2022)**

While the court quashed the defendant's petition for a writ of certiorari that challenged his manslaughter conviction, Justices Bryan and Mitchell (joined by Justice Bolin) issued concurrences opining that the defendant may be entitled to postconviction relief on grounds of ineffective assistance of counsel.

From the Alabama Court of Criminal Appeals

Confrontation Clause; Juvenile Transfer

***A.P.S. v. State*, CR-21-0024 (Ala. Crim. App. Dec. 16, 2022)**

The court reversed the juvenile court's order transferring a juvenile for trial as an adult on his charge of capital murder due to a violation of the juvenile's Confrontation Clause rights. The admission of hearsay testimony regarding the statement of a witness who described the juvenile's participation in offense was not harmless. The court noted, however, that jeopardy does not attach to a transfer hearing where there was no finding that the juvenile was delinquent or violated a criminal law, and the state may seek again to have the juvenile prosecuted as an adult.

Failure to Bury a Dead Animal; Sentencing For Misdemeanor Offenses

Tisdale v. State, CR-21-0174 (Ala. Crim. App. Dec. 16, 2022)

In challenging her conviction of failure to bury a dead animal in violation of Ala. Code § 3-1-28, the defendant argued that her offense was ineligible for a term of imprisonment. The court construed the statute's language to permit imprisonment for up to three months as a Class C misdemeanor and found no error in the defendant's suspended 90-day sentence.

Ineffective Assistance; Personality Disorder Evidence

Largin v. State, CR-20-0228 (Ala. Crim. App. Dec. 16, 2022)

Among other holdings, the court rejected the capital murder defendant's claim that his trial counsel rendered ineffective

assistance by presenting expert testimony during his trial's penalty phase regarding his narcissistic personality disorder. The defendant was convicted of capital murder and sentenced to death after fatally shooting his parents. The psychologist's testimony contextualized the defendant's disorder and explained guilt phase evidence regarding his unemotional response when informed of his parents' deaths. The decision to introduce the evidence was strategic in nature and did not constitute deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984).

Burglary; Impeachment

Caver v. State, CR-21-0333 (Ala. Crim. App. Dec. 16, 2022)

The court rejected the defendant's contention that his actions did not constitute third-degree burglary under Ala. Code § 13A-7-7, which requires proof that the defendant knowingly enters or remains unlawfully in a dwelling with

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the intention to commit a crime therein. Ala. Code § 13A-7-1(2) defines a “dwelling” as “[a] building which is used or normally used by a person for sleeping, living or lodging therein[,]” and a person may have more than one dwelling at the same time. Thus, evidence that the victim was temporarily living in his sister’s house did not prohibit a conviction arising from the burglary of his mobile home. Further, the victim’s testimony that he saw the defendant “going through a box of stuff in [his] bedroom,” and that he found one of his knives near the defendant’s car, was sufficient to prove that the defendant entered the mobile home with the intent to commit a theft therein. The court also found no error in the denial of the defendant’s requested jury instructions regarding impeachment; the victim’s trial testimony, though differing in some ways from his prior statements, was consistent with those statements overall.

Probation Revocation; Preservation

Gavin v. State, CR-2022-0618 (Ala. Crim. App. Dec. 16, 2022)

The probationer’s argument that the trial court revoked his probation solely on the basis that he had been arrested for new offenses was barred from appellate review due to his failure to first present it to the trial court.

Speedy Trial; Split Sentence Act

Williams v. State, CR-21-0347 (Ala. Crim. App. Dec. 16, 2022)

By not both raising the claim in the trial court and obtaining an adverse ruling on it, the defendant failed to preserve his argument that his right to a speedy trial was violated in his prosecution for driving under the influence. Though he raised the claim in his motion to dismiss, the record did not indicate that the trial court knew that the motion was filed, and the filing of a motion with the circuit clerk is not sufficient to impute knowledge of the pleading to the trial court. The court remanded for resentencing, however, because the trial court imposed a split sentence under Ala. Code § 15-18-8 which was not available for a misdemeanor at the time of the DUI offense.

Speedy Trial

Quinnie v. State, No. CR-21-0374 (Ala. Crim. App. Dec. 16, 2022)

After considering the factors of *Barker v. Wingo*, 407 U.S. 514 (1972), the court found no violation of the defendant’s right to a speedy trial. While the state negligently delayed prosecuting the defendant’s charge for approximately 41 months, he acquiesced in the delay for more than three years, and he made no attempt to demonstrate that he suffered any actual prejudice from the delay.

Double Jeopardy; Habitual Offender Sentence Enhancement

Reynolds v. State, CR-21-0478 (Ala. Crim. App. Dec. 16, 2022)

The court reversed the summary dismissal of the defendant’s claims for relief under Ala. R. Crim. P. 32. First, the defendant’s claim that his convictions of first-degree robbery and first-degree theft under Ala. Code §§ 13A-8-41 and 13A-8-3 arose from the same underlying theft and thus constituted double jeopardy was potentially meritorious. Further, his claims that his sentencing under the Alabama Habitual Felony Offender Act, Ala. Code § 13A-5-9, was illegal because it was based on out-of-state juvenile adjudications was also potentially meritorious; youthful-offender convictions are not considered prior convictions for purposes of sentence enhancement under § 13A-5-9.

Menacing

Douglas v. City of Mobile, CR-20-1012 (Ala. Crim. App. Dec. 16, 2022)

Evidence that the defendant pulled her vehicle into a position that blocked the victim’s vehicle into a parking space, held a tire iron out of her window, and screamed that she would “crack [her]...skull and hit [her] upside the head with the tire iron” was sufficient to show that the defendant “by physical action...intentionally place[d] or attempt[ed] to place another person in fear of imminent serious physical injury” and thus committed the offense of menacing under Ala. Code § 13A-6-23. ▲



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