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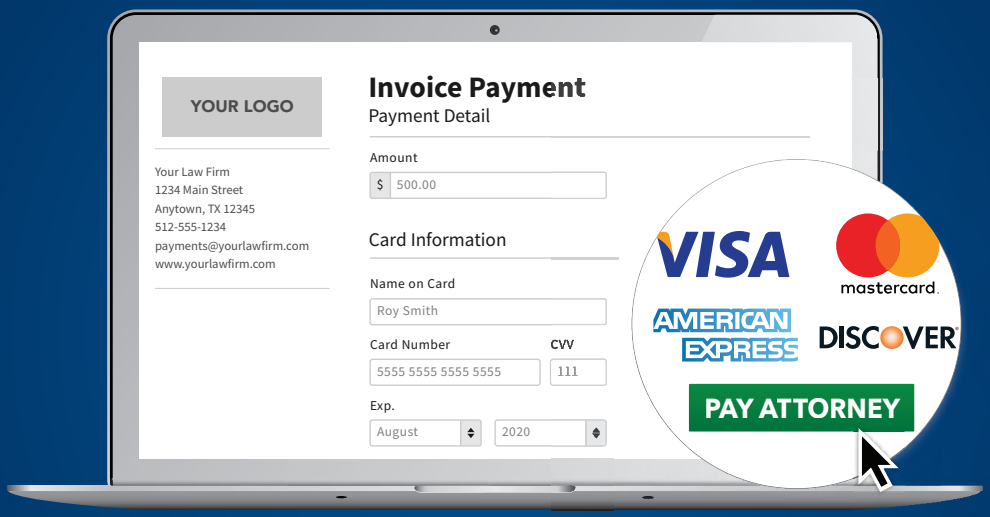

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On The Cover

Sunset at Terry Cove, Baldwin County, Alabama.

–Submitted by an Alabama State Bar member

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ALABAMA STATE BAR

415 Dexter Avenue
Montgomery, AL 36104
(334) 269-1515 • (800) 354-6154
FAX (334) 261-6310
www.alabar.org

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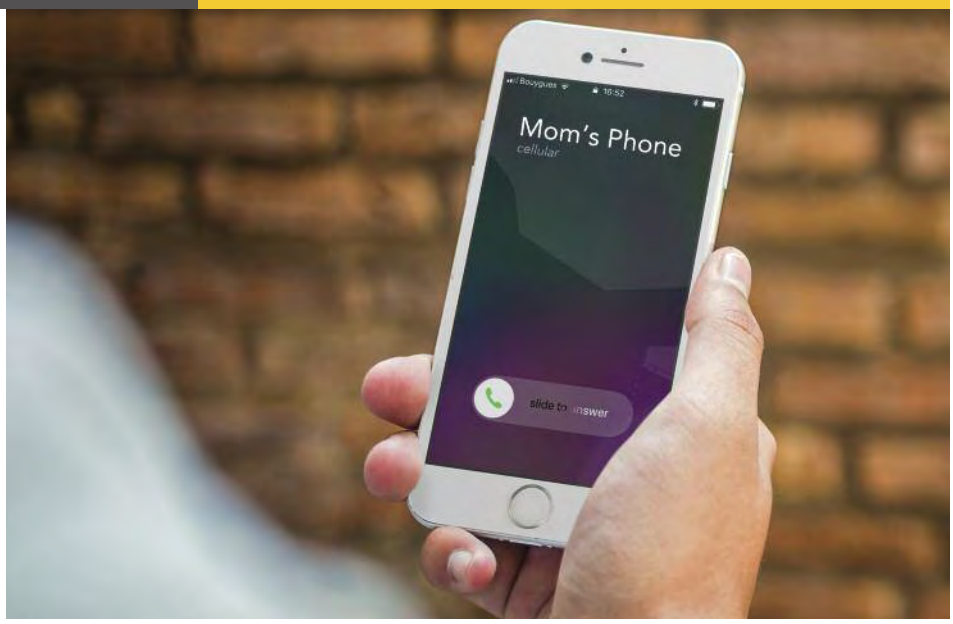
Augusta S. Dowd
barpresident@alabar.org,
(205) 323-1888



Mom's Phone

A few months ago, something went haywire with my phone–I am certain through no fault of my own–and it had to be "reset." I understood that process to mean that all of the settings and information on my phone had to be stripped away and then re-installed to get my phone back in working order. After the reset, my phone went back to working like it was supposed to . . . with one significant exception. Whenever I placed an outgoing call, the recipient was notified by caller ID that the call was coming in from "Mom's Phone." As you might expect, this technological quirk resulted in all kinds of hilarious commentary, including that I had clearly elevated the role of bar president and taken it to previously unheard of (and perhaps excessive) new places! Thankfully, for the most part, call recipients seem to have had sufficiently positive relationships with their own mothers that they answered the phone graciously, kindly and warmly, if a little bit confused. It even seemed to work on lawyers who are normally a bit prickly (I shall refrain from other more descriptive terms given that this article will be around for posterity!). They answered the phone without the typical edge in their voices, laughing and asking whether I knew that my caller ID was described quite unprofessionally as "Mom's Phone." Almost without exception, "Mom's Phone" was a good conversation starter. Seeing "Mom's Phone" pop up on caller ID set a civil, humorous and pleasant tone for whatever turns each call might take. This reset took my telephonic communications in a new and positive direction.

As I look back on the last year, I think the notion of a reset and then heading in a new and positive direction has been a major theme of my presidential year. Our state bar has always been in good hands with excellent leadership, but this year has brought significant changes in its leadership–resets, if you will. Those resets have brought new leadership to the bar staff. Our new leaders will be critical to our bar's successful navigation through whatever challenges lie in our future. Much like the reset that resulted in all of my communications coming from "Mom's Phone," I trust that these resets in our bar will continue to lead our bar and its membership on a positive and productive trajectory.

As you all know, Phillip McCallum went into office as our new executive director shortly before the 2017 Annual Meeting. Since Phillip's rookie year coincided with my presidential year, we occasionally made some interesting and totally unexpected twists and turns as he learned how to be an executive director at the same time as I was stumbling along learning to be presidential. I could not have asked for a better person to work with me and navigate the path forward for our bar. If you haven't already done so, please reach out to Phillip and get to know him. Phillip is the real deal. We are fortunate that he chose to leave a very successful law practice to serve our membership and the public. Phillip is passionate about his love for our profession and the advancement of our membership. He cares deeply about the lawyers who make up our exceptional association. He has served us well, and I know he will continue to do so into the future.

Phillip agreed with me that a reset was needed in the bar's relationship with its members as well as in the bar's relationship with our judiciary. As a part of that reset, over the course of this year, Philip and I have traveled the state presenting a program we titled the "State of the Bar." Our presentation was a combined discussion of bar news and updates to our member benefits along with a discussion of court costs and court-funding issues facing our judiciary, our profession and access to justice for the public we serve. Many of you were gracious enough to host us, and we greatly enjoyed talking to lawyers about the bar, but more importantly, getting to know you and hearing your concerns about issues that affect all of us. From the feedback we have received, I believe that the State of the Bar program has been a huge success. Our members have expressed great appreciation following our visits. I certainly believe both

(Continued from page 237)

Phillip and I benefitted greatly from learning from our members first-hand. And as those of you who have attended one of our State of the Bar sessions know, a significant substantive area of our presentation has been the discussion of court costs and court funding. As a result of this reset, our lawyers are now speaking up and addressing these issues with their local legislators, which was a key goal of our State of the Bar presentations.

Similarly, I believe there has been a very positive reset in the bar's relationships with the judiciary as a whole and with our supreme court specifically. I am greatly encouraged that enhanced communication and dialogue with our judiciary will continue into the future. A strong relationship between the bench and the bar can only work to the best interests of both groups.

Speaking of resets, how about our new general counsel, Roman Shaul?! From the start of my presidential year, the question of who would be our new general counsel was one of the key inquiries I received from lawyers and judges across the state. Who could possibly fill the shoes of Tony McLain? It was very important to the future of our bar that we get this selection right, just as it was very important that our next executive director be a person as special as Phillip. As with Phillip's selection, selecting Roman as our general counsel resulted from utilization of an exhaustive search process, and I am grateful to those who served as a part of the search committee for this position. I have no doubt the result of their hard work will pay dividends for our bar and our profession for years to come. If you attended the annual meeting in Sandestin, I hope you had an opportunity to meet Roman. What a terrific person he is–I can't wait to see how Roman works with our already outstanding general counsel's office to take that office to the highest levels of service and professionalism.

After a year of resets, next year will be a year of adjustment, change and growth. With the two top staff positions in our bar now filled, it is time to use our staff's combined talents along with the talents of our bar leadership to continue to move forward our entire association. I look forward to seeing our bar move toward greater relevance and engagement with our membership, the judiciary and the public.

I leave the leadership of the bar in the very capable hands of my friend, Sam Irby, who, by the time this article is printed, will have been installed as the 143rd president of our state bar. Having worked closely with Sam throughout my presidency, I can tell you that the upcoming year is going to be enormously successful. Sam is bringing with him great vision and passion for our profession and our members. With Sam at the helm and Christy Crow waiting in the wings as our president-elect, next year is going to be fun to watch!

In closing, I thank you all for the honor of allowing me to be your president. It has been an incredible year for me personally, extremely rewarding and a lot of fun. Many thanks to my husband and children, my law firm, the co-counsel and opposing counsel who patiently worked around my bar schedule, my clients, the members of my Executive Council, the members of the Board of Bar Commissioners and the staff of the ASB for their selfless support and wisdom throughout. You guys rock! And even though I may not be your bar president the next time I give you a call, I hope seeing "Mom's Phone" will still bring a smile as you answer the phone. I look forward to our next conversation and to continuing the good work we have all done together this year. Thank you for the honor of serving you and this bar, and I wish you all the very best that life has to offer. ▲

Harold Albritton Pro Bono Leadership Award

The Harold Albritton Pro Bono Leadership Award seeks to identify and honor individual lawyers who through their leadership and commitment have enhanced the human dignity of others by improving pro bono legal services to our state's poor and disadvantaged. The award will be presented during Pro Bono Month 2018 (October).

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

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

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

To be considered for the award, nominations must be submitted by **August 1, 2018**. For more information about the nomination process, contact Linda Lund at (334) 517-2246 or *linda.lund@alabar.org*.

Annual License Fees and Membership Dues

Renewal notices for payment of annual license and special membership dues will be emailed in early September. The fee for an Occupational License is $325 and the dues for a Special Membership are $162.50. Payments are due by October 1; payments made after October 31 will be subject to the statutory late fee. ***As a reminder, you will not receive a paper invoice in the mail.***

Upon receipt of the renewal notice, online payments may be made at *www.alabar.org* or you can create and print a voucher to mail with your check. Log in to the website and select "Consolidated Fee Invoice" from your MyDashboard page to make an online payment or print a voucher. Instructions for the payment process and help with logging in are available online as needed.

EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
phillip.mccallum@alabar.org

This is Your Bar

Each year, the annual meeting marks the closing of one chapter and the opening of a new one. It's a time of fun and fellowship, but it's also the beginning of a new era for bar leadership. I was able to reflect on a very transformational year for me professionally and how this time last year I was just sinking my teeth into a new job. This opportunity has allowed me to be on the other side of the situation, to be the administrator instead of the bar president, to be working at the bar instead of just being a member and to further appreciate the contributions of leadership and bar staff. After nearly 30 years of practicing law, being executive director of this organization has been a challenge, and though each new opportunity presents growing pains, it also has its rewards.

This year, our bar made it a priority to get on the road and emphasize that the Alabama State Bar is for every lawyer, no matter their firm size, practice area or professional achievements. We want our members to feel invested in this organization and know that we are just as invested in them. Meeting lawyers in all corners of Alabama has been an informative, eye-opening experience and a reminder of the many challenges our profession faces. As the association that unites us, the Alabama State Bar looks forward to strengthening the bond that holds us all together–lawyers rendering service to others. I am excited to see how our members continue to have an impact on their communities.

During her year in office, President (now past President) Augusta Dowd has been incredibly engaged and intentional in her efforts to lead this bar into the future. I cannot thank her enough for her guidance and friendship during my time of transition to the position of executive director. As we move into President Sam Irby's tenure, I look forward to the ways he will further our mission as an organization.

We are in the midst of a revival with many changes on the horizon. We recently welcomed a new general counsel in Roman Shaul. I hope you were able to meet him at the annual meeting. We are fortunate to have his expertise, both as an exceptional private practice lawyer and a judge, in our corner. In Sandestin, we announced major improvements to our communications effort, along with personnel news. Many of you were able to see the new branding roll-out and interact with BIG Communications, the team we hired to undertake this project. Not only is BIG working on branding, they are also in the process of re-designing the website to make it friendly for *all* users–bar members and the general public.

There is no better time to get involved in the Alabama State Bar. Being a member doesn't start and end at the admissions ceremony; it is a partnership with us from law school to retirement. I have enjoyed getting to know our members this past year and look forward to continuing my road trip around the state. Serving lawyers in this capacity has been one of the highlights of my career and I appreciate those who have helped me along the way. ▲

ALABAMA LAWYERS' Hall of Fame

President Augusta S. Dowd addresses the Hall of Fame Selection Committee and family and friends of the honorees.

May is traditionally the month when new members are inducted into the Alabama Lawyers' Hall of Fame

which is located at the state judicial building. The idea for a Hall of Fame first appeared in the year 2000 when Montgomery attorney Terry Brown wrote state bar President Sam Rumore with a proposal that the former supreme court building, adjacent to the Alabama State Bar building and vacant at that time, should be turned into a museum memorializing the many great lawyers in the history of this state.

The implementation of the idea of an Alabama Lawyers' Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines and then provide a recommendation to the Board of Bar Commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004.

A 12-member selection committee, consisting of the immediate past president of the Alabama State Bar, a member appointed by the chief justice, one member appointed by each of the three presiding federal district court judges of Alabama, four members appointed by the Board of Bar Commissioners, the director of the Alabama Department of Archives and History, the chair of the Alabama Bench and Bar Historical Society and the Executive Secretary of the Alabama State Bar, meets annually to consider the nominees and to make selections for induction.

Inductees to the Alabama Lawyers' Hall of Fame must have had a distinguished career in the law. This could be demonstrated through many different forms of achievement, leadership, service, mentorship, political courage or professional success. Each inductee must have been deceased at least two years at the time of their selection. Also, for each year, at least one of the inductees must have been deceased a minimum of 100 years in order to give due recognition to historic figures, as well as the more recent lawyers of the state.

The selection committee actively solicits suggestions from members of the bar and the general public for the nomination of inductees. Nominations are needed of historic figures as well as present-day lawyers for consideration. Great lawyers cannot be chosen if they have not been nominated. Nominations can be made throughout the year by downloading the nomination form at *www.alabar.org* and submitting the requested information. Plaques commemorating the inductees are located in the lower rotunda of the judicial building and profiles of all inductees are found on the bar's website. ▲

Bibb Allen family

Mahala Ashley Dickerson family and friends

Bibb Allen

1921 - 2007

Legendary trial lawyer who tried more than 750 trials during his career; served as a fighter pilot in WWII flying more than 100 missions; received seven Bronze Stars, the Distinguished Flying Cross and the Belgian Croix de Guerre; graduated from the University of Alabama School of Law (1950); member of the Law Review, Order of the Coif, ODK and Farrah Order of Jurisprudence; inducted into numerous trial lawyer honorary associations; served as president of the Birmingham Bar Association, the Alabama Defense Lawyers Association and the Alabama State Bar (1976-1977)

Mahala Ashley Dickerson

1912 - 2007

Born in Montgomery County, Alabama; attended Montgomery Industrial School for Girls where she became friends with Rosa Parks; graduated cum laude from Fisk University (1935); received law degree from Howard University (1948); active civil rights attorney in the 1940s and 1950s; first female African-American attorney admitted to the Alabama State Bar (1948); moved to Alaska in 1958 and became first female African-American attorney there; received honorary doctorate from the University of Alaska Anchorage for advocacy of minority rights; one of five women presented with the 1995 Margaret Brent Award by the ABA; 2006 Maud McLure Kelly Award recipient from the Alabama State Bar

John Cooper Godbold family

Alto Velo Lee, III family and friends

John Cooper Godbold

1920 - 2009

Graduated from Auburn University (1940); artillery officer in the U.S. Army (1941-1946); received law degree from Harvard Law School (1948); practiced law in Montgomery from 1949 until his appointment to the Fifth Circuit Court of Appeals (1966); appointed Chief Judge of the Fifth Circuit (1981); Chief Judge of the Eleventh Circuit (1981-1986); served in senior status for the Eleventh Circuit (1987-2009); Director of the Federal Judicial Center (1987-1990); Distinguished Professor, Cumberland School of Law (1990-2005); recipient of Edward J. Devitt Service to Justice Award (1996); Alabama Academy of Honor (2002)

Alto Velo Lee, III

1915 - 1987

Admitted to the Alabama State Bar in 1937; served in the state legislature (1944-1947); chair of both the State Docks Board and the State Ethics Commission; community leader as chair of the Dothan City School Board, president of both the Dothan Junior Chamber and Chamber of Commerce and president of Dothan's National Peanut Festival; widely respected as a formidable litigator; member of the Board of Bar Commissioners; Fellow of the American Trial Lawyers Association; president of the Houston County Bar Association; president of the Alabama State Bar (1974-1975)

Charles Tait family

Charles Tait
1768 - 1835

Born in Virginia, Charles Tait served as Alabama's first (and, at the time, only) Federal District Court Judge (1820-1826); played a significant role in the state's history as a lawyer, educator, legislator, jurist, scientist and planter; served in the U.S. Senate from Georgia (1809-1819); sponsored Alabama's admission to the Union; member of the American Philosophical Society; studied fossils in the "Claiborne Beds" on his property along the Alabama River; elected a corresponding member of the Academy of Natural Science in Philadelphia in 1832

ALABAMA LAWYERS' HALL OF FAME

PAST INDUCTEES

2016
William B. Bankhead (1874-1940)
Lister Hill (1894-1984)
John Thomas King (1923-2007)
J. Russell McElroy (1901-1994)
George Washington Stone (1811-1894)

2015
Abe Berkowitz (1907-1985)
Reuben Chapman (1799-1882)
Martin Leigh Harrison (1907-1997)
Holland McTyeire Smith (1882-1967)
Frank Edward Spain (1891-1986)

2014
Walter Lawrence Bragg (1835-1891)
George Washington Lovejoy (1859-1933)
Albert Leon Patterson (1894-1954)
Sam C. Pointer, Jr. (1934-2008)
Henry Bascom Steagall (1873-1943)

2013
Marion Augustus Baldwin (1813-1865)
T. Massey Bedsole (1917-2011)
William Dowdell Denson (1913-1998)
Maud McLure Kelly (1887-1973)
Seybourn Harris Lynne (1907-2000)

2012
John A. Caddell (1910-2006)
William Logan Martin, Jr. (1883-1959)
Edwin Cary Page, Jr. (1906-1999)
William James Samford (1844-1901)
David J. Vann (1928-2000)

2011
Roderick Beddow, Sr. (1889-1978)
John McKinley (1780-1852)
Nina Miglionico (1913-2009)
Charles Morgan, Jr. (1930-2009)
William D. Scruggs, Jr. (1943-2001)

2010
Edgar Thomas Albritton (1857-1925)
Henry Hitchcock (1792-1839)
James E. Horton (1878-1973)
Lawrence Drew Redden (1922-2007)
Harry Seale (1895-1989)

2009
Francis Hutcheson Hare, Sr. (1904-1983)
James G. Birney (1792-1857)
Michael A. Figures (1947-1996)
Clement C. Clay (1789-1866)
Samuel W. Pipes, III (1916-1982)

2008
John B. Scott (1906-1978)
Vernon Z. Crawford (1919-1985)
Edward M. Friend, Jr. (1912-1995)
Elisha Wolsey Peck (1799-1888)

2007
John Archibald Campbell (1811-1889)
Howell T. Heflin (1921-2005)
Thomas Goode Jones (1844-1914)
Patrick W. Richardson (1925-2004)

2006
William Rufus King (1776-1853)
Thomas Minott Peters (1810-1888)
John J. Sparkman (1899-1985)
Robert S. Vance (1931-1989)

2005
Oscar W. Adams (1925-1997)
William Douglas Arant (1897-1987)
Hugo L. Black (1886-1971)
Harry Toulmin (1766-1823)

2004
Albert John Farrah (1863-1944)
Frank M. Johnson, Jr. (1918-1999)
Annie Lola Price (1903-1972)
Arthur Davis Shores (1904-1996)

Efforts to Protect Seniors and Other Vulnerable Adults from Financial Exploitation

By Joshua D. Jones and W. Preston Martin

In April 2016, Alabama became one of the first states to enact legislation requiring certain financial institutions to report suspected financial exploitation of persons deemed to be "vulnerable clients" to governmental authorities.[1] The goal of the Protection of Vulnerable Adults from Financial Exploitation Act (the "Act") is to protect those individuals who may be most susceptible to financial abuse, such as elderly customers or adults with diminished capacity, from potential wrongdoers. The Act seeks to accomplish that goal by mandating that broker-dealers, investment advisers, agents and other "qualified individuals" report suspected exploitation when those financial professionals have a reasonable belief that it may have occurred, has been attempted or is being attempted. This article will (i) provide an overview of the Act, (ii) analyze similar efforts by state regulators and legislatures, FINRA and the federal government, and (iii) hear from various stakeholders regarding the implementation of the Act.

