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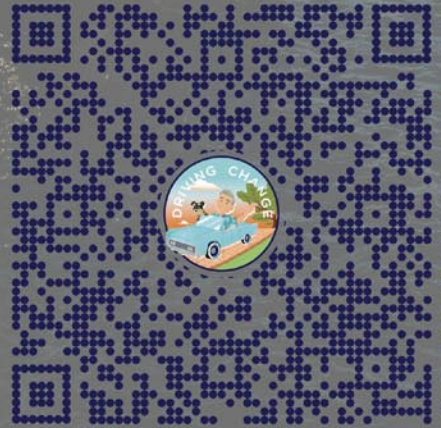
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On The Cover

Another beautiful evening sky as kayakers enjoy Mobile Bay, near the site of this year's 146th Annual Meeting at the Grand Hotel Golf Resort & Spa, Point Clear

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Thank you to all the local bars who have welcomed President Vance during his Drive for Five tour!

May is a busy month at the Alabama State Bar! Not only are we in the final stages of planning for this summer's annual meeting, but we also celebrate and commemorate several areas of our profession during this time.

We kicked off the month with Law Day in Alabama on May 1. More than 100 classrooms around the state had an attorney give presentations on this year's Law Day theme – Cornerstones of Democracy: Civics, Civility, and Collaboration. The annual Law Day program was created to celebrate the role of law in our society and to cultivate a deeper understanding of the legal profession, and I believe this year's theme is especially timely. Through civility and collaboration, we can learn to overcome our differences, resolve our disputes, and preserve the professionalism of the practice of law. We appreciate all those attorneys who volunteered their time to speak to Alabama schoolchildren on these topics. It's a meaningful way we

can inspire younger generations to be interested in a career as a lawyer.

This month, we also celebrate the attorneys whose work inspired many generations of lawyers with our annual Alabama Lawyers Hall of Fame induction ceremony. Inductees to the Hall of Fame must have had a distinguished career in law demonstrated by leadership, service, mentorship, political courage, or professional success. It is an honor to attend these ceremonies. The stories and achievements of those inducted serve as a reminder of the extraordinary impact lawyers have on society, both within and outside their law careers. I encourage you to take the time to visit the Hall of Fame page on the ASB website and read about each of this year's five inductees.

Finally, the month of May is Attorney Wellness Month. This annual focus on the health and wellbeing of our members officially started in 2020 by then-President Christy Crow. At the time, the Quality of Life, Health & Wellness Task



May 1 is Law Day in Alabama, and numerous attorneys volunteered their time and experience to help teach students about the role of law in society. If you missed out on this year's program, be sure to volunteer next year!

Force was created to focus on providing tools to create healthy habits and environments, and the new challenges associated with COVID-19 made the work of that task force even more important.


This task force is now a standing committee, and I'm proud of the work this year's co-chairs Susan Han and Brandy Robertson have done to continue to encourage dialogue and action to promote better wellness among attorneys. As leaders in our profession, it is up to all of us to help decelerate the growing incidences of depression, substance abuse, and physical and mental health problems among attorneys.

This year, we have made lawyer wellness the focus of my presidency. Through our work in the Drive for Five initiative, we've worked to further remove the stigma of talking about mental health and addiction while also educating our members on the free and confidential help the bar offers those who are struggling. As we wrap up the final stops on the Drive for Five Tour, I look forward to sharing more with you about the impact of this campaign in my July column.

It's hard to believe next month marks the last full month of my time as president of the Alabama State Bar. As I often share with our members during the

many visits we've made around the state, I encourage you to get involved with the state bar. This is your state bar, and the more active you become, the

more you'll gain. I believe that the Alabama State Bar provides a vehicle for attorneys to engage in activities that make the practice of law more than just a job.



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The camaraderie, the opportunity to know and work with lawyers from all over the state, and the feeling that I can and do make a difference are just some of the things I've gained from my service to the bar.

While many activities happen this month, there are opportunities to get involved any time of the year with the bar. Take the opportunity to volunteer, provide pro bono assistance to those in need, to attend one of our CLEs or meetings, or take part in this month's health and wellness challenges. It could not only improve your practice, but it could also make a tremendous positive impact on your life. ▲



President Vance, committed to visiting each local bar, wrapped up his Drive for Five tour during April and May.

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EXECUTIVE DIRECTOR'S REPORT

Terri Lovell
terri.lovell@alabar.org



The Power of Legacy

This is the time of year when we recognize those Alabama lawyers whose distinguished careers made a positive and lasting difference in our profession and beyond.

The first class of the Alabama Lawyers Hall of Fame was inducted in 2004, and since then, nearly 90 additional attorneys have been inducted during these May ceremonies and memorialized on the walls of the lower level of the Heflin-Torbert Judicial Building in Montgomery.

It is always a privilege to participate in the Hall of Fame program and to honor these outstanding lawyers for their commitment and service to our state, local communities, and our nation. This program and its purpose are at the heart of the bar's motto: *Lawyers Render Service*.

On the grounds of the Alabama State Bar building, we continue to work on a special recognition for the past president who coined that motto – Tuskegee attorney Fred Gray.



Gray



ASB past President Fred Gray and wife Carol celebrate the groundbreaking of the Fred Gray Courtyard with bar leaders and executive staff.

With his many accolades, including a Presidential Medal of Freedom, Gray's courage, conviction, and legal career made our country a better place. We are proud to call him a true friend and pioneer of the profession, and I am excited to see the Fred Gray Courtyard take shape.

Our profession should also be very proud that two more legal pioneers, Mahala Ashley Dickerson and Alice Lee, were honored as 2023 inductees to the Alabama Women's Hall of Fame.

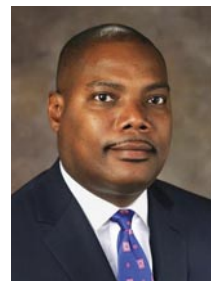


Dickerson



Lee

As I've joined alongside many others this month to honor the men and women whose legacy helped build the foundation of the legal profession as we know it today, I've thought about the power of legacy. Raymond Bell, one of our 75 bar commissioners and the president-elect of the Mobile Bar Association, recently reminded me that our investment in the next generation of lawyers is our legacy to create. His statement has prompted me to ask myself these questions and share them with you.



Bell

Do we know the legacy we want to leave?

We follow many exceptional leaders in the profession who have been making a way for others to come behind them

(Continued from page 141)

and alongside them. What about us? What do we want to be remembered for? What path do we create that will help someone else down the road? Someday people will summarize our lives in a single sentence. Why not pick it now?

Are we living the legacy we want to leave?

Make no mistake, the legacy we leave will depend on the life that we live. It's a living reflection of who we are. It's our story, unfolding in real time. In creating a legacy as a leader – and all lawyers are leaders – people will remember how we made them feel and how we helped them get to where they are today. How we handle the big decisions, and the small, everyday moments, will become the legacy we leave.

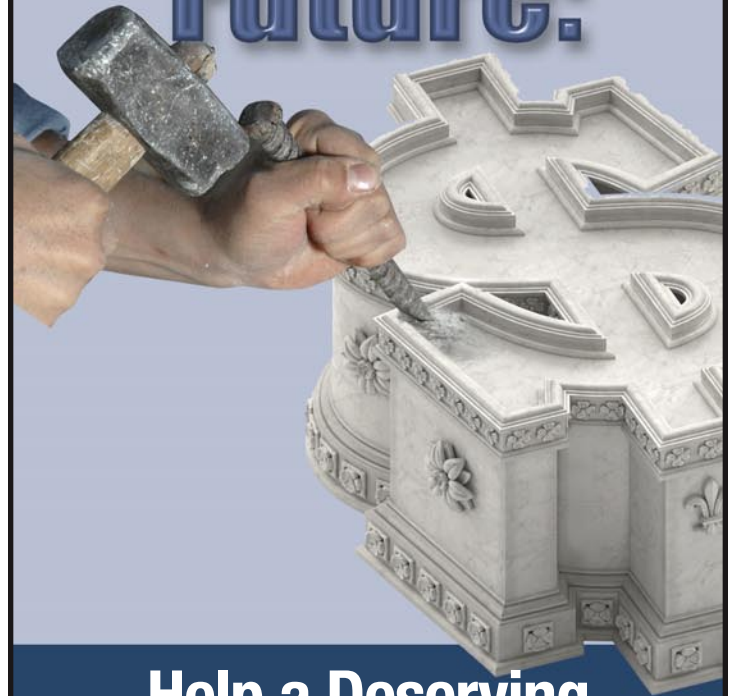
Who will carry on our legacy?

We all have different goals in life and things we want to accomplish. One thing that is certain is that a legacy lives on in people, not things. Too often, we put our energy into organizations, buildings, systems, or other lifeless objects. But only people live on after we are gone. Everything else is temporary. By focusing on connecting with, nurturing, and inspiring people, we can generate a positive and long-lasting legacy far beyond our time.

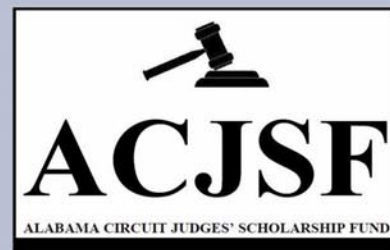
I challenge all of us to **lead and live today with tomorrow in mind**. To some extent, legacy is about putting others first. I never dreamed I would lead an organization for Alabama's lawyers. My goal is to personally invest in lawyers who will carry our legacy. Why? Because a leader's lasting value is measured only by succession.

We all can make an organization, a program, or a team look good for a moment, but the best leaders aren't focused on the now, the results, or the accolades. Legacy is leaving behind something that succeeds without us. *Let's all remember to pass the baton ...* and prepare others to run the next leg of the race with success. ▲

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EDITOR'S CORNER

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

Our goal in every edition is to give you something that is useful in your practice. We love to hear stories from lawyers who print articles to take to their local courts, and we love to hear stories from lawyers who use articles in appeals. In this issue, you get a touch of both. And I think you'll agree that our authors are outstanding.

Jay Mitchell is a sitting justice on the Alabama Supreme Court. Something that doesn't get nearly enough attention is the success his law clerks have had in moving from the Alabama Supreme Court to the United States Supreme Court. One is there right now (Bijan Aboutorabi); one will be there later this year (Will Courtney); and one will be there in a future term (Annie Wilson). If another sitting state supreme court justice can match that record, I haven't heard of it.

Lars Longnecker is a current clerk for Justice Mitchell. He is a graduate of the University of Chicago School of Law, and he's been working in various capacities at the Alabama Supreme Court since June 2003.

If you think you know whether a case is binding legal precedent, Lars and Justice Mitchell sent us an article that deftly shouts, "Not so fast!" They begin with this example: "When you scroll to the bottom of the opinion, you see that in addition to the justice who authored the opinion, three justices concurred and three justices concurred in the result, while two justices dissented. So, seven *concur*s and two *dissent*s, right? And with this vote line, you can now cite the opinion as the majority opinion of the court and binding precedent in Alabama, right?"

Intrigued? I was. I don't think I'll ever count vote lines quite the same way again. See "How to Read a Vote Line of the Alabama Supreme Court" (page 146).

Now that we are on a roll with the Alabama Supreme Court, how about an article from Joe Germany, a clerk for Justice Will Sellers. Joe sent us "Appeal of

Board of Equalization Valuations" (page 152). I don't know much about this topic – *much* being code for *I know nothing at all* – but having read it and having been through Joe's excellent reasoning and clear logic, I feel far better acquainted with something that looks a maze for the uninitiated and a trap for the unwary. He reduces the walk through that maze to a pleasant afternoon stroll. Well done, Joe, well done.

