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On The Cover

A cold winter morning at Caney Creek Falls in the Bankhead National Forest near Double Springs, Alabama

—Photo by James Deitsch

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The Alabama Lawyer (USPS 743-090) is published six times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama and additional mailing offices. POSTMASTER: Send address changes to *The Alabama Lawyer*, P.O. Box 4156, Montgomery, AL 36103-4156.

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

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Professionalism: Disagreeing Without Being Disagreeable

As you all know by now, one of my main goals as your president is to seek to improve the public image of lawyers by highlighting our hard work as well as our significant contributions to our local communities. Lawyers have been given the sacred title of “professional,” which carries with it a host of responsibilities and expectations. Sometimes it may feel, too, that no matter how much we give back, we do not always receive the credit that our profession deserves. Yet, in these unprecedented times, we have an opportunity as leaders to rise above

the tension that has developed in our country as a result of public stressors, such as the pandemic, civil unrest, and the recent election, to seek to heal our communities and lead by example.

My work as a litigator requires me to interact with attorneys all across the nation. While most are professional in their actions, few have the strong collegial support that Alabama State Bar members share. Maybe it’s our Southern hospitality, but I genuinely believe that Alabama lawyers care about each other in a way that transcends a handshake or

greeting for the sake of appearing professional. Unlike larger states, we are a small enough group that word can certainly get around fast if a certain attorney is very difficult to deal with. As Alabama lawyers have said for years, it is simply not worth burning a bridge with a fellow lawyer because we are more than likely going to see that lawyer again in our career.

I like to say that “we can disagree without being disagreeable.” Our jobs naturally put us in the awkward position of requiring us to disagree as adversaries, but that should never mean that we disagree in a way that embarrasses or demeans the other side. There is nothing to gain by being the lawyer who is rude, “who is always right,” or who seems to receive too much enjoyment from arguing for the sake of it. We are all passionate about our cases, but we often need to remind ourselves to keep our behavior in check when we are expressing that passion before a client, judge, jury, or opposing counsel.

More often, it is not just lawyers in the room observing our behavior. Clients may be in the room, and while they all have different expectations for their lawyer’s behavior, you can rarely go wrong with decorum. The most concerning is when we act out of character in front of law clerks, young lawyers, or other young people who are looking to us to set an example.

In 1992, the Alabama Board of Bar Commissioners approved a Code of Professional Courtesy that is still available on our website. Although almost 30 years old, it is as relevant today as it was when it was first written. However, to help revive this code and refresh it as necessary to accommodate our current work-life, I have asked our Bench & Bar Task Force to review and make recommendations for changes, if necessary, to the code. In addition to revising the code, I have asked the task force to recommend and, if possible, implement programs, guidelines, or seminars to improve the level of professionalism and civility in the practice of law.

As it stands, the Code of Professional Courtesy offers 19 simple guidelines for

how to operate successfully in a profession that requires us to disagree without being disagreeable. I encourage all of us to review them on the bar’s website.¹ In addition to those well-written guidelines, I offer three pointers that I was given as a young lawyer and have tried to always follow: treat staff and

court personnel with the utmost respect, abide by the 24-hour rule for any communication, especially emails, and dress appropriately. In short, many of the rules for professionalism really emanate from the lessons we learned at an early age from our parents and on the playground.

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(Continued from page 9)

The former diversity and education director at the Illinois Supreme Court Commission on Professionalism prepared a list of 20 professionalism tips for young lawyers.² These professionalism tips are also good reminders for all of us “old lawyers,” too. Number 14 is to treat “all staff with respect and courtesy” because everyone “deserves the same respect and courtesy you would like them to show to you.”³ This is especially true now that we are all navigating the nuances of Zoom meetings, hearings, and depositions. By now, we have learned that Zoom cannot handle more than one person talking at a time, so we have to accept that the court reporter will need to interrupt occasionally to ensure that he or she got everyone’s objections on the record. In these times, we need to strive to be more patient than ever with each other.

Even before the pandemic, I have been on calls where numerous lawyers were on the phone waiting to be transferred into a telephonic conference with the judge. We still had the occasional technical difficulty before Zoom, and I remember one time in particular where a lawyer took out his frustration on the judge’s assistant. I wanted to be sure that the assistant knew I had not treated her that way, so I said, “Ms. Smith,⁴ that was not Bob Methvin speaking.” Apparently, there was no need for me to say anything because she responded by saying that she knew exactly who was speaking. Clearly, our reputations are often developed by disrespectful acts such as these, as opposed to the numerous great deeds we perform.

Another way that we can easily tarnish our reputations as professionals is by sending an email in the heat of the moment. Back before email, lawyers were taught the 24-hour rule. We may have dictated a harsh response to a letter, but waited a day before mailing

the harshly worded letter. This gave us an opportunity to reconsider our response after we had a chance to cool down or have someone else review the letter. In most every case, the harsh response was not sent. Today, people have become accustomed to immediate responses via emails. When the 24-hour rule is not followed, lawyers find themselves in a back and forth chain of heated and unproductive messages. One of the worst scenarios for a lawyer is when his or her unprofessional email finds itself as an attachment to a pleading, which can also result in lawyer discipline if it is particularly bad.

Both of the tips for young attorneys that I mentioned earlier, as well as our Code of Professional Courtesy, remind attorneys of one of the simplest ways to maintain professionalism: dress appropriately.⁵ With so many of us working from home, it is only natural that our daily attire has changed. However, what we wear is always an opportunity for us to show our respect to the court or our client. In fact, it was reported that a Florida judge issued a letter reminding attorneys to avoid casual dress for Zoom court appearances.⁶ This letter came early in the pandemic after the judge had witnessed a male lawyer appear shirtless and another attorney appear still in bed.⁷

In sum, professionalism can be as simple as being nice to each other, including staff and court personnel, waiting before sending a heated email, and dressing like you did before Zoom tempted you to wear pajama pants with your suit jacket. However, our bar is full of members who deserve credit for going above and beyond these standards. In fact, the Alabama State Bar continues to recognize its members who exhibit a devotion to professionalism. For example, at the annual meeting, the J. Anthony “Tony” McLain Professionalism Award is bestowed on those who have shown outstanding,

long-term, and distinguished service in the advancement of professionalism. Past recipients include **Harlan I. Prater, IV and Michael E. Upchurch (2020); W. Percy Badham, III and J. Douglas McElvy (2019); Billy C. Bedsole (2018); Samuel N. Crosby (2017); Charles W. Gamble (2016);** and **J. Anthony McLain (2014)**. These fine lawyers serve as outstanding examples of professionalism for all of us to follow.

At the end of the day, there are many great lawyers who deserve, but do not always receive, recognition for their professionalism. While we cannot all receive the Tony McLain Professionalism Award, we can certainly strive for it and promote professionalism among our colleagues as a tribute to Tony’s enduring legacy. ▲

Endnotes

1. *Code of Professional Courtesy*, ALABAMA STATE BAR, available at <https://www.alabar.org/office-of-general-counsel/ethics-division/code-of-professional-courtesy/>.
2. Michelle Silverthorn, *20 Professionalism Tips for Millennial Attorneys*, 2CIVILITY (Jan. 27, 2015), available at <https://www.2civility.org/20-professionalism-tips-millennial-attorneys/>.
3. *Id.*
4. Names have been changed.
5. Silverthorn, *supra* note 2 (“**Be aware of your professional dress.** Err on the side of conservatism when it comes to your professional dress, especially in your early days at the job. Older attorneys, in particular, may have certain unspoken expectations as to office wear. Learn what those expectations are. And as the saying goes, ‘Don’t dress for the job you have; dress for the job you want.’ If you want to be a partner, start dressing like one.”); *Code of Professional Courtesy*, *supra* note 1 (“During any court proceeding, whether in the courtroom or chambers, a lawyer should dress in proper attire to show proper respect for the court and the law.”).
6. C. Isaiah Smalls II, *Broward judge tells lawyers to get out of bed and wear a shirt for Zoom hearings*, MIAMI HERALD (April 13, 2020, 4:59 PM), available at <https://www.miamiherald.com/news/local/community/broward/article241976371.html>.
7. *Id.*

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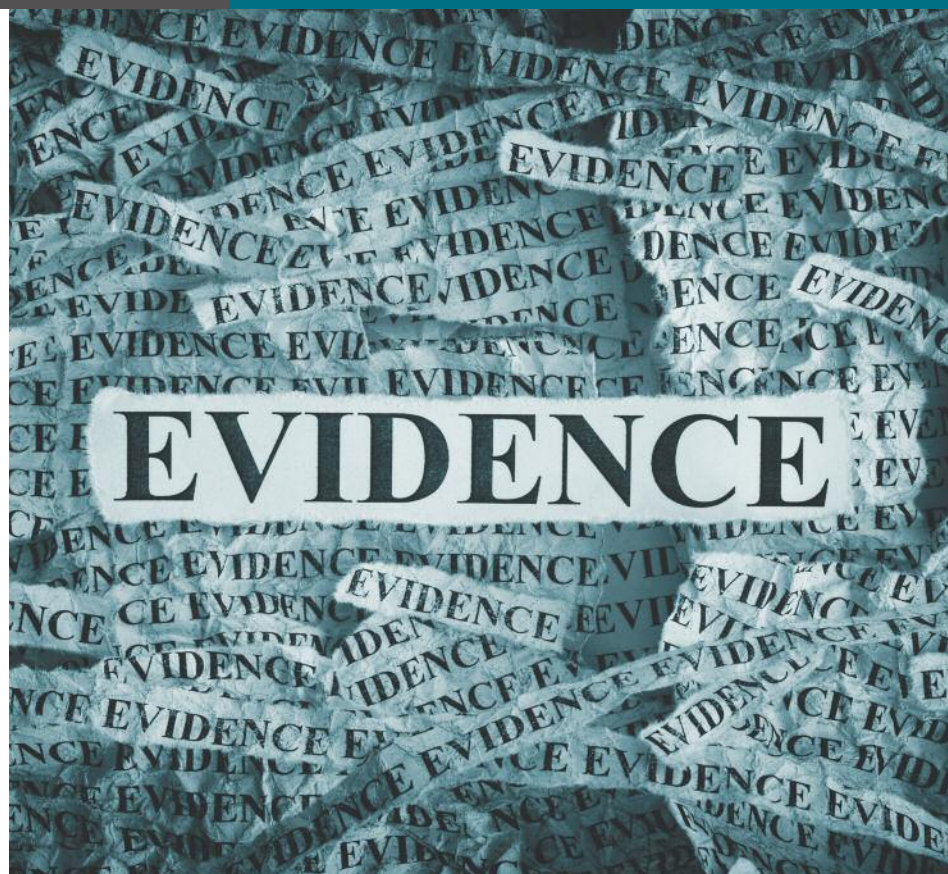
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Welcome to the evidence issue.

Every issue has a story behind it—some issues have stories you just wouldn't believe—so let me tell you the story about this one. Scott Donaldson decided that sitting as a circuit judge in Tuscaloosa for a decade was not punishment enough, so he found himself on the Alabama Court of Civil Appeals where he has sat since 2013. He called me one day with an article idea. His pitch was that he's witnessed a decline in the skill level that lawyers demonstrate on evidentiary issues. He also mentioned that one of Alabama's law

schools no longer requires a course in evidence. I was appalled; he had my ear.

As we chewed over the topic and as ideas began to flow, we decided that what we'd stumbled into was not an article idea, but an idea for an entire issue. I assigned it to him, and he went immediately to work. I think you will be pleased with what he came up with.

We begin with Judge Donaldson's thoughtful piece about the decline in trial skills. He points out what he's seen, and he ends with a discussion about whether we trial lawyers should have our



own certifications and heightened MCLE requirements. He is a terrific writer, and if you take a minute and read his article I suspect that your interest in the topic will be piqued (page 18).

Terry McCarthy and Allison Bendall give us a quick and informative history of the Alabama Rules of Evidence. I learned a lot from these two, and they ought to know something about the topic. Terry is one of the coauthors of the newly-published Seventh Edition of *McElroy's Alabama Evidence* (page 23).

Judge Donaldson told us that about half of Alabama's lawyers practice either family law or criminal law, so we begin our substantive articles with family law. Ashleigh Dunham and Sandi Gregory are experienced family law practitioners, and they suggest some practical pointers that every family law practitioner should think about, including self-authenticating documents and the emerging field of things that come from social media, including text messages. Who doesn't need to know more about that? (page 26)

Judge Elisabeth French is the presiding judge of the 10th judicial circuit, and she joined forces with Julie Cochrun and LaBella McCallum to cover the civil side of things. They provide us with a quick overview of opening statements, pre-trial motions, demonstrative evidence, learned treatises (and how long has it been since you thought about those?), business records, medical expenses (especially when the plaintiff chooses to not introduce them), pro tanto settlements, and closing arguments (page 31).

Evidence is a crucial component of criminal trials, and Judge Bill Filmore, the presiding judge of the 33rd judicial circuit, teamed with Federal Public Defender Tobie Smith, and with General Counsel for the Alabama Office of Prosecution Service Patrick Lamb to help us avoid some pitfalls. Need a refresher course in motions to suppress, the use of police reports, scientific evidence, social media, or cell towers? (page 36)

Gary Blume and Ron Smith give us their take on dependency cases. They write from the perspective of someone defending dependency cases, not from the other side of things. Their pens were sharp and their words were interesting (page 41).

What about district court cases? Megan McCarthy and Jason McCormack talk to us about issues that arise in a court that so many lawyers practice in, but about which there are too few articles and too few CLEs. They have some fresh ideas—do you give your district court judge a trial notebook?—and their insights are those of people who have given serious thought to their topic. Nice job (page 47).

We end with Lauderdale County Probate Judge Will Motlow and Brad Phillips discussing evidence in probate court. We probably spend too little time thinking about evidentiary issues in this court. Our authors have taken some time to help us fill in the gaps. I am going to spend some more time with this article (page 52).

Judge Donaldson came up with the idea of finding some bright lawyers and judges and having them write about topics that come up in their courts. I think he did a terrific job.

I mentioned his work on this issue to a friend of mine who shall remain nameless (he is Circuit Judge Isaac Whorton, but let's keep that between us), and he told me about a class that Judge Donaldson taught, how good it was, and that he was excited to see what we came up with. I think that Judge Whorton will be as pleased as I was with the results.

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

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



IMPORTANT NOTICES

- ▲ **Judicial Award of Merit**
- ▲ **J. Anthony “Tony” McLain Professionalism Award**
- ▲ **William D. “Bill” Scruggs, Jr. Service to the Bar Award**
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The purpose of the J. Anthony “Tony” McLain Professionalism Award is to honor the leadership of Tony McLain and to encourage the emulation of his deep devotion to professionalism and service to the Alabama State Bar by recognizing outstanding, long-term and distinguished service in the advancement of professionalism by living members of the Alabama State Bar.

Nominations are considered by a five-member committee which makes a recommendation to the Board of Bar Commissioners with respect to a nominee or whether the award should be presented in any given year.

William D. “Bill” Scruggs, Jr. Service to The Bar Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the William D. “Bill” Scruggs, Jr. Service to the Bar Award through **March 15**. Nominations should be prepared on the appropriate nomination form available at www.alabar.org and mailed to:

Justin C. Aday
Acting Secretary
P.O. Box 671
Montgomery, AL 36101-0671

The Bill Scruggs Service to the Bar Award was established in 2002 to honor the memory of and accomplishments on behalf of the bar of former state bar President Bill Scruggs. The award is not necessarily an annual award. It must be presented in recognition of outstanding and long-term service by living members of the bar of this state to the Alabama State Bar as an organization.

Nominations are considered by a five-member committee which makes a recommendation to the Board of Bar Commissioners with respect to a nominee or whether the award should be presented in any given year.

ASB Women’s Section Awards

The Women’s Section of the Alabama State Bar is accepting nominations for the following awards:

Maud McLure Kelly Award

This award is named for the first woman admitted to practice law in Alabama and is presented each year to a female attorney who has made a lasting impact on the legal profession and who has been a great pioneer and leader in Alabama. The Women’s Section is honored to present an award named after

a woman whose commitment to women’s rights was and continues to be an inspiration for all women in the state.

The award will be presented at the Maud McLure Kelly Luncheon at the Alabama State Bar Annual Meeting.

Susan Bevill Livingston Leadership Award

This Women’s Section award is in memory of Susan Bevill Livingston, who practiced at Balch & Bingham. The recipient of this award must demonstrate a continual commitment to those around her as a mentor, a sustained level of leadership throughout her career and a commitment to her community in which she practices, such as, but not limited to, bar-related activities, community service and/or activities which benefit women in the legal field and/or in her community. The candidate must be or have been in good standing with the Alabama State Bar and has at least 10 years of cumulative practice in the field of law. This award may be given posthumously. This award will be presented at a special reception.

Submission deadline is **March 15**.

Please submit your nominations to Elizabeth Smithart, chair of the Women’s Section, at esmithart@yahoo.com. Your submission should include the candidate’s name and contact information, the candidate’s current CV and any letters of recommendations. If a nomination intends to use letters of recommendation previously submitted, please note your intentions.

Amendment of Rule 13, Alabama Rules of Juvenile Procedure

The Alabama Supreme Court has amended Rule 13, Alabama Rules of Juvenile Procedure. The amendment is effective February 1, 2021.

Rule 13(A)(1) has been amended to require that, once issued, a summons in a delinquency, child-in-need-of-supervision, dependency, or termination-of-parental-rights proceeding be personally served, by a process server, upon the parent(s), legal guardian(s), or legal custodian(s) of the child at issue, as well as other necessary parties to the proceeding. The amendment to Rule 13(A)(1) further provides that a child, if he or she is 12 years old or older, shall be served with the summons directly by process server and not by service upon any other person or by certified mail. Finally, Rule 13(A)(1) has been amended to provide that, upon motion and good cause shown, a court may direct that an adult be served by certified mail.

A new subsection (2) has been added to Rule 13(A), providing that a hearing on the allegations in a delinquency, child-in-need-of-supervision, dependency, or termination-

(Continued from page 17)

of-parental-rights petition shall be set by entry on the trial docket or by written order at least 14 days before the date set for trial, unless all the parties agree to a shorter time. Rule 13(A)(2) further provides that the clerk of the court shall, no later than three days after a case has been placed on the trial docket, notify all parties by providing notice as required by Rule 13(C).

Former Rule 13(A)(2) has been renumbered as Rule 13(A)(3) and now includes references to the specific Alabama Code sections providing for service in termination-of-parental-rights and removal-of-disabilities-of-nonage proceedings.

Finally, former subsections (3), (4), and (5) of Rule 13(A) have been renumbered as subsections (4), (5), and (6), respectively.

The order amending Rule 13 and adopting the Comment thereto can be found at <https://judicial.alabama.gov/rules>.

Sean Blum
Reporter of Decisions
Alabama Appellate Courts

Notice of Election And Electronic Balloting

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

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

Nomination and Election of President-Elect

Candidates for the office of president-elect shall be members in good standing of the Alabama State Bar as of February 1, 2021 and shall possess a current privilege license or special membership. Candidates must be nominated by petition of at least 25 Alabama State Bar members in good standing. Such petitions must be filed with the secretary of the Alabama State Bar no later than 5:00 p.m. on February 1, 2021.

Nomination and Election of Board of Bar Commissioners

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

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

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

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

Election of At-Large Commissioners

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

Submission of Nominations

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

Justin C. Aday
Acting Secretary
P.O. Box 671
Montgomery, AL 36101-0671

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

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

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

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EVIDENCE RULES AND TRIAL SKILLS: Where Are We and Where Do We Go from Here

By Judge W. Scott Donaldson

“The Constitution guarantees a fair trial through the Due Process Clauses... [A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.”

Strickland v. Washington,
466 U.S. 668, 684–85 (1984).

For several years, I worked with middle school students preparing a mock trial to be presented at the end of the spring semester. The fact pattern I used involved a dispute between neighbors that arose from the sale of an item that did not meet the purchaser’s expectations. The purchaser refused to pay and demanded another item; the seller refused and insisted on full payment.

The students learned that interacting with each other inevitably leads to disputes and that this was a common one. The question we began with was fundamental: how does this dispute get resolved? We started with the assumption that there was nothing in place and worked through the historical evolution of dispute resolution. For example, the students saw that using violence to resolve disputes led to chaos and left the community unable to conduct business. Trials by ordeal and mystical approaches

were not satisfactory. Monarchs and other arbiters could at least resolve the claims, but the students viewed the results as too dependent upon the personal biases and whims of the decision-maker.

What the students always said they wanted was “fairness.” We looked for a dispute resolution system that at least attempted to treat all sides equally and without favoritism, and with a reasonably predictable result that could be applied to future disputes of a similar nature so that the community could govern itself accordingly. What was missing, the students ultimately concluded, were rules that were binding and guided the decision-maker toward a conclusion consistent with the stated goals. Thus, the judicial system was created within the classroom, and the mock trial made more sense to them.

As noted in the quote at the beginning of this article, a fundamental element of the constitutionally guaranteed “fair” trial in our judicial system is the presentation of evidence “subject to adversarial testing.” In this edition of *The Alabama Lawyer*, experienced lawyers and judges from across our state give practical advice on that topic in six of the most common practice areas in our state court system. The authors were asked to write as if a lawyer who had an upcoming trial in that practice area asked: “What should I focus on?” The authors refer to some of the most common Alabama Rules of Evidence (“the Rules”), as the presentation and adversarial testing of evidence is largely governed by those Rules.

We need external guides, like the Rules, in part so that reliable information can be presented in an orderly manner and to restrain the decision-maker from making decisions based on personal preferences. The Rules are not meaningless hurdles for the parties to navigate; instead, they “should be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”¹ As the students concluded, reasonable guidelines established in advance and applied in a consistent manner help ensure that the parties have a “fair” dispute resolution process, a “fair” trial.

The authors also make suggestions about how evidence should be presented in court under the Rules, or more broadly, about a lawyer’s trial skills. I think we need to assess the quality of our trial skills today, and examine ways we can improve those skills. My reasons require that we look at where we are now and where we should we go from here.

Where Are We?

The practice of law involves many different skills and activities. When we are functioning in the role of representing a client in court proceedings, we are not in the trial business; instead, we are in the dispute resolution profession. The value our profession

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brings to society in that activity depends upon how well we perform that role.

Here's why I think we need to improve our performance.

I have taught many multi-day evidence courses attended by hundreds of trial judges from across the country, and I always learn much more than I teach. We talk to each other during and after class about law, lawyers, and the future of the legal system. The feedback from these trial judges is generally consistent regardless of geographic or demographic differences—trial skills of lawyers overall are declining, and in some areas, declining rapidly. An informal survey of trial judges in our state produced similar results, and my years as a trial judge observing trial work and as an appellate judge reading transcripts confirms this assessment. To be clear, we are talking about a perceived overall downward trend, as there are many, many lawyers in our state who have the highest quality of trial skills anywhere. There are also a couple of specific practice areas where trial judges almost uniformly applaud the trial skills of the lawyers. But, in general, many have the perception that we are going backward in this area, and the perception at least merits further examination.

Let's start with our traditional system of legal education followed by on-the-job training. Our law schools are outstanding educational institutions with outstanding faculty members who are experts in education. But we all know that students often graduate with no clinical trial experience and no training in trial skills, pass the bar

The feedback from these trial judges is generally consistent regardless of geographic or demographic differences—trial skills of lawyers overall are declining, and in some areas, declining rapidly.

examination, and are then given a license to represent life, liberty, and property in court. This is not new.

Today, however, at least one of the American Bar Association-accredited law schools in our state does not require students to take an evidence course to graduate. This is new. So, if you wonder whether your opposing counsel or trial judge ever took an evidence course, the answer may be “no.”