The Protection of Vulnerable Adults From Financial Exploitation Act

The Act was drafted by the Alabama Securities Commission ("ASC") in connection with its role of furthering investor protection. As discussed in more detail below, the Act contains several key provisions: (i) broker-dealers, investment advisers and other qualified individuals are *required* to report to the ASC and the Alabama Department of Human Resources ("DHR") whenever they reasonably believe that financial exploitation of a "vulnerable adult" may have occurred, has been attempted or is being attempted; (ii) brokerage firms[2] that suspect financial exploitation are permitted to delay the disbursement of funds from a vulnerable adult's account; (iii) in certain instances, brokerage firms are authorized to make disclosures about potential financial exploitation to "reasonably associated individual[s]" or to other third parties with whom the vulnerable adult has a legal relationship (*e.g.*, legal guardian, conservator, trustee); and (iv) to incentivize brokerage firms, the Act provides qualified immunity from administrative and civil liability for actions taken consistent with the Act. The following is a brief overview of the Act.

As defined in the Act, a "vulnerable adult" includes (i) a person 65 years of age or older, and (ii) a "protected person" as defined in § 38-9-2 of the *Code of Alabama*, which includes persons over 18 years of age who are senile, have intellectual or developmental disabilities, or are mentally or physically incapable of adequately caring for themselves.

Who Is Protected by the Act?

The Act seeks to protect "vulnerable adults" from financial exploitation. As defined in the Act, a "vulnerable adult" includes (i) a person 65 years of age or older, and (ii) a "protected person" as defined in § 38-9-2 of the *Code of Alabama*, which includes persons over 18 years of age who are senile, have intellectual or developmental disabilities, or are mentally or physically incapable of adequately caring for themselves.[3] The ASC has encouraged brokerage firms to implement policies and procedures to help employees identify adults who may be subject to financial exploitation as a result of their advanced age, diminished capacity or other intellectual or developmental disabilities. In addition to this encouragement, the ASC has issued written guidance to firms regarding the implementation of the Act and containing "useful information related to the detection, reporting, and mitigation of senior financial exploitation."[4] In doing so, the ASC has noted that "[f]inancial professionals are often uniquely positioned to see the red flags of cognitive decline or other potential impairments affecting their clients and customers, and their prompt actions may prevent a client or customer from becoming the victim of financial exploitation."[5]

The ASC has also developed training programs to help brokerage firms teach their frontline employees to spot the signs of cognitive decline or a reduced capacity to handle financial decisions. One of the best ways to detect signs of diminished capacity is by developing strong relationships with clients, which puts the financial professional in a better position to notice red flags that may signal cognitive issues.[6] An AARP study found that the red flags most commonly observed by compliance officers and financial advisors were repeating of orders or questions, difficulty with basic math, memory loss and erratic behavior.[7] Finally, firms should train their employees on "how to ask appropriate questions regarding potential cognitive decline while still maintaining a client's sense of autonomy and dignity."[8]

Detecting Senior Financial Exploitation

In addition to helping their employees identify clients who could be a potential victim of financial exploitation, firms should also train their employees to detect potential financial exploitation. The Act broadly defines "financial exploitation" as the wrongful taking of property, and any act or omission taken by a person (or through a legal relationship such as a power of attorney, conservatorship or guardianship) with the intent to deprive a vulnerable adult of his or her property.[9] Per the ASC, there are several signs that indicate an investor could be the victim of financial exploitation:[10]

- Uncharacteristic and repeated cash withdrawals or wire transfers;
- Appearing with new and unknown associates, friends or relatives;
- Uncharacteristic nervousness or anxiety when visiting the office or conducting telephonic transactions;
- A lack of knowledge about his or her financial status;
- Having difficulty speaking directly with the client or customer;
- Unexplained or unusual excitement about a sudden windfall; reluctance to discuss details;
- Sudden changes to financial documents such as powers of attorney, account beneficiaries, wills or trusts; and
- Closing of accounts without regard to penalties.

Reporting Senior Financial Exploitation

Under the Act, brokerage firms[11] are *required* to notify the ASC and DHR if there is a reasonable belief that a client has been the victim of financial exploitation.[12] To simplify the reporting process, the ASC and DHR developed an initial reporting form–the "Alabama Securities Commission and Department of Human Resources Report of Adult Suspected to be Financially Exploited"–which must be completed and transmitted to both agencies via email.[13]

Notifying Third Parties of Potential Financial Exploitation

Beyond reporting suspected financial exploitation to the ASC and DHR, the Act also provides an avenue for brokerage firms to notify trusted third parties about unusual activity in a vulnerable adult's account.[14] Notably, pursuant to the Act, brokerage firms are *permitted*, but *not required*, to inform trusted third parties of the potentially exploitive activity. It is left to the brokerage firm to select the appropriate third party contact based on the relationship with the client, but the Act notes that "[d]isclosure may not be made to a designated third party that is suspected of financial exploitation or other abuse of the vulnerable adult."[15]

Delaying the Disbursement of Funds

Another option provided under the Act is delaying disbursements in situations of potential financial exploitation. Under the Act, a brokerage firm is *permitted* to delay a disbursement from an account of a vulnerable adult if the brokerage firm "reasonably believes . . . that the requested disbursement may result in financial exploitation of a vulnerable adult."[16] In connection with delaying a disbursement, a brokerage firm must notify all parties authorized on the account at issue, notify the ASC and DHR within two business days and conduct an internal review of the suspected or attempted financial exploitation.[17] The ASC recommends that "given the potential and unintended consequences of delaying disbursements, firms should develop clear and robust policies and procedures designed to effectively utilize these delays and to ensure that such delays comply with Alabama law and [are] used only in appropriate circumstances."[18] Moreover, the delay of any disbursement must terminate after 15 days or upon a "determination by the broker-dealer or investment adviser that the disbursement will not result in financial exploitation of the vulnerable adult[,]" whichever is sooner.[19] And the delay may only be extended once for another 10 days upon request by the ASC or DHR or as otherwise ordered by a court of competent jurisdiction.[20]

Qualified Immunity from Potential Liability

Finally, to incentivize brokerage firms to help protect customers from financial exploitation, the Act provides civil and administrative immunity to brokerage firms that comply with the provisions of the Act in "good faith" and with "reasonable care."[21] In drafting the immunity provisions, the ASC hoped that "firms will be more willing to utilize the available tools such as contacting designated third-parties, other third-parties in extraordinary circumstances and delaying disbursements when necessary."[22]

The Model Act and Related State Legislation, FINRA Action and Federal Developments

Alabama's Act is premised on a model act developed and adopted by the North American Securities Administrators Association ("NASAA").[23] It should be noted that Joseph P. Borg, director of the ASC, is also currently serving as president of NASAA, a position that he has held twice prior to his current appointment. Director Borg and his staff at the ASC were involved in the drafting of NASAA's model act and pushed for its adoption by NASAA. As noted above, the Alabama Act was in fact drafted by the ASC, with the NASAA model act serving as a guide.[24]

Unsurprisingly given this history, Alabama's Act largely tracks NASAA's model act. In addition to minor revisions adopting the Act to the specifics of Alabama's legal code and administrative structure, the primary difference between the two lies with the provision allowing for disclosure of suspected abuse to certain third parties. NASAA's model act provides that such disclosures may be made to "any third party previously designated by the eligible adult."[25] The Alabama Act allows for disclosure not only to such designees, but also to "a reasonably associated individual" and to others with particular legal relationships to the vulnerable adult, such as legal guardians, conservators, trustees and agents with power of attorney.[26] The Alabama Act's allowance for disclosure to individuals whom the broker believes is a "reasonably associated individual" and the accompanying immunity for such disclosures made in good faith and with reasonable care provides a mechanism whereby the broker can involve family members or trusted friends, whether or not previously designated by the vulnerable adult. As such, the Alabama Act's protection is more comprehensive than that contemplated by the model act and arguably more manageable given the common sense approach allowing for notification of those closest to the adult, whether or not previously designated. It should be noted that such notification is *permitted*–but not required–under both the Act and the model act.

The adoption of NASAA's model act did not end in Alabama. As of mid-January 2018, 13 states had adopted some version of the NASAA model legislation, and numerous other states are considering similar legislation.[27] Both pending and passed state legislation differ from the Alabama Act and NASAA's model act in various degrees. The most notable difference is that some states *permit* disclosure of suspected financial exploitation to regulatory agencies, but do not *require* it. For instance, Missouri's Senior Savings Protection Act provides that a qualified individual "may notify" applicable state agencies if it "reasonably believes that financial exploitation of a qualified adult has occurred, has been attempted, or is being attempted[.]"[28] Reporting is therefore optional, not mandatory. Other states provide for reporting only in circumstances in which the victim is over a statutory age and is actually suffering from infirmities of aging, such as demonstrated mental dysfunction.[29] Practitioners should consult governing state law for other potentially important distinctions.

In addition to state legislatures, both the self-regulatory organization that oversees the firms and professionals selling securities in the United States and the U.S. Congress have taken action of interest. On February 5, 2018, the Financial Industry Regulatory Authority, Inc. ("FINRA") implemented Rule 2165. The FINRA rule applies to "specified adults," the definition of which largely tracks the vulnerable adult definition used in the Act.[30] The primary distinction between the FINRA rule and the Act is that the rule is permissive in that it allows for member firms to place a temporary hold on disbursements from accounts upon a reasonable belief "that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted," but it does not *require* such a hold.[31]

In conjunction with passing Rule 2165, FINRA also amended Rule 4512 to require firms to make "reasonable efforts to obtain the name of and contact information for a trusted contact person upon the opening of a customer's account."[32] The amendment to Rule 4512 adds section (a)(1)(F) to require that firms request the contact information of "a trusted contact person age 18 or older who may be contacted about the customer's account" from clients in connection with the account opening process.[33] Moreover, firms must inform clients in writing at the time of account opening that they may contact the trusted person if they suspect financial exploitation.

New Rule 2165 and the amendment to Rule 4512 work together in connection with placing a hold on a disbursement. Under Rule 2165, the first requirement after placing a hold is to notify both all authorized parties to the account as well as the trusted contact person identified pursuant to the process in Rule 4512(a)(1)(F). The second step required after placing the hold is to immediately initiate an internal review of the circumstances surrounding the suspected exploitation.[34] As with the Act, the FINRA rule provides for notification of the client within two days and expiration of the hold no later than 15 business days after the placement of the hold.[35] The FINRA rule also provides for a 10-day extension, but, unlike the Act, that extension may be implemented by the firm if either ordered by a state regulator/agency or the firm's internal review supports it, whereas the Act allows for such an extension only by the ASC or DHR.[36]

As with the Act, the FINRA rule also requires firms who implement it to maintain certain records.[37] In addition, it also requires implementing firms to develop written supervisory procedures and training policies.[38] Unlike the Act, Rule 2165 does not contain an immunity from civil liability provision comparable to the Act, though it does provide firms with a safe harbor from certain FINRA rules regarding improper use of client accounts and funds, expedition of certain customer requests regarding the transfer of securities and its general provision relating to standards of commercial honor and just and equitable principles of trade.[39]

In taking these actions to protect seniors, FINRA cited its experience with the Securities Helpline for Seniors™, which had "highlighted issues relating to financial exploitation of this group of investors" including the need for member firms to be able "to quickly and effectively address suspected financial exploitation of seniors and other vulnerable adults consistent with FINRA rules."[40] FINRA's helpline was launched in April 2015 in an effort to provide senior investors with direct access to FINRA staff regarding questions or concerns that seniors may have with their brokerage accounts and investments.[41] In its Report on the FINRA Securities Helpline for Seniors™, FINRA highlighted the helpline's effectiveness and relation to its other regulatory programs and recommended certain practices for the firms to consider, including possibly "using the account opening process to obtain the name and contact information for a trusted person the firm can contact if firm representatives have concerns regarding the personal or financial well-being of the investor."[42] With the amendment to Rule 4512, FINRA has now mandated this prior suggestion.

Finally, Congress is undertaking efforts to prevent financial exploitation of seniors in the consideration of legislation that would exempt financial institutions from civil and administrative liability for reporting such potential exploitation to governmental agencies.

Finally, Congress has undertaken efforts to prevent financial exploitation of seniors in the form of legislation that exempts financial institutions from civil and administrative liability for reporting such potential exploitation to governmental agencies. On May 24, 2018, President Donald Trump signed the "Economic Growth, Regulatory Relief, and Consumer Protection Act," which included a provision titled the "Senior Safe Act."[43] Under the Senior Safe Act, institutions are exempt from civil and administrative liability if they (1) report potential exploitation of a senior citizen to regulatory or law-enforcement agencies in good faith and with reasonable care and (2) provide certain training to its employees related to the suspected financial exploitation of a senior citizen.[44] The federal legislation is broader than both the Act and FINRA 2165 in that it would apply to banks, credit unions, insurance companies, and insurance agencies.[45] However, it does not *require* any such reporting nor does it provide a mechanism for delaying distributions as set forth in the Act, NASAA's model, and the FINRA rules.

Thoughts from the ASC and the Industry

Obviously, prevention of financial exploitation of seniors and other vulnerable adults is an area of great concern to the general public, regulators and regulated industries. In Alabama, the securities industry is regulated by the Alabama Securities Commission. As noted above, the ASC is led by Director Joseph P. Borg, who has been director of the ASC since 1994. Director Borg sat down with the authors of this article for a discussion of the Act and related issues. In addition to Director Borg, the authors spoke with John Cronin, the former securities director in the Vermont Department of Financial Regulation and the head of State Government Relations with LPL Financial.

As noted above, Alabama was the first state to enact a statute that *required* brokerage firms to report potential financial exploitation. Director Borg explained the reasoning behind this mandatory reporting requirement: "In our state, it is mandatory for physicians to report physical abuse and it is mandatory for hospitals and assisted living homes to report physical abuse, so why would we take the position that financial exploitation is not as important as someone falling out of a bed or being abused by somebody in their family?" These sentiments were echoed by the co-sponsor of the Act, Senator Arthur Orr (R), 3rd District, who stated at the time of the Act's passage that "[w]e should do everything we can to thwart any efforts of those who would seek to prey upon the elderly and steal their hard earned savings."[46]

With respect to the Act's requirements from an industry member's perspective, LPL's Cronin noted that he views the Act "as a tool for the financial services industry to work with government entities" and further as a "collaboration enabling a proactive approach to protecting seniors and vulnerable adults from financial exploitation, which is critical as our population ages." Stated differently, both firms and regulators have a vested interest in protecting investors from exploitation. And the Act provides one means of working together to accomplish that goal.

Director Borg also commented on the number of incidents that have been reported to the ASC since the Act went into effect on August 1, 2016. He remarked that after the industry became accustomed to the new law, the ASC began receiving about "ten to twelve reports a month on average. And of that, nine out of twelve are usually resolved pretty quickly." Cronin's experience since the Act went into effect has led him to find that "the reporting mechanism ASC built into the statute creates an efficient system that allows firms to report and yet remain focused on protecting investors."

Regarding the types of matters the ASC has seen reported, Director Borg further noted that "the majority of the issues reported to the [Alabama Securities Commission] stem from family members. One thing we often hear is a family member saying 'well, I've been taking care of her or him for so long, I'm going to get this anyway, so I just took some now.'" Of course, when such actions are taken without authorization or against the will of a senior or other vulnerable client, they constitute exploitation.

Finally, Director Borg also highlighted several steps taken by the ASC to aid firms in their efforts to comply with the Act. As an initial matter, Director Borg reported that the ASC is ready, willing and able to conduct trainings and information sessions for member firms and qualified individuals. The ASC has provided in-depth trainings throughout the state on compliance with the Act and coupled these with discussion regarding hot topics on the regulatory landscape. Director Borg further noted that the ASC is more than willing to work with Alabama attorneys to conduct such seminars for law firms and their clients. Cronin has attended a training conducted by the ASC on this issue and notes that "the training was very well received by our Alabama advisors." Attorneys who are interested in learning more or in organizing such training for the benefit of their clients are encouraged to reach out directly to the ASC.

In a further effort to educate the public and regulated entities, the ASC has adapted and issued 21 pages of guidelines originally developed by NASAA's Seniors Committee in an effort "to provide broker-dealers and investment advisers doing business in Alabama with useful information related to the detection, reporting, and mitigation of senior financial exploitation."[47] In addition to the guidelines that walk through the various obligations imposed by the Act, the ASC drafted a rather straightforward reporting form for use in making the required disclosures.[48] Director Borg recommended that firms familiarize themselves with the form and utilize it when reporting to the ASC and DHR.