I get a lot of telephone calls that begin with "Have y'all published an article on...?" I suspect that both articles will be answers to that question for quite some time.

Enjoy the articles. Email me at wguard@mindspring.com if you have questions or comments or want to join us as an author. 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. ▲

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How to Read a Vote Line of the Alabama Supreme Court

By Justice Jay Mitchell and Lars A. Longnecker

You're hard at work on your brief for an Alabama court.

The issue before you is governed by Alabama law, and you've just found an Alabama Supreme Court opinion that is on point.

When you scroll to the bottom of the opinion, you see that in addition to the justice who authored the opinion, three justices concurred and three justices concurred in the result, while two justices dissented. So, seven *concur*s and two *dissent*s, right? And with this vote line, you can now cite the opinion as the majority opinion of the court and binding precedent in Alabama, right?

Not so fast.

Lawyers should know that not every opinion issued by the Alabama Supreme Court and published in the Alabama Reporter constitutes binding precedent.¹ Rather, the doctrine of *stare decisis* applies only to those opinions in which a majority of the court has expressed agreement on a point of law that is integral to the court's decision.²

There are nine justices on the Alabama Supreme Court, and, at its simplest, this means that an opinion is binding precedent when five or more justices have concurred in that opinion.

But not all types of concurrences are the same, and it's not always as easy as skipping to the vote line at the bottom of an opinion and counting the number of justices whose names appear next to some version of the word "concur." Sometimes, it's not possible to determine what, if any, precedential value an opinion has until after you've carefully read that opinion and the accompanying special writings to discern exactly where the justices' agreement lies.

Path of a Case at The Alabama Supreme Court

To understand the vote line of an Alabama Supreme Court opinion, it's helpful to know the path a case takes when it's filed here. In contrast to the United States Supreme Court – where a justice is assigned opinion-writing duties for a case only after some preliminary discussion and an initial vote – cases filed in the Alabama Supreme Court are assigned to individual justices on a rotating basis after briefing is completed, without discussion or analysis of the case beforehand.

For some extraordinary cases like petitions for the writ of mandamus and permissive appeals filed under Rule 5, Ala. R. App. P., the path is different. These cases are first considered by the court on its weekly miscellaneous docket, at which time the court conducts an initial review to determine whether to accept the case. If a majority of the court agrees to accept the case, the court orders full briefing and, once briefing is complete, the case is assigned to the next justice up in the rotation – unless that justice dissented from the decision to accept the case. In that circumstance, the dissenting justice is skipped, and the case is assigned to the next justice in the rotation who did not dissent from the decision to accept the case.

The justice to whom a case is assigned (or JTWA in court parlance) then works up the case, ultimately drafting either a proposed opinion or a memorandum recommending that the case be disposed of by order without an opinion. (Because orders disposing of a case have no precedential value outside of that particular case, we focus in this article only on cases decided by opinions.) Monthly, these proposed opinions are then circulated to the other justices for review.

Notably, not every opinion is circulated to every justice for a vote. Rather, as set forth in Rule 16, Ala. R. App. P., the court is authorized to consider most cases in five-justice divisions. The court has historically divided itself into two five-justice divisions headed by the two senior associate justices (with the chief justice sitting in both divisions). Most opinions are first circulated only to the other four justices sitting in the JTWA's division, and if the four other justices in that division agree with the JTWA's recommended disposition of a case, the opinion may be released without being considered by the other four justices. But if even one justice in the division dissents, the case is forwarded from that division to the court's monthly general conference, where it is considered by the entire court.

Some opinions are circulated directly to general conference for consideration by the full court. These include death-penalty cases, cases in which the JTWA is recommending that the judgment of an intermediate court of appeals be reversed, disbarment proceedings, and utility-rate cases, among others. Additionally, any opinion deciding a case that was previously considered by the entire court on the weekly miscellaneous docket is circulated directly to general conference. It's the court's policy that once a justice participates in a case, that justice has the right to continue participating until the case is resolved.

Voting

After reviewing the proposed opinions that are circulated, the justices enter their preliminary votes. These votes may change as the justices continue to discuss the case, but eventually, each justice will finalize their vote and that vote will be printed on the vote line at the end of each opinion. These votes can take various forms.

A. Concur (C)

The most common vote is probably “concur.” When a justice concurs in an opinion, it is presumed that the justice is in complete agreement with the opinion. The justice authoring the opinion is also counted as a C vote.³

B. Concur specially (CS)

A justice concurs specially when the justice agrees with everything in the main opinion but wants to write separately to make some additional point. For example, a justice may want to identify an equally correct alternate rationale that supports the court's judgment. *See, e.g., Bonner v. Lyons, Pipes & Cook, P.C.*, 26 So. 3d 1115, 1126 (Ala. 2009) (Lyons, J., concurring specially) (explaining that he “concur[s] fully in the main opinion” but writes specially “to offer an alternative basis” for the court's judgment). Or a justice may write to explain how that justice voted as it relates to a previous case involving the same issue. *See, e.g., Brock v. Kelsoe*, 335 So. 3d 624, 632 (Ala. 2021) (Mitchell, J., concurring specially) (explaining how the evidence in *Brock* differed from the evidence in *Taylor v. Hanks*, 333 So. 2d 3d 132 (Ala. 2021), a similar case in which Justice Mitchell declined to join the majority).

Finally, in some cases a justice may concur specially to flag an issue that merits further attention later. These writings may be directed to the legislature, *see, e.g., State v. Two White Hook Wreckers*, 337 So. 3d 735, 740 (Ala. 2020) (Bryan, J., concurring specially) (encouraging the legislature to review Ala. Code § 28-4-287 (1975), as it relates to forfeiture actions), or to parties in future cases. These latter types of writings are especially important as they may indicate the path by which a party can prevail in a future case. *See, e.g., Ex parte BBH BMC, LLC*, 299 So. 3d 961, 967 (Ala. 2020) (Mendheim, J., concurring specially) (expressing a willingness to consider a premises-liability claim against a health-care provider outside the structure of the Alabama Medical Liability Act (“the AMLA”), §§ 6-5-480 to -488 and § 6-5-540 to -552, if appropriate, but concurring with the majority opinion because the plaintiff had conceded that the AMLA governed his case).

A CS vote on the vote line is treated exactly like a C vote when counting the votes to determine whether a majority exists.

C. Concur in the result (CR)

A concur-in-the-result vote indicates that the justice agrees with the ultimate judgment of the opinion, i.e., whether to affirm or reverse the lower court's judgment. (The equivalent vote by a justice on the United States Supreme Court would be a vote "concurring in the judgment.") But when a justice has entered a CR vote, the justice also presumably disagrees with some aspect of the opinion.

Because a justice has no obligation to write separately to explain a CR vote, it's not always possible to discern the basis of that disagreement. It may be that the justice thinks the case should have been decided on an alternate basis and that the opinion's analysis is faulty. Or the justice may feel the opinion includes dicta that should have been left out.

It's also possible for a CR vote to be based on less substantive reasons – a justice may not like the tone or certain language used in the opinion. And in some cases, justices might enter a CR vote simply because they do not like that there *is* an opinion; they'd prefer, for example, to affirm the lower court's judgment without an opinion under Rule 53, Ala. R. App. P.⁴

In sum, it's impossible to know the extent to which a justice agrees with an opinion when the justice has entered a CR vote and hasn't written separately to explain that vote. Accordingly, a justice who has concurred in the result without writing is not included with the majority when determining whether the opinion has precedential value. As such, a case like *Washington v. Hill*, 960 So. 2d 643 (Ala. 2006) – in which four justices concurred and five justices concurred in the result without writing – is not binding precedent even though the court's decision to affirm the trial court's judgment was unanimous.

The calculus may change, however, when a justice writes to explain a CR vote. In those cases, it's often possible to tell what aspects of the opinion the justice concurring in the result agrees with, and the justice's vote is no different than a run-of-the-mill C vote as to those aspects. In this circumstance, the justice may even frame the vote as "concurring in part and concurring in the result" (CP/CR) to manifest this intent more clearly. *See, e.g., Barnett v. Jones*, 338 So. 3d 757, 769 (Ala. 2021) (Mendheim, J., concurring in part and concurring in the result) ("I concur with Part B. of the 'Analysis' section of the main opinion, and I

concur in the result of the main opinion affirming the Montgomery Circuit Court's judgment.""). But CR and CP/CR writings are not always this explicit, and careful reading is often required to determine the extent to which a CR vote goes toward joining the opinion.

D. Concur in part and dissent in part (CP/DP)

The meaning of this vote is fairly self-evident: a justice who concurs in part and dissents in part agrees with some part of the judgment but disagrees with another part. Common situations in which a justice might enter a CP/DP vote include cases where a judgment has been entered in a multi-claim action and the justice agrees with the opinion's conclusion as to some of those claims but disagrees as to others, *see, e.g., Hollis v. Brighton*, 885 So. 2d 135, 145-46 (Ala. 2004) (See, J., concurring in part and dissenting in part), *Hollis*, 885 So. 2d at 146 (Stuart, J., concurring in part and dissenting in part), and cases in which a justice agrees with the opinion that a judgment awarding a plaintiff damages should be affirmed, but disagrees with the court's decision to affirm the amount of awarded damages, *see, e.g., ConAgra, Inc. v. Turner*, 776 So. 2d 792, 799 (Ala. 2000) (Houston, J., concurring in part and dissenting in part).

Because a justice who concurs in part and dissents in part is obligated to write and explain the CP/DP vote, it is usually not difficult to read that writing and discern those parts of the main opinion in which the justice concurs. The justice's vote may effectively be counted as a C vote as to those parts when determining whether the opinion has precedential value.

E. Dissent (D)

A dissenting justice rejects the result reached by the opinion. A justice is not obligated to write and explain the basis for a D vote, but as is the case with all other votes, if the dissenting justice writes separately, it may be possible to find some agreement with the opinion that could give it precedential value in some respect. But that would be uncommon, and a D vote is generally not counted as part of the majority for any purpose.

F. Recusals (R)

A justice whose recusal is noted on the vote line was not involved in deciding the case. Once the basis for recusal is discovered, the recusing justice does not participate in discussion about the case, nor does the justice enter a vote. Effectively, the size of the court "shrinks." If one justice is recused, it is an eight-justice court, and five justices are still needed for a majority. But if two

justices are recused, it is a seven-justice court and only four justices are needed to form a majority. Thus, for example, the opinion in *Naftel v. State ex rel. Driggars*, [Ms. 1200755, Feb. 18, 2022] ___ So. 3d ___ (Ala. 2022), is binding precedent with only a four-justice majority because two justices recused themselves.

G. Not sitting (NS)

Finally, while it is not technically a vote and there is no corresponding entry on the vote line, justices will occasionally “not sit” on a case even if they are not recused. For example, a justice new to the court may choose not to vote on a case that was orally argued before the justice joined the court. Or a justice may have a relationship with an attorney or party in a case that doesn’t disqualify the justice, but the justice nonetheless deems it prudent not to participate. Unlike recusal, the justice’s absence does not affect the size of the court. Thus, if two justices are not sitting in a case in which the other seven justices vote, five votes are still needed to form a majority.⁵

Reading the Vote Line

With an understanding of the different votes you’ll normally encounter on a vote line, you’re well equipped to understand the import of those votes in any given case. If you’ve read many Alabama Supreme Court opinions, you’ve probably noticed that the vast majority of the time there are five or nine justices voting in any given case. In either of these situations, the basic rule is the same – five C or CS votes will always make the opinion binding precedent.⁶ If the vote line contains at least five of those votes, no further analysis is needed, and you can confidently treat the holdings of the opinion as binding precedent. But if there are not five C or CS votes, and there are CR, CP/CR, or CP/DP votes accompanied by writings explaining those votes, further work is required to determine whether the opinion has any precedential value.