In 2015, the bar examination review company, BARBRI, surveyed more than 1,500 law students, law faculty, and lawyers for a State of the Legal Field Survey.² The survey showed that “only 23 percent of practicing attorneys who work with recent law school graduates and 45 percent of law school faculty members think new attorneys are ready to do their jobs.” These findings correlate with the view that graduating and passing a bar examination does

not, in itself, indicate trial skill competence.

So how does the lawyer acquire competent trial skills? Historically, many lawyers learned through experience in the courtroom.³ Today, however, there are many more lawyers. The number of trials and court proceedings has not increased correspondingly, in part due to dispute resolution processes that arose as alternatives to litigation. This means there are fewer opportunities for lawyers to appear in court and, accordingly, fewer opportunities to acquire and develop trial skills.

This does not mean that litigation is not occurring in our state courthouses. Lawyers litigate daily in family court, juvenile court, probate court, small claims court, district court, and in a plethora of hearings in criminal proceedings related to probation, bond, and release conditions, etc.⁴ According to the Economic Survey of Lawyers in Alabama 2014,⁵ about half of the lawyers in this state practice family and/or criminal law. But when lawyers appear in court today, they are often on their own with no mentor or experienced lawyer to train them in trial skills. One survey indicates that almost 30 percent of Alabama lawyers are sole practitioners, and about two-thirds are in firms of five lawyers or fewer.⁶

In 2012, I wrote an article in *The Alabama Lawyer* entitled “Improving Jury Service”⁷ and made this observation: “Lawyers who are actively engaged in trial work will effectively present the evidence and arguments to the jury in the most efficient manner which saves time and money to the system and to our

jurors. Their clients are better served and are more satisfied with the process. Conversely, lawyers who dabble in trial work or have no experience and no mentor to consult or assist are often incompetent to try a case, resulting in enormous wastes of time and resources and dissatisfied clients.” The same analysis applies to bench trials.

So, a question is presented: if you are in a licensed profession and don’t get training and instruction in certain skills in school, and don’t get the opportunity to acquire those skills through experience, should you continue to be licensed to engage in that activity? Or is there a better way, one that would increase our value to clients and to society?

Where Do We Go from Here?

In the 2012 article, I proposed that we should require more training, education, or experience to obtain and maintain a license to represent clients in court proceedings.⁸ The reasons are more persuasive now. Our current system of licensing lawyers who have no education or training or experience in trial skills is not improving the quality of legal representation in court and, eventually, will erode public confidence in our value.

Just for discussion, here’s a proposal to change that: pass the bar examination and you are licensed to practice law and engage in all of the privileges of the profession—except for representing clients in

court proceedings. For that activity, you need an additional certification which can be obtained by either (a) establishing that you took and passed an evidence course and a trial advocacy course in law school within three years of applying for the certificate or (b) by obtaining 80 hours of continuing legal education (“CLE”) training specifically focused on trial skills (not an “after-dinner” CLE entertainment program). Once you have obtained the certification, you must renew it every three years by establishing that you have, during the time period, appeared as counsel in at least 15 court cases, or tried at least three bench or jury trials to verdict, or obtained 24 hours of approved trial skills CLE. If your practice does not involve representation of clients in court, you need not obtain or renew the certification.

This would ultimately reduce litigation costs and delays because lawyers with trial certification would be more informed about the Rules and better able to focus on the issues to be tried. This assessment is not novel. A writer in 1935 stated: “If we had experienced and qualified trial lawyers, much of the courts’ time could be saved. The trial lawyer, the advocate, the barrister, if you please, is not necessarily the better lawyer, but better qualified for that phase of the work. How much time is wasted, even by the most learned lawyers, who when only occasionally before the courts, having had little experience in trial work and without natural qualifications therefor, grope and even blunder in the presentation of the case, when if carried to a completion by an experienced trial

lawyer, possessing natural talents for the work, the case might have been presented in much less time and in a manner certain to accomplish the ends of justice.”⁹

Perhaps we could compare this to the medical privileging concept. A physician can be generally licensed to practice medicine in a state, but must obtain additional privileges to perform certain services within a hospital such as operating on a patient. To obtain the privilege, the physician must prove that he has the requisite skill and expertise in specific areas through training and/or experience. When properly implemented, the system helps to protect patients from incompetent

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care and the quality and efficiency of care improves. The privileges are periodically reviewed to ensure a continuing level of competency. For example, a physician who has not performed an operation in years will not be allowed to renew the privilege to operate without obtaining refresher training. For the same reasons, a lawyer who has not represented clients in court proceedings in many years should not continue to be licensed to do so without some type of review. That's where the certification renewal process would apply.

Now, I'm not suggesting that we completely adopt the barrister/solicitor system as found in some countries, primarily because I am mostly ignorant about how those systems function. I am suggesting that we should not keep doing what we have always done and expect the results to improve. Undoubtedly, there are more consequences to be considered. For example, how would a certification process affect the desperate need for more pro bono services if there are fewer lawyers certified for court practice? One argument is it would decrease the availability of pro bono work as lawyers who are certified in trial skills would probably be busier. A contrary argument is that the certification process would not affect lawyers giving advice and counsel without appearing in court, and for those clients who need court representation, certified lawyers would be more economically able to devote uncompensated time. This could also lead to an expansion of services to be provided by para-professionals.

And what are the needs of the clients?

The assistance of a lawyer possessing high quality trial skills to help resolve a dispute in the most favorable way available under the law and facts and in compliance with ethical requirements.

There may be better approaches than what I propose, but we should at least have the discussion. In 1960, Theodore Levitt published an article in the *Harvard Business Review* entitled "Marketing Myopia." He thought businesses would do better by concentrating on the needs of the customer first and not on the product being sold, and by asking the question: what business are we really in? Lawyers who represent clients in court proceedings can adapt the question and answer: we are in the dispute resolution profession. And what are the needs of the clients? The assistance of a lawyer possessing high quality trial skills to help resolve a dispute in the most favorable way available under the law

and facts and in compliance with ethical requirements. If trial skills continue to diminish, the needs of the clients will not be met satisfactorily, and society will look for other answers.

I love our profession, and I am fully convinced that our society is better, safer, more productive, and more prosperous when lawyers with quality trial skills are involved in the resolution of disputes.

Let's look for ways to improve those skills. ▲

Endnotes

1. Ala. R. Evid. 102.
2. Available at <https://www.thebarbrigroup.com/new-lawyers-believe-they-are-ready-for-the-job-practicing-attorneys-disagree-according-to-first-ever-state-of-the-legal-field-study/>.
3. Whether this "trial by fire" approach should have been replaced years ago with a clinical training requirement as part of the legal education model is not the subject of this article.
4. An argument can be advanced that much more attention to these areas should be devoted in the educational process, since these are the majority practice areas of lawyers.
5. Prepared by the Practice Management Assistance Program of the Alabama State Bar and available at <https://www.alabar.org/assets/2019/02/Economic-Survey-of-Lawyers-in-Alabama-2014.pdf>. See page 19.
6. *Id.*, page 9.
7. 73 Ala. Law. 190 (May 2012).
8. *Id.*
9. W. Erskine Williams, *The Barrister and Solicitor in British Practice: The Desirability of a Similar Distinction in the United States*, 14 Texas L. Rev. 55 (1935).

Judge W. Scott Donaldson



Judge Scott Donaldson has been a judge on the Alabama Court of Civil Appeals since 2013. He was a circuit judge in Tuscaloosa County from 2003-2013 and was in private practice from 1984 until 2003.



A Brief History of Alabama Evidence Law

And a Few Tips for the Alabama Lawyer

By Terrence W. McCarthy and Allison R. Bendall

Introduction

The Alabama Rules of Evidence did not become effective until January 1, 1996, nearly 200 years after the Alabama court system was created. For many decades, Alabama evidence law was found in the case law, statutes, and constitutions of both Alabama and the United States. As time passed, rules of court, such as the Alabama Rules of Criminal Procedure and the Alabama Rules of Civil Procedure, were added as additional sources of Alabama evidence law.

The Federal Rules of Evidence became effective in 1975, which was the culmination of a national movement to codify evidence law.¹ In the years that followed, most states adopted state rules of evidence patterned largely after the federal rules. Alabama was one of those states. A 23-member Alabama Rules of Evidence advisory committee, under the leadership of Dean Charles Gamble, held its first of many meetings on September 9, 1988.² After many years of hard

work, debate, hearings, public comment, and revised drafts, the Alabama Supreme Court adopted the original Alabama Rules of Evidence with an effective date of January 1, 1996.³ Many (and probably most) of the rules merely codified pre-existing case law and/or statutes, but several of the rules altered pre-existing evidence law.⁴

The Alabama Rules of Evidence have been changed on three occasions since their adoption. First, effective January 1, 2012, the Alabama Supreme Court amended Rule 702 to adopt *Daubert v. Merrill Dow Pharms., Inc.* as the standard for scientific expert testimony.⁵ Second, several rules were amended or added with an effective date of October 1, 2013.⁶ Third, several changes were made to the rules and advisory committee's notes with an effective date of January 30, 2020.⁷

Tips for the Alabama Lawyer

With this backdrop, the following are some key points that an Alabama practitioner needs to know when faced with evidence issues in an Alabama state court:

- **Evidence Law Outside the Rules of Evidence Remains Critical.** One of the main goals of the original drafters was to minimize the number of times a lawyer had to look outside of the rules themselves to find a rule of evidence.⁸ However, there are still many examples of where the answer to an evidence question continues to be found in a statute, rule of court, Alabama's state constitution, or the United States Constitution.⁹ In fact, the rules of evidence themselves tell us this in several places.¹⁰
- **Beware of Pre-Existing Case Law and Statutes Inconsistent with the Rules.** Cases and statutes that pre-date the Alabama Rules of Evidence that are consistent with the Alabama Rules of Evidence continue to be in full force and effect. Pre-existing cases and statutes that are inconsistent with the Alabama Rules of Evidence, however, are no longer in full force and effect. It is not always easy to determine which cases and statutes have been abrogated, but a search of the advisory committee's notes is a good start. For example, Section 12-21-162(a)

of the Alabama Code provides that a witness who has been convicted of perjury or subordination of perjury is incompetent to be a witness.¹¹ The advisory committee's notes to Rule 601 state that this statute was superseded with the passage of Rule 601.¹²

- **Be Careful Not to Rely on Old Evidence Resources.** As addressed above, the original Alabama Rules of Evidence changed pre-existing evidence law in several ways, and they have been changed three times since adoption. Relying on cases and books that pre-date those changes can be dangerous. For example, Rule 703 was amended in 2013 to provide that experts can base opinions on inadmissible facts or data if of a type reasonably relied upon by other experts in that field.¹³ Pre-existing case law says otherwise, but it is no longer applicable.
- **There Are Several Notable Differences Between the Alabama and Federal Rules.** While the Alabama Rules of Evidence are patterned after the federal rules, there are several critical differences between the two sets of rules. A few examples:
 - Rule 106. This rule, often called the "rule of completeness," generally provides that when a party introduces part of a writing or recorded statement, the adverse party may require other parts to be introduced at that time, if fairness calls for them to be considered contemporaneously.¹⁴ The corresponding federal rule would allow for the admission of a separate writing or recorded statement.¹⁵ Alabama rejected that rule and requires it to be the same writing or recorded statement.¹⁶
 - Rule 804(b)(1). This rule provides a hearsay exception for former testimony when the witness is unavailable and certain conditions are met.¹⁷ In a civil case in Alabama, both the offering party and the party against whom the testimony is offered must either have been a party to the proceeding when the former testimony was given or have a predecessor in interest who was such a party.¹⁸ Under the corresponding federal rule, there is no such "identity of parties" requirement for the offer-

ing party, and the federal “predecessor in interest” requirement for the party against whom the testimony is offered is more liberal.¹⁹

- Rule 702. In Alabama, the *Daubert* standard for expert witnesses applies only to scientific expert testimony.²⁰ Under the federal rules, the *Daubert* standard applies to all experts.²¹

True, the advisory committee’s notes to the federal rule, and cases interpreting the corresponding Federal Rules of Evidence, can generally be considered persuasive authority in Alabama.²² But that is certainly not the case when the Alabama and federal rules differ. As such, it is critical for the lawyer practicing in Alabama state court to be familiar with these differences.²³

Conclusion

Because formal legal education tends to focus on the Federal Rules of Evidence, it is important for Alabama lawyers to familiarize themselves with the history of, revisions to, and key differences found in the Alabama Rules of Evidence. Alabama lawyers should not fall into the trap of relying on sources of persuasive authority relating to the Federal Rules of Evidence that are inconsistent with their Alabama counterparts. Further, attorneys practicing in Alabama must be careful to not rely on old sources of law abrogated by the initial enactment of the Alabama Rules of Evidence or any subsequent revisions. ▲

Endnotes

1. Charles W. Gamble, *Drafting, Adopting and Interpreting the New Alabama Rules of Evidence: A Reporter’s Perspective*, 47 ALA. L. REV. 1, 1 (1995).
2. *Id.* at 3.
3. *Id.* at 4.
4. Compare ALA. R. EVID. 412 (codifying ALA. CODE § 12-21-203(1975)), with ALA. R. EVID. 601 (superseding ALA. CODE § 12-21-163(1975)).
5. See ALA. R. EVID. 702(b) (adopting *Daubert*, 509 U.S. 579 (1993)); ALA. R. EVID. 702 advisory committee’s note to 2012 amendment.
6. CHARLES W. GAMBLE, TERENCE W. MCCARTHY & ROBERT J. GOODWIN, *GAMBLE’S ALABAMA RULES OF EVIDENCE*, § 1103 (3d ed. 2014). The rules that were amended or added were Rules 404(a); 405(a); 407; 408; 412; 510(b); 608(b); 703; 801(d)(1)(C); 801(d)(2); 803(6); 804(b)(2); 804(b)(5); 902(11); 902(12); and 1103.
7. Charles W. Gamble, Robert J. Goodwin & Terrence W. McCarthy, *An Overview of the 2020 Amendments to the Alabama Rules of Evidence*, 81 ALA. LAW. 350 (2020). Two new sections to Rule 902 (Rules 902(13) and 902(14)) were added. Additionally, amendments were made to Rule 803(16) and the advisory committee’s notes to Rules 503A(d)(3), 803(7) and 803(8).
8. See Gamble, *supra* note 3, p. 8.

9. *Id.*
10. See e.g., ALA. R. EVID. 402 (stating that relevant evidence may be excluded except as provided in the federal or state constitutions, the rules of evidence, rules of court, or statutes); ALA. R. EVID. 802 (stating that hearsay is not admissible except as provided by the rules of evidence, other rules of court, or statute); ALA. R. EVID. 901(b)(10) & 902(10) (recognizing that methods of authentication can be found in statutes and other rules of court).
11. ALA. CODE § 12-21-162(a).
12. ALA. R. EVID. 601 advisory committee’s notes.
13. *Id.* at 703 advisory committee’s notes to 2013 amendment.
14. *Id.* at 106.
15. *Id.* at 106.
16. *Id.* at 106.
17. *Id.* at 804(b)(1).
18. GAMBLE, MCCARTHY & GOODWIN, *supra* note 8, § 804(b)(1), Practice Pointer 6.
19. FED. R. EVID. 804(b)(1).
20. ALA. R. EVID. 702 advisory committee’s notes to 2012 amendment; *Daubert*, 509 U.S. 579 (1993).
21. See FED. R. EVID. 702 advisory committee’s notes to 2012 amendment (clarifying “the amendment does not distinguish between scientific and other forms of expert testimony. The trial court’s gatekeeping function applies to testimony by any expert.”) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)).
22. See ALA. R. EVID. 102 advisory committee’s notes (“The committee assumes, consequently, that cases interpreting the Federal Rules of Evidence will constitute authority for construction of the Alabama Rules of Evidence.”).
23. In addition, Alabama courts are not bound by the federal cases or federal advisory committee’s notes. In fact, on at least one occasion, the Alabama Supreme Court has expressly rejected the federal case law and advisory committee’s notes for a rule that was patterned after the federal rule. See *Ex parte Byner*, 270 So. 3d 1162, 1169 (Ala. 2018) (stating that while cases construing the Federal Rules of Evidence are persuasive authority, they are not mandatory authority; rejecting federal cases and advisory committee’s notes and holding that robbery is a Rule 609(a)(2) crime of dishonesty or false statement useable for impeachment purposes).

Terrence W. McCarthy



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Family Law

Trial and Evidence Practice Pointers

By Ashleigh M. Dunham and Sandra E. Gregory

Family law is full of emotion and drama mixed in with biased facts and evidentiary pitfalls.

Whether you are in the midst of an original divorce or attempting to modify custody or alimony, it is important to understand the Rules of Evidence to effectively represent your client. In Alabama, family law cases are heard by bench trials only. Your entire case depends on your judge. The easiest way to help that judge help you is to understand the basics of evidence as it relates to family law cases.

Foundation and Authentication

The first step to presenting exhibits is laying the foundation. As a practitioner, you build suspense for the court by providing the court with why the evidence is important or relevant to the case.¹ Foundation is merely the threshold for getting evidence into the record. In fact, most foundational objections go more to the weight of the evidence than to its admissibility.²

Foundation includes authentication. In order to authenticate an exhibit, you must provide the court enough information to show that your evidence is what you are claiming it to be.³ You can often achieve this by a witness who can attest to the authenticity of the exhibit by testifying as to their personal familiarity of it.⁴ Examples of exhibits that are often used in family law cases are items such as photos of excessive alcohol use (i.e. a party passed out surrounded by liquor), photos of a nice home that is clean and organized, or photos of the children appearing happy and healthy when a parent is accused of abuse. Photographic evidence is heavily used since your client does not need to be present to authenticate the photograph but merely give testimony to substantiate what the photo depicts.⁵ They do not have to be the photographer.⁶ It is the other side's responsibility to cross examine your witness as to why the court should give that evidence less weight.

Self-authenticating documents⁷ are very helpful. They save time by alleviating the need of lengthy authentication testimony. They allow you to quickly make a point before the court. Note that you still must overcome other evidentiary barriers such as hearsay—which will be discussed below.⁸

A growing trend in family law cases is the introduction of social media, email, text messages, and other electronic messaging mediums. The Alabama Court of Criminal Appeals has explained that circumstantial evidence is enough

to admit electronic messages explaining that “the e-mail address, cell phone number, or screen name connected with the message, the content of the messages, facts included within the text, or style of writing; and metadata such as the document’s size, last modification date, or the computer IP address.”⁹ In a custody modification appeal, the court of civil appeals explained that “it was important that there be evidence that the e-mails, instant messages, or text messages themselves contained factual information or references unique to the parties involved”¹⁰

Different courts handle text messages differently. The safest method to authenticate is to allow either the sender or recipient to authenticate the message through their testimony.¹¹ There are several apps that will download a text message into a format that makes it easier to show the range of dates in which the texts were sent, a transcript of the text messages, and the phone numbers used to communicate which show the basic information needed to authenticate so that you can focus on the communication rather than your foundation. Before you introduce the exhibit, have your witness explain why the exhibit is important and how you have provided the conversation for the court (i.e. a transcript or screenshot). Here are suggestions:

Emails

- Do you recognize this exhibit marked as defendant’s X?

- What is the date of the email?
- What is the email address of the sender or the recipient?
- How did you receive it?
- Are there any personal markings that indicate who the sender was?
- How do you know who the sender is? (Have the witness explain the circumstantial evidence they use to determine it was the sender they believe it to be, such as tone, follow-up conversations, routine communicating through this medium, actions that followed, etc.)

Text Messages and Instant Messages

- Do you know Jane Doe’s phone number? What is it?
- Are you familiar with Jane Doe?
- Do you communicate with her on a regular basis (have you in the past)? How?
- When was this conversation?
- [Show the witness the text.]
- Do you recognize this?
- What is it?
- How do you know it is Jane Doe?
- What is the name listed?
- How is she listed in your phone?
- What is the phone number?
- Is this a fair and accurate representation of the conversation?
- Has this been altered in any way?
- [Offer into evidence]
- Can you read me the conversation you had with Jane Doe?

Social Media

- Have you visited [social media platform]?
- When it was visited?
- How the site was accessed?
- How do you know this is the website you're referencing?¹²
- Have you visited this site before?
- [Provide screen shot that was printed from website]
- What is the date and time that the screenshot was captured?
- Is this what you witnessed when you went to this website?
- Has it been altered or changed in any way since you first witnessed it?
- Are you familiar with Jane Doe?
- How do you know her?
- Are you friends with her on social media?
- What platforms?
- Is it currently active?
- Would you recognize it if I showed it to you?
- Is this a fair and accurate representation of their page as you have seen on it [date]?
- Does it appear altered in any way?
- How do you know that this was sent by Jane Doe?

Hearsay

Because hearsay is generally not admissible in court proceedings, family law practitioners must understand that 1) the testimonial or documentary evidence is (or is not) hearsay, or that 2) the testimonial or documentary evidence falls (or does not fall) within an



Most child custody cases involve hearsay evidence, particularly if the issue of child custody is contested.

exception to the hearsay rule.¹³ The hearsay rule is based upon the idea that unsworn out-of-court statements are to be excluded because they are unreliable and untrustworthy.¹⁴ Hearsay may be a statement that is an oral assertion, a written assertion, or nonverbal conduct that is intended as an assertion.¹⁵ Hearsay may also include a question as long as the question is an assertion.¹⁶

Family law cases include much testimony that can be characterized as “he said, she said.” Typically, your best evidence against the opposing party is their own words. Anything that the opposing party states can be used against

them, whether it is through text message, social media, email, or a parenting app, and it comes in over a hearsay objection because it is a statement by a party opponent.¹⁷ Another response to a hearsay objection as to your own client's statements to others is it can be used to rehabilitate your client's testimony if it is consistent and is offered to rebut a charge of recent fabrication or improper influence or motive.¹⁸

Hearsay presents the most problems when the case involves children. Most child custody cases involve hearsay evidence, particularly if the issue of child custody is contested. Whether the case involves an original divorce, a modification, or a contempt issue, our clients relay to us what other adults or children have said or done as the underlying basis for the action. In an original divorce proceeding, the courts must determine what is in the best interests of the child in determining an award of custody and/or visitation.¹⁹ Even in a custody modification under *Ex parte McLendon*,²⁰ the courts have to determine if disrupting a child's physical placement is outweighed by the child's best interest. Couple that with a general view that children should not be brought to courthouses to testify because giving such testimony could be emotionally damaging, even in the best of circumstances, what is a divorce and family law practitioner to do?

As noted, a party opponent's statements are admissible; however, children are not parties to an original divorce action²¹ or parties to a divorce modification.²² Thus, statements made by children to

either parent are hearsay and must be excluded unless the statements fall under one of the exceptions. One way to get a child's statement into evidence is to argue that the statement is an "excited utterance:"²³ "[a] statement relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition."²⁴ Three conditions must be met for the admission of the statement: 1) there must be a startling event or condition; 2) the occurrence of the event and the statement must be made close enough in time to indicate the declarant has not had time to fabricate; and 3) the statement must be spontaneous product of the occurrence operating on the visual, auditory, or other perspective sense of the speaker.²⁵ When there are allegations of physical or sexual abuse, note that the Alabama Supreme Court has held that for a child victim, in a criminal context, who made statements to her parents about being the victim of sexual abuse that occurred earlier in the evening, the statement, although not contemporaneously with the actual abuse, was made contemporaneously with the stress and excitement resulting from the abuse.²⁶

Another common issue in custody proceedings is when a child complains of a physical ailment due to a custody or visitation arrangement. We hear this all of the time: "Suzie always says her head hurts when she has to visit with her mother." Ordinarily, Suzie's statements would be excluded as inadmissible hearsay. However, Suzie's statements may

fall under the exception under Rule 803(3) about then existing mental emotional or physical condition.²⁷ This exception relates to "statement[s] of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)..."²⁸

Divorce law practitioners also need to be cognizant of the hearsay exception in Rule 803(1) for a present sense impression, which is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."²⁹ For example, Jack, who is the ex-wife's neighbor, calls the ex-wife and states, "Suzie is running in the road barefoot, and I do not see your ex-husband at all." You would first have to establish that the statement was made while Jack was perceiving the event, or immediately thereafter, and then the statement could come in under the Rule 803(1) exception to the hearsay rule.