Conclusion

As the press release accompanying the passage of the Act states, the Act is intended to be "a powerful mechanism to help ensure that the investment community . . .

will report suspicious financial activity involving any vulnerable Alabama adult who is exposed to dishonest or illegal actions that could jeopardize their long-term financial well-being."[49] And with the passage of the Act, "Alabama is leading the nation in its efforts to protect seniors and vulnerable adults through its innovative reporting system, which makes it easier to report concerns which is essential when we want to protect our loved ones as they age," said Cronin. Accordingly, brokerage firms and attorneys advising the same must familiarize themselves with the Act and the requirements it sets forth. Moreover, the recent attention given this issue by legislatures and regulators should provide ample incentive to keep apprised on developments in an effort to protect vulnerable clients from financial exploitation. ▲

Endnotes

1. *See* Ala. Code, § 8-6-170, et seq. (2016).
2. For purposes of this article, "brokerage firms" encompasses the Act's use of the terms "broker-dealer" and "investment adviser."
3. *See* Ala. Code, § 8-6-171(10).
4. *See* Alabama Securities Commission, *Protecting Vulnerable Adults from Financial Exploitation: A Guide for Alabama Broker-Dealer and Investment Advisor Firms*, hereinafter the "ASC Guide," p. 2. Retrieved from *http://asc.alabama.gov/Acts/Guidelines%20ALA%20CODE%208-6-170%20et%20seq.pdf*.
5. *Id.*at p. 4.
6. *Id.* at pp. 4-5.
7. *Id.* at p. 5.
8. *Id.*
9. *See* Ala. Code, § 8-6-171(5).
10. *See* ASC Guide, p. 9.
11. Pursuant to the Act, broker-dealers, investment advisers and "qualified individuals" are subject to these reporting requirements. Notably, banks are *not* subject to these reporting requirements.
12. *See* Ala. Code § 8-6-172. Notably, while prior statutes had *permitted* firms to report potential abuse, Alabama was the first state to *mandate* such reporting.
13. The "Alabama Securities Commission and Department of Human Resources Report of Adult Suspected to be Financially Exploited" can be found on both the ASC, (*www.asc.alabama.gov*) and DHR (*www.dhr.alabama.gov*) websites.
14. *See* Ala. Code § 8-6-174.
15. *Id.*
16. *See* Ala. Code § 8-6-176.
17. *Id.*
18. *See* ASC Guide, p. 16.
19. *See* Ala. Code § 8-6-176(b).
20. *Id*.
21. *See* Ala. Code § 8-6-173, 8-6-175 and 8-6-177.
22. *See* ASC Guide, p. 19.
23. *See NASAA Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation*, hereinafter the "NASAA Model Act." Retrieved from *http://serveourseniors.org/wp-content/uploads/2015/11/NASAA-Model-Seniors-Act-adopted-Jan-22-2016.pdf*.
24. Alabama Securities Commission (April 18, 2016), *Alabama Legislature Passes Bill to Help Protect Vulnerable Adults* [Press release]. Retrieved from *http://asc.alabama.gov/News/2016%20News/4-18-16%20Protection%20of%20Vulnerable%20Adults%20Act%202016.pdf*.
25. NASAA Model Act, § 5.
26. *See* Ala. Code § 8-6-175.
27. *See NASAA Model Legislation to Protect Vulnerable Adults from Financial Exploitation: Legislative Text & Updated Commentary for 2018 Legislative Session*. Retrieved from *http://serveourseniors.org/wp-content/uploads/2017/12/NASAA-Model-Act-and-Updated-Commentary-for-2018-Session.pdf*.
28. MO Rev Stat § 409.610 (2016).
29. *See, e.g.*, N.D.C.C. § 10-04-08.5 (2017).
30. FINRA Rule 2165(a)(1).
31. *Id*. at § (b)(1).
32. FINRA Regulatory Notice 17-11 (March 2017). Retrieved from *https://www.finra.org/sites/default/files/Regulatory-Notice-17-11.pdf.*
33. FINRA Rule 4512 § (a)(1)(F).
34. *Id*. at § (b)(1)(C).
35. *Id*. at §§ (b)(1)(B) and (b)(2).
36. *Id*. at § (b)(3).
37. *Id*. at § (d).
38. *Id*. at § (c).
39. *See id.*, Supplementary Material: 01 Applicability of Rule.
40. FINRA Regulatory Notice 15-37 (October 2015). Retrieved from *http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf*.
41. FINRA (April 20, 2015), *FINRA Launches Toll-Free FINRA Securities Helpline for Seniors* [Press release]. Retrieved from *https://www.finra.org/newsroom/2015/finra-launches-toll-free-finra-securities-helpline-seniors*.
42. *See Report on the FINRA Securities Helpline for Seniors™*. Retrieved from *http://www.finra.org/sites/default/files/Securities_Helpline_for_Seniors_Report.pdf*.
43. S.2155, 115th Congress (2017-2018).
44. *Id*. at § 303(a)(2) and § 303(b).
45. *Id*. at § 303(a)(1)(D).
46. *See* supra note 23, quoting Senator Arthur Orr.
47. *See* ASC Guide, generally.
48. *See Alabama Securities Commission and Department of Human Resources Report of Adult Suspected to be Financially Exploited*. Retrieved from *http://asc.alabama.gov/Act_2016-141_Reporting_Form.aspx*.
49. *See* supra note 23, quoting Director Joseph P. Borg.

Joshua D. Jones

Josh Jones is a principal with Bressler, Amery & Ross PC in Birmingham. He received his undergraduate degree from the University of Alabama and is a graduate of Washington and Lee University School of Law. Jones focuses his practice in the defense of brokerage firms and financial institutions against claims asserted by their customers and employees. He is also a member of the firm's senior issues: counseling and litigation defense group.

W. Preston Martin

Preston Martin is a principal with Bressler, Amery & Ross PC in Birmingham in the securities practice group. He received his J.D. from the University of Georgia School of Law and his B.B.A. from the University of Georgia. In addition to defending brokerage firms and financial institutions, Martin has an estate-planning practice and is a member of the firm's senior issues: counseling and litigation defense group.

ALABAMA'S *DAUBERT* AMENDMENT: An Overview of the Current State of the Law and Resources for the Practitioner

By Terrence W. McCarthy and Brooke G. Malcom

Introduction

As most Alabama lawyers know, the Alabama Supreme Court amended Rule 702 of the *Alabama Rules of Evidence* effective January 1, 2012 to adopt a *Daubert*-based standard for the admissibility of expert scientific evidence. Before this amendment, the Alabama legislature had amended *Ala. Code* § 12-21-160 to adopt the *Daubert* standard for expert scientific evidence. To ensure consistency, the Alabama Supreme Court followed the legislature with the amendment to Rule 702.

Professor Robert Goodwin, who serves as the reporter to the advisory committee on the *Alabama Rules of Evidence*, provided an excellent overview of the new *Daubert* standard in an article published in the May 2012 edition of this publication.[1] Professor Goodwin's article has been, and remains, a "must read" for any lawyer who deals with expert witnesses in Alabama state courts. While this article will hit some highlights of the *Daubert* rule, those not familiar with this standard should consult Professor Goodwin's article.

The *Daubert* amendment was on the books for more than five years before any substantive Alabama appellate decisions were issued on the amendment. On February 10, 2017, the silence ended when the Alabama Court of Criminal Appeals addressed the *Daubert* amendment in *Payne v. State*, CR-15-0225, 2017 WL 543151 (Ala.

Crim. App. Feb. 10, 2017) (not yet released for publication). The Alabama Supreme Court followed on July 7, 2017 with *Mazda Motor Corp. v. Hurst*, No. 1140545, 2017 WL 2888857 (Ala. Jul. 7, 2017) (not yet released for publication). In both cases, the appellants challenged the rulings of the trial courts under *Daubert*. The trial courts' decisions were affirmed.

Because most cases are resolved before they reach the appellate stage, these two appellate decisions are just the tip of the *Daubert* amendment iceberg. Without question, Alabama lawyers and judges frequently wrestle with the *Daubert* amendment and encounter issues that are not covered in these opinions. This article will address the current status of the *Daubert* amendment based on the *Payne* and *Hurst* decisions, and will outline practical considerations for Alabama attorneys when confronting the *Daubert* amendment.

A Brief Overview Of *Ala. R. Evid.* 702 and the *Daubert* Standard

The *Alabama Rules of Evidence* had an effective date of January 1, 1996.[2] The version of Rule 702 at that time, entitled "Testimony by Experts," read as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[3]

The original Rule 702 contained several requirements for expert testimony that remain in effect today. First, as was the case at common law before the passage of the rules of evidence, any expert witness must be qualified.[4] The drafters of Rule 702 advised that "[t]he applicable law on this subject should remain largely as it was before the adoption of Rule 702. For example, under Rule 702 'qualification' should continue to be defined broadly, so that one may gain an expertise through practical experience as well as through formal training or education."[5]

Second, the original Rule 702 specified that expert testimony must "assist the trier of fact."[6] While the phrase "assist the trier of fact" was not new to Alabama, the passage of Rule 702 "change[d] the focus from whether the subject of the testimony is beyond common understanding to whether the expert's opinion or testimony will assist the trier of fact."[7] While experts historically were "permitted to give opinions only upon subjects that [were] held to be beyond the understanding of the average layperson," the passage of Rule 702 made it "possible that an expert opinion or testimony on a question of common knowledge would be admitted by the trial judge as helpful to the trier of fact."[8]

Third, the original Rule 702 provided that an expert could testify in the form of an opinion "or otherwise."[9] The use of the term "or otherwise" recognized the ability of an expert to give testimony "in non-opinion form."[10] For example, "'an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.'"[11]

These original Rule 702 provisions remain unchanged and are still in effect today with one caveat: today, they are contained in Rule 702(a), which became necessary with the passage of Rule 702(b) effective January 1, 2012.

While experts often base their opinions on scientific tests, the original Rule 702 did "not undertake to answer the question whether such tests possess sufficient reliability to be admissible."[12] As dictated by years of Alabama case law, that question was answered by using the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under that standard, "[s]cientific tests are admissible only when they have gained general acceptance in the particular field."[13] More specifically, the *Frye* standard applied to underlying principles or techniques that were both "novel" and "scientific."[14] Thus, the *Frye* standard imposed an additional hurdle for "novel scientific" expert testimony, and it remained in effect after the passage of Rule 702 even though it was not explicitly mentioned in the text of the rule.

Around the time the original Alabama advisory committee was drafting the *Alabama Rules of Evidence*, the United States Supreme Court decided the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Generally speaking, *Daubert* abrogated

the *Frye* test for scientific expert evidence in federal courts. *Daubert* instructed that the trial court is to serve as the "gatekeeper" for scientific expert evidence, and in that role, the trial court must assess whether the techniques used by the expert are both relevant and reliable. In performing this analysis, the United States Supreme Court identified the following non-exclusive factors the trial court may consider: (1) whether the expert's theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether the technique or theory is generally accepted within the relevant scientific community; (4) the known or potential rate of error of the technique or theory when applied; and (5) the existence and maintenance of standards controlling application of the technique.[15]

The issue in *Daubert* was the admissibility of "scientific" expert testimony. The decision did not address expert testimony in the form of "technical" or "other specialized knowledge." Approximately six years later, in *Kumho Tire Co., Ltd., et al. v. Carmichael*, 526 U.S. 137 (1999), the United States Supreme Court held that the *Daubert* standard applies to all forms of expert testimony in the federal courts.[16]

While many states quickly followed the lead of the federal courts and adopted the *Daubert* standard for some or all expert testimony, Alabama did not. The exception is that, in 1994, the Alabama legislature adopted *Ala. Code* § 36-18-30, which adopted *Daubert* as the test for the admissibility of scientific expert testimony based on DNA analysis. *Frye*, however, remained the standard in Alabama for the admissibility of all other expert testimony that was considered novel and scientific.

This changed with the Alabama Supreme Court's order dated November 29, 2011. This order, which added Rule 702(b), adopted *Daubert* as the standard in place of *Frye* for most scientific expert testimony. The text of Rule 702 is as follows:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

(b) In addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if:

1. The testimony is based on sufficient facts or data;
2. The testimony is the product of reliable principles and methods; and
3. The witness has applied the principles and methods reliably to the facts of the case.

The provisions of this section (b) shall apply to all civil state-court actions commenced on or after January 1, 2012. In criminal actions, this section shall apply only to non-juvenile felony proceedings in which the defendant

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

After describing each physician's background, qualifications and testimony at trial, the court of criminal appeals concluded that the trial court fully complied with the requirements of Rule 702(b), and did not abuse its discretion in allowing the physicians to give their expert opinions.

was arrested on the charge or charges that are the subject of the proceedings on or after January 1, 2012. The provisions of this section (b) shall not apply to domestic-relations cases, child-support cases, juvenile cases or cases in the probate court. Even, however, in the cases and proceedings in which this section (b) does not apply, expert testimony relating to DNA analysis shall continue to be admissible under *Ala. Code* 1975, § 36-18-30.

(c) Nothing in this rule is intended to modify, supersede or amend any provisions of the Alabama Medical Liability Act of 1987 or the Alabama Medical Liability Act of 1996 or any judicial interpretation of those acts.[17]

For a detailed description of what Rule 702(b) changed, as well as what it did not change, please consult Professor Goodwin's article.

The Rule 702(b) Appellate Decisions

The Alabama legal community waited more than five years for the first substantive appellate decisions interpreting Rule 702(b), but the wait is over. At the time of this writing, two substantive decisions have been issued by Alabama appellate courts, which we address in turn.

Payne v. State:

In *Payne*, the defendant was convicted of intentional murder of his infant daughter, and he argued on appeal that the trial court erred in admitting the medical causation testimony of five physicians who either treated or performed an autopsy on the small child. All five physicians testified that the child's injuries were not consistent with the defendant's testimony that the child fell from a bed. The defendant moved in limine to bar the State of Alabama from eliciting testimony or offering any evidence '"regarding the scientific probability of certain injuries sustained by the alleged victim.'"[18] After each physician was questioned by defense counsel on voir dire, the trial court denied the defendant's motion in limine. After describing each physician's background, qualifications and testimony at trial, the court of criminal appeals concluded that the trial court fully complied with the requirements of Rule 702(b), and did not abuse its discretion in allowing the physicians to give their expert opinions.

After setting forth the basic facts of the case, the *Payne* decision gives an overview of the *Daubert* standard, relying on the text of Rule 702(b), the advisory notes and decisions from other jurisdictions. The opinion also gives a very general description of each expert, along with a description of why the trial court allowed each expert to testify. The appellate court's analysis in which it applied the *Daubert* standard to the facts of the case, however, is limited to this one paragraph:

> Whether a witness is qualified to testify as an expert is a question within the sound discretion

of the trial court. *See Lockhart v. State*, 163 So.3d 1088, 1156 (Ala. Crim. App. 2013). As detailed above, the five physicians all testified extensively concerning their qualifications and experience and their basis of knowledge for their opinions. It is clear that the circuit court fully complied with the requirements of newly amended Rule 702, *Ala. R. Evid.*, and properly determined that the experts' testimonies were reliable. The circuit court did not abuse its discretion in allowing the five physicians to state their expert opinions concerning whether J.P.'s extensive injuries were the result of a fall from a bed.[19]

While the analysis in the *Payne* decision was fairly limited, one takeaway seems clear: the passage of Rule 702(b) has not changed the fact that Alabama appellate courts give trial courts great discretion in deciding whether an expert is competent to testify. It is also noteworthy that the *Payne* decision gives additional guidance on the "factors" a court may consider in performing the Rule 702(b) analysis. First, the *Payne* decision lists factors from the actual *Daubert* case: "(1) whether the expert's theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether the technique or theory is generally accepted within the relevant scientific community; (4) the known or potential rate of error of the technique or theory when applied; and (5) the existence and maintenance of standards controlling application of the technique."[20] The court also listed other factors that other courts sometimes consider in determining reliability under Rule 702(b), including whether: "(1) the expert's testimony is prepared solely in anticipation of litigation, or is based on independent research; (2) the expert's field of expertise/discipline is known to produce reliable results; (3) other courts have determined that the expert's methodology is reliable; and (4) non-judicial uses for the expert's methodology/science."[21]

Mazda Motor Corp. v. Hurst:

As addressed above, Rule 702(b) applies only to "scientific" expert testimony, and the issue of what is "scientific" was addressed by the Alabama Supreme Court in 2017. In *Hurst*, the plaintiffs sued Mazda under the Alabama Extended Manufacturer's Liability Doctrine, alleging the fuel system of the Mazda vehicle was defectively designed. Mazda filed a pre-trial motion in limine to preclude the testimony of the plaintiffs' design engineering expert, Jerry Wallingford, contending that Wallingford did not satisfy Rule 702(b). The trial court accepted the plaintiffs' argument that Wallingford's opinions did not involve scientific evidence, so Wallingford was not held to the Rule 702(b) standard.

During Wallingford's direct examination, the word "scientific" was used four times. He mentioned utilizing the "scientific method" three times, and the fourth time he agreed that he had "uncontrovertible scientific evidence" to support his opinions. The jury returned a substantial verdict against Mazda. On appeal, Mazda argued that Wallingford, by referencing "scientific" multiple times in his testimony, held himself out as being a scientific expert, so he should have been held to the scientific standard of Rule 702(b).

The Alabama Supreme Court acknowledged that "[s]ome authorities support Mazda's position."[22] For example, the court referenced Professor Robert Goodwin's article which, quoting the actual *Daubert* case, observed that "the trial court must determine whether proferred expert testimony *purports* to be scientific."[23] The Alabama Supreme Court also analyzed the Eleventh Circuit case of *Michigan Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915 (11th Cir. 1998), in which the expert witness was held to the scientific *Daubert* standard after he held himself out as an expert in fire sciences.[24]

Ultimately, the Alabama Supreme Court rejected Mazda's argument and held that it was not error for the trial court to refuse to apply Rule 702(b) to Wallingford's testimony. While the Alabama Supreme Court did not necessarily reject the premise that holding oneself out as a scientific expert could require the application of *Daubert*, it found that the trial court did not err by concluding that line was not crossed. In reaching this conclusion, the court made several observations. First, the court referenced the longstanding concept that whether an expert should be allowed to testify is left to the sound discretion of the trial court, whose decision will not be disturbed absent an abuse of

discretion.[25] Second, the court indicated that Wallingford's scientific references were "sparse and insignificant," as the word "scientific" was used in Wallingford's testimony a total of four times over 230 pages of record testimony.[26] Third, the court emphasized that overall his testimony was based on his specialized knowledge and experience, as opposed to a scientific theory, principle, methodology or procedure.[27] Finally, the court did not want to substitute the trial court's discretion for a "blanket" and "rigid rule" that would call for the application of Rule 702(b) anytime an expert uses the word "science" in his or her testimony.[28]

The Current Landscape of Rule 702(b)

Although there are only two substantive appellate decisions interpreting Rule 702(b) at the time of the writing of this article, Alabama trial judges and attorneys confront the rule on a regular basis. The appellate courts will continue to interpret Rule 702(b) and answer questions that are currently unknown. The remainder of this article focuses on some issues the authors have seen based on first-hand experience and discussions with attorneys and judges.

How do we know if the expert's testimony is "scientific?"

Rule 702(b) applies to expert testimony only if it is "based on a scientific theory, principle, methodology or procedure."[29] Thus, Rule 702(b) does not apply to expert testimony based on "technical" or "other specialized knowledge." Deciding whether a particular expert's testimony is or is not scientific is a difficult issue for Alabama judges and lawyers. "Scientific" is not defined in Rule 702, and, after decades of applying the *Frye* standard (which applied only to novel scientific testimony), it is "apparent that Alabama courts have not attempted to narrowly define the phrase 'scientific test or experiment,'" but rather "have been content to determine on a case-by-case basis whether proffered testimony implicates a scientific test or experiment."[30]

The *Hurst* decision illustrates how the question of whether expert testimony is based on science can be a difficult one. The expert at issue in *Hurst* was an engineer, and one would be hard pressed to find a dictionary definition of "engineering" that does not include some form of the word "science."[31] Thus, the defendant's argument to apply Rule 702(b) had some support even if the expert had not used the word science in his trial testimony. Both the trial court and the Alabama Supreme Court, however, found that Rule 702(b) did not apply.