Take the court’s recent opinion in *Haddan v. Norfolk Southern Railway Co.*, [Ms. 1190976, Feb. 4, 2022] ___ So. 3d ___ (Ala. 2022), as an example. A quick glance at the opinion shows that it was authored by Justice Stewart; Justices Bryan, Mendheim, and Mitchell concurred; Justices Shaw and Sellers concurred in part and dissented in part; Justice Bolin con-

curred in the result; Chief Justice Parker dissented; and Justice Wise recused herself.

Our first step in understanding the vote line is to recognize that we have an eight-justice court due to Justice Wise’s recusal. Accordingly, five C or CS votes are needed to form a majority. There are only four C votes, however, so we don’t have a majority opinion; we have only, in court parlance, a “plurality opinion.”⁷ But does that plurality opinion have any precedential value?

A review of Justice Shaw’s CP/DP special writing – which Justice Sellers joined – reveals that it does. In that writing, those justices indicate that they in fact “concur in the main opinion insofar as it affirms the trial court’s threshold evidentiary determination striking some of [the appellant’s] deposition testimony as hearsay.” *Haddan*, ___ So. 3d at ___ (Shaw, J., concurring in part and dissenting in part). Thus, six justices have concurred with that aspect of the opinion, and *Haddan* can therefore be comfortably cited as precedent with regard to its hearsay analysis.

Citing a Supreme Court Decision

Once you’ve determined that an opinion is binding precedent for a proposition of law, it can be cited as such to any Alabama court.⁸ Under the doctrine of vertical stare decisis, state trial courts and the intermediate appellate courts are bound to follow the decision. Federal courts considering issues of Alabama law should follow the decision too. *See West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940) (“[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted.”).

Under the doctrine of horizontal stare decisis, the Alabama Supreme Court will usually follow its own precedent as well. But it’s always possible that the court might reconsider and overrule a previous decision. If you think a decision was wrongly decided, don’t be afraid to ask the court to overrule it.

It’s not often stated, but it’s the policy of this court not to overrule a decision unless a party has specifically asked the court to do so, *see Eickhoff Corp. v. Warrior Met Coal, LLC*, 265 So. 3d 216, 224 (Ala.

2018), and you don't want to miss an opportunity to do everything you can to advance your client's case.

But what about those opinions that don't have a majority and are not binding precedent? Should a lawyer avoid citing these opinions? Not necessarily.⁹ To be sure, if you're considering citing a plurality opinion, first make sure you've done all your research and confirm that there is not a different opinion you can cite that is binding precedent. Many times, however, there is not – a plurality opinion is the best you can do. Plurality opinions are often the product of difficult cases where there is not a wealth of caselaw on an issue. When that's true, a plurality opinion can still be cited for its persuasive value, and that opinion may still be the key to winning your case. Indeed, it's possible that the rationale of the court in a plurality opinion will later become the rationale of the court in a majority opinion. *See, e.g., Ex parte Wood*, 852 So. 2d 705, 709 n.3 (Ala. 2002) (noting that *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000), was a plurality opinion but that its rationale was later expressly adopted by a majority of the court in *Ex parte Butts*, 775 So. 2d 173, 177-78 (Ala. 2000)).

Of course, be sure to buttress your citations to plurality opinions with citations to treatises and caselaw from other jurisdictions that support your position.

And, importantly, when citing a plurality opinion, be sure to *always* acknowledge it as such. Failing to do so will make you look sloppy at best and deceitful at worst – neither of which will impress the court or increase your chances of winning the case. ▲

Endnotes

1. The Alabama Reporter, which is extracted from the Southern Reporter, is the official Reporter of the Alabama Supreme Court. Its published volumes contain the official version of court opinions and, while opinions accessed in Westlaw, Lexis, or other computerized databases should mirror that version, in the event of a discrepancy the Alabama Reporter version controls.
2. Dicta in an opinion is not binding in future cases even if a majority of the court concurred in the opinion containing the dicta. *See Ex parte Patton*, 77 So. 3d 591, 595, 596 (Ala. 2011) (explaining that certain language in *Ex parte Trinity Industries, Inc.*, 680 So. 2d 262 (Ala. 1996), was “not essential” to the court’s “ultimate holding” in that case and was therefore “nothing more than dicta and was not binding in subsequent cases”).
3. Be careful not to add an extra C vote for the author when considering a per curiam opinion; in these cases, the vote of each participating justice is found on the vote line. Opinions are often issued per curiam when more than one justice has made substantial contributions to the opinion such that the opinion can no longer be attributed to only one author.
4. Justice Mitchell will generally enter a CR vote only when the opinion reaches the right outcome for what he believes is the wrong reason. *See, e.g., Ex parte Jones*, [Ms. 1210194, Sept. 16, 2022] ___ So. 3d ___, ___ (Ala. 2022) (Mitchell, J., concurring in the result) (explaining his disagreement with the majority opinion’s rationale but nonetheless concurring in the result because the Alabama Court of Criminal Appeals’ affirmation of the petitioner’s conviction was ultimately correct for a different reason). In other words, it’s not enough that Justice Mitchell believes there might be an equally correct alternate rationale or might phrase some things differently – if the analysis in the opinion is not wrong, it gets a C or a CS.

5. Incidentally, a justice cannot choose to “not sit” in a case if that decision would result in an even split among the remaining justices. In this scenario, the justice is required to either vote or formally enter a recusal so that the chief justice can appoint a special justice to participate and break the tie.
6. Because only five justices consider cases that are submitted to division conference, all of those justices must enter a C or CS vote for the opinion to be binding precedent – even one CR or CP/CR vote at this stage will keep the opinion from becoming binding precedent. In this circumstance, the JTWA has the discretion to release the opinion even though it isn’t binding precedent or to send the case to general conference in an attempt to get a majority. A justice’s decision here will usually be based on the law and facts of that specific case. If the case is a “unicorn” with issues that are unlikely to be seen again or if the opinion is merely redundant to existing caselaw, the JTWA may choose to have the opinion released even though it will not be binding precedent. But if the case involves a murky area of the law and it might be helpful to the bench and bar to have binding precedent, it is more likely that the JTWA will send the case to general conference in the hopes of picking up five C votes.
7. A plurality opinion has been described as “an appellate opinion without enough judges’ votes to constitute a majority but having received the greatest number of votes of any of the opinions filed.” Bryan A. Garner, *Garner’s Dictionary of Legal Usage* 683 (3d ed. 2011). When there is no majority opinion in a case, the plurality opinion will typically be the main, or lead, opinion. But not always. *See, for example, Ex parte Alabama Power Co.*, [Ms. 1210104, June 30, 2022] ___ So. 3d ___ (Ala. 2022), in which Justice Mitchell’s special writing concurring in the result was joined by two other justices and was the plurality opinion.
8. It probably goes without saying but, when citing and quoting an Alabama Supreme Court opinion, be sure to quote the opinion – not the headnotes furnished by West or any other publisher. Those headnotes are not written or approved by the court and may or may not accurately reflect what was decided in the opinion.
9. But appellate practitioners should take care never to allege conflict with a plurality opinion as a basis for seeking certiorari review from a decision of the Alabama Court of Civil Appeals or the Alabama Court of Criminal Appeals under Rule 39(a)(1)(D), Ala. R. App. P., because you can’t have conflict with a case that isn’t binding precedent. *See Ex parte Ball*, 323 So. 3d 1187, 1187 (Ala. 2020) (Parker, C.J., concurring specially). Better to find another opinion or frame your case in terms of an issue of first impression under Rule 39(a)(1)(C).

Justice Jay Mitchell



Justice Jay Mitchell is an associate justice on the Alabama Supreme Court. Before joining the court, Justice Mitchell was a shareholder with Maynard, Cooper & Gale PC and served on the firm’s executive committee. He received his undergraduate degree from Birmingham-Southern College, his master’s degree from University College in Dublin, Ireland, and his law degree from the University of Virginia School of Law.

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Appeal of Board of Equalization Valuations

By Joseph D. Germany

Taxpayers are not always satisfied with the value fixed on their property

by a board of equalization (“BOE”). The first step for the unhappy taxpayer is to object to the valuation.¹ If the BOE overrules the objection and enters a final assessment, then the taxpayer may appeal from the BOE’s ruling to the circuit court of

the county where the property is located.² The procedure for taking such an appeal is set out in Ala. Code § 40-3-25 (1975). That statute, consisting of an uninviting wall of text, has given rise to a number of disputes in recent years.³

The procedure itself appears straightforward. On the date that the BOE enters its final tax assessment, a 30-day period begins to run. During that 30-day period, the

taxpayer must satisfy a number of statutory requirements to perfect an appeal. The requirements of the statute are also seemingly clearcut: filing notice, filing a cost bond, paying the assessed taxes (or executing a supersedeas bond), and, if so desired, making a written demand for a jury trial. However, many of these requirements have been held to be jurisdictional rather than procedural, and the deadlines to meet the statute's requirements have proven to be murkier than they first appear.

The purpose of this article is twofold: first, to lay out the requirements under § 40-3-25 for taking an appeal from a BOE ruling on the valuation of a property and, second, to address which of those requirements are jurisdictional.

The Jurisdictional-Procedural Distinction

The distinction between jurisdictional and procedural requirements is vital.

First, whether a requirement is jurisdictional impacts the available forms of judicial review. Questions of subject-matter jurisdiction are a proper basis to petition for a writ of mandamus.⁴

Second, if a requirement that an appealing taxpayer has failed to satisfy is jurisdictional, then the court is forced to dismiss the appeal.

However, an appealing taxpayer may be able to cure a procedural defect.⁵


In part, the jurisdictional nature of certain requirements under § 40-3-25 stems from the special nature of tax appeals. The right to appeal in a tax proceeding “is a right conferred by statute, and must be exercised in the mode and within the time prescribed by the statute.”⁶ As will be discussed, this means that some requirements that would not be jurisdictional under the Alabama Rules of Appellate Procedure are jurisdictional for appeals taken under § 40-3-25. It also means that arguments drawing from other areas of appellate practice may be less than persuasive, at least as they relate to whether one of § 40-3-25's requirements is jurisdictional.⁷ All of this is to say that timely compliance with § 40-3-25's requirements is crucial to avoid dismissal for want of subject-matter jurisdiction.

Filing Notice

The first step for perfecting an appeal under § 40-3-25 is to file a notice of appeal within 30 days of the BOE's final assessment. Notice must be filed in two places – with the secretary of the BOE and with the clerk of the circuit court. The Alabama Supreme Court held in *Ex parte Shelby County Board of Equalization* that filing notice with the secretary of the BOE was a jurisdictional requirement.⁸ Consequently, failing to timely file notice with the secretary means that the appealing taxpayer has failed to invoke the circuit court's jurisdiction, and the appeal will be dismissed as a result. No holding has been made regarding the requirement to timely file notice with the clerk of the circuit court; however, the reasoning

of *Ex parte Shelby County Board of Equalization* suggests that failure to comply with *any* of the requirements in § 40-3-25 prevents the circuit court from gaining jurisdiction.⁹ As a result, it seems likely that the requirement to file notice with the clerk within 30 days would be jurisdictional as well.