Children's statements made to their doctors for the purposes of medical diagnosis or treatment are also excepted from the hearsay rule.³⁰ Such statements describe medical history, or past or present symptoms, pain, or sensations or the inception or general cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. An example might be Suzie reporting to her doctor that the cause of the bump on her head was the fact that she was not wearing her helmet when she fell off her bicycle when she was visiting with her father.

Privileges

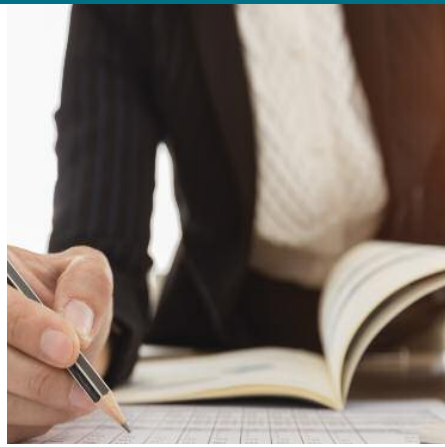
Children's statements to their counselor or therapists, however, are not allowed into evidence under Rule 803(4) because of some very technical applications of the psychotherapist-patient privilege and exceptions for children.³¹ The general rule is that a communication between psychotherapist and patient is afforded the same protection from disclosure as is afforded between an attorney and client.³² When the patient is a child, the privilege belongs to the child and only the child may waive it, not a parent.³³ Note that Rule 503(d)(5) recognizes an exception to the psychotherapist-patient privilege in child custody cases in that there is no privilege when the mental state of a *party* is clearly at issue, and proper resolution of the custody question requires disclosure.³⁴ However, a child is not considered to be a party to a custody modification action.³⁵

Be mindful, however, that statements made by parties to a custody proceeding to her counselor are not immune from disclosure. The Advisory Committee's Notes to Rule 503 seem to suggest that when a person is seeking custody of a child, her mental or emotional condition is at issue and, if so, testimony from counselors and/or counselors' records are not protected by psychotherapist-patient privilege. Also, take note that one differentiating factor, in custody cases, is that unlike most other areas of the law, character evidence is generally allowed.³⁶ In

fact, in some instances such as modification of custody proceedings, a party's character may be at issue in the case.³⁷ Witnesses may testify to certain instances, conduct, reputation, or their opinion of the parties as their character is at the heart of the matter involved.³⁸

Remember, your judge is human, too. Sometimes you receive a ruling on a "speaking objection" in which opposing counsel will simply explain their objection, but never give the basis for the actual objection. This term is also used when opposing counsel is attempting to use their objection to instruct the witness how to answer the question.³⁹ When that happens, and you need to preserve the case for your client, try requesting that your judge give her reason for sustaining the objection.⁴⁰ When preparing for trial, make sure to make a chart of your possible exhibits, any possible objections, and your responses to those objections.

Being prepared is key. ▲



When preparing for trial, make sure to make a chart of your possible exhibits, any possible objections, and your responses to those objections.

Endnotes

1. Thomas A. Mauet, *Trial Techniques*, 178. (2010).
2. *Tidwell v. State*, 496 So. 2d 109 (Ala. Crim. App. 1986).
3. Ala. R. Evid. Rule 901.
4. *Id.*
5. Steven N. Peskind, *The Family Law Trial Evidence Handbook* 144-147, (2013).
6. *Id.*
7. See Ala. R. Evid. 902.
8. *Id.* Committees Notes.
9. *Culp v. State*, 178 So. 3d 378, 379, 2014 Ala. Crim. App. LEXIS 102, *1.
10. *Smith v. Smith*, 196 So. 3d 1191, 1199, 2015 Ala. Civ. App. LEXIS 72, *18.
11. Peskind, *supra n. 5*, at 159.
12. At this point you will have the witness provide identifying information such as logos, photos, web address.

22. *Jones v. McCoy*, 150 So.3d 1974, 1081 (Ala. Civ. App. 2013), *Ex parte Dr. Barbara Johnson*, 219 So. 3d 655, (Ala. Civ. App. 2016).
23. Ala. R. Evid. 803 (2).
24. *Id.* at 803(2).
25. McElroy's Alabama Evidence, *supra n. 13*, § 265.01(1) at 1281.
26. *Ex parte C.L.Y. v. State of Alabama*, 928 So. 2d 1069 (Ala. 2005).
27. Ala. R. Evid. 803(3).
28. *Id.* at 803(3).
29. *Id.* at 803(1).
30. *Id.* at 803(4).
31. *Ex parte Dr. Barbara Johnson*, *supra n. 21*, 19 So. 3d at 657.
32. Ala. Code 1975, § 34-26-2. The Alabama Rules of Evidence also recognize such privilege. See Rule 503, Ala. R. Evid.
33. *Ex parte T.O.*, 898 So. 2d 706, 711 (Ala. 2004).
34. Ala. R. Evid. 503(d)(5).
35. *Jones vs. McCoy*, *supra n. 21*.
36. *Ex parte Berryhill*, 410 So. 2d 416, 419 (Ala. 1982).
37. Peskind, *supra n. 5*, at 39-40.
38. Ala. R. Evid. Rule 405.
39. Law Information Institute, *Speaking Objection*, Aug. 1, 2020, https://www.law.cornell.edu/wex/speaking_objection.
40. Peskind, *supra n. 5*, at 306.

Ashleigh M. Dunham

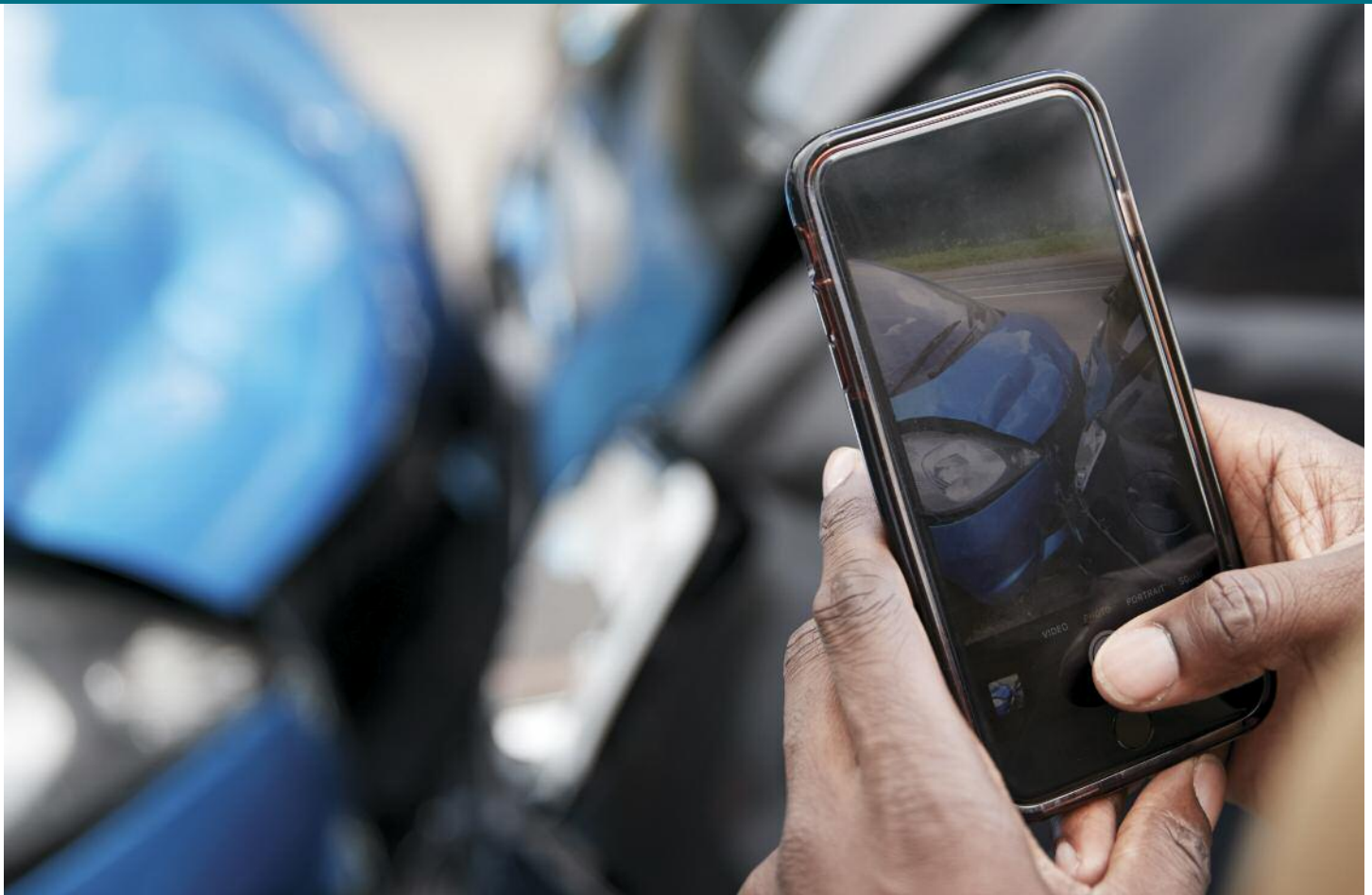


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Circuit Civil

Trial and Evidence Practice Pointers

By Judge Elisabeth A. French, Julia T. Cochrun, and LaBella S. McCallum

With changes in the law school curriculums in terms of evidence requirements,

many in the legal profession have observed that attorney trial skills have declined in recent years. The goal of this article is to present practical trial tips and important concepts to understand when offering evidence at trial.

Insurance

The scope of voir dire examination is left largely to the discretion of the trial judge.¹ “It is well settled that a trial court is vested with great discretion determining how voir dire examination will be conducted. . . the trial court’s decision will not be overturned except for an abuse of that discretion.”² During voir dire examination, the judge will usually address the jury to determine whether a juror is

covered under an insurance policy providing coverage to a defendant in the case. Challenges for cause are allowed when a juror, in the case of a mutual company, is the holder of a policy of insurance with an insurance company indemnifying any part of the case.³ Only in exceedingly rare circumstances will the existence of insurance be admissible.

Opening Statements

The purpose of opening statements is to explain the case and what the parties expect the evidence will show. Some attorneys provide details about witnesses and what they expect the testimony will be. Many jury trials in this state involve automobile accidents. Accident reports are generally not admissible and should not be discussed in opening statements. Attempts to admit accident reports as evidence may result in a mistrial.⁴ Accident reports can be admissible evidence when the officer who is authoring the reports personally observes all the events described in the report.⁵

Pretrial and Motions In Limine

Trial preparation necessitates knowing the admissibility foundations for the required elements of proof.⁶ Identifying the forms of proof available and eliminating admissibility obstacles is key. Anticipating the form of the objection and the response thereto will allow coherent trial flow.⁷ Standard pretrial orders and an individual judge's pretrial orders compel parties to preemptively address evidentiary issues. Stipulations can streamline issues. Motions in limine allow the court to address evidentiary issues so that the parties can plan accordingly.⁸ Rulings, pretrial and otherwise,

must be made part of the record. Despite a ruling pretrial that offered evidence is not precluded, a proper foundation must still be laid at trial. If the evidence is ruled precluded, make an offer of proof on the record. Protect the record, clearly stating grounds for or against admissibility.⁹ Follow through on pretrial and in-trial rulings by instructing witnesses as to how they may impact their testimony to avoid a mistrial or other sanctions.¹⁰

Accident reports are generally not admissible and should not be discussed in opening statements.

Demonstrative Evidence

Demonstrative evidence is a vital tool of persuasion in a trial. There is a clear difference between non-admissible demonstrative exhibits that may be used to highlight or explain other evidence and admissible demonstrative evidence that may go back to the jury for deliberations. Authentication using evidence sufficient to support that the exhibit is what you claim is required.¹¹ It must be relevant,¹² be more probative than prejudicial,¹³ overcome hearsay issues,

¹⁴ be based on personal knowledge,¹⁵ and if it contains opinions, must comply with ARE Rules 701 and 702.

Educational summaries are generally not admissible. Example: Counsel's writings on a flipchart of key points of a witness's testimony. The court may permit a party to use such materials in presenting its unilateral view of the evidence to assist the jury.¹⁶ As a form of argument, the court (and opposing counsel) should make clear that the summary exhibit is not actual evidence. It is excluded from the jury room during deliberations.

Substitute evidence is admitted *in place* of actual evidence. A creation of a party, it should be vetted by both the opposing counsel and the court to prevent introduction of otherwise inadmissible material. Example: A compilation summary listing of medical bills incurred by the injured party. Ala. R. Evid. Rule

1006¹⁷ establishes the method for admissibility of such substitute evidence when the underlying evidence would be impracticable to present at trial due to sheer volume. This condensed version allows for focus on what the voluminous data represents. Experts can be involved in reducing data to a more understandable and succinct compilation while maintaining the significance of the data. The original data must have been previously made available to the other parties. The writings must be 1) voluminous, 2) cannot be conveniently examined in court, 3) vetted to ensure accuracy in the compilation, and 4) otherwise admissible. The court may require that the underlying data be likewise produced to the court. This is best handled well before the start of trial so that objections can be made to the underlying data as well as the compilation itself. In practice, if the underlying larger materials are already admitted, use Rule 1006 to support an argument that the summary should likewise be admitted.

Learned Treatises

Rule 803(18) creates a hearsay exception allowing admissibility, with proper foundation, of published writings on a learned subject, as direct, substantive evidence to prove the matter asserted therein.¹⁸ This exception only permits the treatise statements *to be read into evidence*. Critical to preventing error, counsel should inventory all admitted exhibits at case close to prevent exhibits admitted under this rule from going to the jury room for deliberations.

The foundation requires that the writing first must be established as a reliable authority. Reliability can be supported by testimony by a witness (i.e. an expert) that the author of such writing is recognized in the field and that other professionals acknowledge the accuracy of the publication.¹⁹ The writing can be deemed reliable by judicial notice; however, it still must be brought to the attention of an expert. Then, the person offering the publication must show either that the publication was relied upon by the expert during direct examination or was called to the expert's attention on cross-examination. This second requirement ensures that the content is used by the jury with expert assistance in explaining or applying the information. If you intend to cross examine an op-

posing expert using a treatise, unless the opposing expert admits that it is authoritative, be sure that you have established it as authoritative through another witness.

Business Records

A business record, when properly authenticated, may be offered for substantive proof of the matter asserted under Ala. R. Evid. 803(6).²⁰ The reliability of such records is codified for civil cases with ARCP 44(h)²¹ and for criminal cases with Ala. Code § 12-21-43.²² The business must be the maker of the document rather than just a receiver who may have added it to their business's system of records.²³ Documents authored by a third party, even if contained in a business's records, do not qualify without more. Those hearsay-within-hearsay documents must meet other foundational requirements in order to be admissible. Opinions and diagnoses are admissible through records if they are otherwise qualified as if the statement had been made by an expert, as recognized by Ala. R. Evid. 702,²⁴ or by a layperson as helpful, as recognized by Ala. R. Evid. 701.²⁵

In lieu of calling a qualified witness, Ala. R. Evid. 902 (11)²⁶ and 902(12)²⁷ provide methods for meeting the elements for authentication. The certification document must provide the same foundational elements in order to comply with these rules.²⁸ A party intending to offer a record pursuant to this process must provide written notice of that intention to opposing parties, making the record and certification available for inspection sufficiently in advance so that it can be challenged. As an example, this process can be used to authenticate medical records that fall outside the statutory exceptions.²⁹

The trial court still has the discretion to exclude records for a lack of trustworthiness even if the elements are satisfied. However, the party objecting to admissibility on that ground has the burden to establish a lack of trustworthiness. The weight to be given to the admitted records is still subject to attack, especially if the admitting witness is not the maker of the records. Documents prepared for litigation use will be scrutinized as they were likely not prepared in the regular course of business.

The foundation to be established with the witness

should elicit that the record was kept in the course of a regularly conducted business activity, that it was the regular practice of that business activity to make the record, and that it was done reasonably contemporaneous with the events. There is no requirement that the authenticating witness be the custodian, entrant, or maker of the record.

Introduction of Medical Expenses by Defendant When Plaintiffs Do Not Claim Them as Damages

There is a trend in cases with low medical bills for plaintiff attorneys to not offer the bills at trial. While Alabama has not clarified its position on the issue, it is important to be aware of the national trends favoring admittance of medical bills into evidence. Nationally, there is a great deal of support for the introduction of medical expenses into evidence even though plaintiffs do not claim them as damages. The rationale is that medical bills are helpful to jurors in awarding fair and reasonable verdicts and are indicators of the severity (or lack thereof) of injuries. Most recently, in a South Carolina case,³⁰ the plaintiff claimed damages for pain and mental anguish but not medical expenses, despite the fact they existed. The South Carolina Court of Appeals stated: “[w]e see no reason [the jury] should be kept ignorant of the cost of [the plaintiff’s] medical treatment in determining the facts.”³¹ The court allowed this testimony over the plaintiff’s objection as to the relevance of those bills. This case is one among many where courts have supported the contention that medical bills are helpful to jurors in awarding fair and reasonable verdicts.³²

The rationale is that medical bills are helpful to jurors in awarding fair and reasonable verdicts and are indicators of the severity (or lack thereof) of injuries.

In Alabama, the issue is somewhat unresolved. Additionally, Alabama Pattern Jury Instruction 11.10 acknowledges there is little guidance for jurors to determine appropriate compensation for pain: “There is no legal rule or yardstick that tells you how much money to award for physical pain (and mental anguish)....”³³

Pro Tanto Settlements

A pro tanto settlement is a partial settlement by a plaintiff with one or more joint tortfeasors. Plaintiffs’ counsel should be sure to reserve the right to proceed against remaining joint tortfeasors when executing a pro tanto release to avoid any unintentional releases.³⁴ Likewise, once a pro tanto settlement is executed, the remaining co-defendants are entitled to credit any judgment with the pro tanto settlement.³⁵ Accordingly,

defendants should assert a setoff defense with specificity at the first opportunity or otherwise risk losing such post-judgment relief. While defendants can move to admit the pro tanto settlement or have the court set off the settlement against the judgment, the trial court has discretion on whether to instruct the jury on the total amount of the settlement should defendants opt to move for admission of the pro tanto settlement.³⁶ Under Alabama Rule of Evidence 408, evidence of pro tanto settlements are admissible so long as it is not offered to prove “liability for, invalidity of, or amount of a claim.”³⁷

Closing Arguments

In closing arguments, it is never appropriate to ask the jurors to put themselves in the shoes of the parties. Comments on the wealth or poverty of the parties are likewise not permissible. Be mindful of the inferences that arise from the evidence, the credibility of the witness, and the common sense that is reasonable to support a verdict. ▲

Endnotes

1. *McCray v. State*, 88 So. 3d 1,75 (Ala. Crim. App. 2010) (quoting *Ex Parte Land*, 678 So. 2d 224, 242 (Ala. 1996)).
2. *Burlington Northern R.R. v. Whitt*, 575 So. 2d 1011, 1017 (Ala. 1990) *See also Redus v. State*, 243 Ala. 320, 328 (1942) (holding that voir dire examination of jurors as to qualification and the course and extent thereof is largely within the court's discretion).
3. Ala. Code § 12-16-150 (1975).
4. *See, e.g., Mainor v. Hayneville Telephone Co.*, 715 So. 2d 800 (Ala. Civ. App. 1997) (holding that pursuant to § 32-10-11 of the Code of Alabama, the lower court erred in admitting police accident reports).
5. *Ex Parte McKenzie*, 37 So. 3d 128, 132 (Ala. 2009) (citing *Worsham v. Fletcher*, 454 So. 2d 946 (Ala. 1984)).
6. Use the Alabama Pattern Jury instructions as a method to identify proof elements.
7. *See* Charles W. Gamble, Terrence W. McCarthy, & Robert J. Goodwin, *McElroy's Alabama Evidence*, (3d ed. 2014). This publication is a reliable source that provides specific foundations, forms of objections, and response examples as well as practice pointers.
8. *See McElroy's Alabama Evidence*, supra n. 7, § 403, Practice Pointer number 3 (using a pre-trial motion in limine to avoid the dilemma of the jury being admonished to ignore hearing prejudicial evidence as this sort of instruction cannot "unring the bell.").
9. *Liberty Nat'l Life Ins. Co. v. Beasley*, 466 So. 2d 935, 936 (Ala. 1985). An appellant who suffers an adverse ruling on a motion to exclude evidence, made in limine, preserves this adverse ruling for post-judgment and appellate review only if he objects to the introduction of the proffered evidence and assigns specific grounds at the time of trial, unless he has obtained express acquiescence of the trial judge that such subsequent objection to evidence proffered at trial and assignment of grounds therefor are not necessary.
10. *Mottershaw v. Ledbetter*, 148 So. 3d 45(Ala.2013). A trial court properly granted a new trial to a patient's estate administrator, as the jury was exposed to evidence that had been excluded by a motion in limine, which evidence might have improperly influenced the jury and resulted in actual prejudice.
11. Ala. R. Evid. 901.
12. *Id.* at 401.
13. *Id.* at 403.
14. *Id.* at 801-806.
15. *Id.* at 602.
16. *Id.* at 611.
17. *Id.* at 1006.
18. *Id.* at 803(18).
19. *Hrynkiw v. Trammell*, 96 So. 3d 794, 809 (Ala. 2012). ARE 803(18) recognizes the inherent reliability of such publication when an expert admits the author's expertise and that the publication is recognized by professionals in that field.
20. Ala. R. Evid. 803(6).
21. ARCP 44(h).
22. Ala. Code 1975.
23. *See Ex Parte Frith*, 526 So. 2d 880 (Ala. 1987), *Ex Parte J.R.*, 896 So. 2d 416 (Ala. 2004), *L.A.C. v. State Department of Human Resources*, 890 So. 2d 1026 (Ala. Civ. App. 2003).
24. Ala. R. Evid. 702.
25. *Id.* at 701.
26. *Id.* at 902(11).
27. *Id.* at 902(12).
28. "[T]he proponent of the evidence may now overcome authentication, hearsay, and best-evidence-rule objections with a properly certified copy of a record of regularly conducted activity, but all other valid objections remain. Thus, even if the proponent of the evidence satisfies the requirements of these sections, the evidence may still be excluded under applicable general rules of evidence..." Committee Comments to ARE 902.

29. Hospital records meeting requirements of Ala. Code §§ 12-21-5 and 12-21-6, (1975) are admissible. Use the form provided § 12-21-7 when issuing a subpoena for such records to obtain the statutory authentication. Non-hospital records should use the process outlined in ARE 902(11) or 902(12) or other exceptions as set out in ARE 901(7) or other statutes. Use of ARCP Rule 36 Request for Admissions likewise can provide a path for admission of documents.
30. *Nestler v. Fields*, 426 S.C. 34, 824 S.E.2d 461 (S.C. Ct. App. 2019).
31. *Id.* 426 S.C. at 38, 824 S.E.2d at 464.
32. *Chapman v. Mazda Motor of America, Inc.*, 7 F. Supp. 2d 1123, 1124-25 (D. Mont. 1998); *Brice v. National Railroad Passenger Corp.*, 664 F. Supp. 220, 224 (D. Md. 1987); *McGee v. River Region Medical Center*, 59 So. 3d 575, 581-82 (Miss. 2011); *Luther v. Lander*, 373 P.2d 495, 500 (Alaska 2016); *Barkley v. Wallace*, 595 S.E. 2d 271, 273-74 (Va. 2004); *Melaver v. Garis*, 138 S.E. 2d 435 (Ga. App. 1964).
33. *See* Ala. Pattern Jury Inst. Civ. 11.10 (3d ed.).
34. § 44:12. *Pro Tanto* settlement credit to non-settling defendant, 2 Trial Handbook for Ala. Law. § 44:12 (3d ed.); *see also* Ala. Code § 12-21-109.
35. *Lowry v. Garrett*, 792 So. 2d 1119 (Ala. Civ. App. 2001).
36. *Morris v. Laster*, 821 So. 2d 923 (Ala. 2001); 1 Ala. Pattern Jury Instr. Civ. 11.44 (3d ed.).
37. *See* ARE 408.