That leads to the obvious question: how can courts and lawyers determine whether expert testimony is "scientific" or not? There are two resources that should help in determining whether a particular expert's testimony is or is not scientific. First, Alabama courts followed the *Frye* standard for decades in determining the admissibility of "novel scientific" evidence. Thus, "[p]revious judicial authority developed under the *Frye* standard regarding whether expert testimony is, or is not, 'scientific' should remain instructive–if not controlling–for determining whether expert testimony is scientific and subject to the *Daubert*-based admissibility standard."[32]

A second resource is federal decisions handed down after *Daubert*, but before the *Daubert* rule was extended to include all (i.e., including non-scientific) expert testimony.[33] When *Daubert* was decided in 1993, most federal courts initially applied its holding–as *Ala. R. Evid.* 702(b) does now–exclusively to "scientific" evidence. Six years later, in *Kumho Tire*, the United States Supreme Court extended the *Daubert* standard to all expert testimony proffered under *Fed. R. Evid.* 702. Thus, federal decisions during that six-year window can be instructive, as federal courts were faced–as Alabama courts are now–with determining whether proffered expert testimony was or was not "scientific."[34]

Does Rule 702(b) apply in medical malpractice cases?

As Professor Goodwin outlined in his 2012 overview of Rule 702(b), it is not entirely clear what role Rule 702(b) plays in medical malpractice cases even though the amended Rule 702 states that "[n]othing in this rule is intended to modify, supersede, or amend any provisions of the Alabama Medical Liability Act of 1987 or the Alabama Medical Liability Act of 1996 or any judicial interpretation of those acts."[35]

The Alabama Medical Liability Act ("AMLA") generally requires

the plaintiff in a medical malpractice case to offer standard of care expert testimony from a "similarly situated health care provider."[36] As Professor Goodwin referenced in his article, satisfying this AMLA statute requirement does not automatically mean the testimony is admissible. The Alabama Supreme Court held in *Holcomb v. Carraway*, 945 So. 2d 1009 (Ala. 2006), that a trial court may still exclude standard-of-care expert testimony from a similarly-situated health care provider under Rule 702. The *Holcomb* decision was issued before the adoption of Rule 702(b).

At first glance, it seems obvious that the *Daubert* standard would not apply to standard-of-care expert testimony in a medical malpractice case because Rule 702(c) explicitly states that "[n]othing in this rule is intended to modify, supersede, or amend any provisions of [AMLA] …" As Professor Goodwin explained, however, Rule 702(c) also states it is not intended to "modify, supersede, or amend" any "judicial interpretation" of AMLA, which would include the *Holcomb* decision. The *Holcomb* decision states that "'the *Alabama Rules of Evidence* continue to apply to the trial court's determination of who is allowed to testify as an expert witness,'" which means one might conclude that the new Rule 702(b) would also apply.[37]

Professor Goodwin concluded that "Rule 702(c) appears to preclude the imposition of the *Daubert* test in any AMLA actions because to do so would constitute a modification or amendment of the AMLA, and is prohibited by the language of the amendment itself."[38] To date, the Alabama Supreme Court has not addressed this issue.

Does your type of case trigger Rule 702(b)?

The Alabama bench and bar should remember that Rule 702(b) does not even apply in certain cases. Specifically, the *Daubert* standard does not apply to domestic-relations cases, child-support cases, juvenile cases or cases in the probate court. In criminal actions, the *Daubert* standard applies "only to non-juvenile felony proceedings."[39]

Does your case satisfy the "effective date" test of Rule 702(b)?

Rule 702(b) actually has its own effective date written into the rule. Whether the *Daubert* amendment applies depends on when the action was commenced. Rule 702(b) states that its provisions "shall apply to all civil state-court actions commenced on or after January 1, 2012. In criminal actions, this section shall apply only to non-juvenile felony proceedings in which the defendant was arrested on the charge or charges that are the subject of the proceedings on or after January 1, 2012."[40]

By contrast, several amendments were made to the *Alabama Rules of Evidence* in 2013, and these amendments apply in any "proceeding" begun on or after October 1, 2013 without regard to when the action was actually filed. A "proceeding" for purposes of the amendments is understood to be a proceeding at which evidence is to be presented. Thus, for example, if a civil lawsuit was filed on

Rule 702(b) applies to expert testimony only if it is "based on a scientific theory, principle, methodology or procedure." Thus, Rule 702(b) does not apply to expert testimony based on "technical" or "other specialized knowledge."

September 1, 2010 and the trial is set to take place on September 1, 2018, the 2013 amendments would apply.[41] Rule 702(b), however, would not apply because the action was commenced prior to January 1, 2011.

Is a *Daubert* hearing required?

The authors are not aware of any Alabama case law establishing that a *Daubert* hearing is required every time a party invokes a *Daubert*-type objection. Most federal courts do not *require Daubert* hearings; instead, the trial court is vested with the discretion of whether to conduct a *Daubert* hearing.[42]

Conclusion

The *Payne* and *Hurst* decisions are the latest illustrations that Alabama appellate courts give trial courts great discretion in deciding whether an expert is competent to testify. Questions remain governing Alabama appellate courts' treatment of the *Daubert* standard and how it will be interpreted and applied. ▲

Endnotes

1. *See* Robert J. Goodwin, *An Overview of Alabama's New Daubert-Based Admissibility Standard*, 73 Ala. Law. 196 (May 2012).
2. Ala. R. Evid. 1103.
3. Ala. R. Evid. 702 (as originally enacted).
4. Ala. R. Evid. 702 (as originally enacted).
5. Ala. R. Evid. 702, Adv. Comm. Notes.
6. Ala. R. Evid. 702 (as originally enacted).
7. Ala. R. Evid. 702, Adv. Comm. Notes.
8. *Id*.
9. Ala. R. Evid. 702 (as originally enacted).
10. Ala. R. Evid. 702, Adv. Comm. Notes.
11. *Id*. (quoting Fed. R. Evid. 702 advisory committee's note).
12. Ala. R. Evid. 702, Adv. Comm. Notes.
13. *Id*.
14. Charles W. Gamble, Terrence W. McCarthy, & Robert J. Goodwin, *Gamble's Alabama Rules of Evidence*, § 702, Practice Pointer 5 (3d ed. 2014).
15. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-95 (1993).
16. *Kumho Tire Co., Ltd., v. Carmichael*, 526 U.S. 137, 147 (1999).
17. Ala. R. Evid. 702.
18. *Payne v. State*, CR-15-0225, 2017 WL 543151, at * 3 (Ala. Crim. App. Feb. 10, 2017) (not yet released for publication).
19. *Payne*, 2017 WL 543151, at *11.
20. *Id.* at *4 (internal cites and quotes omitted).
21. *Id.* (quoting *State ex rel. Montgomery v. Miller*, 321 P.3d 454, 464 (Ariz. 2014)).
22. *Mazda Motor Corp. v. Hurst*, No. 1140545, 2017 WL 2888857, at *9 (Ala. Jul. 7, 2017) (not yet released for publication).
23. *Id*. (quoting Robert J. Goodwin, *An Overview of Alabama's New Daubert-Based Admissibility Standard*, 73 Ala. Law. 196, 1999 (May 2012) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)).
24. At the time the *Michigan Millers* case was decided, many federal courts applied the *Daubert* analysis to scientific experts only. In *Kumho Tire*, the United States Supreme Court extended the *Daubert* analysis to all expert testimony in federal courts.
25. *Mazda Motor Corp.*, 2017 WL 2888857, at *13.
26. *Id*.
27. *Id*. at *11.
28. *Id*. at *13.
29. Ala. R. Evid. 702(b).
30. *See* Robert J. Goodwin, *Fifty Years of* Frye *in Alabama: The Continuing Debate over Adopting the Test Established in* Daubert v. Merrill Dow Pharmaceuticals, Inc., 35 Cumb. L. Rev. 231, 245-46 (2005).
31. *See e.g.*, Merriam-Webster (defining "engineering" in part as "the application of science and mathematics by which the properties of matter and the sources of energy in nature are made useful to people.").
32. *Gamble's*, at §702. Practice Pointer 11. In his 2005 *Cumberland Law Review* article discussing the *Frye* standard in Alabama, Professor Robert Goodwin provided a helpful discussion of Alabama cases decided under the *Frye* mantle of "novel scientific test or experiment." Careful lawyers can review those cases, and decide whether they lend support to an argument that a particular expert's testimony is or is not scientific.
33. "Alabama courts hold federal decisions in interpreting the *Federal Rules of Evidence* as persuasive authority in interpreting the *Alabama Rules of Evidence*." Charles W. Gamble, Terrence W. McCarthy and Robert J. Goodwin, *Gamble's Alabama Rules of Evidence*, § 102 (3d ed. 2014); *see Ex parte Billups*, 86 So. 3d 1079, 1085, n. 4 (Ala. 2010); *see also*, Ala. R. Evid. 102, advisory committee's note ("The committee assumes, consequently, that cases interpreting *Federal Rules of Evidence* will constitute authority for construction of the *Alabama Rules of Evidence*.").
34. *See, e.g.*, *Michigan Millers*, 140 F.3d at 920 (noting that the expert witness "held himself out as an expert in fire sciences and testified that he could determine the origin of the fire through the knowledge of the science of fires"); *Carmichael v. Samyang Tire, Inc.*, 131 F. 3d 1433, 1436 (11th Cir. 1997) (holding that the expert's testimony about tire failure was not "scientific").
35. Ala. R. Evid. 702(c).
36. *See* Ala. Code § 6-5-548.
37. *See* Robert J. Goodwin, *An Overview of Alabama's New* Daubert*-Based Admissibility Standard*, 73 Ala. Law. 196, 200 (May 2012) (quoting *Holcomb*, 945 So.2d at 1020).
38. *Id*.
39. Ala. R. Evid. 702(b).
40. *Id*; *see also* Charles W. Gamble, Terrence W. McCarthy and Robert J. Goodwin, *Gamble's Alabama Rules of Evidence*, §§ 702; 1103 (3d ed. 2014).
41. *See* Ala. R. Evid. 1103(b); *see also* Charles W. Gamble, Terrence W. McCarthy and Robert J. Goodwin, *Gamble's Alabama Rules of Evidence*, § 1103 (3d ed. 2014).
42. *See Estate of Barabin v. AstenJohnson Inc.*, 740 F.3d 457, 464 (9th Cir. 2014) (*Daubert* hearings are "commonly used" but "not required"); *Broussard v. Maples*, 535 Fed. Appx 825, 827-28 (11th Cir. 2013) (district court not required to hold *Daubert* hearing).

Terrence W. McCarthy

Terry McCarthy (along with Charles Gamble and Robert Goodwin) is co-author of the Third Edition of *Gamble's Alabama Rules of Evidence* and the forthcoming Seventh Edition of *McElroy's Alabama Evidence*. He is a partner at Lightfoot, Franklin & White in Birmingham, serves on the advisory committee for the *Alabama Rules of Evidence* and has taught evidence courses at Cumberland School of Law, the University of Alabama School of Law and Birmingham School of Law.

Brooke G. Malcom

Brooke Malcom is a partner at Lightfoot, Franklin & White in Birmingham. She defends clients in cases involving personal injury and products liability, as well as complex environmental and toxic tort matters. She serves on the Board of Directors of the Birmingham Bar Association's Volunteer Lawyers Program.

THE LEADERSHIP FORUM: Focus on Personal Mindset Intentionality and Awareness

By Edward M. Patterson

On May 10, at the beautifully restored Florentine Building in downtown Birmingham, Alabama State Bar Executive Director Phillip McCallum welcomed 80 guests to the 14th graduation dinner and ceremony of the Alabama State Bar Leadership Forum. ASB President Augusta Dowd, assisted by President-elect Sam Irby, presented certificates and gifts to the 28 graduates of Class 14. Before dinner, Hare Wynn Newell Newton LLP of Birmingham hosted a cocktail reception. J. Wilson Nash of Birmingham gave the invocation. Dr. Nina N. Bass of Atlanta read a tribute in memory of John W. "Bo" Landrum, former executive director of the Birmingham Bar Association. President Dowd, as guest speaker, challenged each member to take what he or she has learned by looking into their soul to their passions and then leading from the heart. Catherine C. Long and Aaron Chastin of Birmingham gave remarks on behalf of Class 14. A lot of good-natured "pomp and circumstance," earmarked by fun and light-heartedness, accompanied the evening–one this writer will remember.

The frozen chosen

The start of the January orientation session was delayed because of a crippling snow storm that blanketed Montgomery. Ten of the class members made it to Montgomery before the snow storm and were held captive at the Renaissance Hotel as the city shut down. They dubbed themselves "the frozen chosen," and quickly bonded before other classmates arrived the next evening. Class 14 has been thoughtful and engaging, studious and reflective, warm and outgoing. Year after year, the forum brings together men and women who differ in every way, yet have a common desire to grow and change through new learning, application and experience. We balance a demanding curriculum with ample opportunity for social activities.

Class 14 statistics are mostly consistent with past classes. The average age for this group is 36 and admitted to practice an average of 10½ years, with 64 percent of the class being male and 36 percent female (cf: Class 13 was two-thirds female and one-third male). A total of 89 percent were white with 11 percent representing minorities. Total composition of the forum always equals or exceeds the diversity statistics of the bar as a whole. Class 14 represents an 89 percent metropolitan practice with 11 percent non-metropolitan practice. Diversity continues to be balanced among plaintiff and defense practices (36 percent each) with representation in corporate/transactional in-house counsel (11 percent) and government/public service/legal education (17 percent).

Over 14 years, the forum has received 900 applications and accepted 415 attorneys. Forty-six percent of those who applied have been selected. A total of 405 men and women have graduated. The graduation rate over 14 classes beginning in 2005 has been an astounding 98 percent. This speaks to the dedication of those accepted to complete the courses since attendance is mandatory.

In awarding Leadership Forum the 2013 E. Symthe Gambrell Professionalism Award, the nation's highest award for professionalism programs, the American Bar Association commended the forum for its innovative, thoughtful and exceptional content, for its powerful and positive impact on emerging leaders and for the extraordinary example it has established that others might emulate.

With high expectations from applicants who committed a substantial time block to participate in seven days of mandatory sessions over five months, the forum kept

its focus on giving this class practical tools to grow personally and professionally in response to their demand for skills on "how to lead." These skills require intentionality, deliberation and focused attention. With the help of expert faculty, we seek to establish a class norm of engagement, discussion, respectful debate and even disagreement. We are unaware of another state bar-sponsored leadership program that provides a similar curriculum. The program continues to deliver what it promises: the legal profession has a special role in society to cultivate leadership skills by moving from theory to practice, participating in self-discovery and forcing participants to contemplate and learn from the inside out.

Activities and social events were held at various well-known restaurants and venues throughout the state, while a number of firms opened their pocketbooks, as well as their offices, to host and support events of the forum.

The forum is designed to aid participants' development into innovative, critical thinkers equipped to respond to disruptive change. The forum continues to use the Birkman Assessment Tool which we believe is the most effective one for attorneys at this stage of their career. Behavioral psychology and the role of personality in leadership is now a significant portion of the curriculum and are reinforced in each session. At the outset, the class spends a large chunk of time identifying their productive behaviors, their needs or motivations and their unproductive "stress" behaviors. Graduates have almost uniformly agreed that the Birkman is a predictive summary of how they as individuals and in work-units approach communication, conflict and decision-making.

This year's primary faculty included Professors Steve Walton and Michael Sacks of the Goizueta Business School at Emory University, now having completed their sixth year of teaching. Gregory L. Riggs, former vice president and general counsel of Delta Airlines, was added as a major faculty member this year.

For the second year, 14 hours of MCLE credit were approved, including two hours of ethics/professionalism. The program content contained approximately 55 hours. This year's core curriculum consisted of teaching self-awareness, awareness of others and influence without authority; organizational culture; decision-making; leading organizational change; delivering client value; and meeting client

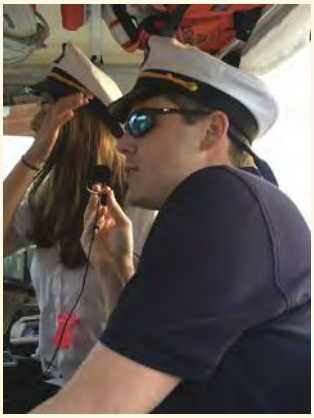
expectations, as well as participants discussing the role of servant leadership and working on solving complex problems involving hypotheticals based on real-life scenarios.

Other faculty members included Major General Michael D. Rothstein, former commander and president, Air University, and commander, Curtis E. LeMay Center for Doctrine Development and Education, Air University, Maxwell AFB; Lt. General (retired) Ronald Burgess, Auburn University Senior Counsel for National Security & Cyber Programs and Military Affairs; Clayton Hornsby, deputy director, Alabama Law Institute; Diandra Debrosse, Zarzaur, Mujumdar & Debrosse LLC; LaVeeda Battle, The Battle Law Firm; Celia J. Collins, Johnstone Adams LLC; M. Kathleen Miller, Armbrecht Jackson LLP; Dawn Wiggins Hare, senior executive, United Methodist Church Commission; Latisha Colvin, Office Federal Public Defender; and Kasee Heisterhagen, Burr &Forman LLP. New topics were added, including "The Lawyer as Masterful Leader: Optimizing Personal Effectiveness, Influence and Success in a Demanding Profession," "Changing the Workplace Culture for Women Attorneys" and "Leadership, Habit, Influence, Value."

Leadership Forum Class 15 begins January 2019. Applications will be available in the summer and class 2019 will be selected in the fall. Consistently the forum has exceeded the expectations of 97 percent of its graduates. In the words of one alumnus who speaks for many, *"The Forum continues to re-invent itself and evolve as the practice of law and the world around us changes. Lawyers have a unique opportunity to impact humanity in meaningful and significant ways. In order for that impact to have the greatest value we must collectively rise above our individual limitations. The sum of the whole must exceed the sum of the parts. That Alabama Leadership Forum is a program that facilitates that outcome every year and in every group without fail."*

The bar's future is bright when it reflects upon the quality of graduates it is producing each year. Finding a way for these remarkable attorneys to give back to the profession is a one of the forum's main priorities.