However, there is at least one source of respite for the appealing taxpayer. The Alabama Supreme Court has held that “[t]he mailbox rule applies to the filing of a notice of appeal with the [secretary of the BOE] under § 40-3-25.”¹⁰ The mailbox rule, as it applies to an appeal of a BOE ruling, is laid out in § 40-1-45. For the purpose of satisfying §



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40-3-25's requirement of filing notice with the secretary of the BOE, the mailbox rule requires only that the appealing taxpayer mail the notice to the BOE secretary within 30 days of the BOE's final assessment.¹¹ Even if the notice is received by the BOE secretary outside that period, it will be considered timely so long as it would have been timely on the postmarked date.¹²

Whether the mailbox rule also applies to filing a notice of appeal with the clerk of the circuit court is less clear. The final subsection of § 40-1-45 provides situations in

which the mailbox rule does not apply.¹³ That subsection specifically provides that the mailbox rule does not apply to "[t]he filing of a document in . . . any court."¹⁴ This language suggests that the mailbox rule does not apply to § 40-3-25's requirement of filing notice with the clerk of the circuit court. Given this exception, appealing taxpayers should not rely upon the mailbox rule in making last-minute filings with the circuit-court clerk. Although the mailbox rule applies to filing notice with the BOE secretary, the exception for court filings means that a filing with the circuit court clerk may be untimely if it is received after the deadline, regardless of the postmarked date.

Filing a Cost Bond

Under the second requirement in § 40-3-25, an appealing taxpayer must file bond, conditioned to pay all costs, with the clerk of the circuit court. The cost bond must be filed within the 30-day period outlined in the statute. The Alabama Supreme Court has held that this cost-bond requirement is jurisdictional,¹⁵ although there is a line of dissents contesting that interpretation.¹⁶ As a result, an appealing taxpayer who fails to timely file a cost bond risks having the appeal dismissed for failing to invoke the circuit court's subject-matter jurisdiction.

The jurisdictional status of the cost-bond requirement under § 40-3-25 differs from the jurisdictional status of a cost bond under the Alabama rules of appellate procedure. Under those rules, a failure to file a cost bond on appeal at the

same time as the notice of appeal is not a jurisdictional defect.¹⁷ Appealing taxpayers should remain mindful of this distinction.

Paying the Taxes or Executing A Supersedeas Bond

Finally, a taxpayer appealing from a BOE property-valuation ruling must pay the assessed taxes before they become delinquent.¹⁸ Alternatively, the appealing taxpayer may file a supersedeas bond when taking the appeal.¹⁹ As a practical matter, this requirement does not necessarily mean that the taxes must be paid within the same 30-day window applicable to the requirements of filing notice or filing the cost bond. If the date of delinquency arrives more than 30 days after the date of the BOE's final assessment, then a payment made outside of that 30-day window, but before the taxes become delinquent, will still be considered timely.²⁰

There is still an open question as to whether failing to pay the taxes before they become delinquent is a jurisdictional defect. Several justices of the Alabama Supreme Court have suggested that it is, stating that "§ 40-3-25 requires a taxpayer who has not executed a supersedeas bond to pay the assessed taxes before they become delinquent in order to perfect an appeal and invoke a trial court's jurisdiction."²¹ However, that statement has little precedential value, if any.²²

It is unclear whether a court would find this to be a jurisdictional requirement.

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There is caselaw suggesting that all requirements of § 40-3-25 are jurisdictional.²³ This interpretation is consistent with the fact that tax appeals are creatures of statute and is also in line with precedent holding § 40-3-25's other requirements to be jurisdictional.

However, making jurisdiction contingent upon the payment of taxes creates some oddities. Justice Mendheim, in his special writing in *Ex parte Mobile County Board of Equalization*, stated that the dismissal of a taxpayer's appeal due to a failure to timely pay assessed taxes is "procedurally mandated, but ... does not implicate the circuit court's subject-matter jurisdiction."²⁴ That conclusion was partially based on the fact that the holding in the main opinion could result in a circuit court's having subject-matter jurisdiction at filing but losing it when the taxes became delinquent. This is somewhat different than how we typically think of subject-matter jurisdiction.

Regardless, the safest route is either to pay the taxes before the date of delinquency or to execute a supersedeas bond at the time of taking the appeal.

Jury Demand

The right to demand a jury trial is unique to property-tax disputes – generally there is no right to a jury in a tax case.²⁵ Either the taxpayer or the BOE may demand a trial by jury on appeal from the BOE ruling.²⁶ The party seeking a jury trial must file a written demand with the clerk of the circuit

court within 10 days after the appeal is taken.²⁷ There is no caselaw specifically analyzing this provision in § 40-3-25, so it is unclear whether the same principles governing the filing of notice would also apply to the filing of a demand for a jury trial. As with § 40-3-25's other requirements, timeliness is everything. A party seeking a jury trial should make sure to deliver its demand to the clerk within 10 days and should not rely on the mailbox rule to ensure timeliness.

Conclusion

Appealing a final property-valuation ruling from a BOE requires that the taxpayer take three steps within statutorily defined periods. Those steps are: 1) filing a notice of appeal with the BOE secretary and the clerk of the circuit court; 2) filing a cost bond; and 3) either paying the taxes due or executing a supersedeas bond. If the appealing taxpayer desires a jury trial, they must make that demand within 10 days of taking the appeal. An appealing taxpayer should be mindful of which requirements are jurisdictional and be sure to satisfy them in a timely manner to avoid dismissal. ▲

Endnotes

1. Ala. Code § 40-3-24 (1975).
2. *Id.*
3. See *Ash Assocs., LLC v. Jefferson Cnty. Bd. of Equalization*, [Ms. SC-2022-0491, Sept. 30, 2022] ___ So. 3d ___, 2022 WL 4588780 (Ala. 2022) *Ex parte Mobile Cnty. Bd. of Equalization*, [Ms. SC-1210058, July 8, 2022] ___ So. 3d ___, 2022 WL 2610228 (Ala. 2022); *Ex parte*

Kennemer, 280 So. 3d 367 (Ala. 2018); *Target Corp. v. Jefferson Cnty. Bd. of Equalization*, 197 So. 3d 1006 (Ala. Civ. App. 2015); *Lumpkin v. State*, 171 So. 3d 599 (Ala. 2014); *Ex parte Shelby Cnty. Bd. of Equalization*, 159 So. 3d 1 (Ala. 2014).

4. *Mobile Cnty. Bd. of Equalization*, 2022 WL 2610228 at *3.
5. *Rogers v. Hansen*, 187 So. 3d 1108, 1111 (Ala. 2015).
6. *State v. Mills*, 175 Ala. 549, 543, 57 So. 481, 481 (1912).
7. *Lumpkin*, 171 So. 3d at 604.
8. *Shelby Cnty. Bd. of Equalization*, 159 So. 3d at 4.
9. *Id.*; see also *State v. Crenshaw*, 249 So. 2d 617 (1970).
10. *Kennemer*, 280 So. 3d at 371.
11. § 40-1-45, Ala. Code 1975.
12. *Kennemer*, 280 So. 3d at 371.
13. § 40-1-45(d).
14. *Id.*
15. *Lumpkin*, 171 So. 3d at 604.
16. *Ash Associates*, 2022 WL 4588780 at *1 (Sellers, J., dissenting); *Lumpkin*, 171 So. 3d at 609 (Moore, C.J., dissenting).
17. Rule 7, Ala. R. App. P.
18. § 40-3-25, Ala. Code 1975.
19. *Id.*
20. *Ex parte Crenshaw*, 287 Ala. 139, 143, 249 So. 2d 622, 624 (Ala. 1971).
21. *Mobile Cnty. Bd. of Equalization*, 2022 WL 2610228 at *4 (per Stewart, J., with one justice concurring).
22. *Ex parte Discount Foods, Inc.*, 789 So. 2d 842, 845 (Ala. 2001).
23. *Shelby Cnty. Bd. of Equalization*, 159 So. 3d at 4.
24. *Mobile Cnty. Bd. of Equalization*, 2022 WL 2610228 at *11 (Mendheim, J., concurring in the result).
25. See *Rush v. Department of Revenue of State of Alabama*, 416 So. 2d 1023, 1024 (Ala. Civ. App. 1982) (citing *State v. Overby*, 265 Ala. 39, 89 So. 2d 525 (1956)).
26. § 40-3-25.
27. *Id.*

Joseph D. Germany



Joe Germany is a 2022 admittee to the Alabama State Bar after graduating from the University of Alabama School of Law. He is clerking with Alabama Supreme Court Justice William B. Sellers.



NOTICE

DISCIPLINARY NOTICES

- ▲ Notice
- ▲ Disbarment
- ▲ Suspensions

Notice

- **Jason Michael Osborn**, who practiced in Mobile and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of this publication, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 2022-1089 before the Disciplinary Board of the Alabama State Bar. [ASB No. 2022-1089]

Disbarment

- Georgia attorney **Michael Anthony Eddings**, who is also licensed in Alabama, was ordered by the Disciplinary Board of the Alabama State Bar to receive reciprocal discipline of disbarment in Alabama, effective January 31, 2023, pursuant to Rule 25, Alabama Rules of Disciplinary Procedure. Eddings was disbarred from the practice of law in Georgia for violating Rules 3.3, 4.1, 4.2(a), 8.1(a), and 8.4(a)(4) of the Georgia Rules of Professional Conduct. According to the Supreme Court of Georgia, Eddings, while representing a client charged with murder, interviewed a material witness who was represented by an attorney and failed to obtain permission prior to interviewing the material witness. During the murder trial Eddings testified under oath that he was aware that the witness was represented by other counsel and that he had not obtained counsel's permission to speak with the witness. Eddings maintained that he was not required to obtain permission prior to speaking to the witness. The day following testimony, Eddings sent an email to the judge presiding over the trial, recanting his sworn trial testimony and averring that he had been given permission to speak with the witness by counsel. [Rule 25(a), Pet. No. 2022-843]

Suspensions

- Montgomery attorney **Brian Daniel Mann** was interimly suspended from the practice of law in Alabama by order of the Disciplinary Commission of the Alabama State Bar, effective December 28, 2022. The Disciplinary Commission's order was based on a petition for interim suspension filed by the Office of General Counsel of the Alabama State Bar wherein it was determined that Mann was engaging in continuing conduct that was causing or likely to cause immediate and serious injury to a client or the public. The Alabama Supreme Court noted Mann's interim suspension, effective December 28, 2022. [Rule 20(a), Pet. No. 2022-1214]
- Fairhope attorney **James McCauley Smith** was suspended from the practice of law for one year in Alabama by the Supreme Court of Alabama, effective December 15, 2022. The Supreme Court of Alabama entered its order based upon the Disciplinary Board's report and order, wherein Smith was found guilty of violating Rules 1.15 [Safekeeping] and 8.4(b), (c), and (g) [Misconduct], Alabama Rules of Professional Conduct. Smith admitted that he failed to deposit earned fees into his trust account and failed to file business and personal taxes for the past four to five years. [ASB No. 2021-1176]
- Birmingham attorney **James Marion Wooten** was suspended from the practice of law for 91 days in Alabama by the Supreme Court of Alabama, effective December 21, 2022. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order, wherein Wooten was found guilty of violating Rules 1.3 [Diligence], 1.4 [Communication], 1.15 [Safekeeping Property], and 8.4 (d) and (g) [Misconduct] Alabama Rules of Professional Conduct. Wooten sought and was appointed as the personal representative of his brother's estate in January 2006. At the time the only heir was his brother's seven-year-old daughter. Wooten admitted that while the estate remained open, he improperly advanced himself fees from the estate without seeking permission from the probate court. Despite the fact the fees had not been earned, Wooten failed to place the funds in trust. Wooten also did not disclose to the family that he had taken the fees. Wooten was later sued over the handling of the estate. The matter was settled, and Wooten re-paid all the fees he had previously withdrawn from the estate. [ASB No. 2021-118] ▲



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OPINIONS OF THE GENERAL COUNSEL

Roman A. Shaul
roman.shaul@alabar.org



Referral Fees and Court-Awarded Fees Must Still Be Reasonable Under Rule 1.5 of the Alabama Rules of Professional Conduct

QUESTION:

I received the referral of a case that I agreed to take as a contingency fee matter. We ultimately prevailed in the case and now have the opportunity to petition the court for an award of attorney fees. The referring lawyer did not work on the case, and, therefore, will not have any billable time included in the fee petition. Can I ethically receive both a court award of attorney fees and recover fees under the contract with the client? Also, can I ethically give the referring lawyer a portion of the attorney fees the court awarded?