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Circuit Criminal Trial and Evidence Practice Pointers

Judge William H. Filmore, Tobie J. Smith, and J. Patrick Lamb

Most Often Cited Rule of Evidence: 404(b)

The first sentence of Alabama Rules of Evidence Rule 404(b) gives the general rule: “Evidence of other crimes, wrongs, or acts is not admissible to prove the char-

acter of a person in order to show action in conformity therewith.” But the rule goes on to say that it *may* be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The cases that are tried the most often are the ones with the most severe penalties. Rule 404(b) is most often seen in sexual assault cases involving children. This exception has been carved out in case

law, as “[the Alabama Supreme Court has] held that evidence of similar collateral sex acts with a child was admissible under Rule 404(b) to prove that the appellant was ‘motivated by an unnatural sexual desire for young girls.’”¹ Needless to say, this evidence, if admitted, could be very damaging to the defendant. The court should conduct a hearing outside the presence of the jury under Rule 104(a) to determine what limits will be made to the testimony. Courts are not looking to try cases within cases. It is recommended that a limiting instruction should be given at the time of the testimony and again during the general charge. The instruction not only should attempt to limit the use of the evidence, but also attempt to explain the application of the burden of proof.

Whether the use of 404(b) is for propensity of similar collateral sex acts with a child, or for other purposes, the court should still perform a balancing test under Rule 403 to the evidence presented in each case. The court should examine the strength of the evidence, the need for the evidence, whether the evidence is too remote, the degree of similarity, and whether a limiting instruction will be sufficient.² Remoteness may not be as big a factor in sexual assault cases.³ And, we don’t need to forget that “the jury almost surely cannot comprehend the Judge’s limiting instructions.”⁴ An example of a limiting instruction could be:

Ladies and gentlemen of the jury, there was evidence offered in this case in regard to other alleged specific conduct or acts on the part of the defendant other than the charge

in the indictment in this case. That evidence is not offered nor allowed in for your consideration as evidence that the defendant committed the acts that are charged in this case simply because he may have committed some other similar act at the time not in issue in this case. This evidence cannot be considered by you in passing upon whether the defendant actually committed the acts charged in this case. Nor may it be considered by you in considering the character of the accused. Such evidence may be considered by you only in passing upon what the defendant’s motive, if any, may have been at any time material to the issues in this case. The state is offering this evidence for the sole purpose of showing the defendant’s unnatural sexual desire for young girls as defendant’s motive to commit the crime charged in the present case.

Motions to Suppress Evidence

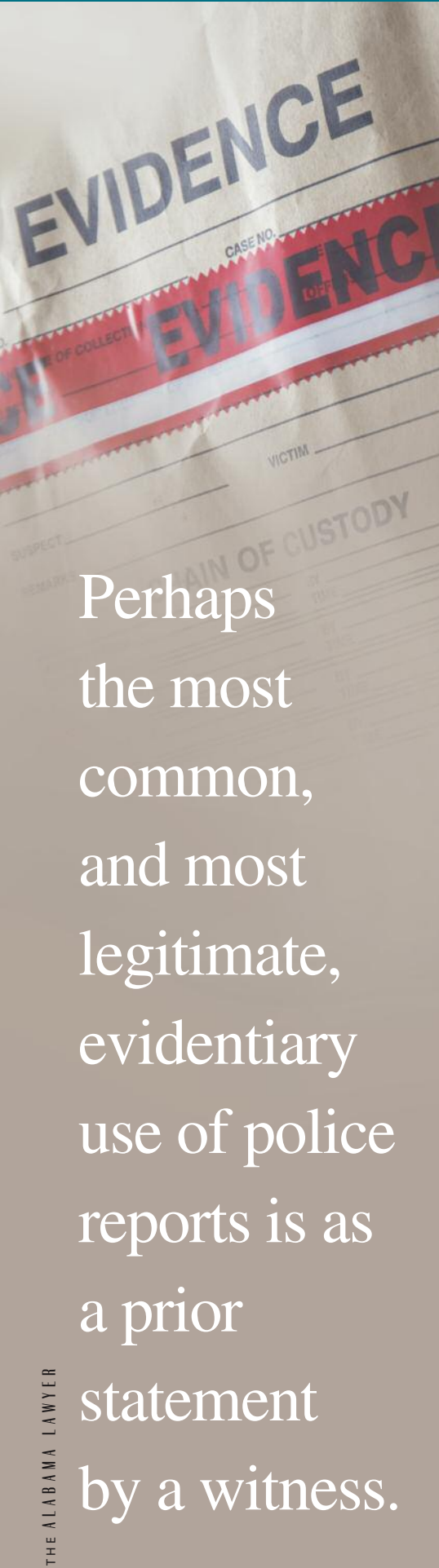
The most significant evidentiary rule in criminal cases might not even be in the rules of evidence. The exclusionary rule is a doctrine that “forbids the use . . . at trial” of evidence obtained in violation of the Fourth Amendment⁵—if suppressing the evidence will “result in appreciable deterrence” of future Fourth Amendment violations.⁶ In

some of the most commonly prosecuted crimes, such as unlawful possession of drugs, a weapon, or other contraband, the entire case turns on the admissibility of a single piece of evidence. If the evidence is suppressed, then the prosecution cannot prove the charge and will have no choice but to dismiss.

Despite that, lawyers often miss opportunities to suppress crucial evidence, even when doing so could drastically transform the complexion of the case, because they either do not look for those opportunities or do not recognize them. There can be many reasons for that: inexperience,⁷ unfamiliarity with the complexities of Fourth Amendment law, or simply an aversion to motions practice. But it really is not possible to effectively practice criminal defense, or to effectively prosecute crimes, without a basic understanding of Fourth Amendment rules, suppression practice, and the exclusionary rule.⁸

The law regarding unlawful searches and seizures is too elaborate to summarize here, but the basics of suppression practice are simple enough. Proving that a search or seizure was lawful—or unlawful (the party that bears the burden depends on whether the search was based on a warrant)⁹—usually requires testimony and evidence that differs from, and would not be permitted as, trial evidence. So, an oral motion at trial will not do, and a written, pretrial motion is necessary.¹⁰

As for the deterrence rationale underlying the exclusionary rule, the mere fact of a Fourth Amendment violation provides an argument for suppression: “to compel respect for the constitutional guaranty in the



Perhaps the most common, and most legitimate, evidentiary use of police reports is as a prior statement by a witness.

only effectively available way—by removing the incentive to disregard it.”¹¹ But exclusion “doesn’t follow automatically” from a Fourth Amendment violation;¹² it also requires a showing that under the particular facts of the case, suppression would “deter[] officer misconduct and punish[] officer culpability”¹³ Ordinarily, that means a violation must have resulted from not just accidental or merely negligent disregard for Fourth Amendment protections, but rather “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”¹⁴

At a suppression hearing, the prosecution usually should present its case first, a detail that frequently confuses judges and lawyers because of the fact that the hearing is on the defendant’s motion. This order of presentation more naturally follows the burden of production and proof.¹⁵

Evidentiary Use of Police Reports

Police reports can be useful in a variety of ways, but are frequently misused. It is natural that prosecutors and defense attorneys alike will look to police reports as valuable sources of information. In an evidentiary setting, though, reports are seldom the right source of admissible evidence. Their main evidentiary value is to show what someone said at or near the time of an incident, and because of that, most direct uses of them would be hearsay.¹⁶

A police report, like any writing, may be used to refresh a witness’s recollection, even that of a non-police witness.¹⁷ But that ordinarily does not mean that a witness should be allowed to continually refer to or read from the report, notes, or any other writing while on the stand, because the purpose of refreshing recollection is to allow a *present* recollection of something the witness previously knew but cannot readily recall.¹⁸ On the other hand, a report may be read verbatim into the record if it qualifies under the hearsay exception for a recorded recollection.¹⁹

Perhaps the most common, and most legitimate, evidentiary use of police reports is as a prior statement by a witness. Usually, the prior statement will be one asserted to be inconsistent with the witness’s testimony and used to impeach,²⁰ because the permissible uses of prior *consistent* statements are more limited.²¹ To qualify as a witness’s prior statement, the police report’s contents must have been made by the witness in some way.²² That includes the officer who wrote the report, but it also can include another officer, witness, or person who signed it, if in doing so the person intended to adopt part or all of the contents.²³

Scientific Evidence

Definition: Scientific evidence must rest on scientific principles, and it is distinguished from other expert testimony which relies solely on specialized knowledge. Examples of non-scientific

evidence includes print or firearm identification testimony,²⁴ an animal's cause of death,²⁵ examinations of skeletal remains,²⁶ crime scene analysis,²⁷ handwriting analysis,²⁸ and black light tests.²⁹ Non-scientific evidence is generally admitted if it satisfies the basic requirements of Rule 702: reliable expert knowledge, helpful to factfinder, and relevance.

Admissibility Tests: Traditional Alabama precedent adopts the “Frye” test³⁰ or the “general acceptance test.”³¹ This test is intended for use in admission of “novel” scientific evidence supported by scientific principles, methods, or procedures which have gained *general acceptance in the field* in which the expert is testifying. The broader *Daubert* test³² allows admission of novel scientific evidence when 1) based on sufficient facts or data, 2) is the product of *reliable principles and methods*, and 3) the principles and methods are applied in a reliable manner. The focus on the two tests is “general acceptance” versus a “reliable” principle and method. This shift began in Alabama state courts with DNA evidence in 1994³³ and for both civil actions and felony cases in 2011.³⁴

The pertinent analysis to determine the proper test for admissibility is whether the evidence is indeed “scientific” and then whether to apply the general *Frye* test or the specified *Daubert* test.

Social Media

Social media evidence such as Facebook, Twitter, and other platforms have become a regular part

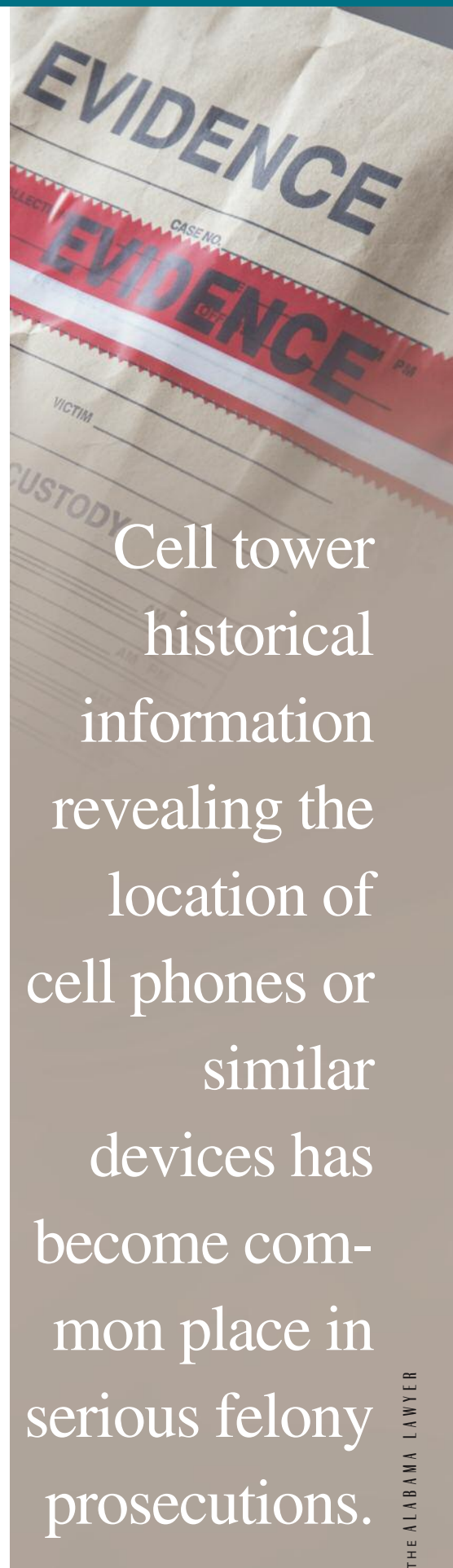
of criminal investigations and prosecutions. Similarly, digital communications such as emails or text messages are common place in all manner of trial settings. They may be admitted similarly to other forms of evidence and must overcome authentication, hearsay, relevance, and best evidence. Examples in Alabama of proper foundations include a detective who took screen shots of a material posting in conjunction with a media search and corroborating circumstances;³⁵ and printouts of emails explained by domestic victim who helped set up the account and which included photographs of sender, his initials, and personal references in the content.³⁶ Such evidence may also be admitted as a business record by a provider of cell service or similar digital provider.³⁷

Admissibility is not the only concern for social media or digital evidence. The weight of the evidence may become a concern if the authenticating witness has a bias.

Cell Towers³⁸

Cell tower historical information revealing the location of cell phones or similar devices has become common place in serious felony prosecutions.

4th Amendment: Historical cell tower location data is generally governed by federal law³⁹ which is adopted by state statute.⁴⁰ In interpreting these laws, the United States Supreme Court in *Carpenter v. United States*⁴¹ that a search warrant based upon probable cause is required to obtain location information from cell tower records.



Cell tower historical information revealing the location of cell phones or similar devices has become common place in serious felony prosecutions.

Prior to this opinion, 18 U.S.C. § 2703(d) provided for disclosure of cell tower records based upon “specific and articulable facts showing that there are reasonable grounds” as opposed to probable cause. Pre-*Carpenter* cases have allowed admission due to the “good faith” exception.⁴² Post-*Carpenter* location records should be obtained by a search warrant or proper exception. Evidence obtained in violation of the Fourth Amendment should be challenged by a suppression motion.

Authentication: Records, including cell tower records, must be authenticated prior to their admission. Authentication is satisfied by “evidence sufficient to support a finding” that the record is what the proponent claims.⁴³ Cell tower records are typically admitted as business records⁴⁴ and as such may be self-authenticating depending upon the certification.⁴⁵ It is noteworthy that the self-authentication rule requires prior notice.

Qualifications and Presentation: Cell tower records may be interpreted by a witness who is properly qualified.⁴⁶ This would include training and experience, but does not necessarily require “expert” testimony. Cell tower location testimony is limited; however, the location of the cell tower is generally admissible.⁴⁷ Limitations as to how precise location testimony is are largely based upon the quality of the expert and reliability of the method.⁴⁸ ▲

Endnotes

1. *Towles v. State*, 168 So. 3d 133 (2014).
2. Goode and Welborn, *Courtroom Evidence Handbook*, p. 98.
3. *McClendon v. State*, 813 So. 2d 936 (Ala. Crim. App. 2001).
4. *Michelson v. United States*, 335 U.S. 469, 484 (1948).

5. *Herring v. United States*, 555 U.S. 135, 139 (2009) (citing *Weeks v. United States*, 232 U.S. 383, 398 (1914)).
6. *United States v. Leon*, 468 U.S. 897, 909 (1984) (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)).
7. Even seasoned lawyers may lack experience in this area if they have never gotten in the habit of looking for suppression issues.
8. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (defense counsel’s performance was constitutionally deficient where he “failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State’s intention to introduce” crucial incriminating evidence arguably seized in violation of Fourth Amendment).
9. 6 Wayne R. LaFare, *Search & Seizure* § 11.2(b) (5th ed. 2019) (“[M]ost states follow the rule utilized in the federal courts: if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant the burden of proof is on the prosecution.”); *Ex parte Hergott*, 588 So. 2d 911, 914 (Ala. 1991) (“The State has the burden to prove that a warrantless search was reasonable.”).
10. See F. R. Crim. P. 12(b)(3)(C); Ala. R. Crim. P. 3.13; 15.6.
11. *Elkins v. United States*, 364 U.S. 206, 217 (1960).
12. *United States v. Taylor*, 935 F. 3d 1279, 1289 (11th Cir. 2019).
13. *Id.* at 1290 (emphasis omitted) (citing *Herring*, 555 U.S. at 142).
14. *Herring*, 555 U.S. at 144.
15. See LaFare, *supra* note 5.
16. Ala. R. Evid. 803(8)(B) and F.R.E. 803(8)(A)(ii) both provide that police reports are not admissible by the prosecution under the public-records exception to the hearsay rule. The federal exclusion applies to both parties, while the Alabama rule applies only where the report is “offered against the defendant,” Ala. R. Evid. 803(8)(B) (emphasis added).
17. See F.R.E. 612; Ala. R. Evid. 612.
18. See, e.g., *Crusoe v. Davis*, 176 So. 3d 1200, 1205 (Ala. 2015) (trial court properly barred officer from testifying about contents of police report where he “admitted he had no independent recollection of the contents”).
19. See Ala. R. Evid. 803(5); Fed. R. Evid. 803(5).
20. *Id.* at 801(d)(1)(A); Fed. R. Evid. 801(d)(1)(A).
21. See Ala. R. Evid. 801(d)(1)(B); Fed. R. Evid. 801(d)(1)(B).
22. See Fed. R. Evid. 801(b), (d)(1)(A); Ala. R. Evid. 801(b), (d)(1)(A).
23. See Ala. R. Evid. 801(a); Fed. R. Evid. 801(a).
24. *Revis v. State*, 101 So.3d 247 (Ala. Crim. App. 2011).
25. *Courtaulds Fibers, Inc. v. Long*, 779 So.2d 198 (Ala. 2000).
26. *Ex parte Dolvin*, 391 So.2d 677 (Ala. 1980).
27. *Simmons v. State*, 797 So.2d 1134 (Ala. Crim. App. 1999).
28. *West v. State*, 793 So.2d 870 (Ala. Crim. App. 2000).
29. *Stewart v. State*, 601 So.2d 491, 499 (Ala. 1993).
30. *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923). See *Ex parte Perry*, 586 So.2d 242 (Ala. 1991).

31. See *Swantstrom v. Teledyne Cont’l Motors, Inc.*, 43 So.3d 564, 580 (Ala. 2009).
32. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993).
33. Ala. Code § 36-18-30.
34. *Id.* at § 12-21-160 (2012).
35. *Knight v. State*, 2018 WL 3805735 (Ala. Crim. App. 2018).
36. *Culp v. State*, 178 So.3d 378 (Ala. Crim. App. 2014).
37. *Pettibone v. State*, 91 So.3d 94 (Ala. Crim. App. 2011).
38. Note that these issues were largely addressed in an opinion issued by the court of criminal appeals in January 2020, *Watson v. State*, — So. 3d —, 2020 WL 113366 (Ala. Crim. App. 2020).
39. The Stored Communications Act, 18 U.S.C. § 2701, et. seq.
40. Ala. Code §§ 13A-8-115 and 15-5-40.
41. *Carpenter v. United States*, 138 S.Ct. 2206, 201 L.Ed. 2d 507 (2018).
42. See *United States v. Carpenter*, 926 F. 3d 313 (6th Cir. 2019).
43. Rule 901(a) of the Alabama Rules of Evidence.
44. Ala. Code §12-21-43 and Rules 803(6), 902(11), and 1001 of the Alabama Rules of Evidence.
45. Alabama Rule of Evidence 902(11), (13), and (14).
46. *Woodward v. State*, 123 So. 3d 989, 1014-16 (Ala. Crim. App. 2011).
47. *Id.*
48. Recently discussed in *United States v. Frazier*, 442 F. Supp. 3d 1012 (M.D.Tenn. 2020).

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Juvenile Court

Evidentiary and Procedural Potential Pitfalls

By *Gary L. Blume and Ronald W. Smith*

“I’m not strange, weird, off, nor crazy. My reality is just different than yours.”

—The Cheshire Cat¹

Many lawyers who rarely find themselves representing accused, abused, or neglected children or their family members in juvenile court often feel as if they’ve “gone down the rabbit hole.” Terms and concepts are different. Evidentiary standards vary depending upon the stage of the proceeding. In this article, we’ll examine the highlights of both dependency and delinquency cases.²

Dependency Practice

Prior to Filing of a Dependency Petition

Child abuse or neglect cases typically arise as a result of an investigation by a social worker from the Department of Human Resources (DHR) in response to a complaint that may have come from a concerned relative, teacher, neighbor, estranged former partner, or busy-body. The social worker will often represent that she/he has broad powers to remove children and place them with another relative or close friend under what is referred to as a safety plan.³ Parents and others involved often think that they've been provided with an enforceable court order. Rather, they've signed a hand-written, fill-in-the-blank agreement that is effective only for 90 days.⁴ If you're called by a parent in the midst of a DHR inquiry, it is critical to remember that DHR does not have the authority to require a parent to do anything without a court order.⁵ Make them go to court and prove their case.

Emergency Removal from the Custody of a Parent

A child may be summarily removed in an extreme situation, if a *law enforcement officer* has "reasonable grounds" to believe that a child is in imminent danger and the removal of the child is necessary for the protection of the child's health and safety, or if there's no parent or other suitable person able to provide for the child.⁶ The child is then placed temporarily in DHR foster care, and DHR must file a dependency petition.

After the Filing of a Dependency Petition—The Shelter Care Hearing

There must be a hearing within 72 hours when a child has been summarily removed from a parent's custody.⁷ This is referred to as a shelter care hearing. If a parent

If you're called by a parent in the midst of a DHR inquiry, it is critical to remember that DHR does not have the authority to require a parent to do anything without a court order.⁵

can be found, he/she must be provided with written or verbal notice of the date, time, place, and purpose of the shelter care hearing.⁸ During the shelter care hearing, "[a]ll relevant and material evidence helpful in determining the need for shelter may be admitted by the juvenile court, *even though not admissible in subsequent hearings.*"⁹ In other words, hearsay and other generally inadmissible evidence will be considered during the shelter care hearing. Don't be surprised if even unqualified speculation regarding what an expert may later conclude about a child's situation comes to light during the shelter care hearing. That is a bell that is extremely difficult to un-ring.

All dependency hearings are conducted without a jury and separate from other proceedings. The general public is excluded. Usually, only the parties, their counsel, witnesses, and the DHR social worker are present. Other persons the court finds to have a proper interest in the

case or in the work of the court may be present. If the juvenile court finds that it is in the best interests of the child, the child may be excluded from the hearing.¹⁰

A parent's attorney should become as thoroughly acquainted with the facts and circumstances of the case as possible before a shelter care hearing. The parent's attorney needs to know about the parent—warts and all. Remember, from an evidentiary point of view just about everything negative about your client can and will come in during the shelter care hearing. Since the same judge will normally preside over the later adjudicatory trial, a parent's attorney may consider it worthwhile to avoid the judge hearing the worst about the parent at this stage. A stipulation at the shelter care hearing is not binding upon the parent at subsequent proceedings.¹¹

At the conclusion of the shelter care hearing, the juvenile court shall immediately release the child to the care, custody, and control of the parent/legal guardian/legal custodian or another suitable person, unless the court finds that the child has no parent/legal guardian/legal custodian or other suitable person able

to provide supervision and care for the child, or that the release of the child would present a serious threat of substantial harm to the child.¹² The juvenile court's decision must be supported by *clear and convincing evidence* if it determines not to release the child.¹³

If the juvenile court returns the child to the parent at the conclusion of the shelter care hearing, the court may impose a variety of conditions, including, but not limited to, restrictions on travel, associations, or living conditions of the child, pending the adjudicatory trial.¹⁴

Finally, a shelter care order in which the juvenile court finds dependency, is an order that “addresses crucial issues that could result in depriving a parent of the fundamental right to the care and custody of his or her child” and is an appealable order.¹⁵

Pre-Adjudicatory Orders, etc.