A graduate of Class 14 sums up the experience for this class: *"I can't say enough about this splendid program and what a remarkable experience the Leadership Forum is and has been. I say so in the present tense because I know the relationships we have forged will last a lifetime."* ▲



(Photograph by FOUTS COMMERCIAL PHOTOGRAPHY, Montgomery, photofouts@aol.com)

LEADERSHIP FORUM 2018
CLASS 14

Evan G. Allen
Beasley, Allen, Crow, Methvin, Portis & Miles PC, Montgomery

Brandon W. Bates
U.S. Attorney's Office, Middle District of Alabama, Montgomery

Casey N. Bates
Alabama Law Enforcement Agency, Montgomery

Gaines B. Brake
Maynard, Cooper & Gale PC, Birmingham

R. Aaron Chastain
Bradley Arant Boult Cummings LLP, Birmingham

Rochelle A. Conley
Law Office of Rochelle A. Conley, Huntsville

Christopher H. Daniel
Sheffield & Lentine PC, Birmingham

Patrick W. Dean
Legislative Services Agency, Montgomery

Brandon J. Demyan
Office of the Senate President Pro Tem, Montgomery

Amandeep S. Kahlon
Bradley Arant Boult Cummings LLP, Birmingham

S. Gaillard Ladd, Jr.
Armbrecht Jackson LLP, Mobile

H. Eli Lightner, II
White Arnold & Dowd PC, Birmingham

Catherine C. Long
Baker Donelson, Birmingham

Allen P. Mendenhall
Thomas Goode Jones School of Law, Montgomery

Tamika R. Miller
Miller Smith LLC, Montgomery

Mary Martin M. Mitchell
Alabama Department of Revenue–Legal Division, Montgomery

J. Wilson Nash
Brasfield & Gorrie LLC, Birmingham

D.G. Pantazis, Jr.
Wiggins, Childs, Pantazis, Fisher & Goldfarb LLC, Birmingham

Russell N. Parrish
Farmer, Price, Hornsby & Weatherford LLP, Dothan

R. Ashby Pate
Lightfoot, Franklin & White LLC, Birmingham

Anna S. Pierson
Crocker & Sparks, Cullman

Stephen C. Rogers
Maynard, Cooper & Gale PC, Huntsville

Andrew R. Salser
Lloyd & Hogan PC, Birmingham

L. Robert Shreve
Burr & Forman LLP, Mobile

Tempe D. Smith
Hare, Wynn, Newell & Newton LLP, Birmingham

Margaret W. Vinsant
Southern Company, Birmingham

Kimberly C. Waldrop
Sasser, Sefton & Brown PC, Montgomery

Elizabeth A. Young
Law Office of Liz Young, Gardendale

FROM THE OFFICE OF GENERAL COUNSEL

Roman A. Shaul

As general counsel, I see my role as that of a resource to our membership.

I hope that I can be a servant to the membership like he (Tony McLain) was and that you will feel comfortable calling on me like so many called on him.

This column generally offers substantive and practical advice concerning issues touching upon ethics and professionalism. However, for my inaugural article as general counsel, I decided to use this space to express my profound appreciation for the opportunity that I have been given to serve our profession and the Alabama State Bar. I will introduce myself to you and give some insights into what informs my view of the world and what I see as my role.

First, thank you to President Augusta Dowd, the entire search committee and the Board of Bar Commissioners for their volunteerism and dedication to the Alabama State Bar and the process of selecting a new general counsel. I also thank Doug McElvy, who graciously served as interim general counsel and kept the office running efficiently and effectively during a difficult time. Doug's guidance and wisdom has been invaluable to my transition.

I was raised in rural Tuscaloosa County and went to undergraduate, graduate and law school at the University of Alabama. Having been born to a 17-year-old mother and 19-year-old father, we did not have much in the way of resources or material belongings, but my parents always worked very hard and often had multiple jobs. And, my three younger brothers and I were always expected to do our part.

The first lawyer I ever met was my freshman year of college when I walked into a local law firm and asked if they were hiring any runners. After law school, I practiced in Tuscaloosa for approximately two years and then at Beasley Allen in Montgomery for 17 years. The last 17 months, I have served as a circuit court judge in Montgomery County and recently won election to a full-term. My wife, Caroline, and I have been married for almost 13 years and we are blessed to have three wonderful daughters–Anne Kingsley (nine), Isabel (eight) and Thompson (one).

I come to this office having been a litigator most of my career. In private practice, I represented insurance companies, small businesses, large corporations, individuals and state governments. I have done title work, oil and gas work and litigation, and handled family law matters and tried criminal cases. I always tried to put my client in the best position based on the facts of the case. To me, this goal never meant treating opposing lawyers like the enemy and gaining ground at all costs. I always tried to establish commonalities early in a case and was mindful that the lawyer on the other side usually had family and professional obligations similar to mine. Like most lawyers, I have had my share of wins and losses, but I tried to be graceful in defeat. Whenever I lost a dispositive motion, trial or appeal, I made it a point to contact opposing counsel and congratulate him or her on the result, and if appropriate, thank them for the compassion they showed my client.

As general counsel, I see my role as that of a resource to our membership. I am here to help you keep your law license. Although I am required to enforce the *Rules of Professional Conduct*, my office will do it fairly and with compassion. What I have found both in practice and in my time on the bench is that if you give lawyers a path and an opportunity to do right, they usually do. I am hopeful that my office can work with you when ethical issues arise in your practice and help you navigate the correct path. Former General Counsel Tony McLain was as beloved a figure in our profession as I have ever known. He was a friend to many and known to be a person whom you could call for sage advice. In my heart, this will always be Tony's office. I hope that I can be a servant to the membership like he was and that you will feel comfortable calling on me like so many called on him. ▲

DISCIPLINARY NOTICES

Notices

- **Thedric Brackett, Jr.,** who practiced in Birmingham and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 30, 2018 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 2016-760 and Rule 20(a), Pet. No. 2017-1218 before the Disciplinary Board of the Alabama State Bar. [Rule 20(a), Pet. No. 2017-1218; ASB No. 2016-760]
- **Malcolm Bailey Conway,** who practiced in Mobile and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 31, 2017 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 2016-1558 before the Disciplinary Board of the Alabama State Bar. [ASB No. 2016-1558]
- **Mollie Hunter McCutchen,** whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of the date of this publication or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB Nos. 2012-1276 and 2013-2046 by the Disciplinary Board of the Alabama State Bar.
- **Leon David Walker, III,** whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of the date of this publication or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 2011-636, 2012-595, 2012-625, 2012-836, 2012-1363, 2012-1760, 2012-1853, 2012-2090, 2012-2241, 2013-112, 2013-710 and 2013-1935 by the Disciplinary Board of the Alabama State Bar.

Reinstatement

- On January 23, 2018, the Supreme Court of Alabama entered an order reinstating former Birmingham attorney **Todd S. Strohmeyer** to the practice of law in Alabama based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar. On October 15, 2012, an order was entered suspending Strohmeyer's license to practice law. [Rule 28, Pet. No. 2017-1405]

Transfers to Inactive Status

- Birmingham attorney **Steven Douglas Eversole** was transferred to inactive status, effective February 1, 2018, by order of the Supreme Court of Alabama.

- Anniston attorney **Nathaniel Davis Owens** was transferred to inactive status, effective February 2, 2018, by order of the Supreme Court of Alabama.

Disbarments

- Birmingham attorney **Thedric Brackett, Jr.** was disbarred from the practice of law in Alabama, effective March 9, 2018. The supreme court entered its order based on the report and order of the Disciplinary Board of the Alabama State Bar, disbarring Brackett after he was found guilty of violating Rules 1.3, 1.4(a), 1.5, 1.16(d) and 8.4(a) and (g), *Ala. R. Prof. C*. In March 2013, Brackett was hired by a client to represent her to probate and take other action with regard to the estate of her deceased mother. The client paid Brackett $1,200 as an attorney fee in the matter. Aside from a single letter to the mortgagee of the property of the estate in April 2013, Brackett took little to no action on behalf of the client prior to August 2014. Bracted told the client that he filed a petition to probate her mother's estate, when, at that time, he had not. Brackett did not, at any time, file a petition or other pleading with the probate court with regard to the client's mother's estate. In August 2014, the client discovered that Brackett still had not filed anything with the probate court on her behalf or in furtherance of the probate of her mother's estate. Thereafter, Brackett failed to respond to the client's calls and texts seeking information about the matter and the client was forced to hire another attorney to represent her in the probate matter. Brackett failed to earn the $1,200 fee and failed to refund the unearned portion of the fee after he was terminated by the client. [ASB No. 2014-1563]

- Birmingham attorney **Minerva Camarillo Dowben** was disbarred from the practice of law in Alabama, effective March 9, 2018. The supreme court entered its order based on the report and order of the Disciplinary Board of the Alabama State Bar, disbarring Dowben after she was found guilty of violating Rules 1.3, 3.2, 8.1(b) and 8.4(d) and (g), *Ala. R. Prof. C*. In September 2013, Dowben filed a 1983 Civil Rights Act suit on behalf of a client. The suit named numerous defendants who each filed motions to dismiss for a failure to state a claim. The court ordered Dowben to file an opposition brief by November 1, 2013. Dowben failed to file any response or otherwise respond to the defendants' motions to dismiss. The court issued Dowben a show cause order on December 23, 2013. Dowben failed to respond to the court's show cause order. On January 15, 2014, the court terminated Dowben as counsel. On February 21, 2014, Dowben filed a motion to show cause, in which she sought the court's permission to continue representing the client. The court granted Dowben's motion. However, Dowben took no other action in the case. [ASB No. 2014-323]

- Theodore attorney **Ronald Ray Goleman, Jr.** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective February 15, 2018. The supreme court entered its order based on Goleman's consent to disbarment wherein he admitted to mishandling and continuing to utilize his trust account while he was suspended from the practice of law. [Rule 23(a), Pet. No. 2018-228; ASB Nos. 2017-503 and 2017-1075]

- Northville, Michigan attorney **Carolyn Tubbs Mardis,** who is also licensed in Alabama, was ordered by the Supreme Court of Alabama on March 9, 2018 to receive the reciprocal discipline of disbarment from the practice of law in Alabama, effective February 12, 2018. Mardis was previously disbarred by the District of Columbia for violating Rules 1.5(b), 1.15(a), 1.7(b)(4), 3.3(a), 8.1(a) and 8.4(b), (c) and (d). Mardis was found guilty of conspiring with others in a fraudulent scheme to unlawfully obtain title to a property that was subject to a tax sale. In addition, Mardis unlawfully took possession of the property owner's personal property, lied to her law firm about her actions and testified falsely under oath in a related civil matter. [Rule 25(a), Pet. No. 2017-1452; ASB No. 2015-243]

(Continued from page 271)

Suspensions

- Cullman attorney **Randy Allan Hames** was interimly suspended from the practice of law in Alabama, effective March 26, 2018. The supreme court entered its order based upon the Disciplinary Commission's order finding probable cause existed that Hames was causing or likely to cause, immediate and serious injury to a client and to the public. Hames was arrested on March 5, 2018 in Cullman County on two counts of human trafficking, second degree. [Rule 20(a), Pet. No. 2018-373]

- Daphne attorney **Russell Foster Bozeman** was summarily suspended pursuant to Rule 20a, *Ala. R. Disc. P.*, from the practice of law in Alabama by the Supreme Court of Alabama, effective February 1, 2018. The supreme court entered its order based upon the Disciplinary Commission's order that Bozeman be summarily suspended for failing to respond to formal requests concerning a disciplinary matter. [Rule 20(a), Pet. No. 2018-159]

- Birmingham attorney **Steven Clyde Reed Brown** was interimly suspended from the practice of law in Alabama, effective February 21, 2018. The supreme court entered its order based upon the Disciplinary Commission's order finding Brown's conduct is continuing in nature and is causing, or likely to cause, immediate and serious injury to a client and/or to the public. Brown was indicted on August 25, 2017 by the grand jury of Jefferson County, wherein he was charged with multiple felony counts of securities fraud. [Rule 20(a), Pet. No. 2018-223]

- Birmingham attorney **George Bondurant Elliott** was suspended from the practice of law in Alabama, effective March 18, 2018, for noncompliance with the 2016 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 17-390]

- Birmingham attorney **Edward Eugene May** was suspended from the practice of law in Alabama for 91 days by order of the Supreme Court of Alabama, effective April 4, 2018. On January 30, 2018, the Disciplinary Commission of the Alabama State Bar issued an order revoking May's probation and imposing a 91-day suspension from the practice of law in Alabama. May violated the terms of his probation by committing a violation of Rules 1.15(a) and (e), *Ala. R. Prof. C.* [ASB No. 2013-2105]

- Montgomery attorney **Joe Morgan Reed** was suspended from the practice of law in Alabama for 91 days, effective March 27, 2018. Reed will be required to 45 days of the suspension, while the remainder will be held in abeyance pending completion of a two-year probationary period. While on probation, Reed must complete the Alabama Practice Management Assistance Program and 150 hours of pro bono service, and obtain 12 hours of additional ethics CLE. The suspension was based upon the Disciplinary Commission's acceptance of Reed's conditional guilty plea, wherein he admitted to filing a legal pleading on behalf of a person with whom he had never met and did not have an attorney-client relationship, in violation of Rule 8.4, *Ala. R. Prof. C.* [ASB No. 2017-363]

- Birmingham attorney **Anna Genevieve Turner** was suspended from the practice of law in Alabama, effective March 18, 2018, for noncompliance with the 2016 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 17-405]

- Tuscumbia attorney **William Jordan Underwood** was interimly suspended from the practice of law in Alabama pursuant to Rules 8(c) and 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective January 11, 2018. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing Underwood's indictment for bribery of a juror. [Rule 20(a), Pet. No. 2018-56]

- Birmingham attorney **Michael Evans Wallace** was suspended from the practice of law in Alabama for two years, with Wallace to serve 90 days by order of the Supreme Court of Alabama, effective March 27, 2018 through June 25, 2018. The suspension was based upon the Disciplinary Commission's acceptance of Wallace's conditional guilty plea, wherein he admitted to violating Rules 1.15(a), (e) and (f), 3.3, 3.4 and 8.4(c), (d) and (g), *Ala. R.* Prof. *C.* While on probation, Wallace must complete the Practice Management Assistance Program and submit monthly trust account reports to the Office of General Counsel. Wallace filed a petition for divorce on January 27, 2016 on behalf of a client. Service was not perfected until July 2016. Thereafter, the defendant failed to file an answer to the petition. However, Wallace failed to move for a default judgment. In December 2016, Wallace was informed by the court that the petition would be dismissed if no answer was filed and he did not move for a default. On January 24, 2017, Wallace filed an application and affidavit for entry of default in the divorce, which is required to be signed by the petitioner and a notary. Wallace forged the signature of his former employee, who was also a notary, and then filed the application with the court. [ASB Nos. 2017-364 and 2017-614] ▲

▲ **Camille Wright Cook**

Camille Wright Cook

Seldom are we graced by someone who fills our lives with joy, excitement, compassion and friendship. Camille W. Cook was one of those special people, and I was honored to be her friend and admirer for more than 44 years.

Camille Wright Cook died on February 20, 2018 surrounded by sons Sydney Cook, Reuben Cook and Cade Cook, daughter Camille Ashley and a host of family members at her home in Tuscaloosa at the age of 93. She was born in Tuscaloosa to Judge Reuben H. Wright and Camille Searcy Wright. She received her bachelor's degree from the University of Alabama (University) in 1944 and her law degree from the UA School of Law in December 1947, a member of what is now respectfully and affectionately known as the "Great Class of 48." Among her graduating class were many future Alabama leaders and distinguished members of the bar, including Senator Howell Heflin, Congressmen Tom Bevill and George Huddleston, U.S. District Judge Bert Haltom, Judge Charles Wright of the Alabama Court of Civil Appeals and Richmond Flowers, a former attorney general.

Following graduation from law school, she married and moved to Auburn, where she taught business law at Auburn University from 1948-68; she joined the faculty of the University of Alabama School of Law in 1968 and was a professor of law from 1978-1993; at the UA School of Law she served many roles, including assistant dean and director of Continuing Legal Education (CLE). In 1990, she received the Outstanding Commitment to Teaching Award; her teaching interests included family law, women and the law, contracts, sex discrimination and children's rights, and her numerous publications reflected those interests. Prior to her retirement in 1993, she served as the John S. Stone Professor of Law.

It was in her capacity as a member of the Admissions Committee at UA School of Law that I first made her acquaintance in 1970. I was accepted for the fall 1971 class and Mrs. Cook's son, Sydney, was my classmate and friend. I needed part-time work to help pay for law school, and Mrs. Cook hired me as one of her student assistants when she assumed CLE responsibilities in early 1972. As director, she was tasked with the responsibility of developing a comprehensive series of seminars to teach Alabama attorneys and judges the new *Alabama Rules of Civil Procedure*, prior to the implementation of those rules in 1973. Professor Cook quietly, quickly and efficiently organized herself and her staff and conducted seminars throughout Alabama on the rules, and completed the job in an outstanding manner.

In addition to her duties as director of CLE, Mrs. Cook also taught and was recognized as one of the effective classroom teachers at UA Law School. She was recognized as a teacher who possessed both academic knowledge and a practical understanding of the law. As lawyers, we all know that respect as a professor is earned, not conferred by virtue of the position. She aspired to establish a courteous and clear, yet challenging, classroom environment in which her students felt comfortable expressing their opinions. She was a passionate, energetic and "hands-on" educator. She was also available to meet with her students, and knew the vast majority of the student body by their first names. She also knew their hometown, undergraduate institution and, often, the names of their parents. She was a wonderful friend and mentor to law students, and routinely went above and beyond what was merely required of her as a professor, and did so because she cared for her students and genuinely wanted to see them succeed. Her teaching excellence was recognized by the University in 1991 when she received the Outstanding Commitment to Teaching Award given by the National Alumni Association.

Mrs. Cook taught her work-study assistants and all the law students she taught and encountered some very important lessons in both life and legal skills: work ethic, integrity and humility.

Mrs. Cook displayed an admirable **work ethic**. I observed the way she conducted business and handled herself. She worked hard, but demanded no more of her student assistants than she did of herself. No job was too small or beneath her dignity–the mission must be accomplished and we were a team to make it happen.

Secondly, working with Camille Cook taught us important lessons about **integrity**. With Mrs. Cook, there were never any shortcuts to a decision, absolutely no ignoring of any inconvenient facts and absolutely no stretching of the truth. She reminded us that we depended on the generosity of the hardworking members of the Alabama State Bar to be our speakers and to provide us well-researched and written seminar handouts. We had to be honest with them and to be above reproach in performing our job, as our actions reflected on her position.

Mrs. Cook's third well-known attribute was **humility**. I think anyone who met her was impressed with the power of her intellect. It would be easy enough for a person with that intellect to conclude that perhaps there were very few others in the law school who might have something to offer to her, to develop some intellectual arrogance, especially if those others included young law students. However, you never got that feeling working with Camille Cook. You never got the feeling that she was just tolerating your opinions–you knew she considered and trusted them. Although confident of her own ability, Mrs. Cook was truly humble in the best sense of the word. I heard her say with pride on more than one occasion that she learned something from every single person who had ever worked with her. Although Mrs. Cook was a "pioneer woman" in a field which was traditionally dominated by men, she never viewed her gender as an obstacle. I once heard her remark, after dealing with a difficult male legal giant over a CLE matter, "the cock may crow, but it's the hen who lays the eggs."

Working for Camille Cook was priceless because she made us a part of her extended family. She shared with us parenting decisions of her four children, Sydney, Reuben, Cade and Little Camille. She knew the joys of their school days, courtships and marriage and loved them deeply.

It also worked the other way, as she always showed an interest in her students and our families. She showed interest in our legal and family futures.

(Continued from page 275)

Many of you may be familiar with a wonderful contemporary Christian song, "Find Us Faithful." In that song, the singer thanks those who have been faithful and lead the way for others. The song has a wonderful chorus:

> *"Oh may all who come behind us find us faithful; May the fire of our devotion light their way; May the footprints that we leave lead them to believe; And the lives we live inspire them to obey."*

Mrs. Cook, on behalf of all the students and lawyers your life has touched, we all thank you for being faithful to the rule of law and Christian principles of life and sharing your talents with others. Thank you for leaving footprints for lawyers to follow.