ANSWER:

Question #1

You can ethically take a fee under the contingency agreement with the client and petition the court for an award of attorney fees under any applicable fee-shifting statute if the combined amount does not rise to the level of a “clearly excessive fee” under Rule 1.5 (a), Alabama Rules of Professional Conduct. Importantly, you must disclose to the court that you plan to take a fee under both the fee petition and the contingency agreement. Furthermore, any fees awarded by the court must be used as a

credit and/or offset toward the amount owed by the client under the contingency agreement. If the attorney fee amount awarded by the court exceeds the amount you would take under the contingency agreement, you cannot take any additional fee from the client. There may be an exception for taking an additional fee from the client if the court-awarded fees exceed the total amount contemplated by the contingency agreement, however it would be the rare instance. It would further need to be approved by the court awarding the fee.

Question #2

You can ethically share court-awarded fees with a referring lawyer whose work, if any, was not included in the fee petition.

DISCUSSION:

Under Rule 1.5 (a), Alabama Rules of Professional Conduct, “[a] lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee.” Whether a fee is “clearly excessive” is determined by the factors listed in Rule 1.5(a)(1)-(9), Alabama Rules of Professional Conduct. Under your contingency fee agreement with the client, your fee is limited to 40 percent of the net recovery of the settlement or litigation proceeds. For purposes of simple math, if your client recovered \$100,000 as a net recovery, then you would be entitled to a fee of \$40,000 ($\$100,000 \times .40 = \$40,000$) under the fee agreement. You have indicated that you are going to petition the court for an award of attorney fees under a fee-shifting statute. Whether you can take any additional fee from the client depends on the amount the court awards you on your fee petition. Using the illustration above, if the court awarded you an attorney’s fee of \$35,000 as a result of the fee petition, then you could ethically recover an additional \$5,000 from the client since that total would equal the \$40,000 allowed for under the contingency agreement. If the court restricts your ability to get any additional fees from the client, then you would be ethically obligated to follow that order, absent a successful appeal. If the court were to award you an attorney fee in excess of the \$40,000, you could accept that amount, but you should not take any additional fee from the client since it exceeds the amount you are entitled to under the contingency agreement. It is the opinion of the Disciplinary Commission that you would be taking a “clearly excessive fee” if you took an additional fee from the client in circumstances where the court has already awarded you more than you were entitled to under your agreement with the client.

As to your second question, assuming the court has not specifically restricted your ability to share the fees received from the fee petition with another lawyer, it is ethically permissible to share a portion of those fees with a referring lawyer. Under Rule 1.5(e), Alabama Rules of Professional Conduct, a division of fee between lawyers who are not in the same firm, including a division of fees with a referring lawyer, may be made only if:

- (1) Either (a) the division is in proportion to the services performed by each lawyer, or (b) by written agreement with the client, each lawyer assumes joint responsibility for the representation, or (c) in a contingency fee case, the division is between the referring or forwarding lawyer and the receiving lawyer;
- (2) The client is advised of and does not object to the participation of all the lawyers involved;
- (3) The client is advised that a division of fee will occur; and
- (4) The total fee is not clearly excessive.

You have indicated that you received the case at hand via a referring lawyer and that it was taken as a contingency fee matter with a written agreement from the client. Since this case was taken as a contingency fee matter, payment of court-awarded fees would be permissible under Rule 1.5(e)(1)(c), even though the fee included a court award. Furthermore, if the referring lawyer agreed to accept joint responsibility for the case, in writing, even though he did not perform any work, the referral fee could be paid under Rule 1.5(e)(1)(b). ▲



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MEMORIALS

▲ John Richard Hollingsworth, Sr.

John Richard Hollingsworth, Sr.

Rick Hollingsworth, Sr., 76, passed away peacefully and surrounded by his loved ones on Saturday, January 21, 2023, at his home in Enterprise.

He was born on September 21, 1946, in Fayette, Alabama, to John J. and Dixie Hollingsworth. Growing up in a rural farming community, Rick was a self-made man.

He attended Fayette County High School and graduated in 1964; while there, he lettered in all four men's sports and enjoyed high academic success.

A lifelong Tigers fan, Rick attended Auburn University, where he was a proud member of Alpha Gamma Rho Fraternity.

It was during this time that Rick met and married the love of his life, Rebecca Kay Reeves of Vernon, Alabama.

Like many of his generation, Rick was a patriot and loved his country. Prior to completing his degree at Auburn, he enlisted in the United States Navy. He served as an electronics technician on both the U.S.S. Pocono (LCC-16), the Flagship of the U.S. Atlantic Fleet, and the legendary aircraft carrier, the U.S.S. Lexington (AVT-16).

While stationed in Norfolk, Virginia, their son, Rick Hollingsworth, Jr., was born in 1969.

After four years of faithful duty to his country, Rick was honorably discharged and returned to Auburn University to complete his degree.

While completing his degree in accounting, their son, Robert Brian Hollingsworth, was born in 1973. Graduating from Auburn that same year, Rick began his career as an accountant for Alabama Power Company in Birmingham. During his tenure as an accountant, he attended Birmingham School of Law at night, graduating with honors, and passing the Alabama bar exam on his first opportunity.

Returning to Fayette, he opened his law practice, where he often took up the cause of the lost, the downtrodden, and the poor.

Always generous of spirit, Rick would assist those in need in the community. And not a season would go by when he was not coaching one or both of his boys in baseball, football, or basketball.

After many years in Fayette, Rick and his family re-located to Enterprise, where he began a new chapter.

A talented litigator and zealous advocate for his clients, Rick was an "old school" lawyer who believed in respect for the profession and the people he met – clients, lawyers, and judges alike. He always went out of his way to assist fellow lawyers or impart hard-earned wisdom on those who hadn't practiced as long as he had.



Hollingsworth

He could always be counted on to spin a good yarn or tell a good joke when the opportunity presented itself.

After 39 years of practice, including the last 20 with his son, Rick, Jr., he retired in 2017 and engaged in various hobbies and activities.

Always an avid outdoorsman, Rick enjoyed bird-hunting, gun shows, old Western movies, and Auburn athletics.

A devoted family man and a loving father, he always considered his family and their needs in every decision he made.

John Richard Hollingsworth, Sr.'s legacy to those who survive him is, above all, his love for family, his seemingly endless generosity of spirit, his unyielding sense of humor,

and his devotion to anyone he ever called his friend. Rick will be greatly missed by anyone who knew him.

He was preceded in death by his parents. He is survived by his devoted wife, Rebecca Kay Reeves Hollingsworth of Enterprise; his two sons, John Richard Hollingsworth, Jr. (Anna Beth) of Enterprise and Dr. Robert Brian Hollingsworth (Niki) of Winfield; his grandchildren, Brock Hollingsworth, Reid Hollingsworth, Jace Hollingsworth, and Hudson Hollingsworth, all of Winfield; and his ever-loyal rescue dogs, Gus and Charlie Hollingsworth.

In lieu of flowers, the family requests that memorial donations be made to an animal rescue or homeless pet shelter. ▲

Alphonso Beckles

Huntsville

Died: December 29, 2022

Admitted: 1974

Thomas Dewayne Bonds

Loxley

Died: March 6, 2023

Admitted: 2003

Timothy Carstarphen Burgess

Wilmington, NC

Died: April 7, 2023

Admitted: 1995

Maria Bouchelle Campbell

Birmingham

Died: July 10, 2021

Admitted: 1969

Benjamin Sam Carroll

Birmingham

Died: January 24, 2023

Admitted: 1966

Delisa Michelle Chasteen

Shelby

Died: December 17, 2022

Admitted: 2011

Brandon Eugene Collins

Greenville

Died: February 25, 2023

Admitted: 2011

Cheryl Lynn Payton Crisona

Arab

Died: January 6, 2023

Admitted: 1983

Hon. Mary Elizabeth Culberson

Wetumpka

Died: March 23, 2023

Admitted: 1988

Bricker Scott Daughtry

Athens, GA

Died: January 27, 2023

Admitted: 2007

Timothy Lee Dillard

Birmingham

Died: February 10, 2023

Admitted: 1972

Silas Wayne Fuller

Cullman

Died: March 3, 2023

Admitted: 1975

James Robison Harper, Jr.

Mobile

Died: April 5, 2023

Admitted: 1996

William Wiley Horton

Birmingham

Died: March 7, 2023

Admitted: 1985

James Fletcher Hughey, Jr.

Birmingham

Died: February 8, 2023

Admitted: 1970

Janna Lynn Ifshin

Ponce Inlet, FL

Died: April 14, 2023

Admitted: 1992

Lucien Tennent Lee, III

Huntsville

Died: March 19, 2023

Admitted: 1960

Hon. Dominick John Matranga

Mobile

Died: February 1, 2023

Admitted: 1965

William Jeffrey Moore

Enterprise

Died: March 2, 2023

Admitted: 2001

Dent Miller Morton

Birmingham

Died: March 3, 2023

Admitted: 1987

Andrea Pearson Pennington

Birmingham

Died: March 11, 2023

Admitted: 1976

Mose Lee Sudduth, Jr.

Vernon

Died March 15, 2023

Admitted: 1998



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LEGISLATIVE WRAP-UP



Special Session and ARPA Funds

On March 7, 2023, the Alabama Legislature convened for the 2023 Regular Session. The new quadrennium got off to a roaring start with the introduction of 174 bills and then recessed for a two-week period. Later, on the night of March 7 at the annual State of the State address, Governor Ivey announced that she would exercise her authority to call the legislature in to special session starting March 8. The governor’s proclamation or “call” included three topics: the appropriation of funds from the American Rescue Plan Act – Coronavirus State Fiscal Recovery Fund “ARPA;” oversight and transparency on ARPA fund spending; and supplemental appropriations to the Alabama Trust Fund. As described in more detail below, the legislature responded appropriately by convening and passing two pieces of legislation to address these topics and then adjourned sine die from the special session on March 16, 2023.

Supplemental Appropriation to the Alabama Trust Fund

As you may recall during the depths of the effects of the “Great Recession of 2008” voters of Alabama were called upon to vote on a constitutional amendment to allow the state to borrow approximately \$437 million from the Alabama Trust Fund to bridge what were significant financial shortfalls in the General Fund. The voters responded with ratification of what was at the time Amendment 856 to the Constitution of Alabama of 1901, which now appears as Section 219.09 of the Constitution of Alabama of 2022. The funds were distributed in equal transfers to the state General Fund over the next three fiscal years.