The juvenile court may direct DHR to prepare a report with recommendations concerning the child, the family, the home environment, and other matters relevant to the need for treatment or disposition of the case.¹⁶ If there are indications that the child may be physically ill, mentally ill, intellectually disabled, developmentally delayed, or has other special needs, the juvenile court, on its own motion or motion of a party, may order the child to be examined by a physician, psychiatrist, psychologist, etc. and require a written report prior to the adjudicatory trial.¹⁷

Counsel should be aware that if there are allegations of abuse or neglect, DHR may investigate the accusations independently from the juvenile court proceedings in order to enter its findings in the Central Registry for Child Abuse and Neglect (CA/N Registry).¹⁸ The scope of DHR's investigation by its social worker can be extremely broad and is left up to DHR's discretion.¹⁹ DHR will either enter a finding of “indicated” or “not indicated.” An indicated finding means that the DHR social worker found that credible evidence and professional judgment substantiates that the alleged perpetrator was responsible for child abuse or neglect.²⁰ A not indicated finding means that the DHR social worker did not find sufficient credible evidence to support the worker concluding that the parent was responsible for child abuse or neglect.²¹ The parent has the limited due process rights typical of administrative reviews.²²

In the event of such reports, counsel should be prepared for DHR to seek to introduce their reports and findings at the adjudicatory trial, either directly or indirectly.

Adjudicatory Trial

Although § 12-15-310 refers to this stage of a dependency case as an adjudicatory hearing, make no mistake, this is a *trial*. For a parent facing loss of custody of her child, the importance of the proceeding should not be vitiated by any lesser verbiage. Nevertheless, in many jurisdictions, often the court, DHR, and sometimes the child's guardian ad litem (GAL) work to expedite the process. Sometimes, there's an attempt to proceed to entry of an adjudication of dependency without testimony or other evidence of record. Alabama appellate courts will reverse such cases.²³

Section 12-15-310 prescribes the manner in which a dependency adjudicatory trial is conducted, explicitly requiring proof by *clear and convincing evidence*.²⁴ Rule 1(A) of the Alabama Rules of Juvenile Procedure provides that “the *Alabama Rules of Evidence* shall apply in all proceedings in the juvenile courts.”²⁵

Counsel should be mindful of the express language in § 12-15-310(c) allowing a third party to testify about a written or verbal statement made by a child under the age of 12 describing any act of child abuse committed against the child in DHR dependency cases if:

- (1) The statement was made to a social worker, therapist, counselor, licensed psychologist, physician, or school or kindergarten teacher or instructor, or during a forensic interview; and
- (2) The juvenile court finds that the time, content, and circumstances of the statement provide sufficient indicia of reliability. In making its determination, the juvenile court may consider the physical and mental age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, and any other factor deemed appropriate.

Obviously, the juvenile court judge is afforded broad discretion in allowing hearsay statements of children under the age of 12 years. Otherwise, hearsay testimony is subject to the Alabama Rules of Evidence.

Parent's counsel and others opposing the party offering the documents in evidence should be vigilant regarding the contents of DHR pre-adjudicatory reports and “indicated child abuse and neglect findings.” Expect those documents to be replete with double hearsay references from a variety of sources. The initial objection should be hearsay. DHR or another

proponent of the records may argue that these records are an exception under *A.R.E.* Rule 803(6) [Business Records]. This rule has specific predicate requirements that may be difficult to establish through a DHR social worker. Don't be reticent about taking the social worker witness on *voir dire*. They are typically not prepared for questions from an opponent at that point.²⁶

DHR reports typically contain very little first-hand knowledge. The reports contain the social worker's recollection of what someone else told them. Most of that information comes from someone outside of DHR. In that event, the information constitutes double hearsay and may be inadmissible.²⁷ The same is true for reports prepared by the child's guardian ad litem.²⁸

Also, be wary of attempts by DHR to interject the social worker's opinion. In the opinion of the authors, it is doubtful that a social worker who holds a bachelor's degree in social work can be qualified as an expert under Ala. R. Evid Rule 702, as it applies in juvenile court proceedings. The *Daubert*²⁹ expert standards as set out in Rule 702(b) specifically exempt juvenile cases. As such, a DHR social worker seeking to give an expert opinion must be qualified by knowledge, skill, experience, training, and education.³⁰ This same standard applies to true expert witnesses commonly involved in dependency cases, such as physicians, psychologists, etc.

Social workers are typically qualified as lay witnesses. Counsel should seek to limit their testimony to facts of which the social worker has first-hand knowledge. In order to qualify a social worker to provide a lay opinion, a foundation must be established to show that: (1) the witness possesses a personal knowledge of the facts and the offered opinion is rationally based upon the witnesses' perception of those facts;³¹ and (2) that the offered opinion will be helpful to the trier of fact's determination of a fact in issue.³²

Dispositional Hearing

If the juvenile court finds the child dependent, the court may proceed immediately or at a later date to conduct a dispositional hearing.³³ If the court decides to afford the parents an opportunity to "clean up their act," the court shall enter an appropriate order for the temporary care of the child. That temporary arrangement may include placement with the parents, subject to terms and conditions as the court may impose.³⁴

In a dispositional hearing, all relevant and material evidence helpful in determining the best interests of the child, including verbal and written reports, may be received by the juvenile court *even though not admissible in the adjudicatory hearing*. The parties are afforded an opportunity to examine and controvert written reports and to cross-examine individuals making reports.³⁵ In the event of a delayed hearing, there must also be a finding by clear and convincing evidence that the child remained dependent at the time of the dispositional hearing and order.³⁶

Delinquency Practice

Generally, these cases involve a child under the age of 18 years who is charged with having committed an act that, if committed by an adult, would constitute a criminal offense.³⁷ Caselaw of this century has made clear that children under the age of 18 years are not just short adults. A lawyer seeking to defend a child under 18 must become conversant with the underpinnings of this line of United States Supreme Court opinions.³⁸

Child *Miranda*³⁹ Rights

When placed in a custodial situation, a child has more extensive *Miranda* rights than an adult, as she has the right to have a parent present during questioning and to be advised of the reason that the child is being taken into custody.⁴⁰ These rights apply even when a juvenile is charged as an adult under Alabama's automatic-transfer statute.⁴¹

Parents will often angrily protest that they were not told that their child was being questioned. There is no requirement that the parents of the child be informed when the child has been taken into custody ("detained").⁴² The child's right to presence of a parent applies even if the parent declines to speak with the child. And law enforcement may not interrogate a child who has requested the parent's presence, any more than law enforcement can interrogate a suspect who has requested the presence of his counsel who then declines to be present.⁴³

In some situations, the presence of a parent may pressure or induce a child to waive his or her *Miranda* rights. Such inducement, even though offered by a third party, may render a subsequent confession inadmissible.⁴⁴

Rights of a Child Taken into Custody—72-Hour Hearing

If a child is detained in a delinquency proceeding, he must be immediately released to a parent, unless:

- (1) The child has no parent, guardian, custodian, or other suitable person able and willing to provide supervision and care for such child;
- (2) The release of the child would present a clear and substantial threat of a serious nature to the person or property of others where the child is alleged to be delinquent;
- (3) The release of such child would present a serious threat of substantial harm to such child;
- (4) The child has a history of failing to appear for hearings before the court; or
- (5) The charge involves a firearm.⁴⁵

If the child is not immediately released, a petition must be filed and a hearing held within 72 hours of the initial detention.⁴⁶ All relevant and material evidence helpful in determining the need for continued detention may be admitted by the juvenile court, even though not admissible in subsequent hearings.⁴⁷

Delinquency Trial

If the matter is not resolved by some preliminary means,⁴⁸ the case will proceed to trial. The prosecution's burden is proof beyond a reasonable doubt, with full applicability of the Alabama Rules of Evidence. Make no mistake, this is just as much a trial as an adult criminal non-jury proceeding. Don't be misled into thinking that "it's just juvenile court—nothing can happen that will impact the child's adult life." Juvenile delinquency court is no longer like Las Vegas—what happens there does not necessarily stay there.⁴⁹

Prior to trial, the juvenile probation officer (JPO) may question the child and the parents extensively in order to determine the appropriateness of diversion. Statements made to the JPO are not admissible at trial.⁵⁰

If the juvenile court finds that the state has met its burden of proof, all is not necessarily lost—there still must be a dispositional hearing.

Dispositional Hearing—A Child Can't Be Adjudicated Delinquent Solely for Having Committed a Delinquent Act!

If the juvenile court finds that the state has met its burden of proof, all is not necessarily lost—there still must be a dispositional hearing. In dispositional hearings, "all relevant and material evidence helpful in determining the questions presented" is admissible. That includes written and verbal reports, even though those would not have been competent evidence in the delinquency trial. All written reports must be provided to defense counsel, with the opportunity to cross-examine the author.⁵¹ Clear and convincing evidence is required that the child is in need of care or rehabilitation.⁵²

It is at this point that a zealous juvenile defense lawyer must be

mindful of the following statutory language regarding the dispositional delinquency hearing: "If the juvenile court finds that the child is not in need of care or rehabilitation, it shall dismiss the proceedings and discharge the child from any detention or other temporary care."⁵³ In other words, just because it has been proven beyond a reasonable doubt that your client did it, you can still win the day and have the entire case dismissed!⁵⁴ How is this done? Make sure that the child completes counseling, performs community service, and makes restitution prior to the dispositional hearing.

“She who saves a single soul, saves the universe.”

—The Cheshire Cat⁵⁵ ▲

Endnotes

1. *Alice's Adventures in Wonderland*, Lewis Carroll (1865).
2. Termination of parental rights, discretionary transfer, and other proceedings are outside the scope of this article.
3. See, e.g., Ala. Admin. Code r. 66-5-34-.06.
4. Ala. Admin. Code r. 66-5-34-.06-(3)-(a)-3.

5. *T.J. v. Calhoun County Department of Human Resources*, 116 So. 3d 1168 (Ala. Civ. App. 2013).
6. Ala. Code § 12-15-306 (1975).
7. *Id.* at 12-15-308 (1975).
8. *Id.* at § 12-15-308(b) (1975).
9. *Id.* at § 12-15-308(d) (1975).
10. *Id.* at § 12-15-129 (1975).
11. *M.G. v Madison County Department of Human Resources*, 248 So. 3d 13 (Ala. Civ. App. 2017).
12. Ala. Code §§ 12-15-128(a), 12-15-309(a) (1975).
13. *Id.* at § 12-15-128(b) (1975).
14. *Id.* at § 12-15-309(a)(2) (1975).
15. *D.P. v. Limestone County Department of Human Resources*, 28 So. 3d 759, 764 (Ala.Civ.App.2009).
16. Ala. Code § 12-15-313(a) (1975).
17. *Id.* at § 12-15-313(b) (1975).
18. *Id.* at § 26-14-1, et seq. (1975).
19. See, Ala. Code § 26-14-7 (1975).
20. *Id.* at § 26-14-8(a)(1) (1975).
21. *Id.* at § 26-14-8(a)(2) (1975).
22. *Id.* at § 26-14-7.1 (1975).
23. See, e.g., *Ex parte Marshall Co. Department of Human Resources*, 233 So. 3d 345 (Ala. 2017); *R.R. v P.W.R.*, 272 So.3d 1114 (Ala. Civ. App. 2018); *M.F. v W.W.*, 144 So. 3d 366 (Ala. Civ. App. 2013).
24. Ala. Code § 12-15-310(b) (1975). See also, *J.P. v. D.P.*, 260 So. 3d 862 (Ala. Civ. App. 2018).
25. See, *A.R. Juv.P. 1(A)*. See also, *S.A.M. v. M.H.W.*, 261 So. 3d 356 (Ala. Civ. App. 2017) (The court of civil appeals specifically applied *A.R.E.* Rules 201 and 605 to a non-DHR “private” dependency case, holding that the mother was entitled to an “impartial fact finder” under Rules 201 and 605. During the adjudicatory trial the juvenile court judge repeatedly interjected his extra-judicial knowledge of the type of lifestyle engaged in by people like the mother. “All they do is smoke marijuana and hug trees.” The court of civil appeals noted that the mother was unable to cross-examine the judge about his extra-judicial knowledge.).
26. See Ala. R. Evid. 803(6).
27. *T.C. v. Cullman County Department of Human Resources*, 899 So. 2d 281 (Ala. Civ. App. 2004) (Note: J. Murdock’s special concurrence recognizing the double hearsay issue and points out that under the Rules of Evidence, the person furnishing the information to be recorded must be acting in the regular course of the business.)
28. The Rules of Professional Responsibility apply to all attorneys, including guardians ad litem. Formal Opinion Number: 2000-02, quoting Podell, *The Role of the Guardian Ad Litem*, 25 Trial 31, 34 (April 1989) (“The guardians are usually afforded the same rights as the parties’ attorneys (e.g., of making opening statements and closing arguments). Guardians cannot be called as witnesses. Guardians ad litem may not have ex parte communications with the judge.”).
29. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
30. Ala. R. Evid. 702(a).
31. See, e.g., *McGough v. G & A, Inc.*, 999 So.2d 898 (Ala. Civ. App 2007) (holding court will not consider portions of affidavit filed in motion for summary judgment proceeding that contain opinions not based upon personal knowledge); *Musgrove Construction v. Malley*, 912 So.2d 227 (Ala. Civ. App. 2003) (trial court correctly excluded witness supervisor’s opinion as to how worker’s compensation claimant was injured when his testimony, in violation of the firsthand knowledge rule, was based upon viewing the scene after the accident.).
32. *Lingefelt v. International Paper Co.*, 57 So.3d 118 (Ala. Civ. App. 2010) (Accident report containing conclusion of company’s safety manager amounted to little more than “choosing up sides” and, therefore, would not be helpful.)
33. Ala. Code § 12-15-311 (1975).
34. *Id.* at § 12-15-311(c) (1975).
35. *Id.* at § 12-15-311(b) (1975).
36. See, e.g., *D.D.P. v. D.M.B.*, 173 So.3d 1 (Ala. Civ. App. 2015).
37. But see the “automatic transfer statute” that makes a 16- or 17-year-old automatically subject to adult criminal jurisdiction, when accused of certain offenses, some of which are at the discretion of the arresting officer. Ala. Code § 12-15-204 (1975).
38. See *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011); *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 577 U.S. _____, 136 S.Ct. 718 (2016).
39. *Miranda v. Arizona*, 384 U.S. 436 (1966).
40. Ala. Code § 12-15-202(a) (1975).
41. *Id.* at § 12-15-204 (1975); *Young v. State*, 730 So. 2d 1251 (Ala.Crim.App. 1998).
42. *Traylor v. State*, 565 So. 2d 1224 (Ala. Crim. App. 1990); *Carr v. State*, 545 So. 2d 820 (Ala. Crim. App. 1989) (the intake officer or detention facility officer is required to inform the child’s parents of his/her detention—not the arresting/interrogating officer).
43. See *Smith v. State*, 484 So. 2d 560 (Ala. Crim. App. 1986).
44. *Johnson v. State*, 378 So. 2d 1164 (1979) (“A person inducing an accused to make a confession need not always be a law enforcement officer in order to render the confession inadmissible.”)
45. Ala. Code §§ 12-15-127, 128, and 207 (1975).
46. Saturdays, Sundays, and holidays are included. Ala. Code § 12-15-207 (1975).
47. Ala. Code § 12-15-207(d) (1975).
48. Many juvenile courts have diversion programs similar to adult criminal courts. Counsel should be aware that a consent decree is an available resolution in all juvenile courts. It involves a six-month probationary-like procedure with conditions. Once completed, the charges are dismissed. A consent decree may be granted in the juvenile court’s discretion. Ala. Code § 12-15-211 (1975).
49. See Adult Sentencing Guidelines, Sex Offender Registration and Notification requirements, etc.
50. A.R.Juv.P. Rule 24 (D).
51. Ala. Code § 12-15-2212(d) (1975).
52. *Id.* at § 12-15-212(c) (1975).
53. *Id.* at § 12-15-212(c) (1975).
54. See *T.P.B. v. State*, 245 So. 3d 633 (Ala. Crim. App. 2017); *In the Interest of M.H.P.*, 830 N.W. 2d 216 (N.D. 2013).
55. *Alice’s Adventures in Wonderland*, Lewis Carroll (1865).

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District Court

Trial and Evidence Practice Pointers

By Megan K. McCarthy and Jason S. McCormick

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

for a civil lawyer because the district court's jurisdictional limit increased from \$10,000 to \$20,000. Now district court serves to aid in the resolution of many more cases. Because of this, it is important for civil lawyers to understand how to try a case in district court.

District court is not a court of record, which in practical terms

means there is not a court reporter creating an official record of the proceedings. In addition, district court judges will generally not take custody of any evidence, before, during, or after the trial. For the lawyer, who is often under cost constraints in cases brought in district court, this creates certain challenges.

First and foremost, most lawyers perform as a one-person show in district courts. There are rarely senior partners sitting second chair, paralegals handling the evidence, or trial directors managing

technology. It is, as they say, “old school.” For new lawyers, or lawyers unaccustomed to managing evidence and practicing without support teams, this can be daunting.

This article identifies a few of the most common evidentiary pitfalls and offers practical suggestions to lawyers who find themselves trying a case in district court with only a client sitting in the chair beside them.

Know Whether The Opposing Party Is Pro Se Or Represented

Parties in district court are often pro se because district court is a court that provides fast and cheap resolution of cases. It is important to know whether you are trying a case against a pro se party or a represented party. This may seem like a simple concept, but it is very important because a district court’s application of evidentiary rules is often much more lenient than in circuit court, and if a party is pro se, some district court judges often give the party more leniency. Furthermore, it is important to know because you need to prepare your client to be examined or cross examined by the opposing party themselves. Finally, it is imperative to understand whether the opposing party is represented because the limited discovery in district court often requires pre-trial agreements on admissibility. You need to know how educated the other party is on the Alabama Rules of Evidence and tactical trial procedure.

Agree on Admissibility Where Possible

If a lawyer has a particularly important piece of evidence, and it may be too costly to properly establish admissibility, an agreement between counsel is an excellent way to bolster admissibility. Agreements on admissibility of documents often arise in district court on issues such as medical records, medical bills or subrogation liens, photographs, Google Earth images, or videos of accident scenes. It is important to reach an agreement on medical records, medical bills, and subrogation liens because taking the depositions necessary to establish admissibility on issues such as authenticity and medical causation can quickly exceed the amount of the actual medical bills and/or liens. Agreements on admissibility are often convenient for the parties in commercial disputes involving the authenticity of a lease, for example, rather than taking the district court’s time by subpoenaing witnesses to establish agreed-upon facts. The district court judge will appreciate agreements on admissibility of evidence because it helps to reduce time in court for a judge who already has a very busy docket.

Discovery Is Limited

The lawyer should check with the district court judge’s chambers to determine whether limited discovery is permitted or not. Some courts have a standing order that

allows for the parties to exchange 10 to 15 limited discovery questions. If such a standing order does not exist and unless the parties otherwise agree, a motion for limited discovery is required under the Alabama Rules of Civil Procedure prior to issuing discovery.¹ Whether a motion for limited discovery is granted is solely within the discretion of the court. If a motion for limited discovery is denied, attempt to reach an agreement with your adversary on limited discovery to narrow the issues for trial.

Prepare a Trial Notebook

District court trials are rarely specially set. For the practitioner, this means your trial will usually be one of many trials set on the same day, at the same time. All of the lawyers and their respective clients will be sitting together in the courtroom. Typically, a judge will allow you time to confer with the other counsel regarding potential settlement prior to trial. If you are unable to reach a resolution, providing the district court with a trial notebook is an effective way to keep your case on track. This serves two functions including (1) aiding in the speedy resolution of your trial, which in turn helps a busy district court judge, and (2) keeping a trial organized, which serves to aid the court in understanding your arguments.

The trial notebook should contain the complaint and answer, your exhibit list with copies of the exhibits, and the witness list. If you are representing the plaintiff in the case,

an itemization of any claimed damages is helpful to clarify your position. If you are representing the defendant in the case, any information to support your defense needs to be clearly marked. If there are any significant evidentiary considerations that affect the outcome of the case, the lawyer should provide the district court with a brief statement of the applicable law. From the plaintiff's perspective, for example, an injured person with a permanent scar may want to provide the district court with the applicable law warranting an award of damages for future injury. From the defendant's perspective, for example, the lawyer facing breach of contract and fraud allegations with claims for punitive damages should include the applicable law for actually recovering punitive damages.

The lawyer should bring multiple copies of the trial notebook to district court, including one for the district court judge, one for the opposing party, and one for any fact witnesses in the case. Provide any witness who takes the stand with the trial notebook, and use the exhibits referenced in the notebook for the examination. Because the district court judge has the trial notebook, he can follow along with his or her copy of the trial notebook, and the lawyer does not have to worry about keeping track of and finding evidence during the trial. This is particularly important in district court trials as district court judges are often proactive in their examination of witnesses and will often question the witnesses by referencing specific evidence.² In this manner, it is not uncommon that the most extensive cross-examinations take place at the hands of the dis-

trict court judge. The lawyer should prepare her witnesses for cross-examination by the district court judge, as people are often surprised when the judge becomes involved in the case and asks hard questions. Finally, the lawyer should note that the court can call a person to testify regardless of whether a party ultimately decides to call them or not.³


Authenticating The Evidence

Alabama Rules of Evidence Rule 901 provides "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."⁴ Rule 901(b) in turn provides a non-exhaustive list of methods to authenticate evidence, some of which commonly arise in district court, including a witness with knowledge that the evidence is what is claimed (Rule 901(b)(1)) and establishing that the evidence is authorized by law and in fact is recorded by a public office (Rule 901(b)(7)). With documents that are not a public record, the most common and efficient means of establishing authenticity for admissibility purposes is obtaining a certification from the document's custodian that the document is a true and correct copy of the evidence described. A custodian's certification can also be utilized to establish that a document is from a public office and is maintained by that public office as required by law.

Certain types of evidence encompassed by Alabama Rules of Evidence Rule 902 are self-authenticating and do not require

extrinsic evidence for admissibility purposes. Rule 902(1) addresses "domestic public documents under seal," which provides for admissibility of documents bearing the official seal of "the United States, or of any State...."⁵ This provision commonly arises in district court to establish authenticity, for example, of corporate records obtained from the Alabama Secretary of State. "Certified copies of public records" are also deemed self-authenticating provided the documents are "certified as correct by the custodian or other person authorized to make the certification."⁶

It is important to remember the authentication methods under Rules 901 and 902 are not exclusive.



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Further, properly authenticating a piece of evidence does not necessarily render it admissible. The evidence still must satisfy other evidentiary considerations. Remember, too, as previously discussed, if the parties reach an agreement prior to trial as to admissibility, then the documents can be presented to the district court judge without authentication. It is very important that parties discuss all evidentiary issues prior to trial because it allows the parties to avoid unnecessary disagreements and delays at trial.

Overcoming Hearsay

The most common evidentiary issues in district court involve hearsay. Given cost considerations, it is often simply not feasible for the lawyer to fully establish or challenge admissibility of evidence to the degree adhered to in circuit court. Accordingly, it is important to keep in mind the fundamental hearsay principles. Alabama Rules of Evidence Rule 802 states the general exclusionary rule that hearsay is not admissible. While Alabama Rules of Evidence Rules 803 and 804 both bear out the exceptions to the general exclusionary rule, certain exceptions in Rule 803 commonly arise in district court settings.⁷ Prior to attending the trial of a case, the lawyer should review the Alabama Rules of Evidence with potential trial issues in mind. Also, it is always important for the lawyer trying the case to bring the Alabama Rules of Evidence with her to trial to refer to when hearsay issues arise.