Thank you, Mrs. Cook, for gracing our life with yours. ▲

–M. Dale Marsh, Marsh & Cotter LLP, Enterprise

Bail, Chaya
Montgomery
Admitted: 1999
Died: March 5, 2018

Balch, Samuel Eason
Birmingham
Admitted: 1948
Died: April 14, 2018

Bryan, Hon. John Newton, Jr.
Birmingham
Admitted: 1955
Died: March 22, 2018

Childs, Robert Fletcher, Jr.
Birmingham
Admitted: 1972
Died: March 27, 2018

Clark, Ronald Linwood, Jr.
Lanett
Admitted: 2000
Died: February 24, 2018

Cosper, Jason Bradley
Mobile
Admitted: 2016
Died: October 6, 2017

Cothren, Robert Anthony
Birmingham
Admitted: 1984
Died: unknown

Durant, Winston Dansford
Montgomery
Admitted: 1976
Died: April 11, 2018

Friedman, Karl Bernard
Birmingham
Admitted: 1948
Died: April 5, 2018

Groover, Lewis Madison, Jr.
Savannah, GA
Admitted: 1968
Died: February 26, 2006

Hartley, Gerald Wade, Jr.
Montgomery
Admitted: 1998
Died: March 27, 2018

Hester, Douglas Benjamin
Silver Spring, MD
Admitted: 1952
Died: March 29, 2018

Landrum, John William
Birmingham
Admitted: 2003
Died: March 8, 2018

Liggan, Charles Jason
Birmingham
Admitted: 2001
Died: March 27, 2018

Nix, Joseph Bethune, Jr.
Evergreen
Admitted: 1950
Died: March 25, 2018

Odum, James Edmund, Jr.
Birmingham
Admitted: 1977
Died: April 12, 2018

Poole, Elisha Calvin
Greenville
Admitted: 1955
Died: March 29, 2018

Sandidge, Hon. Marise Mims
Montgomery
Admitted: 1978
Died: March 30, 2018

LAWYERS RENDER SERVICE:

Record Donations for Regional Food Banks

By Jeanne Dowdle Rasco

June 14 was a good day for Alabama lawyers, and most importantly, Alabama's 390,000 children who receive free and reduced breakfast and lunch during the school year, but do not have a dependable source for food during the summer.

On that date at the Montgomery Area Food Bank, Attorney General Steve Marshall and Alabama State Bar President Augusta S. Dowd announced and celebrated the results and winners of this year's Alabama Legal Food Frenzy. In its third year, the Legal Food Frenzy was its most successful yet. This year's collaborative effort between the Alabama Attorney General's office and the Alabama State Bar raised the equivalent of 240,000 pounds of food for Alabama's eight regional food banks and their 1,500 partner agencies and pantries.

"This is a time when we pause to be grateful for our good fortune and open our hearts and wallets to help our fellow men, women and children who are in need," said Attorney General Steve Marshall. "Food banks in communities across our state perform outstanding work in their mission to strengthen our communities by providing sustenance and dignity to those who suffer from hunger. I thank you all for your donations which will provide vital assistance."

Two years ago, the Alabama Attorney General's Office and the Alabama State Bar joined with the Alabama Food Bank Association

and started the Alabama Legal Food Frenzy to help end child hunger. During the campaign, Alabama's lawyers, law firms and legal organizations compete to see who can raise the most food and funds for Alabama's eight regional food banks.

As explained by President Dowd, "Alabama lawyers live out our state bar's motto, 'Lawyers Render Service,' in daily interactions with their clients and their communities. The Legal Food Frenzy, now in its third year, is a tangible example of the power lawyers have when they work together toward a common service goal: providing support for our fellow Alabamians in need of food assistance. The timing of the Legal Food Frenzy is no accident. When the 390,000 Alabama children who are on free and reduced breakfast and lunch during the school year are out for the summer, they miss their primary source of nutrition. The food collected during the Legal Food Frenzy helps food banks around the state stock food for the summer so that they are ready to assist these children and their families. I am proud of the good work our bar does in support of these efforts, and look forward to seeing how the Legal Food Frenzy continues to grow in response to a very present need."

President-Elect Sam Irby has already committed to supporting next year's Legal Food Frenzy, scheduled for April 22-May 3, 2019.

Jeanne Dowdle Rasco

Jeanne Dowdle Rasco is with the City Attorney's Office in Huntsville and serves as co-chair of the Alabama State Bar Legal Food Frenzy Task Force.

Pictured above with Alabama Attorney General Steve Marshall and Alabama State Bar President Augusta Dowd (front row) are some of the 2018 Legal Food Frenzy coordinators. Left to right are Desiree Alexander, Eric Anderson, Debbie Gregory, Jeanne Dowdle Rasco and Laura Lester. Not pictured is Katherine Church.

ALABAMA LEGAL FOOD FRENZY

This year's winners are:

Most pounds for a sole proprietor

MF Walker Law Group LLC, Birmingham (2,625 pounds)

Most pounds, most pounds per employee for a small firm and winner of the Attorney General's Cup

Isaak Law Firm, Montgomery (38,963 pounds and 3,896 pounds per employee)

Most pounds per employee for a sole proprietor

The Law Office of Desiree Celeste Alexander, Birmingham (2,151 pounds per employee)

Most pounds and most pounds per employee for a large firm

Carr Allison, Birmingham (25,650 pounds and 185 pounds per employee)

Most pounds and most pounds per employee for a legal organization

Alabama Supreme Court Clerk's Office (28,249 pounds and 1,345 pounds per employee)

Most pounds and most pounds per employee for a medium firm

Hill, Hill, Carter, Montgomery (11,190 pounds and 294 pounds per employee)

(Photo not available)

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

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

Caleb Hindman, Legislative Attorney, Legislative Services Agency
chindman@lsa.state.al.us

Legislative Update, Part 2

The May edition of this column covered the Alabama Law Institute legislation that passed during the 2018 Legislative Session. This month serves as installment two and covers other noteworthy legislation. There were 922 bills introduced during the 2018 Legislative Session, of which 314 bills were enacted and became law, and of that total, 261 were general bills. Below are summaries of select general bills that might be of interest to practitioners around the state. Summaries of all of the general acts can be found at *http://lsa.state.al.us* under the Legal Division Publications.

Constitutional Amendments

University of Alabama Board of Trustees (Act 2018-132)

Senator Greg Reed

This proposed constitutional amendment (1) specifies that the University of Alabama Board of Trustees membership consists of two members from each congressional district in the state as constituted on January 1, 2018; (2) removes the state Superintendent of Education from the board; and (3) removes the requirement that a trustee retire from the board at the annual meeting following the trustee's 70th birthday. Effective upon ratification and will be voted on at the November 2018 General Election

State Legislature (Act 2018-276)

Senator Rusty Glover

This proposed constitutional amendment provides that if a vacancy occurs in the state legislature either on or after October 1 of the third year of a quadrennium, the seat shall remain vacant until a successor is elected at the next succeeding general election. Effective upon ratification and will be voted on at the November 2018 General Election

Ten Commandments (Act 2018-389)

Senator Gerald O. Dial

This proposed amendment (1) authorizes the display of the Ten Commandments on state property and property owned by a public school or public body; (2) prohibits the expenditure of public funds in defense of the constitutionality of the amendment; and (3) provides that if the Ten Commandments are displayed, the display shall be in a manner that satisfies any constitutional requirements, including being intermingled with historical or educational items, or both, in a larger display. Effective upon ratification and will be voted on at the November 2018 General Election

Courts

Municipal Courts–Legal Notice (Act 2018-365)

Senator Rodger M. Smitherman

This act authorizes the use of emails or text messages to notify a defendant in municipal court of any legal process required by the court in addition to other forms of notification, using contact information provided by the defendant. Effective June 1, 2018

Private Judges (Act 2018-384)

Senator Cam Ward

This act includes within the list of individuals authorized to serve as a private judge an individual who is a former probate court judge and who served in the capacity of judge for at least six years, is admitted to the practice of law in the state, is an active member of the Alabama State Bar and is a resident of the state. Effective June 1, 2018

(Continued from page 281)

Judicial Reallocation (Act 2018-567)

Representative Jim Hill

This act (1) requires the Chief Justice of the Supreme Court of Alabama to temporarily assign a circuit or district judge to another circuit for a reasonable period of time to address court congestion, court delay, civil and criminal backlog of cases or for any other reason necessary for the prompt and thorough administration of justice; and (2) authorizes the presiding judge of a circuit to assign a circuit or district judge to serve within the circuit or within the district courts of the circuit to address court congestion, court delay or civil and criminal backlog of cases. The act does not apply to Jefferson County. Effective July 1, 2018

Pro Bono Legal Services (Act 2018-561)

Representative Chris England

This act authorizes attorneys who hold a special law license in the state to provide pro bono legal services organized through or recognized by the Alabama State Bar. Effective July 1, 2018

Criminal Law

Emily's Law (Act 2018-182)

Senator Steve Livingston

This act (1) establishes a procedure by which a dog can be declared dangerous and humanely euthanized or returned to its owner; (2) provides criminal penalties for a dog owner whose dog attacks and causes physical injury, serious physical injury or death to a person, based on the owner's knowledge of the dangerous propensities of the dog; (3) requires the owner of a dog declared to be dangerous to pay an annual dangerous dog registration fee of $100 and obtain a surety bond of at least $100,000; (4) provides criminal penalties for the owner of a dangerous dog whose dog is outside, not contained in a proper enclosure and not secured with a collar and leash or who refuses to surrender a dog subject to a dangerous dog investigation upon the request of an animal control officer or law enforcement officer; and (5) provides criminal penalties for making a false report that a dog is dangerous. Effective June 1, 2018

Capital Punishment (Act 2018-353)

Senator Lee "Trip" Pittman

This act (1) allows a person sentenced to death to elect to be executed by means of nitrogen hypoxia; and (2) provides that if lethal injection is held unconstitutional or is otherwise unavailable, the method of execution for a person sentenced to death shall be nitrogen hypoxia. Effective June 1, 2018

Human Trafficking (Act 2018-385)

Senator Cam Ward

This act (1) changes the criminal penalty for obstruction of the enforcement of the crime of human trafficking in the first degree from a Class C felony to a Class A felony; and (2) changes the criminal penalty for obstruction of the enforcement of the crime of human trafficking in the second degree from a Class A misdemeanor to a Class B felony. Effective June 1, 2018

Human Trafficking (Act 2018-506)

Representative Jack D. Williams

This act (1) further defines the term sexual servitude to remove the requirement of deception or coercion if the sexual conduct is with a minor; (2) establishes the crime of engaging in an act of prostitution with a minor; (3) prohibits a defendant accused of engaging in an act of prostitution with a minor from asserting a mistake of age defense; (4) provides an additional fine used to compensate victims of human trafficking; (5) provides for the expungement of certain crimes committed by victims of human trafficking under certain conditions; and (6) provides that human trafficking offenses and certain prostitution offenses may only be prosecuted in circuit or district court. The act also requires the Alabama Board of Massage Therapy to conduct criminal history background checks for massage therapist licensees and applicants and prohibits any person from staying overnight in a massage therapy establishment. Effective July 1, 2018

Driving Under the Influence (Act 2018-517)

Senators Jim McClendon and Paul Bussman

This act (1) reduces the period for which a person convicted of a first DUI offense must install and operate an ignition interlock device in order to legally drive from six months to 90 days; (2) reduces the period for which a person convicted of a first DUI offense with certain aggravating circumstances is required to install and operate an ignition interlock device from two years to one year; (3) changes the ignition interlock device fee required to be paid to the court from $75 per month the device is installed to a total of $200, regardless of the number of months the device is installed; (4) provides that a portion of the court fee would be distributed to the municipal court if the case is a municipal court case when the person is ordered or agrees to use an ignition

interlock device; (5) requires, until July 1, 2023, that each person charged with a DUI offense and approved for a pretrial diversion program to have an ignition interlock device installed for a minimum of six months or the duration of the pretrial diversion program, whichever is greater; (6) provides that no person may be required to install an ignition interlock device if there is not a certified ignition interlock provider available within a 50-mile radius of the person's place of residence or place of business; and (7) provides that an offender who is granted indigency status is not required to pay any costs associated with installing and maintaining an ignition interlock device and is not required to pay ignition interlock fees charged to a defendant. Effective July 1, 2018

Sentencing–Juvenile Delinquents (Act 2018-525)

Representative Rolanda Hollis

This act provides that when a child is adjudicated delinquent and committed to the Alabama Department of Youth Services in a juvenile court for a felony or a misdemeanor for a set period of time or as a serious juvenile offender, the juvenile court shall order that the delinquent child be credited with all of his or her actual time spent detained prior to, or subsequent to, adjudication for the offense. Effective July 1, 2018

Annalyn's Law (Act 2018-528)

Senator Clyde Chambliss

This act (1) requires local law enforcement to notify the principal of the public or nonpublic school where a low-risk juvenile sex offender is planning to attend and, if a public school, the local superintendent of education with jurisdiction over the school; (2) requires juvenile sex offenders to notify local law enforcement of any change in school attendance; (3) further provides that failure to comply, unless otherwise provided, constitutes a Class C felony; (4) requires the State Board of Education to develop, and each local board of education to adopt, a comprehensive model policy for the supervision and monitoring of low-risk juvenile sex offender students attending school with the general student population; and (5) requires alternative educational placement for any juvenile sex offender who is at moderate or high risk for re-offense. Effective July 1, 2018

(Continued from page 283)

Hollie's Law (Act 2018-537)

Representative Phillip Pettus

This act (1) includes as a capital offense murder by a defendant in the presence of a child under the age of 14 years at the time of the offense, if the victim was the parent or legal guardian of the child; (2) includes as an aggravating circumstance the commission of a capital offense committed when the victim was less than 14 years of age; and (3) includes as an aggravating circumstance the commission of a capital offense committed by a defendant in the presence of a child under the age of 14 years at the time of the offense, if the victim was the parent or legal guardian of the child. Effective July 1, 2018

Driving Under the Influence (Act 2018-546)

Senator Arthur Orr

This act (1) increases the lookback period for which a court may consider a defendant's previous driving under the influence convictions from five years to 10 years; and (2) provides that a person who is convicted of driving under the influence is guilty of a Class C felony if the person has a previous felony DUI conviction, regardless of when the previous conviction occurred. Effective July 1, 2018

Fentanyl (Act 2018-552)

Senator Cam Ward

This act (1) provides enhanced criminal penalties for the unlawful possession, distribution, or trafficking of Fentanyl and other synthetic controlled substance Fentanyl analogues; and (2) changes the criminal penalty for certain drug trafficking offenses from life without parole to life imprisonment. Effective April 6, 2018

Tax Law

Income Tax (Act 2018-232)

Senator Del Marsh

This act expands the adjusted gross income range allowable for a maximum standard deduction and exempts certain foreign income from income taxes to the extent the income is exempt from federal income tax. Effective March 15, 2018

Tax Credits for Private Intrastate Adoption (Act 2018-549)

Senator Dick Brewbaker

This act changes name of the term private intrastate adoption to private adoption and revises the definition of the term to provide that the birth mother and baby do not have to reside in the state. Effective for all tax years beginning on or after January 1, 2019

Sale of Tax Liens (Act 2018-577)

Representative Corley Ellis

This act authorizes the tax collecting official of each county to elect to adopt a revised tax lien sale procedure in which tax liens are sold at auction to the bidder with the lowest interest rate on the amount required to be paid to redeem the property from the sale. Effective July 1, 2018

Education Law

Employment of Teachers (Act 2018-83)

Senator Gerald O. Dial

This act extends the prohibition against allowing a tenured teacher to resign within 30 calendar days prior to the next school term to include all public K-12 teachers and to remove employees of two-year institutions operated under the Department of Postsecondary Education from the prohibition. The act also increases the length of notice that a teacher is required to give before terminating employment from five to 30 days. Effective May 1, 2018

Administrative Leave (Act 2018-140)

Senator Lee "Trip" Pittman

This act repeals Section 13A-6-83, *Code of Alabama* 1975, which provides that a school employee charged with the crime of engaging in a sex act or deviant sexual intercourse with a student or the crime of having sexual contact with a student may be placed on paid administrative leave while the charge is adjudicated. Effective February 27, 2018

Child Safety Act (Act 2018-278)

Representative Pebblin W. Warren

This act (1) revises the definition of the term day care center to include preschools; (2) removes the exemption from licensure by the Department of Human Resources of certain child care facilities that are part of a church or nonprofit religious school; (3) clarifies that the licensing of a faith-based child care facility may not be construed to infringe upon the rights of the facility to teach or practice a religion; and (4) revises the criminal history background information check required for certain individuals. Effective March 21, 2018

Student Bullying (Act 2018-472)

Representative John F. Knight

This act (1) changes the name of the Student Harassment Prevention Act to the Jamari Terrell Williams Student Bullying Prevention Act; (2) prohibits student bullying, intimidation, violence and threats of violence off of school property; (3) redefines harassment as bullying; and (4) specifically includes cyberbullying within the definition of the term bullying. Effective June 1, 2018

Family Law

Kinship Guardians (Act 2018-273)

Representative Paul W. Lee

This act (1) provides that a kinship guardian may be appointed by a juvenile court only if a parent of the child is living, but all parental rights have been terminated and the child has resided with the individual caregiver seeking to be appointed as a kinship guardian for a period of six months or more immediately preceding the written request; and (2) deletes the requirement that a parent, legal guardian or legal custodian of a child must consent in writing before a successor guardian may be appointed. Effective June 1, 2018

Health Law

The Alex Hoover Act (Act 2018-466)

Representative April Weaver

This act (1) authorizes the parent or legal guardian of a terminally ill or injured minor to execute, in consultation with the minor's attending physician, a directive for the medical treatment and palliative care to be provided to the terminally ill or injured minor; (2) requires the Department of Public Health to establish a form for an order for Pediatric Palliative and End of Life (PPEL) Care to be used by medical professionals outlining medical care provided to terminally ill minors in certain circumstances; and (3) provides immunity to health care providers who provide, withhold or withdraw medical treatment pursuant to an order for PPEL Care. Effective March 29, 2018

Military

License Plates and Tags (Act 2018-133)

Representative Barry Moore

This act (1) provides for the issuance of a removable windshield placard by the Department of Veterans Affairs to recipients of certain military honors or to individuals who are recognized as having a certain veteran status; and (2) provides that it is unlawful to park a motor vehicle in places designated for recipients of a certain military honor or for individuals with a specific veteran status. Effective May 1, 2018

Veterans Employment Act (Act 2018-194)

Representative Connie C. Rowe

This act authorizes a tax credit of $2,000 to certain small businesses that hire an unemployed or combat veteran for a full-time position paying at least $14 an hour if the veteran has been employed for 12 consecutive months. Effective January 1, 2018

The Military Family Jobs Opportunity Act (Act 2018-540)

Representative Thad McClammy

This act requires each professional licensing body in the state, with enumerated exceptions, to adopt rules to recognize professional licenses and certificates that were obtained in other jurisdictions by the spouses of an active duty reserve or transitioning member of the United States Armed Forces, including the National Guard, or a surviving spouse of a service member who, at the time of his or her death, was serving on active duty, who is relocated to and stationed in the state under official military orders, if the issuing state has licensing criteria greater than or substantially similar to that of Alabama. Effective April 6, 2018