As the legislature began to see the light at the end of the most dire financial effects of those recessionary times, they acted to ensure that these funds would be paid back by passing the People’s Trust Act.¹

This act provided benchmarks for the re-payment of these funds to the Alabama Trust Fund by September 30, 2026. Since that time the legislature has been working to fulfill that obligation and the passage of Act 2023-2 finished the task by appropriating the final \$59,997,772 that was owed. As an aside, in 2011 the total balance of the Alabama Trust Fund was approximately \$2.9 billion, and, as of March 1, now stands in excess of \$4 billion.

Appropriation of ARPA Funds

The American Rescue Plan Act (H.R. 1319) was passed by the 117th Congress on March 10, 2021 and signed into law by President Biden the following day. Among many other provisions, this act allocated \$350 billion to state, local, territorial, and tribal governments through the State and Local Fiscal Recovery Funds (SLFRF) program. State governments were allocated \$195.3 billion of this amount, resulting in a \$2.1 billion share to the State of Alabama. Separate from this allocation, Alabama’s 67 counties were designated a cumulative total of \$952 million, along with another \$787 million for Alabama’s municipalities.

The federal ARPA legislation provided for the disbursement of SLFRF monies to state and local government via two separate, equal “tranches.” The State of Alabama received its first tranche of funds (\$1.06 million) in June 2021, and the legislature subsequently appropriated these funds over two special sessions called for that purpose in the fall of 2021 and early 2022, as discussed in more detail below. The second tranche of the remaining 50 percent of funds was received in the spring of 2022 and appropriated in the five-day special session recently held in March 2023.

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(Continued from page 163)

The ARPA legislation specified four broad statutory categories of allowable uses of the SLFRF funds:

- (1) Responding to the public health and negative economic impacts of the pandemic, including assistance to households, small businesses, and non-profits, or aid to impacted industries such as tourism, travel, and hospitality;
- (2) Providing premium pay to essential workers;
- (3) Providing government services to the extent of revenue loss due to the pandemic; and
- (4) Making necessary investments in water, sewer, and broadband infrastructure.

The interim rule adopted by the U.S. Department of Treasury published in May 2021 provided methodology for the calculation of “lost revenue” for state and local governments, pursuant to (3) above. State and local governments were

later allowed to use a “standard allowance” of the lesser of \$10 million or the government’s total Fiscal Recovery Fund award, in lieu of the performing the revenue loss calculation, pursuant to the subsequent final rule that was published by the U.S. Treasury in January 2022. Alabama’s revenue replacement calculation resulted in \$537 million available to be allocated from this component, of which the legislature appropriated \$400 million for prison construction with the passage of Act 2021-547 during the 2021 First Special Session at the end of September.

The legislature was called into another special session a few weeks later to take up redistricting legislation and appropriate \$80 million for hospitals and nursing homes. This was accomplished with the passage of Act 2021-557.

After legislators arrived in Montgomery in January 2022 for the final Regular Session of the quadrennium, Governor Ivey immediately called a special session to be held within the regular session to appropriate the remaining first

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tranche of funds (\$580 million). The legislature responded by passing Act 2022-1, which appropriates funds as shown below.

From the balance of revenue replacement funds (\$137 million):

- Broadband – \$34 million
- Other Health Care – \$36.8 million
- Telemedicine – \$5 million
- Rural Hospital Assistance Grants – \$30 million
- Reimbursement of Inmate Care by Counties – \$11 million
- Volunteer Fire Departments and EMS – \$20 million

From the balance of the remaining unobligated amount of the first tranche of funds (\$443 million):

- Hospitals and Nursing Homes – \$80 million
- Broadband – \$51 million
- Water and Sewer Infrastructure – \$225 million
- Unemployment Trust Fund – \$79.5 million
- Administrative Costs – \$7.8 million

When the newly elected members of the legislature convened for the first regular session of the new quadrennium in March, the legislature was again called into a special session straightaway to appropriate the second tranche of ARPA funds (\$1.06 billion), as well as approximately \$42,000 in unused Local Fiscal Recovery funds that were reallocated to the state. The legislature worked over the following week and a half and passed Act 2023-1, which allocated funds as outlined below:

- Health Care – \$339 million
- Broadband – \$260 million
- Water and Sewer Infrastructure – \$400 million
- Community-Based Programs – \$55 million
- Department of Labor – \$5 million
- Administrative Costs – \$1 million

Our state has already begun reaping the benefits of these funds: Over 900 volunteer fire departments have each received a \$10,000 grant to support their operations; 398 of the state's 1,061 public water and sewer systems – 37 percent – have applied for funding to improve access to clean water and sewer infrastructure projects; 53 rural health care facilities have already received a total of over \$28 million; unemployment insurance taxes paid by employers dropped 29 percent thanks to an infusion of \$79.5 million; hospitals and nursing homes have been reimbursed \$160 million to

remain operational and preserve access to care; and \$400 million has been spent on the construction of two new correctional facilities for the state.

More information about projects financed with the state's ARPA funds and how to apply for grants and programs funded by them can be found at <https://frf.alabama.gov/>.

Conclusion

On March 21, the legislature resumed work in the 2023 Regular Session with 29 legislative days remaining to be used by June 19, 2023. A full accounting of the bills and issues of note addressed in the regular session will be reported in the July edition of this column. ▲

Endnote

1. See, Section 29-10-1, Code of Alabama 1975.

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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 Boult 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

Indemnity

***Mobile Infirmary Ass'n v. Quest Diagnostics Clinical Labs., Inc.*, No. SC-2022-0641 (Ala. Feb. 24, 2023)**

The Alabama Supreme Court affirmed summary judgment for the laboratory, first finding that the indemnity provision did not “clearly and unequivocally” require the laboratory to provide indemnity for the actions of the party seeking indemnity. The court also found that, because the trial concluded that the party seeking indemnity had contributed to the injury, the arbitration clause did not require the laboratory to provide indemnity.

Disposition of Remains

***Bethel v. Franklin*, No. SC-2022-0787 (Ala. Feb. 24, 2023)**

The Alabama Supreme Court reversed the probate court's denial of a preliminary injunction to the father of a deceased person, concluding that the father had a reasonable chance of prevailing on establishing that the deceased was estranged from her spouse, giving him the right to direct the disposition of her remains under Alabama Code § 34-13-11. It also concluded that the estranged spouse's voluntary cessation of the conduct sought be enjoined did not moot the request for injunctive relief and was instead evidence of the need for such relief.

Gambling

***Brighton Ventures 2, LLC v. State*, No. SC-2022-0511 (Ala. Jan. 13, 2023)**

The Alabama Supreme Court affirmed civil forfeiture judgments for the state against bingo operations. The court affirmed the finding that the money seized was “bets or stakes.” It also rejected a challenge that the forfeiture constituted an excessive fine because it determined that forfeiture is remedial, not punitive.

Employment

***Davis v. Montevallo*, No. 1210016 (Ala. Jan. 13, 2023)**

The Alabama Supreme Court reversed summary judgment entered in favor of a city that employed the plaintiff and terminated his at-will employment without (the plaintiff contended) following the procedures set forth in the city's employee handbook. The court found that the termination provisions of the handbook were mandatory by their own terms and that the handbook constituted an offer for a unilateral contract, even though the plaintiff was an at-will employee.



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Arbitration

Escapes! To the Shores Condominium Assoc., Inc. v. Hoar Construction, Inc., No. 1210378 (Ala. Feb. 17, 2023)

The Alabama Supreme Court found that because an arbitral panel considered evidence from both parties and both parties had the opportunity to present evidence, the panel's decision not to consider certain evidence and not to reopen discovery did not constitute misconduct by the panel under 9 U.S.C. § 19(a)(3) or render the arbitration fundamentally unfair.

Mandamus

Ex parte TruckMax, Inc., No. SC-2022-0957 (Ala. Feb. 17, 2023)

Because the defendant had the remedy of an appeal, the Alabama Supreme Court held that the trial court's decision not to allow the defendant to amend its answer would not justify review by mandamus.

Default

Farrag v. Thomas, No. 1200541 (Ala. Feb. 17, 2023)

The Alabama Supreme Court found that arguments relating to personal jurisdiction (including whether an agent was authorized to accept service) were waived if not raised in a Rule 60(b) motion in the trial court. The court also affirmed the finding that the defendant had failed to establish excusable neglect, even though the trial court did not specifically address the *Kirtland* factors.

Civil Procedure

Bowling v. U.S. Bank Nat'l Ass'n, as Trustee, No. SC-2022-0762 (Ala. Feb. 17, 2023)

Because it found that claims arising from the same facts and involving overlapping allegations and evidence remained pending and undecided, the Alabama Supreme Court dismissed an appeal and concluded that the underlying trial court judgment should not have been certified as final under Alabama Rule of Civil Procedure 54(b).

Wantonness

Tutor v. Sines, No. 1210037 (Ala. Feb. 17, 2023)

The Alabama Supreme Court affirmed judgment finding the defendant to have acted wantonly in operating a motor vehicle because the court found substantial evidence that the driver was speeding and using her phone use, something the driver knew to be dangerous.

(Continued from page 167)

Itemizing Damages

Lay v. Destafino, No. 1210383 (Ala. Feb. 17, 2023)

The Alabama Supreme Court held that a defendant failed to preserve her argument that the trial court's damages award after a bench trial violated Alabama Code § 6-11-1 because, the court reasoned, the defendant failed to raise the issue in a post-trial motion under Alabama Rule of Civil Procedure 59(e). The court affirmed the other bases for the trial court's judgment as well.

From the Alabama Court of Civil Appeals

Custody

A.E. v. Madison Cty. DHR, No. CL-2022-0644 (Ala. Civ. App. Jan. 13, 2023)

The court of civil appeals affirmed the juvenile court's decision to award custody to paternal grandparents upon finding that the mother had failed to fully participate in the rehabilitation services offered to her by DHR and that the mother lacked stable housing. The court affirmed that DHR had made reasonable efforts to reunite the family and that continued efforts were not necessary. The court reversed, however, the visitation award because it granted the paternal grandparents nearly unfettered discretion over the mother's supervised visitation. Specifically, the court found two hours of supervised visitation to be too little, found the requirement that mother pay for visitation at a visitation center to be an unreasonable restriction on the mother's access to her child, and found the grandparents' discretion over the time and place of visitation to be too broad.

Ex parte Slayton, No. CL-2022-0973 (Ala. Civ. App. Jan. 27, 2023)

Because a mother had failed to register a Georgia divorce award in Alabama as required by the Uniform Child Custody Jurisdiction and Enforcement Act, the court found that the trial court lacked jurisdiction over the part of the mother's petition to modify custody in Alabama and issued a writ of mandamus directing the trial court to dismiss that part of

the mother's petition. The court otherwise declined to issue a writ of mandamus regarding the trial court's emergency relief because such award expired by its own terms and had become moot.

Ex parte N.J., CL-2022-1228 (Ala. Civ. App. Jan. 27, 2023)

The court of civil appeals issued a writ of mandamus directing a trial court to register a Texas judgment regarding child custody. The court found that the party challenging the registration had not requested a hearing on the validity of the Texas judgment, and that the party seeking to register the judgment had complied with all the requirements of Alabama Code § 30-3B-305. Given these findings, the court determined that the trial court had no discretion to hold a hearing, failing to register the Texas judgment, and setting the Texas judgment aside.

Ellis v. Duncan, No. CL-2022-0510 (Ala. Civ. App. Feb. 3, 2023)

Because the court determined that a mother's post-judgment motion to modify child custody had merit because it argued that the custody order vested complete discretion over the father's visitation to a third party, the court of civil appeals found that the denial of mother's post-judgment motion by operation of law was reversible error and remanded for the trial court to hold a hearing.