Medical Records

The Alabama Rules of Evidence Rule 803 exceptions are particularly relevant to district court proceedings, as these exceptions can render hearsay admissible without regard to the availability of the person who made the statement being present at trial. One of the most common Rule 803 issues arises in the context of medical records and medical causation. Rule 803(4) provides the hearsay exception for “[s]tatements for purposes of medical diagnosis or treatment,” and Rule 803(6) provides the hearsay exception for “[r]ecords of regularly conducted activity.” In the event medical records are part of the evidence in district court, the lawyer should first discuss admissibility with opposing counsel. If an agreement is not reached, the lawyer should provide an affidavit from the medical provider certifying that the medical records comply with these provisions. While this does not always fully resolve the hearsay issues associated with medical causation testimony contained within medical records, it can sometimes establish admissibility of the medical records themselves. Securing medical deposition testimony from treating doctors, either to establish or refute medical causation, is often not feasible in district court given the costs of the deposition.

Business Records

Separate from issues involving medical records, consumer cases

often involve business records in the form of lease agreements, contracts, emails, etc. Admissibility of these type of documents commonly falls within the business records exception of Rule 803(6). More often than not, an affidavit from the custodian of records comporting with Rule 803(6) satisfies district court evidentiary considerations for these documents, if the custodian of records is unable to testify at trial.

Past Recollections Recorded

Often, parties or witnesses in district court seek to present journals or timelines documenting their injuries, or in the case of consumer matters, their interactions with the opposing party. While these documents are hearsay if offered for the truth, Alabama Rules of Evidence Rule 803(5), “Past Recollection Recorded,” provides an exception when the documents are “concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately....” Pursuant to Rule 803(5), the witness may be permitted to read from the journal or timeline provided the witness 1) personally observed the event or facts, 2) made or saw the writing, 3) while the matter was fresh, and 4) knew then the contents were correct. While Rule 805 provides that the writing itself may not be admitted, as a practical matter, the lawyer should seek agreement as to admissibility for the document in order to expedite the trial process for the district court.

Statements Made by Witnesses

In terms of what many consider as hearsay, i.e. verbal statements made by someone else, Rule 803 also contains several important hearsay exceptions to utilize for admitting testimony of what individuals said who may not be present at trial. Statements made at or around the time of an accident or injury, for example, often meet the “present sense impression” exception under Rule 803(1), the “excited utterance” exception under Rule 803(2), and/or the “then existing mental, emotional, or physical condition” under Rule 803(3). As the descriptions imply, these hearsay exceptions typically require the statement to be made while perceiving or experiencing an event or in very close proximity to it.

Witnesses

The lawyer should subpoena any key witnesses to trial regardless of whether the witness is expected to appear voluntarily or not. Make sure your witnesses are present and on time. Some district courts in Alabama do not allow parties to wear shorts or shirts with inappropriate writing. Prepare your witness prior to the hearing of this potential issue in order to avoid delay. If your case is not ready when called, it will usually either be dismissed or placed at the end of the docket. It is also a good idea to have cell phone numbers for all of your witnesses with you at trial in the event a witness is delayed.

Character Evidence

Efforts to use character evidence often find their way into district court, as in many instances the discovery necessary to determine the facts pertaining to character evidence admissibility has not been conducted. Accordingly, it is important to keep in mind that under Alabama Rules of Evidence Rule 404(a), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”⁸ This general exclusionary rule follows from the principle that a prior act cannot be used to establish that a person acted in the same manner as the occasion at issue in the trial. Character evidence can be, however, admissible under Alabama Rule of Evidence 404(b) for other purposes, such as showing “opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” If a lawyer intends to use character evidence, it is wise to have the response to the objection at hand, as the district court may well raise the issue of admissibility if your adversary does not.

Conclusion

Lawyers should not make the mistake of approaching a district court trial with disregard for the Alabama Rules of Evidence. Agreeing on admissibility where possible, providing the court with a readily accessible copy of the exhibits and any substantive legal arguments, and preparing for common authenticity, hearsay, and

character evidence issues will go a long way toward enabling the lawyer to effectively advocate for her client in a district court trial. ▲

Endnotes

1. Rule 26(dc), Ala. R. Civ. P.
2. Ala. R. Evid. 614(b) (“The court may interrogate witnesses, whether they were called by the court or by a party.”).
3. *Id.*
4. *Id.* at 901(a).
5. *Id.* at 902(1).
6. *Id.* at 902(4).
7. See Ala. R. Evid. 802, 803.
8. *Id.* at 404(a).

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Probate Court

Evidentiary and Procedural Potential Pitfalls

By Judge William D. Motlow and R. Bradley Phillips

Introduction

There is a misconception among some attorneys that the Rules of Evidence do not apply during proceedings in the probate courts of this state. Rule 1101 of the Rules states the “rules of evidence apply in all proceedings in the courts of Alabama.” Further, Ala. Code § 12-13-12 affirms that the Rules are applicable in probate court proceedings. From a practical standpoint, however, how strictly the Rules are enforced

varies from probate court to probate court. In most counties, the probate judge is not an attorney. While there certainly are a number of outstanding non-attorney probate judges in this state, the Rules routinely cause confusion and argument among even the most experienced of attorneys. As such, if you find yourself representing a client in a probate court where you do not ordinarily practice, it is a good idea to inquire about the expectations of that particular judge and his general adherence to the Rules.

Wills

Everyone needs a will, if for no reason other than to ensure that our loved ones are not burdened with securing a bond and filing seemingly endless reports and accountings with the court. However, any old document setting forth a decedent's desires for the distribution of her assets upon her passing will not suffice, or at least will not suffice without a fight.

Most common questions regarding wills can be answered by a thorough review of the Alabama Probate Procedures Act, codified at Title 43, Chapter 8 of the Code of Alabama. Any person who is 18 years of age or older and who is of sound mind may make a will.¹ Wills executed in this state, other than the few which may have been executed so long ago as to make them subject to an earlier Alabama statute, are required to be in writing, signed by the testator or in the testator's name by some other person in the testator's presence taking direction from the testator, and signed by at least two other persons, each of whom must have either witnessed the testator sign the document or must have witnessed the testator's acknowledgement that she signed the document.² Best practice demands that an attorney overseeing the execution of a will follow the letter of the law, lest he find himself in a pickle when a will contest is lodged and a subscribing witness testifies that, in reality, the attorney's assistant merely walked the at-issue will down the hallway into his office, asking for a signature on a witness line on the will. The careful attorney will additionally take precaution to avoid allowing a person who is or may become interested in the estate from subscribing as a witness to the execution of the will.

While there are certainly other methods of proving a will, the attorney looking to assist in the seamless transition of a testator's assets to her intended heir(s) will additionally demand that a will be properly attested to and notarized. Because the proponent of a will carries the burden of making a prima facie case that it was properly executed, the careful practitioner will prefer to cause to be drafted a self-proved will.³ A self-proved will⁴ additionally contains a sworn acknowledgement by the testator and affidavits by the subscribing witnesses. If a will is self-proved, its

proper execution is presumed and it shall be, absent proof of forgery or fraud, admitted to probate without additional evidence of validity.⁵

What if a will is alleged to have existed at one time but is now lost? The Alabama Supreme Court recently held⁶ that the proponent of a lost will must prove: (1) the existence of a properly executed will instrument, (2) the loss or destruction of that instrument, (3) that the testator never revoked the instrument, and (4) the substance and effect of the contents of the instrument. It is also not uncommon for an original will to be lost but a photocopy of it can be produced. In such a situation, the first and fourth prongs of the aforementioned test are met by the photocopy, but the proponent of the photocopy retains the burden of proving the original will was not lost or destroyed with the intention of revoking it, which will be the court's presumption.

Simply turning a will over to the probate court for recording, without more, will not result in the issuance of letters testamentary. Surrender of the will must be accompanied by some evidence that the proponent of the will desires that it be admitted to probate.⁷ Any executor, devisee, or legatee named in a will, or any person interested in the estate or who has custody of the will, may propound the will upon the proper probate court for admission.⁸ If requested to do so by a person interested in the decedent's estate, one who has custody of a decedent's will *must* deliver it to someone able to probate the will.⁹ One intending to probate a will must do so with some haste, as a will filed for probate more than five years after the date of the decedent's death is ineffective and may not be admitted.¹⁰

Testamentary Capacity and Undue Influence

Will contests are frequently filed in probate courts prior to the issuance of letters testamentary. Appellate courts in Alabama have held that the "evidentiary standard to establish testamentary capacity is very

low.”¹¹ Opponents will often present medical records that show the testator had been diagnosed with dementia before the will was executed. Such a diagnosis alone is insufficient to prove a lack of testamentary capacity. Neither does being declared incapacitated during a guardianship proceeding necessarily render someone incapable of formulating testamentary capacity. Generally, a testator needs only to understand what property she owns, be able to name to whom she wants to give that property, and understand that she is executing a will.¹² There are instances in which a testator lacks testamentary capacity. However, the evidence in such a case is more likely to show that a will was procured by undue influence rather than demonstrate a lack of testamentary capacity.

“A presumption of undue influence arises when: (1) there is a confidential relationship between a favored beneficiary and the testator, (2) the influence of the beneficiary is dominant and controlling in the relationship, and (3) there is undue activity by the beneficiary in procuring the execution of the will.”¹³ To establish the first prong, a contestant need only establish that there existed a close relationship (generally a family member, close friend, neighbor, caretaker, etc.) between the testator and the accused beneficiary. The second prong is generally more difficult to prove. Medical records might be offered to establish that the testator had been diagnosed with a cognitive decline that might not rise to the level of testamentary incapacity but which potentially shows that he was more likely to be manipulated or taken advantage of. Medical evidence might also demonstrate a physical infirmity that could have made the testator more reliant (for transportation, meals, medication, etc.) on the person with whom he had the confidential relationship. Bank records tending to prove that the beneficiary had access to accounts or showing that the decedent frequently provided the beneficiary with money might also prove to be valuable evidence. These items in the aggregate could suggest undue influence.

Establishing the third prong requires evidence that the favored beneficiary took undue action to procure the will. This could include evidence that the beneficiary caused the will to be drafted by contacting the attorney who drafted the will, being present while the will was executed, driving the testator to and from

the attorney’s office for the purpose of executing the will, and/or paying for the will, perhaps even out of the testator’s funds, to which the beneficiary might have gained access in an untoward manner. The attorney drafting the will might be a witness regarding the third prong of the test.

If the first three prongs are established by the opponent of the will, the burden shifts to the proponent to prove that there was no undue influence in the generation and execution of the will.

Guardianship of an Incapacitated Person

Section 26-2A-20(8) of the Code of Alabama defines an incapacitated person as “[a]ny person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.” Upon the filing of a petition for guardianship over a person suffering from one or more of these conditions, the court will implement a number of safeguards to protect the alleged incapacitated person. If the person is not represented by counsel, the court will appoint an attorney to act as guardian ad litem. The court will also appoint a physician to examine the person and provide a written report. A court representative, generally a social worker, will be appointed to interview the person, conduct an investigation, and provide a written report. These reports may contain hearsay. The person has the right to cross-examine the author of the report as well as call as a witness any person who was interviewed in order to generate those reports. It might be appropriate to ask the judge to refrain from considering a portion of a report that contains clearly inadmissible evidence. The person has the right to present evidence on his own behalf, which could include documents, medical or otherwise, which must be properly authenticated and fall within one of the exceptions to the hearsay rule in order to be admissible.

Section 26-2A-107 of the Code of Alabama authorizes a judge of probate to issue temporary letters of guardianship for up to 30 days if an emergency exists. While the code does not define an “emergency,” a recent Alabama Supreme Court decision¹⁴ indicates that there must be some unforeseen circumstance that requires immediate action in order to prevent substantial harm. It is not enough to simply allege that a person is incapacitated. A petition requesting temporary letters of guardianship should state in the petition, with specificity, the facts as to why an emergency exists and be prepared for that petition to be heavily scrutinized by the court.

Involuntary Commitment

There exist unfortunate circumstances in which members of our society, due to mental illness, become dangerous to themselves and/or others, requiring very specific and often immediate cooperation between the bench, the bar, medical professionals, and law enforcement officials. These situations are often encountered when either a concerned family member or a close friend of an individual in a mental health crisis suddenly appears at the probate judge’s office, complaining of the at-issue individual’s current mental state and violent ideations, actions, or inactions. At other times, the individual has been involved in an incident with law enforcement and the probate court receives a call from an officer with special mental health training, describing the incident and seeking direction how to file a petition for involuntary commitment of the individual. An attorney may receive a call from the probate judge’s office asking if the attorney can immediately meet with a complaining witness to generate a petition for involuntary commitment.

Anyone may file a petition seeking the involuntary commitment of another person.¹⁵ The petition must be in writing, must be properly sworn, and must be filed in the probate court of the county in which the respondent is located¹⁶—a fact that should be observed by petitioners who are seeking the commitment of an individual who is, at the time of filing, temporarily

housed at a hospital or other type of facility in another judicial circuit. The petition must contain the following information: (1) the name and address, if known, of the respondent; (2) the name and address, if known, of the respondent’s spouse, next-of-kin, or legal counsel; (3) the fact that the petitioner has reason to believe the respondent is mentally ill; (4) detailed facts that tend to show the petitioner’s belief is based on specific behavior, acts, attempts, or threats; (5) the names and addresses of other persons with knowledge of the respondent’s mental illness who may be called as witnesses; and (6) any other information.

The petitioner should make liberal use of the “any other information” allowance to include relevant past instances of mental health-related violent outbursts to establish that the petitioner’s fear is reasonable and that the respondent is or could become dangerous. This could include information regarding any weapons the respondent might have, whether the respondent is known to abuse substances, and any prescribed psychotropic medication(s) the respondent is or should be taking.

Specific facts are necessary to survive the probate judge’s initial review of the petition. This will place the petitioner in a position in which, especially if the respondent’s guardian ad litem recognizes the need for the respondent’s continued care, the petitioner might avoid being forced to testify in open court regarding what are often embarrassing details of the respondent’s life. Testimony such as that can create a permanent rift between the petitioner and the respondent who may plan on living together after the respondent is released from the treatment facility. A respondent shall not be immediately taken into custody and held unless such detention is necessary to keep the respondent from doing substantial harm to herself or others or to keep the respondent from fleeing the jurisdiction.¹⁷ This makes detailing specific facts alleging potential harm doubly important lest the petitioner be unable to garner immediate assistance for the in-crisis respondent, thus largely defeating the purpose of filing the petition in the first place.

If the petition survives the initial review by the probate judge, the judge may order that the respondent be taken into custody by the sheriff and

placed in an acute crisis facility pending the outcome of a probable cause hearing to test the sufficiency of the petition. That hearing must take place within seven days of the respondent's being taken into custody.¹⁸ This is a preliminary hearing only, and many probate courts will consider any relevant evidence in this hearing, including hearsay and other evidence which might be excluded at the final hearing. The practitioner should be cautioned, however, that if the only evidence presented at the hearing is hearsay, the petition will likely be dismissed.

If the court determines probable cause exists to hold the respondent for further observation and treatment, the court will issue an order to that effect, and it will also set a final hearing to occur within 30 days of the respondent's being served with notice of the proceeding.¹⁹ Many respondents are successfully diagnosed, treated, and released to a less restrictive alternative environment before the final hearing.

If a final hearing occurs, the Rules are applicable and must be observed.²⁰ The respondent should be present at the final hearing if such can be safely accomplished and if her presence does not hinder the proceedings being conducted in an orderly fashion.²¹

At the conclusion of evidence, if the court is convinced the respondent meets the criteria for involuntary commitment, the court can order that the respondent be forced to undergo either inpatient or outpatient treatment for a period not to exceed 150 days²² based on what the court believes is the least restrictive necessary means available and appropriate for the respondent while remaining effective.²³

If inpatient commitment is ordered, the director of the mental health facility at which the respondent is placed may file, not less than 30 days before the expiration of the then-current commitment order, a petition for a renewal order detailing why the renewal is sought and why less restrictive means of treatment are not appropriate for the particular respondent.²⁴ ▲

6. *Taylor v. Hoehn*, 299 So. 3d 244 (Ala. 2020); see also *Tyson v. Tyson*, 521 So. 2d 956 (Ala. 1988).
7. *Guyton v. LaBossiere*, 423 So. 2d 841 (Ala. 1982).
8. § 43-8-160.
9. § 43-8-270.
10. § 43-8-161.
11. *Smith v. Vice*, 641 So. 2d 785, 786 (Ala. 1994).
12. *Ex Parte Helms*, 873 So. 2d 1139, 1147 (Ala. 2003).
13. *Pirtle v. Tucker*, 960 So. 2d 620, 628 (Ala. 2006).
14. *Ex Parte Bashinsky*, 2020 WL 3581729 (July 2, 2020).
15. § 22-52-1.2.
16. *Id.*
17. Ala. Code § 22-52-7(b).
18. *Id.* at § 22-52-8(a).
19. *Id.* at § 22-52-8(b).
20. *Id.* at § 22-52-9(5).
21. *Id.* at § 22-52-9(1).
22. *Id.* at § 22-52-10.3(d).
23. *Id.* at § 22-52-10.1(a).
24. § 22-52-10.6(a).

Judge William D. Motlow



Judge Will Motlow is the probate judge for Lauderdale County and has 13 years of trial experience.

R. Bradley Phillips



Brad Phillips is the Lauderdale County conservator/administrator and a practicing attorney in Florence and has four years of trial experience.

Endnotes

1. § 43-8-130.
2. § 43-8-131.
3. *Anderton v. Latham*, 342 So. 2d 779 (Ala. 1977).
4. See § 43-8-132.
5. *Id.*



30 Faces of Pro Bono

P A R T 1 O F 6

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

**W. Harold Albritton, III,
United States District
Judge, Montgomery**

Senior United States District Judge Harold Albritton is no stranger to public service. Before his appointment to the federal



THE ALABAMA LAWYER

bench in 1991, Judge Albritton served as president of the Alabama State Bar. Along with the Board of Bar Commissioners, Judge Albritton championed the formation of the Volunteer Lawyers Program—the statewide program that provides a vehicle for lawyers to volunteer their services to low-income clients on a pro bono basis. Recognizing that requiring lawyers to perform pro bono services was unmanageable and could compromise the quality of representation given, Judge Albritton supported the establishment of a system that encouraged lawyers to render legal services voluntarily to economically disadvantaged citizens whose voices might otherwise go unheard. The VLP now meets the legal needs of thousands of indigent Alabamians in civil matters each year through the service and generosity of countless lawyers across the state.

For Judge Albritton, providing pro bono services is a lawyer’s ethical responsibility, the rewards of which far exceed any burden imposed. During his judicial confirmation hearing before the United States Senate Judiciary Committee, Judge Albritton was asked what advice he would give to young attorneys concerning the responsibility of providing pro bono services. He said, “I would tell them and have told them that the delivery of pro bono services to the poor is the highest calling of the lawyer, something that should not be done grudgingly, but should be embraced willingly.” He added, “I would say to them that they will never receive a fee during their entire career that will make them feel more pride in being a lawyer than they will by the grateful tears on the cheek of someone who cannot afford legal services benefiting from their help.”

Cassandra W. Adams, Assistant Dean, Public Interest Program and Externships; Director of Community Mediation Center, Samford University Cumberland School of Law, Birmingham

Assistant Dean Cassandra Adams has a heart for public service. In her words, “Pro bono service is an affirmation of my life purpose.” She received her first pro bono case in 2005, shortly after her Alabama State Bar swearing-in ceremony, assigned to her through the state bar’s Volunteer Lawyers program. She has served on the Pro Bono Task Force since its inception in 2009, serving as its chair in 2014, and was the Pro Bono Mediator of the Year in 2016.

In her position as director of Cumberland School of Law’s Public Interest Program, Dean Adams develops and coordinates pro bono activities for the law school, such as free senior citizen clinics and general assistance legal clinics. Her most memorable and rewarding pro bono experiences have come from her many years of hosting Senior Citizens Wills clinics and Wills For Heroes clinics through the law school’s Public Interest Program. “I have had the privilege of watching law students volunteer to work in clinics, and then they continue volunteering



once they become members of the bar,” she said. “Helping to cultivate a legacy of service through pro bono work is very fulfilling.”

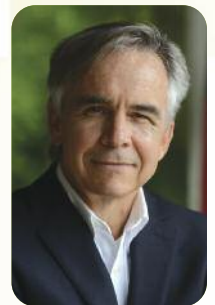
When asked to explain why pro bono work means so much to her, she said, “Pro bono is important to me because I owe a debt that I can only *try* to repay through serving. I stand on the shoulders and backs of generations of people who sacrificed so much so that I could have the opportunity to achieve. Their investment was not in Cassandra the individual, but in the community that I came from and which I remain a member.

“Pro bono work allows lawyers to serve others in a significant and powerful way,” she continued. “I think Winston Churchill said it best: ‘We make a living by what we get, but we make a life by what we give.’”

Allen W. May, Jr., Circuit Judge, Sixth Judicial Circuit, Tuscaloosa

As Judge Al May explained, “Participating in the state bar’s Volunteer Lawyers Program has been one of the most fulfilling experiences in my life. I look forward to doing more.

“As lawyers, we often work in a cocoon and lose sight of the importance of our expertise, especially to those of lesser means who are intimidated by what they perceive as an ominous legal matter. On the front end, our work with pro bono clients not only shields them from the inevitable frustration of attempting to navigate the legal system alone, but it also



shields the system, including our clerk and judge's staff, from docking and processing cases that could be settled out of court or without litigation.

"I don't have stories as a volunteer lawyer that would make it into a John Grisham novel. My clients mostly had real, everyday needs—the administration of the estate of a deceased love one, a real estate contract, a lawyer to communicate with a used car dealer about a dubious transaction, the filing of a paternity action for parental rights. Sometimes the depth of my service was just the offering of advice during a 15-minute meeting at the public library.

"We ought to help people who cannot help themselves, and I think that belief drove me first to the Volunteer Lawyers Program. I also did it for myself. I learned that if you are feeling down because you're too caught up in your own life, and you want to feel better, then go do something for someone else. The Volunteer Lawyers Program offered that something."

William H. Odum, Jr., The Odum Law Firm, Dothan

Law is a second career for Bill Odum. After building and running two small businesses for 25 years, he decided to change careers. He was familiar with the court system, initially having to use it to collect debts and then serving as an expert witness. So, at age 48 he sold his



businesses and went to law school.

Within a year of graduating from law school and passing the bar exam, Odum began volunteering with the Alabama State Bar Volunteer Lawyers Program (VLP). Initially, he volunteered at a Wills For Heroes clinic in Dothan. At that clinic he prepared basic estate-planning documents for his community's everyday heroes, police and firefighters. Odum then began accepting pro bono referrals from the VLP. In fact, he has never declined a pro bono referral from the program. "Everyone needs some help sometime," Odum said. "I needed help when I was young, and I think that as a return service to the community, all lawyers should participate in this program during the year."

When asked why he participates in the VLP he explained, "There is just a satisfaction of receiving a thank-you from a client who is a little less fortunate and helping them get to or get through a situation they need legal help with. I have done it for a long time, and I will do it until the day I die. I enjoy it."

Matthew J. Ward, Assistant Clerk of the Supreme Court of Alabama, Montgomery

As Mother Teresa once noted, "Not all of us can do great things, but all of us can do small acts with great love." While Matthew Ward's legal career centers on public service, pro bono services play a lead



role in his contribution to the Alabama State Bar and his commitment to equal justice. Ward's dedication of nearly 500 hours to pro bono and public services during law school earned him the 2014 Alabama State Bar's Pro Bono Award in the Law Student category. He earned a majority of his hours from his public service with the Supreme Court of Alabama and the Office of the Alabama Attorney General and also from his pro bono efforts with both the Jones School of Law's Family Violence Clinic and the Montgomery Volunteer Lawyers Program's monthly counsel and advice clinics.