Banking and Trusts

Alabama Family Trust Fund (Act 2018-36)

Senator Cam Ward

This act (1) specifies that the Board of Trustees of the Alabama Family Trust Fund shall take all necessary steps to satisfy the regulations, rules and policies of the federal Social Security Administration; (2) provides further for the disbursement of the amounts remaining in a life beneficiary's account upon the death of the life beneficiary; and (3) provides for the disbursement of the amounts remaining in a life beneficiary's account upon the termination of an individual trust agreement by the trustee for any lawful reason other than the death of the life beneficiary. Effective January 31, 2018

Local Government

Alabama Disaster Recovery Program (Act 2018-94)

Senator Greg Albritton

This act (1) grants the chair or president of a political subdivision the authority to declare an emergency if the governor or legislature has done so; (2) expands the use of funds in the Alabama Disaster Recovery Program; and (3) allows

(Continued from page 285)

the Alabama Disaster Recovery Program Committee to provide financial assistance to individuals following certain disasters. Effective February 14, 2018

Tax Abatement (Act 2018-53)

Senator Arthur Orr

This act authorizes the governing body of a county to grant an abatement of all or a portion of the rollback ad valorem taxes due on the property if the property is used for a qualifying project under the Alabama Jobs Act. Effective February 6, 2018

Municipal Business Licenses (Act 2018-411)

Representative Paul W. Lee

This act provides that a business license is not required for a person traveling through a municipality on business if the person is not operating a branch office or otherwise doing business in the municipality. Effective March 28, 2018

Property Law

Right of Redemption (Act 2018-126)

Representative Kerry Rich

This act (1) provides that a right of redemption may not be exercised later than one year after the date of foreclosure; (2) provides that a mortgagee's production of proof that he or she mailed the notice required to be given to the mortgagor upon foreclosure of residential property upon which a homestead exemption was claimed in the tax year constitutes an affirmative defense to any action relating to defective notice or failure to give notice; and (3) reduces the amount of time that an action relating to the notice requirement may be brought from two years to one year. Effective February 22, 2018

Lease Agreements (Act 2018-473)

Representative David Sessions

This act (1) expands the acts or omissions that constitute a non-curable default of the rental agreement; (2) clarifies that the seven-day notice period for a notice to a tenant of noncompliance with a lease is seven business days; and (3) specifies that no breach of a lease may be cured by a tenant more than two times in a 12-month period except by written consent of the landlord. Effective June 1, 2018

Redemption of Land Sold for Taxes (Act 2018-494)

Senator Hank Sanders

This act provides that a party desiring to redeem property sold to the state for unpaid taxes shall pay an interest rate of eight percent of the taxes that were due at the time of default. Effective January 1, 2020 for actions related to taxes delinquent on or after January 1, 2020

Transportation

Transportation Network Companies (Act 2018-127)

Representative David Faulkner

This act establishes comprehensive licensing requirements for transportation network companies such as Uber and Lyft and authorizes licensed transportation network companies to operate in the state. The act also requires the companies to collect a local assessment fee equal to one percent of the gross trip fare for each prearranged ride originating in the state and requires the Public Service Commission to disburse the fees to each municipality or county where the ride originated. Effective July 1, 2018, except that Section 4 of the act, relating to the collection of a local assessment fee, is effective August 1, 2018

Derelict and Abandoned Vessels (Act 2018-179)

Senator Lee "Trip" Pittman

This act (1) authorizes the removal of a vessel from the waters of this state under certain conditions by a law enforcement officer and a private property owner and establishes a procedure for the return, storage and sale of the vessel; (2) authorizes ALEA, without a court order, to sell, donate, destroy or otherwise dispose of an abandoned or derelict vessel that has a certain value; (3) authorizes law enforcement officers to perform an unattended vessel check; and (4) makes it unlawful for the owner of a derelict vessel to refuse or fail to remove the derelict vessel from the waters of this state within 24 hours after a verbal or written request from a law enforcement officer. Effective June 1, 2018

Hardship Driver's License (Act 2018-289)

Senator Clyde Chambliss

This act (1) requires the Alabama State Law Enforcement Agency to develop a hardship driver's license program for

any person whose driver's license has been suspended or revoked, who does not pose a risk to public safety and who cannot obtain reasonable transportation; and (2) specifies that a person who has been adjudicated or convicted of driving under the influence is not eligible for a hardship license. Effective June 1, 2018

Accessible Parking (Act 2018-458)

Representative Ken Johnson

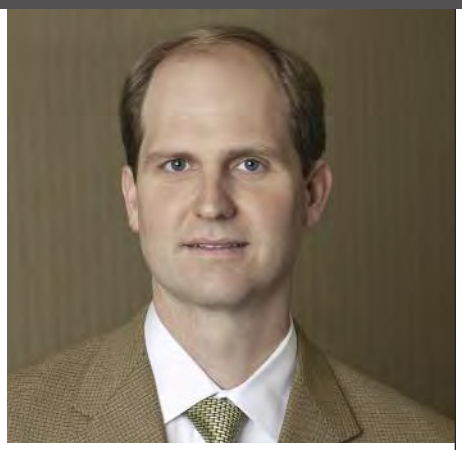
This act (1) authorizes an individual who is not disabled to park a vehicle in a parking place designated for individuals with a disability if a passenger of the vehicle is disabled and lawfully holds a distinctive special long-term access or long-term disability access license plate or placard or temporary disability placard; and (2) specifies that a sign that designates special access or disability parking is not required to display the amount of the fine for violating this law. Effective June 1, 2018

Workers' Compensation

The Philip Davis Act of 2018 (Act 2018-523)

Representative Matt Fridy

This act (1) provides that the surviving spouse of a law enforcement officer or firefighter killed in the line of duty shall continue to receive workers' compensation benefits after remarriage; and (2) provides that a surviving dependent child of a law enforcement officer or firefighter killed in the line of duty shall continue to receive workers' compensation benefits until he or she reaches the age of majority. Effective July 1, 2018 ▲



Wilson F. Green

Wilson F. Green *is a partner in Fleenor & Green LLP in Tuscaloosa. He is a* summa cum laude *graduate of the University of Alabama School of Law and a former law clerk to the Hon. Robert B. Propst, United States District Court for the Northern District of Alabama. From 2000-09, Green served as adjunct professor at the law school, where he taught courses in class actions and complex litigation. He represents consumers and businesses in consumer and commercial litigation.*

Marc A. Starrett

Marc A. Starrett *is an assistant attorney general for the State of Alabama and represents the state in criminal appeals and habeas corpus in all state and federal courts. He is a graduate of the University of Alabama School of Law. Starrett served as staff attorney to Justice Kenneth Ingram and Justice Mark Kennedy on the Alabama Supreme Court, and was engaged in civil and criminal practice in Montgomery before appointment to the Office of the Attorney General. Among other cases for the office, Starrett successfully prosecuted Bobby Frank Cherry on appeal from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.*

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Arbitration; Discovery

***Ex parte Alfa Ins. Corp.*, No. 1170077 (Ala. April 6, 2018)**

Circuit court exceeded its discretion in allowing merits discovery to proceed, and to enter orders compelling same, during pendency of appeal of order denying arbitration. Even though the supreme court had eventually affirmed the circuit court's denial of arbitration, error in allowing discovery was not harmless, because parties had changed substantive positions on some discovery-related issues, which changes could impact the trial court's rulings on discovery issues.

Timeliness of Appeal; Mootness

***Irwin v. Jefferson County Personnel Board*, No. 1161145 (Ala. April 20, 2018)**

Action seeking only injunctive relief did not become moot upon trial court's denial of TRO or preliminary injunction, because they were not case-terminating orders. However, action had become moot because plaintiff was seeking an injunction to bar city from administering new examination for police chief position and appointment of a candidate from a previously-certified list, and city had, in the interim, appointed a new chief not from the list and had administered the examination.

Professional Corporations

***Lynd v. Marshall County Pediatrics, P.C.*, No. 1060683 (Ala. April 27, 2018)**

Issue–whether, for purposes of a shareholder bylaw, a shareholder leaving a professional practice was entitled to "book value" or "fair value" for her shares of stock. The original bylaw (from 1978) provided that shareholder agreement would determine method of valuation "in lieu of" applicable Alabama law (which at the time was *Ala. Code* § 10-4-228, providing for "book value"). At the time of buy-out, however, no such agreement existed. And, *Ala. Code* § 10-4-228 was superseded in 1984 by § 10-4-389, which changed to "fair value" (now at § 10A-4-3.02). Held: in the absence of any shareholder agreement, the valuation determination would be made by applicable law, which would normally be the law as of the time of contract–but in this case, given that the shareholders intended to reject the then-applicable valuation method, the shareholders could not be deemed to have embraced the "book value" method in perpetuity.

Mandamus

***Ex parte International Paper Co.*, No. 1170458 (Ala. April 27, 2018)**

The court issued a writ of mandamus, directing the trial court to rule on pending and unadjudicated motion to dismiss based on enforcement of an outbound forum selection clause. Trial court exceeded its discretion in setting merits discovery deadlines and denying a motion to continue the trial date, and otherwise presiding over ongoing litigation, while "taking under advisement" the pending motion regarding the forum-selection clause without ruling.

Standing; Wrongful Death

***Watson v. UAHSF*, No. 1170057 (Ala. April 27, 2018)**

Legally-appointed personal representative who has been discharged and released as PR of estate no longer has capacity to bring a wrongful-death action. Probate court's order (entered after PR brought the wrongful death action) modifying the PR's discharge to leave open authority to bring action was improper under Rule 60(a), and thus order was ineffective.

Arbitration

***Eickhoff Corporation v. Warrior Met Coal, LLC*, No. 1161099 (Ala. May 4, 2018)**

Because arbitration agreements invoked AAA commercial rules, issues of arbitrability (created because some documents between the parties contemplated "legal proceedings") would be decided by an arbitrator, not the court.

Estates

***Suggs v. Gray*, No.1161118 (Ala. May 4, 2018)**

Among other holdings, circuit court had jurisdiction to adjudicate DJ action originally filed in the circuit court under *Ala. Code* § 6-6-225(3), seeking an equitable division of proceeds as between H's and W's estates, even though the disputes could have potentially been also raised as "claims" in the respective estates before the probate court. However, probate court had exclusive jurisdiction over the disposition of certain CDs and necklace, which were estate assets, and circuit court thus lacked jurisdiction over those claims.

Evidence

***Ansley v. Inmed Group, Inc.*, No. 1160465 (Ala. May 4, 2018)**

In affirming a judgment on jury verdict for defendants physicians and local hospital in medical liability action, trial court did not abuse its discretion in allowing defendants to admit evidence concerning size, capability and financial condition of hospital, where plaintiff sought to adduce on direct examination of hospital administrator that hospital was putting financial gain over patient care; plaintiff opened the door to such evidence on cross.

Taxpayer Standing

***Richardson v. Relf*, No.1170559 (Ala. May 4, 2018)**

Circuit court had no jurisdiction over taxpayer action brought against state superintendent, acting as interim superintendent of Montgomery Schools under its state takeover pursuant to the Educational Accountability and Intervention Act of 2013 ("EAIA"), codified at *Ala. Code* § 16-6E-1, seeking to enjoin sale of school properties to Town of Pike Road. Although taxpayers have standing in Alabama to challenge an expenditure of public funds, the action being challenged in this case (the sale of property) would bring in funds to the public. In a special concurrence written by Justice Main (and joined in by a majority of the court), the court noted that, even if there were standing, the state superintendent had authority under the EAIA to sell the properties.

State Immunity

***Ex parte Board of Trustees of Univ. of Ala.*, No. 1170183 (Ala. May 18, 2018)**

UA Board is absolutely immune from suit under Section 14 of the Alabama Constitution; that immunity is not subject to waiver and deprived the circuit court of subject matter jurisdiction to take any action, including compelling arbitration of claims against the board where the board had not moved to compel such arbitration, but instead had moved for dismissal based on Section 14 immunity.

Default Judgments

***Ex parte Ward*, No. 1170142 (Ala. May 18, 2018)**

Movant seeking to set aside default must allege and provide arguments and evidence regarding all three of the *Kirtland* factors. Bare legal conclusions unsupported by affidavit or other evidence do not suffice to demonstrate a meritorious defense, among other factors, under *Kirtland*.

Rule 60

***Ex parte Price*, No. 1161167 (Ala. May 18, 2018)**

Trial court exceeded its discretion in granting Rule 60(b)(6) motion for relief from a judgment, filed more than two years after initial judgment. The grounds asserted were actually grounds under Rules 60(b)(1)–(3), as to which there was a four-month time limit, and the grounds for relief were actually the result of the movant's own deliberate choices regarding not conducting certain discovery; Rule 60 is not designed to mollify or relieve the movant from the movant's own deliberate choices.

Standing; Election Procedures

***Ex parte Merrill*, No. 1170216 (Ala. May 18, 2018)**

Voters sued election officials, claiming that failure to preserve digital images of ballots used in electronic voting machines deprived them of fair and accurate elections, and seeking injunctive and declaratory relief. Among other holdings: plaintiffs failed to allege or prove they suffered injury in fact which was concrete and particularized as to the failure to maintain digital images of ballots, when the actual ballots are retained.

Evidence; Curative Admissibility

***Baptist Medical Center, Inc. v. Cantu*, No. 1151117 (Ala. May 18, 2018)**

Pretermitting discussion of other issues (including whether defendant hospital was entitled to JML based on alleged agency theory regarding acts of doctor imputed to

(Continued from page 289)

hospital), the court reversed judgment on jury verdict for plaintiff in medical liability case and ordered new trial. Notwithstanding the bar of *Ala. Code* § 6-5-551, where the defendant has "opened the door" to prior other acts of medical negligence, they can become admissible. In this case, however, admission of "other acts" evidence was disproportionate and unfairly prejudicial. The corporate representative testified on direct that she had no knowledge of prior occasions where hospital had been sued where doctor was allegedly agent of the hospital. That opened the door to ask about other instances in which the hospital had been sued on the same claim, but did *not* open the door to demonstrate the factual underpinnings of those claims.

Discovery; Medical Liability

***Ex parte Mobile Infirmary Association*, No. 1160731 (Ala. May 25, 2018)**

Ala. Code § 6-5-551 prohibits discovery of any hospital policies and procedures other than those in effect at the time of the alleged act or omission and related to the alleged act or omission upon which medical liability is premised; thus, trial court exceeded its discretion in ordering discovery of policies in effect at later times. Further, hospital made sufficient showing that other items ordered to be produced were "quality assurance" documents protected by *Ala. Code* § 22-21-8.

From the Court of Civil Appeals

Landlord-Tenant

***Morrow v. Pake*, No. (Ala. Civ. App. April 20, 2018)**

Tenant's claim for damages under the Landlord and Tenant Act, *Ala. Code* § 35-9A-101, was not a compulsory counterclaim to a landlord's action in unlawful detainer and for unpaid rent, because the latter invokes only *quasi in rem* jurisdiction, and *in personam* jurisdiction would have to exist over the tenant in order to trigger compulsory counterclaim status. Res judicata did not bar tenant's subsequent action under the Act, because landlord dismissed his action voluntarily after tenant had moved out, before final adjudication of the unlawful detainer case.

Writs of Certiorari

***EMBU, Inc. v. Tallapoosa County Commission*, No. 2161014 (Ala. Civ. App. April 20, 2018)**

Circuit court cannot exercise supervisory jurisdiction over a local government's denial of approval for a liquor license via petition for writ of certiorari when the local government is located in a county outside the territorial limits of the circuit court.

CDL Licenses

***ALEA v. Carter*, No. 2160820 (Ala. Civ. App. April 27, 2018)**

Under the Rules of the Road Act, a person who receives a notice of suspension or intended suspension of a license (in this case, a CDL) has two options: an administrative review (requested within 90 days), *Ala. Code* § 32-5A-306, or an administrative hearing (requested within 10 days), § 32-5A-307. "Failure to request an administrative hearing within 10 days shall constitute a waiver of the person's right to an administrative hearing and judicial review."

Garnishment; Constitutional Challenge Procedures

***North Alabama Real Estate Group, LLC v. Pineda*, No. 2161064 (Ala. Civ. App. April 27, 2018)**

Argument that Art. X, Sec. 204 of the Alabama Constitution rendered unconstitutional *Ala. Code* § 6-10-6.1, enacted in 2015 and under which wages are purportedly no longer subject to constitutional exemption, could not be considered, because tenant had not served the AG under *Ala. Code* § 6-6-227–thus, trial court was without jurisdiction to consider it.

Injunctions

***Crosby v. Seminole Landing Property Owners Association, Inc.*, No. 2170070 (Ala. Civ. App. May 4, 2018)**

Circuit court's injunction "to preserve the status quo" was erroneous for failure to describe with reasonable detail the acts to be enjoined, as required by *Ala. R. Civ. P.* 65(d)(1).

School Disciplinary Proceedings

***Ex parte Limestone County Board of Education*, No. 2170521 (Ala. Civ. App. May 4, 2018)**

Under *Ala. Code* §12-15-115(b), "[a] juvenile court also shall have original jurisdiction in proceedings concerning any child . . .[w]here it is alleged that the rights of a child are improperly denied or infringed in proceedings resulting in suspension,

expulsion, or exclusion from a public school." Board contended asserted Section 14 immunity from claims brought by student against board in juvenile court, arising from a student's disciplinary matter. Held: Section 14 barred claims for injunctive relief, but claims challenging the disciplinary action itself were subject to the juvenile court's jurisdiction.

Sanctions

***C.L. Smith Auto Sales, LLC v. David Bulger, Inc.*, No. 2170091 (Ala. Civ. App. May 11, 2018)**

Failure of counsel to attend a pretrial conference did not constitute the "'extreme circumstances'" that warrant the "'harsh sanction'" of a default judgment.

Workers' Compensation

***Ex parte Sears, Roebuck & Co., Inc.*, No. 2170632 (Ala. Civ. App. May 11, 2018)**

Trial court's compensability determination was reversed for failure to conduct evidentiary hearing, under *Ex parte Publix Super Markets, Inc.*, 963 So. 2d 654 (Ala. Civ. App. 2007).

De Novo Trials in Circuit Court

***Casey v. Bingham*, No. 2170045 (Ala. Civ. App. May 11, 2018)**

In appeal from a proceeding *de novo* in circuit court following a proceeding in district court, review before the CCA is limited to actions taken by the circuit court, because the district court judgment in such instances is supplanted by the circuit court judgment.

District Courts; Appellate Procedure

***Tolbert v. Erwin*, No. 2170025 (Ala. Civ. App. May 18, 2018)**

Because record demonstrated that notice of appeal from district court to circuit court was filed in the circuit court, notice of appeal would be deemed proper even if filed in the wrong court, because under Alabama law, the circuit court clerk acts as the ex officio clerk of the district court.

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From the United States Supreme Court

Qualified Immunity

***Kisela v. Hughes*, No. 17-467 (U.S. April 2, 2018)**

Officer who fired weapon on subject, who was holding a large kitchen knife, had taken steps toward another woman standing nearby and had refused to drop the knife after at least two commands to do so, was entitled to qualified immunity. In excessive force situations, factual similarity in case law is necessary to clear the "clearly established" hurdle for plaintiffs.