Ex parte Hale, No. CL-2022-1253 (Ala. Civ. App. Feb. 10, 2023)

The court of civil appeals issued a writ of mandamus directing the trial court to vacate its pendente lite order awarding custody to the mother. The trial court found the father in contempt in connection with the parents' visitation arrangement and the appellate court found that the trial court's custody modification was an improper contempt sanction.

Adoption

D.F.H. v. E.R.S., No. CL-2022-0770 (Ala. Civ. App. Feb. 17, 2023)

The court of civil appeals affirmed the trial court's decision that a presumed father had impliedly consented to the adoption of a child by a stepfather. The court interpreted the "period of six months" in Alabama Code § 26-10A-9 to be



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broad enough to include time after an adoption petition is filed, and it concluded that the trial court did not base its entire implied consent finding on its finding relating to the six-month issue.

Alabama Uniform Parentage Act

***P. F.-T. v. M.T.*, No. 2210366 (Ala. Civ. App. Jan. 13, 2023)**

Finding that the argument had not been preserved below, the court declined to consider whether Alabama Code § 26-17-204 is unconstitutional as applied because it does not apply to women in same-sex marriages. Two judges dissented and would have interpreted § 26-17-204 in a gender-neutral manner.

Termination of Parental Rights

***J.G. v. Lauderdale Cty. DHR*, No. 2210452 et al. (Ala. Civ. App. Jan. 13, 2023)**

The trial court’s finding that a father presented a threat of real harm to his children, it reversed the decision to terminate his parental rights because a less drastic remedy was available – namely, the grant of sole custody to the mother.

***W.R. v. Marshall Cty. DHR*, No. CL-2022-0853 (Ala. Civ. App. Jan. 20, 2023)**

The court declared that the status of being a former relative caregiver does not, by itself, make that person a “proper and necessary” party entitled to service under Alabama Rule of Juvenile Procedure 13(A)(1) in a termination proceeding.

***J.M.S. v. B.M.H.*, No. CL-2022-0846 (Ala. Civ. App. Jan. 6, 2023)**

The court reversed the termination of a mother’s parental rights, finding that the evidence admitted at trial – namely, no documents and three transcribed pages of testimony – was too little to clearly and convincingly support the trial court’s findings.

***T.W. v. Calhoun Cty. DHR*, No. CL-2022-0694 et al. (Ala. Civ. App. Feb. 10, 2023)**

The court of civil appeals reversed the termination of a mother’s parental rights because it determined that maintaining the status quo – with the children placed in foster care and the mother having visitation rights – was a viable option to termination, even though the foster parent would not agree to adopt the child.

(Continued from page 169)

Divorce

***Ex parte Pike*, No. CL-2022-1157 (Ala. Civ. App. Jan. 20, 2023)**

The court dismissed a husband's mandamus petition and concluded that a complaint for a divorce is not a compulsory counterclaim in a pending separation action because separation and divorce actions are wholly separate proceedings.

***Lopez v. Rodriguez*, No. 2210320 (Ala. Civ. App. Jan. 20, 2023)**

After affirming the trial court's division of a TSP account, the court of civil appeal reversed the award of alimony because the trial court did not specify whether the award was periodic or rehabilitative, and the trial court was required to make specific findings providing the basis for the award under Alabama Code § 30-2-57. The court also reversed the award of child support because it determined that the husband's income had increased from the time of the pendente lite proceeding and there was no updated CS-42 form in the record as required by Rule 32(E).

***Rasmussen v. Rasmussen*, No. 2210311 et al. (Ala. Civ. App. Feb. 3, 2023)**

The court found that the trial court could not modify the property division in the divorce judgment by purporting to transfer ownership of 529 college accounts from the father to the mother. It affirmed all other aspects of the trial court's judgment.

Dependency

***Ex parte V.G.*, No. CL-2022-0993 et al. (Ala. Civ. App. Jan. 6, 2023)**

The court denied mandamus petitions filed by an aunt who had moved to dismiss grandparent visitation petitions filed by maternal grandparents. The trial court denied the motions to dismiss, and the aunt filed mandamus petitions challenging the grandparents' standing. The court of civil appeal appeals found that the petitions raised merits issues, not standing issues. Accordingly, it found that an appeal was adequate remedy for the aunt and dismissed the mandamus petitions.

***H.T. v. A.C.*, No. 2210396 et al. (Ala. Civ. App. Feb. 3, 2023)**

The court reversed dependency judgments regarding a father's two daughters but affirmed as to the son. As to the daughters, the court found that the record did not contain clear and convincing evidence that the father's conduct and

condition rendered his daughters dependents. As to the son, the court found that the trial court could have determined that the father had abandoned the son, and that the father's mere completion of the services mandated by DHR did not require returning the son to him.

Involuntary Dismissal

***Fipps v. Fipps*, No. CL-2022-0725 (Ala. Civ. App. Feb. 10, 2023)**

The court of civil appeals reversed the involuntary dismissal of a husband's counterclaims after he failed to appear at trial. The husband, who was pro se at the time of trial, testified that he had calendared trial for the day after it was scheduled and, upon arriving at court for trial on the wrong day and realizing his error, filed a motion to alter, amend, or vacate the judgment. He subsequently retained counsel. In view of these facts and others relating to the lead-up to trial, the appellate court concluded that the record did not contain a clear record of delay, willful default, or contumacious conduct sufficient to overcome the strong bias in favor of deciding claims on their merits.

Time Limits at Trial

***J.C. v. K.E.*, No. CL-2022-0702 (Ala. Civ. App. Feb. 10, 2023)**

A party filed a post-judgment requesting a new trial after the trial court imposed a 2.5-hour limit on the party's presentation of evidence. The trial court did not hold a hearing on the post-judgment motion, despite the party's request. The court of civil appeals reversed, holding that the trial court erred in allowing the post-judgment motion to be denied by operation of law. The motion had arguable merit because it is possible that the imposition of strict time limits could deny a party due process.

Post-Judgment Motions

***D.D. v. Etowah Cty. DHR*, No. 2210430 et al. (Ala. Civ. App. Feb. 17, 2023)**

After terminating parental rights at trial, the mother filed timely post-judgment motions. Fourteen days after the motions were filed, the trial court set those motions for a hearing more than 14 days later. At the hearing, the trial court concluded that it lost jurisdiction to rule on the post-judgment motions because more than 14 days had elapsed, and the court had not extended the time to rule on the motions by an additional 14 days. The court of civil appeals affirmed this decision, concluding that the trial court's order setting a

hearing did not comply with Rule 1(B)'s requirement that any extension of the time for ruling on a post-judgment motion can be extended no more than 14 days. The court required orders extending the 14-day period to include an express statement of the intent to do so.

Sales Tax

Opal Management, Inc. v. Alabama Department of Revenue, No. CL-2022-0962 (Ala. Civ. App. Feb. 24, 2023)

The court reversed summary judgment for the department of revenue because it found that the trial court had applied the wrong evidentiary standard. The case had been tried in the Tax Tribunal and then the taxpayer appealed to the circuit court for a trial de novo. The circuit court entered summary judgment in reliance on and in deference to the Tax Tribunal's factual findings. The court of civil appeals reversed, holding that the circuit court should have applied the summary judgment evidentiary standards without deferring to the facts found by the Tax Tribunal, even though

Section 40-2B-2(m)(4) requires the circuit court to presume that the Tax Tribunal's order is prima facie correct.

From the Eleventh Circuit Court of Appeals

Bankruptcy

In re America-CV Station Group, Inc., No. 21-13774 (11th Cir. Jan. 5, 2023)

Because the Court found that a modification to a Chapter 11 reorganization plan materially and adversely affected the treatment of a class of equity holders, the Court held that the equity holders were entitled to a new disclosure statement

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(Continued from page 171)

and a second chance to cast a ballot regarding the plan. The Court ruled that the bankruptcy court erred in determining that the equity holders were deemed to have rejected the plan and it also ruled that even groups deemed to reject the plan are entitled to an additional disclosure and right to vote.

***In re Bozeman*, No. 21-10987 (11th Cir. Jan. 10, 2023)**

The Court reversed the bankruptcy court's judgment that the debtor's payment of debts identified in a bankruptcy plan justified releasing the homestead-mortgagee's lien on the debtor's house dissolved. The plan was final under 11 U.S.C. § 1327, but the anti-modification rule of 11 U.S.C. § 1322(b)(2) prevented the modification of the mortgagee's rights even though the mortgagee had filed a proof of claim only up to the amount of the debtor's arrearage and even though the mortgagee did not object to the plan.

***Esteva v. UBS Financial Servs., Inc.*, No. 21-13580 (11th Cir. Feb. 16, 2023)**

The Eleventh Circuit concluded that it did not have jurisdiction over an appeal from an adversary proceeding when the underlying order did not resolve all the claims in the adversary proceeding and no certification had been made under Rule 54(b). While the Court recognized that cumulative finality could apply, the Court held that it did not apply to this appeal because there had been no final judgment entered below. The parties had stipulated to the dismissal of the remaining claim but did not stipulate to the action as a whole. The Court held that Rule 41(a) (1)(A) voluntary dismissals must dismiss entire actions, not individual claims, so the stipulation to dismiss mere claims was invalid upon filing.

FDIC

***Landcastle Acquisition Corp. v. Renasant Bank*, No. 20-13735 (11th Cir. Jan. 12, 2023)**

The *D'Oench* doctrine bars using evidence outside of a failed bank records in challenges to a facially-valid note, guaranty, or collateral pledge acquired by the FDIC from a failed bank and sold to a solvent bank. This doctrine effectively barred the plaintiff's challenge to the validity of a certificate of deposit because the evidence supporting that challenge was outside of the failed bank's records when the FDIC took over. The Court rejected the plaintiff's attempt to avoid *D'Oench* by arguing that the CD was void, reasoning that the plaintiff's arguments could, at most, made the CD voidable, not void.

American Rescue Plan Act

***West Virginia v. Secretary of U.S. Dep't of the Treasury*, No. 22-10168 (11th Cir. Jan. 20, 2023)**

The American Rescue Plan Act prevented states from using funds received under that act to offset reductions in tax revenue resulting from tax cuts. The Court held that states had standing to challenge the tax offset provision because the court determined that the states were forced to accept or reject an unascertainable funding offer, which injures their special sovereign interests. The Court also concluded that the tax offset provision was too unascertainable to be valid because (1) it does not provide a standard by which a state can assess whether it reduce tax revenues by providing a baselined; (2) it broadly prohibited "directly or indirectly" offsetting tax reductions with funds under the act, which was so broad that states could not determine the scope of forbidden uses; and (3) the novelty of restrictions on spending in this manner are novel, leaving states with little guidance. As a result, the Court found the tax offset provision to be an invalid exercise of the spending power.

Prison Litigation Reform Act

***Wells v. Brown*, No. 21-10550 (11th Cir. Feb. 1, 2023)**

Under the Prison Litigation Reform Act, 28 U.S.C. § 1915, a dismissal for failure to exhaust administrative remedies counts as a dismissal for failure to state a claim if the failure to exhaust appears on the face of the complaint, but summary judgment for failure to exhaust administrative remedies does not count as such a dismissal.

Death Penalty

***Nance v. Commissioner of Georgia Dep't of Corrections*, No. 20-11393 (11th Cir. Jan. 30, 2023)**

The Court found that a claim for an as-applied challenge to a method of execution accrues when the plaintiff learned of the conditions that led him to object to the method of execution. The Court also found that the plaintiff had stated a claim for relief as to the effect of his medication (gabapentin) on a drug to be used in his execution, but that the plaintiff had not alleged that cannulation is not an acceptable alternative procedure for administering a lethal injection. The Court additionally remanded to the district court to determine in the first instance whether the state had a legitimate penological reason not to execute the

plaintiff by firing squad, a method the Court found to be a plausible alternative method.