On the same day that he received the news that he passed the Alabama bar examination, he requested the MVLP assign him three of the pro bono cases that he had helped process at the counsel and advice clinic just days before. In early 2015, Ward then accepted a job with the Montgomery Office of Legal Services Alabama, where he continued providing legal support to victims of domestic violence and indigent citizens facing landlord/tenant issues.

For Ward, the honor of being able to provide pro bono and public services is something he highly recommends. Selflessly focusing the passion of practicing law on helping others who often cannot help themselves brings a fulfilling sense of purpose and demonstrates to the public the investment that our profession contributes to our communities. As vice-chair of ASB's Pro Bono Committee, Ward encourages all attorneys who cannot provide direct services to get involved behind the scenes to help expand the access to justice for everyone. ▲



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NOTICE

DISCIPLINARY NOTICES

- ▲ Notice
- ▲ Reinstatement
- ▲ Transfer to Inactive Status
- ▲ Suspensions

Notice

- **Kevin Darrell Graham**, who practiced in Mobile and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of January 31, 2021 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 2019-1038 before the Disciplinary Board of the Alabama State Bar. [ASB No. 2019-1038]

Reinstatement

- Sarasota, Florida attorney **Shirley Trivett Chapin**, who is also licensed in Alabama, was reinstated to the active practice of law in Alabama by order of the Supreme Court of Alabama, effective August 20, 2020. Chapin was previously suspended from the active practice of law for failing to comply with the 2009 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [Rule 28, Pet. No. 2020-838]

Transfer to Inactive Status

- Montgomery attorney **Connie J. Morrow** was transferred to inactive status, effective September 8, 2020, by order of the Supreme Court of Alabama. The Supreme Court of Alabama entered its order based upon the September 11, 2020 order of Panel II of the Disciplinary Board of the Alabama State Bar in response to Morrow's petition submitted to the Disciplinary Board requesting she be transferred to inactive status.

(Continued from page 61)

Suspensions

- Sulligent attorney **Daniel Heath Boman** was previously suspended from the practice of law in Alabama for two years, of which he was required to serve 90 days and placed on probation for two years. On January 24, 2020, the Disciplinary Commission of the Alabama State Bar entered an order revoking Boman's probation and imposing the original two-year suspension. On September 28, 2020, the Alabama Supreme Court entered an order requiring the two-year suspension to run consecutively with an earlier imposed and unrelated two-year suspension in ASB No. 2019-162. [ASB Nos. 2079-22 and 2017-1420]
- Huntsville attorney **Williams Joseph Gibbons**, licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective July 31, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order that Gibbons be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-578]
- Atlanta, Georgia attorney **Joshua Joseph Gotlieb**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective July 31, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order that Gotlieb be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-579]
- Denver, Colorado attorney **James Patrick Hackney**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective July 31, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order that Hackney be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-582]
- Lineville attorney **Kimberly Hallmark**, who is licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective July 31, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order that Hallmark be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-583]
- Muscle Shoals attorney **Chase Russell Hutcheson**, who is licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective July 31, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order that Hutcheson be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-586]
- Birmingham attorney **James Flint Liddon, III** was suspended from the practice of law for three years in Alabama by the Supreme Court of Alabama, effective September 9, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's acceptance of Liddon's conditional guilty plea, wherein Liddon pled guilty to violating Rules 1.4 [Communication], 1.5 [Fees], 1.15 [Safekeeping], and 8.4(c), (d), and (g) [Misconduct], Ala. R. Prof. C. Liddon voluntarily admitted that he had previously misappropriated client funds. [ASB No. 2019-343]
- Gadsden attorney **John Davis McCord** was interimsly suspended from the practice of law in Alabama pursuant to Rules 8(e) and 20(a), Ala. R. Disc. P., by order of the Disciplinary Commission of the Alabama State Bar, effective August 27, 2020. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel wherein it argued McCord engaged in continuing conduct causing serious injury to his client by commingling client and personal monies and routinely failing to deposit unearned fees in his IOLTA trust account. Moreover, McCord was arrested and charged with multiple counts of felony theft by deception. McCord consented to the interim suspension. [Rule 20(a), Pet. No. 2020-716]
- Birmingham attorney **Philip John Motches**, who is licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective July 31, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order that Motches be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-601]
- Athens attorney **Douglas Lee Patterson** was interimsly suspended from the practice of law in Alabama, effective

August 12, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order finding Patterson'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. Patterson was recently indicted in the Circuit Court of Limestone County in a three-count indictment charging him with use of official position or office for personal gain, financial exploitation of the elderly in the first degree, and theft of property in the third degree. [Rule 20(a), Pet. No. 2020-824]

- Daleville attorney **Charles Neville Reese** was suspended from the practice of law in Alabama by order of the Alabama Supreme Court for 90 days, to run from September 13 through December 12, 2020. The Supreme Court of Alabama entered its order based on the report and order issued by Panel III of the Disciplinary Board suspending Reese for violating Rule 8.4(g), Ala. R. Prof. C., based on his failure to satisfy his personal and professional tax obligations. [ASB No. 2017-999]
- Alpharetta, Georgia attorney **Clarence Richard, III**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective July 31, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order that Richard be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-612]
- San Francisco, California attorney **Rebecca Lynn Sherman**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective July 31, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order that Sherman be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-618]
- Gadsden, Alabama attorney **Clark Van Stewart**, licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective September 9, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order that Stewart be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-620] ▲

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LEGISLATIVE WRAP-UP



The Rules: How Things Get Done

The reach of the Alabama Legislature is immense. Its constitutional and plenary authority allows it to pass laws that not only govern and impact the lives of Alabama's citizens and guests that travel within its borders, but also laws that, to a large degree, control the scope and authority of most all other government functions. During a typical Alabama Legislative Session, there are usually over 1,000 bills introduced for consideration; bills that either create a new law, or amend or repeal an existing law. However, out of the thousands of bills introduced, only about a third of those bills become law. So, one may ask, "How does the process work with so many bills competing for priority?" Who or what controls the introduction, consideration, and passage of pieces of legislation, including all the details that go along with this important process? In other words, what governs the process for legislative consideration of laws? These are important questions to know the answers to for anyone interested in the passage or defeat of any proposed law that impacts, or could potentially impact their lives, the lives of their loved ones, or their checkbooks, for that matter. This should be especially important to those who are familiar with the impact of laws on our daily lives, or whose livelihoods revolve around the law... like lawyers!

Alabama's Constitution establishes only a few key directions and controlling principles that govern the process for the consideration of bills by the legislature, such as the requirements that each piece of legislation contain only a single subject and be considered or publicized in each chamber for three separate days before a final vote is taken, the prohibition against changing a bill's original purpose via subsequent amendment, and the requirement that each bill be considered by a standing committee of each chamber before being voted on by that body. The Alabama Constitution also establishes that laws must be passed by a majority of votes cast (proposed constitutional amendments require a three-fifths vote). But what about other important details like the procedures for how bills are debated, what committees exist, and who comprises the committees? There is also the all-important question of who or what determines the order that bills will be considered by the legislative chambers? The constitution is largely silent as to these important procedural matters. Rather, these matters are governed by rules that are established by the legislature itself, and this authority has been expressly delegated to the legislature by the constitution in Article IV, Section 53 of the Alabama Constitution of 1901. Section 53 states, in pertinent part, that "[e]ach house shall have [the] power to determine the rules of its own proceedings," and this is exactly what the legislature has done and continues to do.

During the organizational session that occurs at the beginning of each quadrennium (i.e., the beginning of each four-year legislative term), each chamber of the legislature, acting in essence as their own democracies, adopts rules for its procedures by a majority vote of each body. This is usually the second order of business after the election of their leadership. Thus, house rules are established to govern proceedings in the house of representatives, senate rules are established to govern senate proceedings, and joint rules are established to govern important areas of interplay between the two chambers. These rules then govern the procedures of the legislature for that quadrennium. However, each chamber's rules can be amended by a majority vote of the membership of that chamber if done in accordance with the rules established for amending the rules, although this is not a common occurrence.¹ The legislative rules of each chamber can also be temporarily suspended upon a supermajority 4/5th vote of the chamber.

The rules of each chamber cover, for the most part, the entirety of the legislative process. Some of the key areas covered by the rules include:

Rules of Decorum

When in session or in committees, both chambers require that legislators not only speak and act respectfully toward each other, refraining from making personal or derogatory

remarks not only toward each other, but also toward a member's constituents. Interestingly, the rules also require the members of the public who are present in a chamber gallery to respectfully conduct themselves or risk being removed from the gallery.

Rules for the Order of Business and Priority Of Bills

Both chambers also have rules for the order of legislative business when the legislature is in session, which begins upon the establishment of a quorum. The order of business includes the taking up of legislation for debate, consideration, and a potential vote ("potential" in the sense that legislators may postpone or remove a bill from consideration or a vote on their bill by "carrying the bill over"). When it comes to debating and voting on legislative bills, the rules establish the order in which bills are considered. By default, the laws are organized for consideration by the order in which they are reported out of committee and back to the chamber, kind of like a first-come, first-serve line for customers. This order of

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(Continued from page 65)

bills for consideration is called the Regular Order Calendar. However, the rules of both chambers allow for certain bills to be placed on priority calendars, which are established by the Rules Committee of each chamber, and these calendars allow these bills to move ahead of the Regular Order Calendar, if they are voted on by the chambers to allow such a change. The method most often used is called a Special Order Calendar. Fun fact: Special Order Calendars are used so often that the Regular Order Calendar is hardly ever utilized.

Rules Establishing Committees

The rules also establish the various types of legislative committees that study bills and the members who serve on those committees. This is important because, according to the constitution, bills must first be acted upon by the committee it is assigned to and reported back out before it can go before the chamber for debate and a vote. The speaker of the house, as the house's presiding officer, is tasked with assigning which representatives will serve on the house's various committees, and who will be the chair of each committee. In the senate, the Senate Committee of Assignments appoints the committee membership and chairperson. This committee is composed of the senate president pro tempore, the lieutenant governor, the senate majority leader, and three additional members appointed by the president pro tempore. Although there are certainly exceptions, it is usually the case that most of the study and consideration of a bill, at least for non-controversial bills, is conducted in the committee setting. Many members will lean on or rely on the work of the committee in determining their position on a bill, due to the large number of bills and limited time and energy each member can spend on every bill up for consideration. For those seeking to defeat, change, or modify a bill, the committee process presents the greatest opportunity to interact with the legislators and express their opinions or concerns. For those seeking the passage of a new law, the committee process often presents the biggest hurdle to complete, next to having the bill placed on a priority calendar for consideration.

Rules for Debating Bills

Although they differ for each chamber, both the house rules and senate rules establish debate procedures for the consideration of bills, which includes the process for who gets to speak on a bill that is up for consideration and for

how long, and the length of time debate on a bill can last before a vote is taken.² In the house of representatives, the speaker of the house determines the order of who speaks on a bill (or other motion or issue under consideration) by calling on representatives who have requested to speak, and when recognized by the speaker to do so, members may speak up to two separate times on the matter for no more than 10 minutes each occurrence. In the senate, the presiding officer is the lieutenant governor, who recognizes senators to speak on bills (or other matters under consideration) according to the order in which, in the officer's opinion, the senators have sought recognition. When recognized, senators may speak as many as two times on a single matter for up to an hour each occurrence. With 35 senators and 105 house members, these timeframes can result in lengthy debates on bills. However, both chambers have rules that can cut off debate and call for a vote on a bill or other matter, if a supermajority of the chamber votes on a motion to cut off the debate. This process is called a cloture motion.

As new legislators quickly learn, these rules are vitally important to the success or failure of legislative bills, as well as to the setting of expectations for the large number of state legislators (140 in all), who all have legislative items that top their own individual priority lists. These rules are also extremely important to know for any other person who is interested in promoting, defeating, or simply tracking the progress of a bill through the legislative process.

The full copy of the current house, senate, and joint rules can be accessed online using the links below. For more information or questions about legislative rules, please feel free to reach out to our office and we will be glad to provide any additional information that is available.

House Rules: <http://www.legislature.state.al.us/aliswww/ISD/House/rules.aspx>

Senate Rules: <http://www.legislature.state.al.us/aliswww/ISD/Senate/Rules.aspx>

Joint Rules of the Alabama Legislature: http://www.legislature.state.al.us/aliswww/ISD/legislature/Joint_Rules.aspx ▲

Endnotes

1. A recent notable exception occurred during the 2016 Legislative Session when the house of representatives amended its rules regarding impeachment proceedings. This occurred after a strong movement arose to impeach then Governor Robert Bentley for alleged coverups related to an extramarital affair.
2. The debate rules also apply to other procedural matters like calendars or resolutions.



OPINIONS OF THE GENERAL COUNSEL

Roman A. Shaul
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Be Careful When Changing The Fee Arrangement with Your Client

Most lawyers have had that case that looks so simple on the front end, but gets very complicated when you start trying to parse out things. Invariably, the lawyer says to herself, "I should have asked for a better rate for this mess." In some situations, you still can ask for a better rate. Sometimes you should not.

Fee arrangements are contracts and generally governed by the law of contracts. See Restatement (Third) of The Law Governing Lawyers § 18 (2000) ("Restatement"). Contracts can normally be modified by mutual consent of the parties, however, based on the fiduciary nature of the lawyer-client relationship, modifications of existing fee agreements are suspect. See Comment 17 to ABA Model Rule of Professional Conduct 1.8 ("relationship between lawyer and client is a fiduciary one"). "The courts are generally in accord that once the initial

contract has been formed and the fiduciary relationship of client and lawyer has begun, any change in the contract will be regarded with great suspicion." Charles W. Wolfram, *Modern Legal Ethics* § 9.2.1, at 503 (1986) (citing cases). "Thus, an agreement that is not made roughly contemporaneously with the formation of the client-lawyer relationship will have to bear an extra burden of justification." Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* § 8.11 at 8-26 (3d ed. 2001).

The modification of existing fee agreements is permissible under the Alabama Rules of Professional Conduct. To do this, the lawyer must show that any change is reasonable under the circumstances at the time of the modification and that the new agreement is communicated to and accepted by the client. Annual, or scheduled, incremental

(Continued from page 67)

increases to a lawyer's regular hourly billing rate is generally permissible if such practice is communicated clearly to and accepted by the client at the commencement of the client-lawyer relationship and any periodic increases are reasonable under the circumstances.

Modifications sought by a lawyer that change the basic nature of a fee arrangement or significantly increase the lawyer's compensation absent an unanticipated change in circumstances ordinarily will be unreasonable. Changes in fee arrangements that involve a lawyer acquiring an interest in a client's business, real estate, or other nonmonetary property will require compliance with Rule 1.8(a). Under this rule, the lawyer can only acquire an interest if: (1) the terms of the transaction are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel; and (3) the client gives informed consent to the essential terms of the transaction and the

lawyer's role in the transaction in a writing signed by the client. The comments to Rule 1.8 explain that:

...a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property. An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.

Compliance with Rule 1.8(a) protects clients from potential overreaching by lawyers. Furthermore, when the client takes

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advantage of the advice to consult independent counsel, it provides an opportunity for a neutral evaluation of the reasonableness of a fee that may be paid or secured by nonmonetary property. The comments to Rule 1.8 make clear that modifications to existing fee agreements will be scrutinized heavily using rule 1.5(a), Alabama Rules of Professional Conduct. Rule 1.5(a) states that, "A lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee." The Rule concludes that the factors to be considered when determine reasonableness of the fee are:

- 1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) Whether the fee is fixed or contingent; and
- (9) Whether there is a written fee agreement signed by the client.

Changes in circumstances that occur after the attorney-client relationship commences, as well as changes in the factors listed in Rule 1.5(a), may cause the client, the lawyer, or both, to seek to revisit the fee arrangement. Any material change warranting such reconsideration of an existing fee arrangement should be communicated to the client as soon as practical. Any delay in communicating a material development may constitute a factor that works against the reasonableness of the proposed modification.

In summary, a lawyer must show that any modification of an existing fee agreement, especially a modification sought by the lawyer, was reasonable under the circumstances at the time of the modification as required by Rule 1.5 (Fees), and communicated and explained to the client as required by Rule 1.4 (Communication). Any modification must also be accepted by the client. As always, if you have any questions, please email us at ethics@alabar.org. ▲



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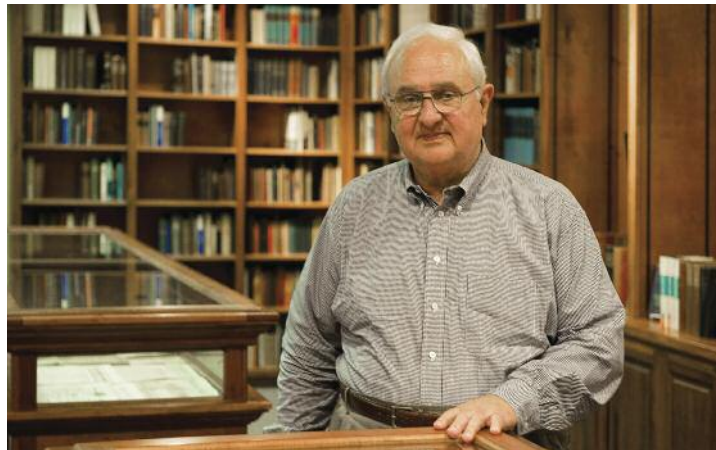
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MEMORIALS

▲ Alexander Stephens Williams, III



Alexander Stephens Williams, III

Steve Williams of Birmingham passed away on October 2, 2020 at the age of 84.

Steve was born on September 24, 1936 in Eufaula to A.S. Williams, Jr. and Sara Dozier Stewart. He led a life of service from a young age as a committed member of the Boy Scouts of America, ultimately earning the rank of Eagle Scout. A graduate of Eufaula High School, Steve earned a degree in finance in 1958 from the University of Alabama, where he was a member of Phi Delta Theta fraternity. While at the university, he met his wife Rosemary Hoover Williams. They married on September 19, 1958 and raised a daughter, Betsy, and two sons, Steve and Jim. Steve later attended the Birmingham School of Law, earning his law degree in 1964.

Steve began his career with First National Bank of Birmingham in 1959. He joined Protective Life Corporation in 1964, where he worked until 2004. At the time of his retirement, he served as executive vice president of investments and treasurer. Throughout his career, he was an active member in many professional organizations, including the Mortgage Bankers Association of America (legion member, Board of Governors member, Executive Committee member), the Life Mortgage and Real Estate Officers Council (chair, director), the Birmingham Mortgage Bankers Association (secretary, treasurer, vice president, president), the Morris Avenue Commercial Restoration Association (vice president, director), the Shades Creek Parkway Association (director), the American Bar Association, the Alabama State Bar, the Birmingham Bar Association, the University of Alabama Commerce Society, the Birmingham Chamber of Commerce, the Newcomen Society of North America, the American Council of Life Insurance, and the International Council of Shopping Centers.

An avid historian, bibliophile, and collector of Americana, Steve built an incredible collection of American, and particularly Southern American, history. His passion began after a trip to historic Williamsburg, Virginia, where he purchased a few books on early American history. He started collecting books about or by United States presidents, eventually gathering the signature of every American president, most on first-edition books. His collection slowly grew, expanding to include Southern and Alabama history. He gathered documents signed by nearly every Alabama governor along with state legislators, state Congressmen, and education leaders, such as Booker T. Washington and George Washington Carver. He collected unpublished diaries, manuscripts, and letters from Alabamians from the 1820s and on, and about 3,000 works of Southern fiction, most of which are first editions. He also assembled one of the largest collections of Southern photography from the 1850s to the 1930s.

Eventually, Steve's collection outgrew his home and was moved to his hometown of Eufaula, where he founded and built the Eufaula Athenaeum. The Athenaeum, curated by Stephen Rowe, is a museum devoted to collecting and preserving material related to the history of the American republic, and particularly Alabama and the southern states. The Athenaeum housed the collection until 2010, when, along with the efforts of then-Dean of Libraries Louis Pitschmann, Steve contributed the vast majority to the University of Alabama library. The A.S. Williams III Americana Collection is housed on the third floor of the Amelia Gayle Gorgas Library on the University of Alabama campus. A true collector, following his first contribution to the university, Steve continued acquiring Americana at an even greater pace than before. He ultimately amassed an extensive second collection, which again filled the Athenaeum, and made arrangements to add these most recent acquisitions to his special collection at the university, which will occur in 2021.

Steve was an active member of South Highland Presbyterian Church, where he taught Sunday school and served in a

number of roles, including the Finance Committee, deacon (diaconate secretary, vice chair, and two terms as chair), and chair of the Every Member Canvas Committee. He generously served a number of community organizations, including the Alabama Symphony Association (president and board of trustees member and chair), the Emmet O'Neal Library (board of trustees chair and member), the Birmingham Historical Society (board of trustees member and endowment board chair), the Alabama Heritage Foundation Board (vice president), the Birmingham Phi Delta Theta Alumni Club (president), the Vulcan District of the Boy Scouts of America (district vice chair), Partners in Neighborhood Growth (board chair and member), Neighborhood Commercial Development Corp. (board member), the Alabama Humanities Foundation (board member), the Alabama School of Fine Arts Foundation (board member), the Birmingham Area Alliance of Business (board member), the Alabama Small Business Investment Company, Inc. (board member and Investment Committee member), United Way of Central Alabama (Alexis de Tocqueville Society member), the Birmingham Kiwanis Club, the University of Alabama Alumni Club, the Jefferson County Community Chest, and Leadership Birmingham.

Steve was preceded in death by his father, Alex; his mother, Sara; and his brother, Dozier. He is survived by his devoted wife of 62 years, Rosemary; his three children, Betsy, Steve (Pam), and Jim (Meaghan); his five grandchildren, Xander (Marissa), Louis (Haley), Asa, Jake, and Fraley; his brother Al; his brother Dozier's wife, Janice, and their daughter, Molly Abele (Don, daughter Stabler). There will be a private graveside service for the family, which will be officiated by the Rev. Dr. Edwin Hurley. In lieu of flowers, the family requests donations to South Highland Presbyterian Church, the Alabama chapter of the American Parkinson Disease Association, or the charity of your choice. ▲

—James S. Williams, Birmingham

Gamble, Joseph Graham, Jr.
Birmingham
Admitted: September 11, 1950
Died: September 25, 2020

Mikul, Leonard Foley
Boone, NC
Admitted: April 27, 1979
Died: September 26, 2020

Tully, Scott Lynch
Broken Arrow, OK
Admitted: June 4, 2012
Died: October 5, 2020

Harper, John Barto
Birmingham
Admitted: September 4, 1969
Died: October 10, 2020

Patton, Lt. Col. Walter Steele, III
Fairhope
Admitted: August 26, 1965
Died: August 24, 2020

Howard, Calvin Marvin
Birmingham
Admitted: April 10, 1969
Died: October 17, 2020

Simms, Keri Donald
Birmingham
Admitted: September 28, 1989
Died: September 4, 2020



Wilson F. Green

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



Marc A. Starrett

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

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Municipal Occupational Taxes

Jefferson County Board of Educ. v. City of Irondale, No. 1180752 (Ala. Oct. 23, 2020)

Municipal occupational tax could be imposed on county board employees because (1) under *McPheeter v. City of Auburn*, 288 Ala. 286, 259 So. 2d 833 (1972), the fact that essential government services were provided by public education employees does not exempt them from otherwise valid municipal occupational taxes, and (2) municipal occupational tax did not create an unlawful pay disparity as prohibited by Ala. Code § 16-13-231.1(b)(2).