FLSA

***Encino Motorcars, Inc. v. Navarro*, No. 16-1362 (U.S. April 2, 2018)**

Service advisors at auto dealership's service department are "salesm[e]n . . . primarily engaged in . . . servicing automobiles," and so they are exempt from FLSA's overtime-pay requirement.

Patent

***SAS Institute, Inc. v. USPTO*, No. No. 16-969 (U.S. April 24, 2018)**

Inter partes review allows private parties to challenge previously issued patent claims in an adversarial process before the Patent Office. In this closely-watched case, the Court, reversing the federal circuit, held that 35 U.S.C § 318(a) requires the Patent Office to review the "patentability" of each challenged aspect of each patent raised by the challenging party.

Patent

***Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712 (U.S. April 24, 2018)**

Inter partes review before the USPTO is constitutional because (1) it does not violate Article III and the judicial powers, and (2) it does not violate Seventh Amendment jury trial rights.

Alien Tort Statute

***Jesner v. Arab Bank, PLC*, No. 16-499 (U.S. April 24, 2018)**

Foreign corporations may not be sued in United States courts under the Alien Tort Statute.

Mootness

***U.S. v. Sanchez-Gomez*, No. 17-312 (U.S. May 14, 2018)**

Case brought by prisoners concerning constitutionality of court policy concerning use of restraints in certain court proceedings became moot when the plaintiffs' criminal proceedings ended. Unlike *Gerstein v. Pugh*, 420 U.S. 103, the case was not brought as a class action, and thus case would not be considered to be class-action-like in saving the case from mootness determination.

Sports Betting; Tenth Amendment

***Murphy v. NCAA*, No. 16-746 (U.S. May 14, 2018)**

Under the Tenth Amendment, all powers not conferred on Congress under the Constitution are reserved to the states. Absent from the enumeration of direct powers to Congress is the power to issue orders directing states to take or not take actions–this is called the "anti-commandeering doctrine." In this case, the Court struck down, on Tenth Amendment anti-commandeering principles, a federal law (the Professional and Amateur Sports Protection Act) which prohibited states from authorizing sports betting (with the exception of Nevada, which was grandfathered in)–though, importantly, PASPA did not prohibit or specifically proscribe sports betting itself. Congress has the power to regulate or prohibit sports betting, should it so choose–but it cannot constitutionally direct the states not to allow it.

Arbitration; Class Actions

***Epic Systems Corp. v. Lewis*, No. 16-285 (U.S. May 21, 2018)**

Arbitration agreements which require employees to adjudicate all claims individually, including federal labor claims which otherwise might proceed as collective actions under the FLSA, are enforceable. The Court nullified a 2012 National Labor Relations Board policy to the contrary, reasoning that Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced.

From the Eleventh Circuit Court of Appeals

DPPA

***Baas v. Fewless*, No. 17-11225 (11th Cir. April 2, 2018)**

Sheriff's captain obtained driver license and booking photos of members of a motorcycle club who were likely to support a bill pending in the Florida legislature which would permit open carry of firearms. Captain determined that presenting Florida's Senate Judiciary Committee with photos of the club members would "shock the Committee" and bolster support against the bill's passage. Held: qualified immunity bars club members' claims under the Drivers Privacy Protection Act against captain, where captain was engaged in authorized acts of lobbying.

False Claims Act; Statute of Limitations

***USA v. Cochise Consultancy, Inc.*, No. 16-12836 (11th Cir. April 11, 2018)**

Civil action alleging an FCA violation must be brought within the later of either (1) six years after the date on which the violation . . . is committed, 31 U.S.C. § 3731(b)(1), or (2) three years after reasonable discovery by the United States official charged with responsibility over the matter, § 3731(b)(2). Held (issue of first impression): three-year discovery provision can apply in cases where the United States declines to intervene, and is triggered by reasonable discovery by the United States official, not discovery by the relator.

Labor

***Transit Connection, Inc. v. NLRB*, No. 17-10294 (11th Cir. April 13, 2018)**

TCI, which operates a public bus service on Martha's Vineyard, appealed an NLRB order directing that it cease and desist from refusing to recognize a union for drivers previously certified by the NLRB. TCI acknowledged that it refused to recognize and bargain, but claimed that the NLRB abused its discretion in certifying the union. The Eleventh Circuit, noting that it had appellate jurisdiction under 29 U.S.C. 160(e) and (f) because TCI also does business in Florida, affirmed the NLRB's union recognition. At the heart of the appeal is the NLRB's *Excelsior* rule; the issue turned on the provision of "residential" addresses for eligible voters. The NLRB hearing officer found that 46 percent of the residential addresses TCI provided were "inaccurate or incomplete" given that at least 18 out of 39 mailings were returned as undeliverable, and invalidated an election on that basis for non-compliance with the *Excelsior* rule.

FLSA

***Mickles v. Country Club, Inc.*, No. 16-17484 (11th Cir. April 18, 2018)**

Under *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1216 (11th Cir. 2001), district courts are advised to follow a two-step certification process in FLSA collective actions; in the first, the court evaluates similarly-situated status based on a motion for conditional certification (based almost solely on the pleadings), and then in a second stage, after a fully-developed record, the court typically considers a motion to decertify. In this case, the district court did not follow *Hipp* because plaintiff didn't timely move for conditional certification (plaintiff waited until the close of discovery in violation of a local rule); nevertheless, several parties filed section 216(b) "opt in" requests. Issue (a question of first impression in every circuit): whether those who filed consents or "opt-in" forms before conditional certification was granted could be considered "parties" to the case. Held: yes; under 29 U.S.C. § 216(b), an opt-in plaintiff is required only to file a written consent in order to become a party plaintiff.

Disability Law

***Durbrow v. Cobb County School Dist.*, No. 17-11400 (11th Cir. April 17, 2018)**

Issue 1: whether appellants' claims of disability-based discrimination under § 504 of the Rehabilitation Act ("§ 504"), 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq., must be administratively exhausted under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. Held: yes. Issue 2: whether the IDEA compels a public school district to provide special education to a student with ADHD who displays vast academic potential, but struggles to complete his work. Held: child was entitled to neither an IDEA evaluation nor special education because he did not qualify as a "child with a disability."

Standing

***Georgia Republican Party v. SEC*, No. 16-16623 (11th Cir. April 26, 2018)**

State party lacked standing to challenge FINRA Rule 2030, governing political contributions of FINRA members who solicit governmental officials for investment advisory services contracts, because it did not demonstrate injury in fact, because the facts pleaded and the types of injury alleged were not sufficient to demonstrate injury which is "certainly impending"–allegations of possible future injury are not enough.

Section 1983

***Dixon v. Hodges*, No. 16-15040 (11th Cir. April 23, 2018)**

Under *Heck v. Humphrey*, 512 U.S. 477 (1994), section 1983 suit cannot be brought if a judgment in the prisoner's favor

(Continued from page 293)

would imply the invalidity of a prisoner's punishment for loss of "gain time" for good behavior. In this case, plaintiff was punished and lost gain time, but his section 1983 suit, if successful, would not necessarily imply the invalidity of his punishment, because he could properly be adjudicated as having committed a battery on a guard while at the same time suffering from excessive force.

DPPA

***Truesdell v. Thomas*, No. 16-16388 (11th Cir. May 2, 2018)**

(1) DPPA permits punitive damages against municipal agencies; (2) district court did not abuse its discretion when it (a) assessed liquidated damages for both occasions when Thomas (deputy sheriff) accessed Truesdell's information; (b) declined to certify a class action, given the variety of reasons stated by the deputy in accessing approximately 42,000 drivers' data; and (c) declined to grant new trial to plaintiff, where jury simply exercised its discretion in assessing punitive damages of $100 against deputy and $5,000 against sheriff, given lack of actual damages.

Arbitration; Class Actions

***Gutierrez v. Wells Fargo Bank, NA*, No. 16-16820 (11th Cir. May 10, 2018)**

WF did not waive its right to compel arbitration as to claims of unnamed class members. In its initial Answer, WF reserved all rights to assert the right to compel arbitration as to absent class members, and it moved to compel arbitration as to the absent class members' claims within a very short time after the class was certified.

FSIA; Commercial Activity Exception

***Devengoechea v. Bolivarian Republic of Venezuela*, No. 16-16816 (11th Cir. May 10, 2018)**

Plaintiff's claims against Venezuela for conversion of historical artifacts belonging to plaintiff relating to General Simon Bolivar were not barred by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2); commercial activity exception under FSIA applied.

Qualified Immunity

***Montanez v. Carvajel*, No. 16-17639 (11th Cir. May 9, 2018)**

Officers were entitled to qualified immunity in Section 1983 claim arising from warrantless search of home for additional suspects after breaking up burglary. Police officers interrupted what they reasonably believed to be a residential burglary and detained two suspects just outside the house. Officers could thereafter lawfully enter the home without a warrant, and without further suspicion of wrongdoing, to briefly search for additional perpetrators and potential victims, because the suspected burglary presented an "exigent circumstance." There was no constitutional violation, much less one of "clearly established" rights.

Inverse Condemnation

***Chmielewski v. City of St. Pete Beach*, No. 16-16402 (11th Cir. May 16, 2018)**

Homeowners (H) brought inverse condemnation action against city regarding beachfront parcel which they contended the city had invited for public use. At trial, jury concluded that city had encouraged and invited access onto H's property by the general public, supported by the police's removal of H's beach chairs, which had been placed to block access to the private property, and the ignoring of H's complaints about public access, causing a taking. The Eleventh Circuit affirmed.

Daubert on Medical Causation; Lay Opinions As to Value of Property

***Williams v. Mosaic Fertilizer, Inc.*, No. 17-10894 (11th Cir. May 14, 2018)**

District court did not abuse its discretion in toxic tort case (concerning damage to plaintiff's property and damage to her person) by striking plaintiff's expert on medical causation on *Daubert* grounds. The case turns on the details of the testimony, but the three problems which the Court focused upon were (1) the doctor's failure to assess properly "dose response" with respect to the plaintiff's exposure; (2) failure to rule out meaningfully other potential causes of plaintiff's medical conditions; and (3) failure to account for plaintiff's background risk to her medical conditions. The district court also did not abuse its discretion in striking plaintiff's own testimony concerning value of property; although an owner is generally competent to testify as to her own opinion on value, that rule yields when the testimony is based solely on speculation.

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Criminal Procedure

***Byrd v. U.S.*, No. 16-1371 (U.S. May 14, 2018)**

The mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. The rule is not absolute, one way or the other, as to whether a driver or possessor of a rental car who is not on the rental agreement has a reasonable expectation of privacy. Central to reasonable expectations of privacy in these circumstances is whether possession is lawful, but it is not dispositive. In this case, defendant had an expectation of privacy as to the rental car he was driving, regardless that he was not listed as a driver on the car's rental agreement. That the defendant had violated the agreement between his friend and the rental company by driving the car did not reduce his expectation of privacy in the car's contents.

Sixth Amendment

***McCoy v. Louisiana*, No. 16-8255 (U.S. May 14, 2018)**

Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that counsel refrain from admitting guilt, even if counsel's experience-based view is that confessing guilt offers defendant the best chance to avoid the death penalty.

Wiretapping

***Dahda v. U.S.*, No. 17-43 (U.S. May 14, 2018)**

Orders authorizing wiretapping under 18 U.S.C. § 2518(3) were not facially invalid where they authorized, contrary to the statute, wiretapping from listening posts outside the issuing jurisdiction, but where the government agreed not to use communications obtained from those extraterritorial listening posts in evidence.

Habeas Corpus

***Wilson v. Sellers*, 138 S. Ct. 1188 (2018)**

When determining whether a state court's unexplained decision was unreasonable under the Antiterrorism and Effective Death Penalty Act, the federal court should "look through" that decision to the reasons provided for the last related state court decision and presume that the unexplained decision was based on those reasons.

From the Court of Criminal Appeals

Right to Counsel

***Battles v. State*, CR-17-044 (Ala. Crim. App. Apr. 27, 2018)**

After waiving appointed counsel, defendant represented himself at trial and was convicted of unlawful possession of pistol. The court reversed, finding that though defendant clearly waived right to counsel, trial court failed to inform him of the disadvantages of waiving that right and that he could withdraw his waiver "at any stage of the proceedings." Trial court erred by not determining whether defendant knew that he would be required to comply with procedural rules and whether he had been involved in previous criminal trials or had knowledge of possible defenses.

Ineffective Assistance; *Batson*

***Woodward v. State*, CR-15-0748 (Ala. Crim. App. Apr. 27, 2018)**

Trial attorneys did not render ineffective assistance by not objecting to the state's peremptory strikes under *Batson*. Defendant mischaracterized the testimony of one of his trial attorneys, who had "clearly and unequivocally" testified that he and his co-counsel refrained from making a *Batson* motion because they believed that the jury, as selected, would not recommend a death sentence.

Search and Seizure

***State v. Abrams*, CR-16-1347 (Ala. Crim. App. Apr. 27, 2018)**

There is no expectation of privacy in license plate numbers or VIN (vehicle identification number) plates. Law enforcement officer could properly stop a vehicle after finding, from a search in a computer database, that its license plate number did not match the vehicle. He could then examine the VIN plate during the stop to determine whether it matched the vehicle's registration. The officer also had probable cause to search the car's trunk after he noticed marijuana odor emanating from it.

Capital Murder; Intent

***Towles v. State*, CR-15-0699 (Ala. Crim. App. Apr. 27, 2018)**

The court reversed the defendant's capital murder conviction arising from the fatal beating of his co-defendant's five-year-old son. The jury was erroneously made aware of the co-defendant's conviction arising from the child's death, and the trial court's oral charge lessened the state's burden of proof by permitting the jury to find the defendant guilty of murder if

(Continued from page 295)

it found that the evidence showed that he intended to cause great bodily harm to the victim.

Teacher/Student

***Pruitt v. State*, CR-16-0956 (Ala. Crim. App. Apr. 27, 2018)**

Acknowledging "the importance of maintaining the integrity of the teacher-student relationship[,]" the court rejected the defendant's constitutional challenge to *Ala. Code* § 13A-6-81's prohibition of sexual relationships between school employees and minor students. The court found no due process or equal protection violation in the application of the statute to a teacher's conduct with students who were enrolled at other schools, for it prohibits sexual activity between school employees and minor students regardless whether they are at the same or different schools.

Perjury

***Habel v. State*, CR-16-1017 (Ala. Crim. App. Mar. 16, 2018)**

The court upheld the defendant's perjury conviction, finding, as a matter of first impression, that her submission of an affidavit to law enforcement containing untrue allegations of sexual abuse against her husband constituted a false statement during an "official proceeding" for purposes of *Ala. Code* § 13-10-101.

Capital Murder

***Gaston v. State*, CR-15-0317 (Ala. Crim. App. Mar. 16, 2018)**

The court affirmed the defendant's capital murder conviction, but reversed his death sentence and remanded for a new sentencing hearing, because the jury was erroneously permitted to consider testimony from victim's family members characterizing the defendant and his crime and opining regarding the appropriate punishment.

Double Jeopardy

***T.D.F. v. State*, CR-16-1202 (Ala. Crim. App. Mar. 16, 2018)**

Juvenile's delinquency adjudication for both resisting arrest and second-degree assault constituted double jeopardy as charged in this case, requiring reversal of his resisting arrest adjudication. ▲

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(205) 908-9018

Hon. R.A. "Sonny" Ferguson, Jr.
raferguson@csattorneys.com
(205) 250-6631

Hon. Arthur J. Hanes, Jr.
ahanes@uww-adr.com
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Hon. Sharon H. Hester
sharon@hesterjames.com
(256) 332-7440

Hon. J. Brian Huff
judgebrianhuff@gmail.com
(205) 930-9800

Hon. Braxton L. Kittrell, Jr.
bkittrell@kittrellandmiddlebrooks.com
(251) 432-0102

Hon. Richard D. Lane
rdlane4031@gmail.com
(334) 740-5824

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

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

Hon. James H. Reid, Jr.
bevjam@bellsouth.net
(251) 928-8335

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

Hon. Fred R. Steagall
fpsteag@gmail.com
(334) 790-0061

Hon. Ron Storey
ron@wiregrasselderlaw.com
(334) 699-2323

Hon. Edward B. Vines
evinesattorney@yahoo.com
(205) 354-7179

Hon. J. Scott Vowell
jsv@scottvowell.com
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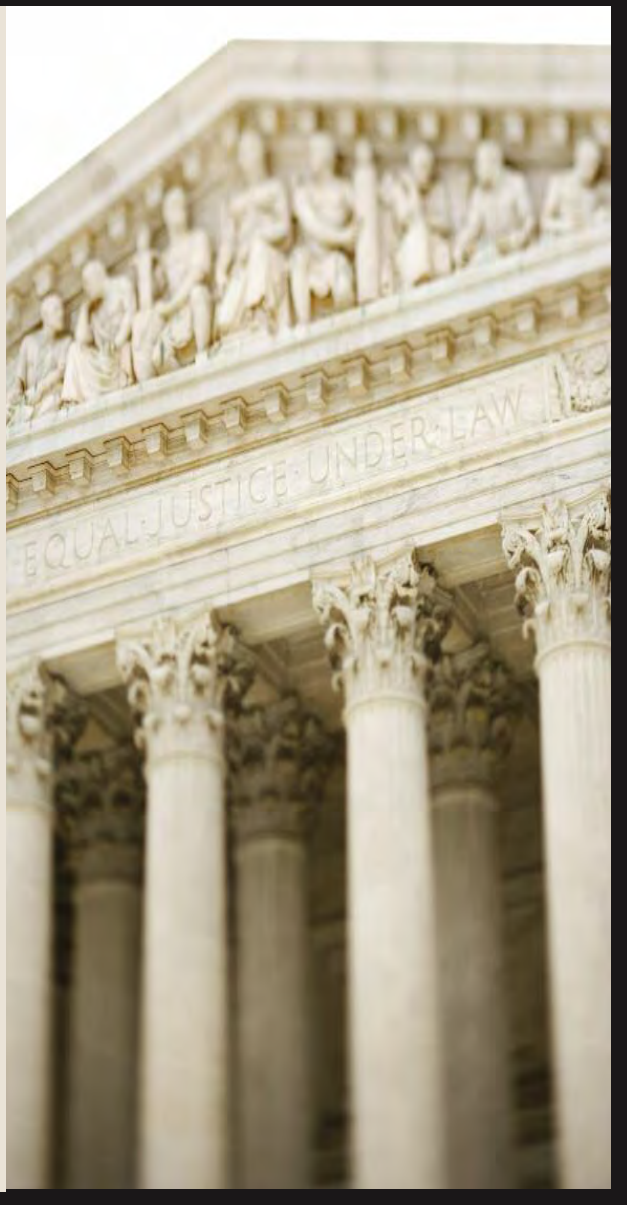

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Holtsford Gilliland Higgins Hitson & Howard PC announces that **Jason R. Herbert** joined as an associate in the central Alabama office, and **Robert C. Alexander, II** and **Matthew A. Laymon** joined as associates in the Gulf Coast office.

Maynard Cooper & Gale announces that **Seth Capper** and **Steven W. Strother, Jr.** joined as associates in the Birmingham office.

Raycom Media Inc. announces that **Ellenann B. Yelverton** is now vice president and general counsel.

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