FTC

***Federal Trade Commission v. Simple Health Plans LLC*, No. 21-13116 (11th Cir. Jan. 27, 2023)**

The Court held that the FTC is permitted to obtain an injunction freezing assets and appointing a receiver for violations of the Telemarketing Sales Rule under Section 19(b) of the Federal Trade Commission Act because the Court determined that such injunctive measures were necessary to preserve funds for a future monetary judgment in favor of consumers.

Personal Jurisdiction

***SkyHop Techs., Inc. v. Narra*, No. 21-14051 (11th Cir. Jan. 26, 2023)**

The Court found that emails that were found to threaten damage to software supported the exercise of personal jurisdiction under both Florida's long-arm statute and federal

principles of due process. Intentionally sending emails to a forum state for the purpose of forcing the recipient to pay additional funds so that the recipient could regain control of its own property satisfied the effects test of *Calder v. Jones*.

Over-Detention

***Sosa v. Martin Cty., Florida*, No. 20-12781 (11th Cir. Jan. 20, 2023)**

The plaintiff was arrested under the mistaken belief that he was a different man (for whom there were outstanding warrants) who shared the same name. He was held for three days. The en banc Eleventh Circuit decided that an arrest based on mistaken identity does not give rise to a constitutional claim as long as a valid arrest warrant exists, and the detention lasts no more than three days.

Standing

***Walters v. Fast AC, LLC*, No. 21-13879 (11th Cir. Feb. 6, 2023)**

The Court reversed summary judgment for the defendant in a TILA case. The Court determined that the plaintiff had a

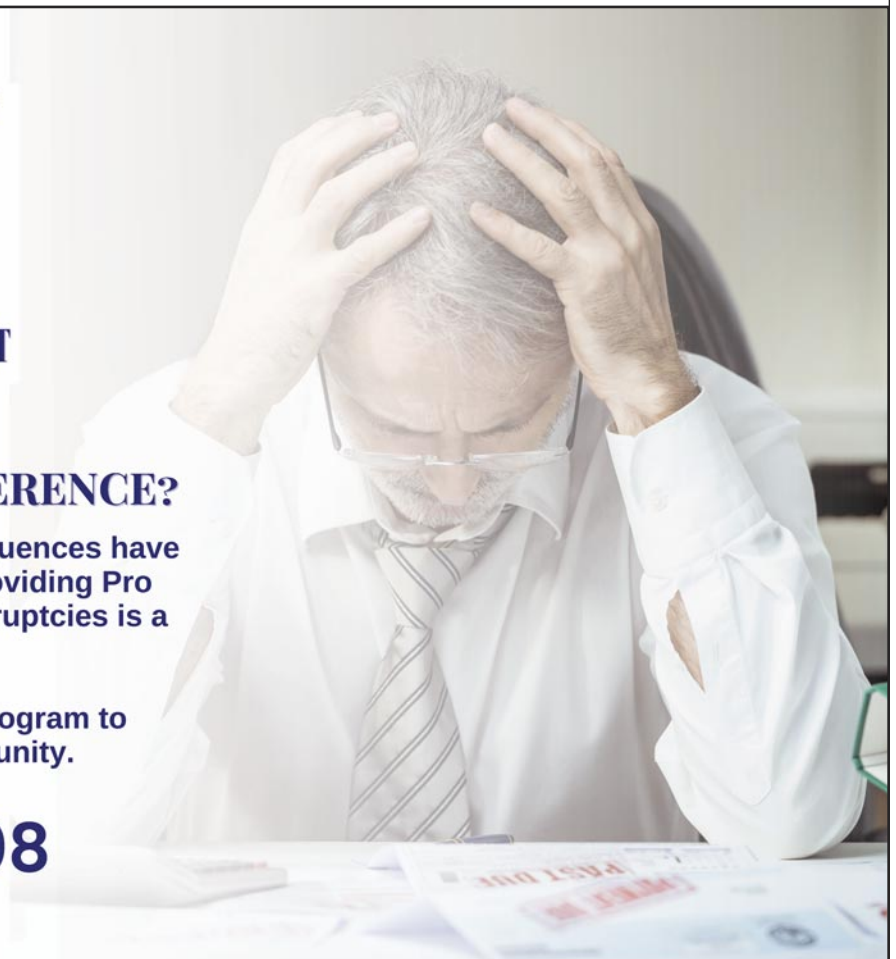


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(Continued from page 173)

viable traceability theory that a representative for a repair servicer was acting as an agent for a lender, making the lender liable for the agent's failure to provide disclosures required by TILA.

Contracts

***GSE Consulting, Inc. v. L3Haris Techs, Inc.*, No. 22-10647 (11th Cir. Feb. 8, 2023)**

The Court interpreted the term "merger" in a provision relating to intellectual property (i.e., the seller receives an additional payment if the intellectual property is "sold, transferred, or merged") in a consulting agreement to receive its ordinary meaning, which the Court determined to mean "combined." It did not interpret the term "merger" to refer to corporate transactions. The seller contended that a reverse triangular merger transaction involving the buyer qualified as a merger under the agreement, but the Court affirmed summary judgment for the buyer.

Medicare Secondary Payer Act

***MSP Recovery Claims, Series LLC v. United Auto. Ins. Co.*, No. 21-12439 (11th Cir. Feb. 22, 2023)**

Because the Eleventh Circuit determined that assignees of Medicare Advantage Organizations were subject to procedural requirements, it affirmed summary judgment for two insurance companies against whom the assignees had made claims under the Medicare Secondary Payer Act ("the Act"). The Court held that the Act did not preempt claims-filing deadlines in the insurance policy before it and that the Act did not preempt Florida's pre-suit demand requirement in the Florida Motor Vehicle No-Fault Law.

Copyright

***Nealy v. Warner Chappell Music, Inc.*, No. 21-13232 (11th Cir. Feb. 27, 2023)**

As a matter of first impression, the Eleventh Circuit answered a question certified by a district court and ruled that when a copyright plaintiff has a timely claim under the discovery accrual rule for infringement that occurred more than three years before the lawsuit was filed, the plaintiff may recover damages for that infringement. The Court rejected an absolute three-year bar on damages.

RECENT CRIMINAL DECISIONS From the United States Supreme Court

***Cruz v. Arizona*, 143 S. Ct. 650 (2023)**

Based on its prior holding in *Simmons v. South Carolina*, 512 U.S. 154 (1994), that a capital murder defendant had a due process right to have his jury instructed that he would be ineligible for parole if sentenced to life imprisonment rather than death, the United States Supreme Court held that an Arizona death-row inmate was entitled to such a jury instruction. The fact that future legislation might later render the inmate eligible for parole did not justify the denial of such an instruction.

From the Alabama Supreme Court

Preservation; Appellate Review of Ala. R. Crim. P. 32 Claims

***Ex parte Macon*, No. SC-2023-0026 (Ala. Mar. 10, 2023)**

The Alabama Supreme Court denied without opinion the defendant's petition for certiorari review after the Alabama Court of Criminal Appeals affirmed the dismissal of his Ala. R. Crim. P. 32 petition. In a special concurrence, Justice Mitchell noted that the Alabama Court of Criminal Appeals' opinion addressed a double jeopardy claim that the defendant raised on appeal but did not present in his Rule 32 petition. Justice Mitchell observed that the Alabama Court of Criminal Appeals was not obligated to review a claim for postconviction relief, even if the claim is deemed jurisdictional in nature, where it was not first presented to the trial court in the Rule 32 petition.

From the Alabama Court of Criminal Appeals

Ala. R. Evid. 404(b), 609(b); Ala. Code § 15-25-31

Williams v. State, CR-2022-0543 (Ala. Crim. App. Feb. 10, 2023)

The trial court did not err in admitting evidence showing that the defendant, an adult charged with numerous sexual offenses against a child, was investigated and arrested for the rape of a child 13 years earlier. This evidence was not hearsay, and it was admissible for proof of motive under Ala. R. Evid. 404(b). While Ala. R. Evid. 609(b) provides that a conviction more than 10 years old is inadmissible for impeachment unless the trial court determines that its probative value substantially outweighs its prejudicial effect, that rule does not apply to collateral acts evidence offered to establish motive. The court also found that the application of the current Ala. Code § 15-25-31 – which changed the rule for admission of a child’s out-of-court statement regarding a sex offense to apply to a child under the age of 12 years at the time of the statement, rather than at the time of the proceeding – had no *ex post facto* effect because it was a procedural, rather than substantive, change in the rule.

Immunity Agreement

State v. Norris, CR-2022-0521 (Ala. Crim. App. Feb. 10, 2023)

The court reversed the dismissal of the defendant’s indictment, holding that a purported verbal agreement between him and the state’s prosecutor regarding whether the state would pursue charges against him did not prohibit his later indictment. The defendant, a former political officeholder who resigned from his office following a corruption scandal, claimed that the prosecutor informed him that charges would not be brought against him if he resigned from office. The state disputed any such agreement. The court found that even if the agreement existed, it was not signed or judicially approved and thus was not a valid immunity agreement.

Probation Revocation

Glasscock v. State, CR-2022-1106 (Ala. Crim. App. Feb. 10, 2023)

The trial court erred in revoking probation on the basis of hearsay. Hearsay is admissible in a revocation proceeding, but the decision to revoke probation cannot be grounded on hearsay alone. Two law enforcement officers testified regarding the probationer’s commission of new offenses, but neither had “firsthand, personal knowledge” of the offenses.

Judicial Notice; Probation Revocation

Lawrence v. State, CR-21-0061 (Ala. Crim. App. Feb. 10, 2023)

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In reversing the trial court's revocation judgment, the Alabama Court of Criminal Appeals first held that it would not take judicial notice of

records obtained from the internet database *Alacourt.com* but not present in the record on appeal. The record on appeal did not show that

the probationer was informed of a requirement to complete a twelve-month drug treatment program. The court further found that the probationer's revocation for failure to complete the program warranted only a 45-day "dunk" under Ala. Code § 15-22-54, rather than full revocation, rejecting the state's contention that full revocation was available for that violation under Ala. Code § 13A-5-8.1.

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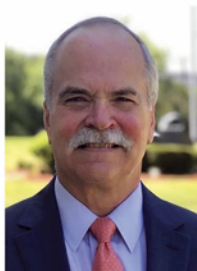
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Ineffective Assistance of Counsel

McCoy v. State, CR-20-0821 (Ala. Crim. App. Feb. 10, 2023)

Defense counsel did not render ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984) by not raising a Fourth Amendment challenge to the warrantless seizure and testing of the defendant's blood in this assault case. Whether the defendant had a reasonable expectation of privacy in blood that he voluntarily provided to medical personnel for the purpose of medical treatment is one of first impression in Alabama. Consequently, the court held that defense counsel could not be held ineffective in not raising the issue.

Elder Abuse

Moore v. State, CR-2022-0914 (Ala. Crim. App. Feb. 10, 2023)

The evidence of a scar on a 70-year-old woman's arm was insufficient to support a finding of "serious physical injury" for purposes of first-degree elder abuse under Ala. Code § 13A-6-192 but was sufficient for proof of "physical injury" as required for second-degree elder abuse under § 13A-6-193. The court reversed the defendant's first-degree elder abuse conviction but remanded for the trial court to adjudicate him guilty of second-degree elder abuse and to sentence him accordingly. ▲

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