Arbitration

Fagan v. Warren Averett Companies, LLC, No. 1190285 (Ala. Oct. 23, 2020)

Trial court improperly compelled arbitration of employee's dispute against employer; employer was in default under the arbitration agreement by not complying with AAA's demand for payment of its portion of filing fees as determined by AAA (which resulted in dismissal of employee's arbitral proceeding and commencement of circuit court lawsuit).

UIM; Opt-Out Rights

Ex parte Alfa Mut. Ins. Co., No. 1190117 (Ala. Oct. 30, 2020)

Once UM carrier intervenes in a pending case brought by its insured against an uninsured motorist, in which the insured did not name its UM carrier as a defendant, the UM carrier does not have the right to opt out of the litigation. Under *Lowe v. Nationwide*, only a carrier named by the UM insured as a defendant has the right to opt out.

Mandamus Review

Ex parte D.R.J., No. 1190769 (Ala. Oct. 30, 2020)

In action by plaintiff against tortfeasor and UM carrier, mandamus review was not available to challenge propriety of circuit court's order voiding *pro tanto* release with tortfeasors. Petitioners did not demonstrate that order fell within the categories of orders for which mandamus review is recognized.

Contract vs. Tort

***Gustin v. Vulcan Termite and Pest Control, Inc.*, No. 1190255 (Ala. Oct. 30, 2020)**

Trial court erred by granting summary judgment to termite contract provider on breach of contract claims regarding failure to repair damage under the contract; genuine issue of fact precluded summary judgment as to whether contractual exclusion for wood in contact with soil applied. Negligence and wantonness claims were properly dismissed because duties arose solely out of contract—mere breach of contract is not a tort.

Rule 41(b) Dismissals

***S.C. v. Autauga County Bd. of Educ.*, No. 1190382 (Ala. Oct. 30, 2020)**

Trial court abused its discretion in dismissing case as sanction under Rule 41(b) against plaintiff, where plaintiff's counsel merely filed a motion to continue hearing on motion to dismiss after one group of defendants had moved for and obtained two continuances.

Rules of Professional Conduct; Contact with Former Employees of Opposing Party

***Ex parte The Terminix International Co., LP*, No. 1180863 (Ala. Oct. 30, 2020)**

Former managerial employee of Terminix was hired as consultant by law firm representing HOAs and homeowners in termite-related litigation against Terminix. Terminix moved to disqualify the law firm, contending that the law firm had violated (among other provisions) Rule 4.2(a), concerning communications with former employees of an organization. The circuit court disagreed and denied the motion to disqualify. The Alabama Supreme Court denied mandamus relief, holding that Rule 4.2(a)'s prohibition on communications with persons represented by counsel, in the context of organizations as adverse parties, applies to current but not former employees of the organizations. The court specifically rejected the Alabama State Bar Disciplinary Commission's 1993 interpretation of Rule 4.2, under which there "might be" a prohibition on contact with former employees of an adverse party for "those employees who occupied a managerial level position and were involved in the underlying transaction." Importantly in this case, there was no evidence that the former manager had any confidential information of Terminix concerning the specific plaintiffs, and the undisputed evidence was that the former manager had destroyed copies of confidential materials not specifically relating to plaintiffs. There was no violation of the former client rule (Rule 1.9) because there was no evidence that the consultant was actually engaged in substantial litigation

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(Continued from page 73)

defense for Terminix during his employment, noting there is a meaningful distinction between lawyer employees (employees primarily involved in lawyer-related work) and non-lawyer employees as it relates to the former client rules.

Recusal

Ex parte Ala. Dept. of Revenue, No. 1190826 (Ala. Oct. 30, 2020)

In a case largely turning on its facts and the unique history of Greentrack's litigation in Greene County, the court granted ADOR's petition for mandamus and trial court's recusal in a pending matter between ADOR and Greentrack pending in the Greene County Circuit Court.

Roe v. Wade

Magars v. Alabama Women's Center Reproductive Alternatives, Inc., No. 1190010 (Ala. Oct. 30, 2020)

Putative father sued AWC for its role in precipitating abortion of his baby. The trial court dismissed his case. The Alabama Supreme Court affirmed for failure of the father to file a proper appellate brief under Rule 28(a)(10). In a special concurrence, Justice Mitchell (joined by Chief Justice Parker and Justices Bolin and Wise) explained his view that *Roe v. Wade* should be overruled.

Administrative Law; Standing

Ex parte LeFleur, No. 1190191 (Ala. Nov. 6, 2020)

Landowners lacked standing to pursue claims challenging ADEM Rule amendments permitting use of alternative-cover materials at landfills. Landowners did not allege or offer evidence that alternative cover materials were less effective than earth-based materials, and thus did not causally link their claimed injury with the alternative-cover materials regulations. This is a two-justice plurality opinion; four concurrences in the result; two dissents, one recusal.

Official Capacity Claims

Meadows v. Shaver, No. 1180134 (Ala. Nov. 20, 2020)

Claims asserted against circuit clerk were official-capacity claims barred by Section 14 of the Alabama Constitution. Under *Barnhart v. Ingalls*, 275 So. 3d 1112 (Ala. 2018), claims are deemed to be asserted against public official in her official capacity if the official would have no duty to the plaintiff in her individual capacity—the test is not merely whether damages would be paid by the public fisc.

Wills

McElroy v. McElroy, No. 1190888 (Ala. Nov. 20, 2020)

Under Ala. Code 43-8-131, a will must be "in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction[.]" There is no statutory requirement that the testator acknowledge in the instrument that a third party is signing the instrument at the testator's direction or that the testator acknowledge that fact to a witness. (Three-justice plurality panel opinion)

From the Court of Civil Appeals

Rebuild Alabama

Fredricks v. McMillan, No. 2190593 (Ala. Civ. App. Nov. 6, 2020)

The court upheld portions of Ala. Acts 2019 (1st Special Session), Act No. 2019-2, known as "the Rebuild Alabama Act," under which certain moneys derived from state gasoline and diesel-fuel excise taxes are to be distributed to pay the principal of and the interest on bonds issued for the financing of improvements to the Mobile Ship Channel. The legislature acted within its discretion to mandate the use of those moneys to defray the "cost of construction, reconstruction, [and] maintenance and repair of public highways" within the scope of Art. IV, § 111.06, Ala. Const. 1901.

Public Employment

Ex parte Johnson, No. 2190689 (Ala. Civ. App. Nov. 6, 2020)

(1) Neither Ala. Code § 16-24B-3(g) nor § 16-24B-5(a) expressly authorizes an appeal from an order dismissing a request for a nonjury expedited evidentiary hearing. The plain language of both code sections allows an appeal from only a final decision of a circuit court following such a hearing. However, the common-law writ of certiorari is available for review of the circuit court's decision. (2) Because the contract of the principal was non-renewed rather than being canceled, the burden was on principal, under § 16-24B-3(e)(2)a., to file timely his request for a nonjury expedited evidentiary hearing to claim his contract was impermissibly

non-renewed based on personal or political reasons, the only recognized statutory grounds for improper non-renewal of a contract employee.

Rule 19

Darby v. Presley, No. 2190403 (Ala. Civ. App. Nov. 20, 2020)

In an action seeking to decide exclusive ownership of property, all cotenants were necessary parties. Trial court's failure to conduct a Rule 19 analysis to determine the feasibility of joinder of those parties warranted reversal and was properly considered the first time on appeal by the parties or by the appellate court *ex mero motu*.

From the Eleventh Circuit Court of Appeals

Heck

Harrigan v. Rodriguez, No. 17-11264 (11th Cir. Oct. 13, 2020)

Harrigan sued Officer Rodriguez under 42 U.S.C. § 1983, claiming Rodriguez shot him without provocation while his truck was stopped at a red light. A Florida state jury convicted Harrigan of aggravated assault and fleeing to elude. Rodriguez moved for summary judgment based on *Heck v. Humphrey*, 512 U.S. 477 (1994), claiming that the § 1983 excessive-force claim was barred because if successful, it would necessarily imply the invalidity of the state court conviction. The district court agreed and granted summary judgment. The Eleventh Circuit reversed, holding that both the use of allegedly excessive force and the proper convictions of Harrigan were not logically impossible to co-exist.

Conservation Easements

Pine Mountain Preserve, LLC v. CIR, No. 19-11795 (11th Cir. Oct. 22, 2020)

Under I.R.C. § 170, a qualifying conservation easement requires that (1) the easement must impose "a restriction (granted in perpetuity) on the use which may be made of the real property[.]" I.R.C. § 170(h)(2)(C), and (2) the grant must ensure that the easement's "conservation purposes" are "protected in perpetuity." *Id.* § 170(h)(5)(A). The Tax Court (1) held that certain 2005 and 2006 easements were not "granted in perpetuity" because, although Pine Mountain had agreed to extensive restrictions on its use of the land, it had reserved to itself limited development rights within the

conservation areas; (2) concluded that a 2007 easement complied with § 170(h)(5)(A)'s requirement that the easement's conservation purposes be "protected in perpetuity," notwithstanding its inclusion of a clause permitting the contracting parties to bilaterally amend the grant; and (3) valued the 2007 easement at \$4,779,500, almost exactly midway between the parties' wildly divergent appraisals. The Eleventh Circuit reversed on issue (1), holding that the 2005 and 2006 easements were granted in perpetuity notwithstanding the development rights; affirmed on issue (2); and reversed on issue (3), holding that the Tax Court's averaging method when faced with competing experts contravened the applicable regulations, which require valuations based on comparable sales or diminution of value findings.

Product Liability; *Daubert*; Evidence

Crawford v. ITW Food Eqpt. Group, LLC, No. 19-10964 (11th Cir. Oct. 21, 2020)

Crawford was operating a Hobart meat saw made by ITW with an unguarded blade when his arm was amputated. He sued ITW for negligent product design under Florida law. After a jury trial, Crawford and his wife were awarded

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\$4,050,000. The Eleventh Circuit affirmed, holding: (1) Plaintiff's expert satisfied the *Daubert* standard; his theory that the design was unreasonably dangerous because it lacked an auto-deploying blade guard was based on his proposed alternative design employing a foot pedal-activated guard, which the expert had tested, and for which he had applied for a patent, and submitted it for peer review in the American Journal of Mechanical Engineering. (2) Admission of expert's supplemental affidavit provided five months before trial was not an abuse of discretion, since ITW chose not to seek a second deposition of the expert, ITW cross-examined the expert on the supplemental report, and the facts underlying the supplemental report were well known in the industry—though the Court emphasized its holding was narrow and fact-based; (3) OSHA reports of other accidents involving meat saws were admissible under the public records exception to hearsay, Rule 803(8); the alleged untrustworthiness of OSHA investigators or their fact-finding was merely speculative and not a proper ground for objection; (4) OSHA reports concerning other accidents involving unguarded meat saw blades were relevant, in that they indicated notice of the defective design, and their probative value was not substantially outweighed by the danger of unfair prejudice.

Qualified Immunity

***Stryker v. City of Homewood*, No. 19-10495 (11th Cir. Oct. 21, 2020)**

In this fact-intensive case, the district court erred in granting summary judgment to officers based on qualified immunity, in action by arrestee Stryker for excessive force in connection with an accident investigation. According to Stryker's testimony, without ever informing him that he was under arrest or using any lesser force, the officer shoved him, shot him in the back with the Taser, and kicked him once he fell to the ground—even though Stryker posed no threat and was (at the time of the Taser use) complying with the officer's instructions. The offense for which the arrestee was charged (failing to comply with officer's instructions) was minor and did not warrant use of extreme force. Stryker's testimony that officers continued to beat and choke him after dragging him out of his truck (after one officer had broken through the glass) and caused the breaking of Stryker's jaw created a fact issue on excessive force; gratuitous continued use of force on a controlled and complying suspect clearly violates the Fourth Amendment.

Lanham Act

***J.B. Weld Co. LLC v. The Gorilla Glue Co.*, No. 18-14975 (11th Cir. Oct. 20, 2020)**

Weld and GG each manufacture competing heavy-duty adhesives consisting of two separate products set in two separate tubes and packaged in a "V" configuration. Weld sued GG after GG began packaging its product similar to Weld's by using the V configuration and employing white and black tipped tubes. The district court granted summary judgment to GG on a variety of Lanham Act and Georgia law-based unfair competition claims. The Eleventh Circuit reversed in part, holding that under the seven-factor test for trade dress infringement ((1) the strength of the trade dress, (2) the similarity of design, (3) the similarity of the product, (4) the similarity of retail outlets and purchasers, (5) the similarity of advertising media used, (6) the defendant's intent, and (7) actual confusion), there was a fact issue on whether the overall design was infringing.

Bankruptcy (*Barton Doctrine*); Personal Jurisdiction

***Tufts v. Hay*, No. 19-11496 (11th Cir. Oct. 20, 2020)**

Under the *Barton* doctrine, plaintiff must obtain leave of the bankruptcy court before initiating an action in district court, when that action is against the trustee or other bankruptcy-court-appointed officer for acts done in the actor's official capacity. In this case, the *Barton* doctrine did not apply because the Bankruptcy Court lacked any jurisdiction due to the dismissal of the underlying Chapter 11. There was personal jurisdiction against the defendant under Florida's long-arm statute and due process because he was being sued for representations made by telephone and electronically into Florida and directed to a Florida resident, and that the exercise of jurisdiction based on those contacts, when those contacts formed the basis of the claim, was not inconsistent with due process.

Juror Misconduct; New Trials

***Torres v. First Transit, Inc.*, No. 18-15186 (11th Cir. Oct. 20, 2020)**

During *voir dire* in a bus accident case, two venire-persons answered no to a written question as to whether they or any close family member had ever been involved in a lawsuit. During oral *voir dire*, the district court asked: "Is there anyone

that has been involved in a civil lawsuit that has shaped your view either negatively or positively about the legal system that you believe would have an effect on your ability to serve as a fair and impartial juror?" Again, neither juror responded affirmatively. Those venire-persons were seated on the jury. After an adverse verdict, defendant moved for new trial after discovering that the two jurors had in fact been sued multiple times, and that the affirmative concealment suggested a lack of impartiality necessitating an evidentiary hearing. The district court denied a motion for new trial and denied an evidentiary hearing, concluding that the oral question was qualified as to whether other litigation had impressed their view of the legal system, and that there was no indication that a lack of partiality was present. The Eleventh Circuit reversed. "To obtain a new trial for juror misconduct that occurred during the jury selection process, a party must make two showings: (1) "that a juror failed to answer honestly a material question on voir dire," and (2) "that a correct response would have provided a valid basis for a challenge for cause." [A] district court must investigate juror misconduct

when the party alleging misconduct makes an "adequate showing" of evidence to "overcome the presumption of jury impartiality." Thus, when a party moving for a new trial based on a juror's nondisclosure during voir dire makes a prima facie showing that the juror may not have been impartial and thus was plausibly challengeable for cause—in other words, when the moving party has presented "clear, strong, substantial and incontrovertible evidence that a specific, non-speculative impropriety has occurred"—the district court must hold an evidentiary hearing prior to ruling on the motion for a new trial in order to adequately investigate the alleged juror misconduct."

Continuing Violation

McGroarty v. Swearingen, No. 19-10537 (11th Cir. Oct. 20, 2020)

Continuing violation theory did not extend the statute of limitations because McGroarty "has alleged a continuing harm (which does not extend the limitations period), not a continuing violation (which may extend the period)."

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Spokeo Standing; FACTA

Muransky v. Godiva Chocolatier, Inc., No. 16-16486 (11th Cir. Oct. 30, 2020) (en banc)

In a long-awaited case concerning Article III standing, the court held that the violation of a statute for which Congress has provided a remedy—in this case, a merchant’s printing a credit card receipt without proper truncation of numbers in violation of the Fair and Accurate Credit Transactions Act’s amendments to FCRA—does not in itself confer Article III standing on a litigant. The litigant must instead plead and prove concrete and real injury resulting from the statutory violation. The court vacated the district court’s approval of a class-action settlement, which had been reached while the 2016 U.S. Supreme Court’s *Spokeo* case was under submission and was prompted in part by an imminent decision in that case, due to a lack of subject matter jurisdiction over the case. Of no small moment on the standing question, in this case Muransky was actually handed the credit card receipt, so there was no enhanced risk of identity theft resulting from the FACTA violation (which was historically the argument for concrete harm in FACTA cases). The case prompted a total of 148 pages of opinion-writing.

Voting Rights Act; Districting

Wright v. Sumter County Bd. of Elections & Registration, No. 18-11510 (11th Cir. Oct. 27, 2020)

Plaintiff alleging vote dilution must satisfy “the three now-familiar *Gingles* factors: (1) that the minority group is ‘sufficiently large and geographically compact to constitute a majority in a single-member district;’ (2) that the minority group is ‘politically cohesive;’ and (3) that sufficient racial bloc voting exists such that the white majority usually defeats the minority’s preferred candidate.” Once those are established, “[t]he statutory text directs us to consider the ‘totality of circumstances’ to determine whether members of a racial group have less opportunity than do other members of the electorate.” *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 425–26 (2006). The “totality of circumstances” in turn are evaluated using the nine so-called “Senate Factors” (from the Senate Report of the VRA). Application of these factors and the district court’s fact-finding are reviewed only for “clear error”—turning largely on this standard of review, the Court affirmed the district court’s striking down a county education board redistricting plan.

Civil Committee Rights

Bilal v. GEO Care, LLC, No. 16-11722 (11th Cir. Nov. 9, 2020)

Civil committee plaintiff (Bilal) largely stated constitutional claims: (1) Bilal’s allegations about being shackled, transport by van instead of airplane, being fed a stale sandwich, and excessive driving speeds failed to state a Fourteenth Amendment claim; (2) Bilal’s allegations that defendants would not allow him to use the bathroom and required him to sit in his own excrement for 300 miles stated a Fourteenth Amendment claim; and (3) claim that month-long stay in the Santa Rosa County Jail in connection with his one-day hearing amounted to unconstitutional punishment stated a valid Fourteenth Amendment claim.

ADA

National Association of Deaf v. State of Florida, No. 18-12786 (11th Cir. Nov. 10, 2020)

This is a claim under Title II of ADA and Section 504 of the Rehabilitation Act against several Florida entities and officials, challenging defendants’ failure to provide captioning for live and archived videos of Florida legislative proceedings. Held: (1) Congress validly abrogated defendants’ Eleventh Amendment immunity with respect to plaintiffs’ claims under Title II; (2) the *Pennhurst* exception to *Ex parte Young* does not bar plaintiffs’ Title II claims for declaratory and injunctive relief against certain state officials; and (3) the Court need not resolve whether sovereign immunity shielded the Florida house and legislature from plaintiffs’ Rehabilitation Act claim at the motion to dismiss stage.

Death on the High Seas

Lacourse v. PAE Worldwide Inc., No. 19-13883 (11th Cir. Nov. 17, 2020)

Death on the High Seas Act, 46 U.S.C. § 30302, extends to a death “caused by wrongful act, neglect, or default occurring on the high seas;” under *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 218 (1986), the location of the negligent act (here, on land, regarding inspections of the plane) is not determinative as long as the death itself occurs on the sea, and no “maritime nexus” is required. Defendant was entitled to the “government contractor” defense, in that “(1) the United States approved reasonably precise maintenance procedures; (2) [the contractor’s] performance of maintenance conformed to those procedures; and (3) [the contractor] warned the United States

about the dangers in reliance on the procedures that were known to [the contractor] but not to the United States.”

First Amendment; Public Employment

Tracy v. Florida Atlantic Univ. Bd. of Trustees, No. 18-10173 (11th Cir. Nov. 16, 2020)

In a fact-intensive First Amendment retaliation case, the court held that (1) requirement that public employee report as outside activity certain work in “professional practice” was not void for vagueness; the policy clearly applied to plaintiff’s blogging because he taught media courses in conspiracy theory and blogged on the same topics; and (2) although the evidence concerning First Amendment retaliation was in conflict, the jury was entitled to weigh the evidence and find for defendant.

First Amendment; Land Use

Thai Meditation Assn. of Alabama, Inc. v. City of Mobile, No. 19-12418 (11th Cir. Nov. 16, 2020)

The court reversed the district court’s grant of summary judgment to city in action challenging city’s refusal to issue zoning permits for construction of a Buddhist meditation and retreat center in a residential area of Mobile. Among other holdings: the Religious Land Use and Institutionalized Persons Act prohibits land-use regulation which imposes a

“substantial burden” on religious exercise, which occurs when it “place[s] more than an inconvenience on religious exercise;” “is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly;” or “can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.” Although *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), refers to “complete prevention” as a way in which a substantial burden can be imposed, complete prevention is not required to establish a substantial burden. Claims under the Alabama Religious Freedom Amendment (“ARFA,” Ala. Const. § 3.01), was also viable; ARFA does not require that the burden on religious exercise be “substantial” in order to trigger strict scrutiny.

Arbitration; Class Actions; Education Law

Young v. Grand Canyon University, No. 19-13639 (11th Cir. Nov. 16, 2020)

Applicable federal regulation, properly interpreted, prohibits any college or university that accepts federal student-loan money from enforcing pre-dispute arbitration agreements and class-action waivers when a student brings a fraud or breach of contract claim.

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First Amendment

Otto v. City of Boca Raton, No. 19-10604 (11th Cir. Nov. 20, 2020)

City and county ordinances prohibiting therapists from engaging in counseling or any therapy with a goal of changing a minor's sexual orientation, reducing a minor's sexual or romantic attractions (at least to others of the same gender or sex), or changing a minor's gender identity or expression, though highly controversial from a therapeutic standpoint, violate the First Amendment because they are content-based regulations of speech that cannot survive strict scrutiny.

RECENT CRIMINAL DECISIONS

From the Alabama Supreme Court

Lesser-Included Offenses

Ex parte Cunningham, No. 1190187 (Ala. Nov. 6, 2020)

Defendant's jury was erroneously instructed on the charge of possession of a controlled substance, a violation of Ala. Code § 13A-12-212, as a lesser-included offense of his indicted charge of distribution of a controlled substance under Ala. Code § 13A-12-211. Statutory elements of the offense and the facts alleged in the indictment—not the evidence presented at trial—are the factors that determine whether one offense is included in another.

Rule 32; Fair Justice Act

Ex parte Marshall, No. 1190644 (Ala. Sept. 25, 2020)

Trial court erred in not dismissing declaratory judgment action filed by several capital murder defendants seeking relief from application of the Fair Justice Act, Ala. Code § 13A-5-53.1, governing Rule 32 petitions in capital murder/death penalty cases. Defendants' claims were not ripe for adjudication because they were fact-specific and should be raised within their Rule 32 proceedings.

Terry Stops

Ex parte Gardner, No. 1190172 (Ala. Sept. 25, 2020)

Although a law enforcement officer is permitted to pat down a suspect's outer clothing for weapons or possible contraband under *Terry v. Ohio*, 392 U.S. 1 (1968), officer is

not permitted to squeeze or otherwise manipulate a suspect's clothing to find contraband that the officer knows is not a weapon.

From the Court of Criminal Appeals

Bail Revocation

State v. Coffey, CR-19-0960 (Ala. Crim. App. Oct. 16, 2020)

State was entitled to an arrest warrant to secure a defendant's presence at a bail revocation hearing following his commission of a new offense while free on bail. To "[r]efrain from committing any criminal offense" was a condition of the defendant's pretrial release under Ala. R. Crim. 7.3(a)(2).

Rule 32; Ineffective Assistance

Spain v. State, CR-19-0708 (Ala. Crim. App. Oct. 16, 2020)

Defendant was properly denied relief on ineffective assistance claims related to the inclusion of intent as an element of the offense of first-degree rape under Ala. Code § 13A-6-61. The inclusion of "intentionally" as an element of the offense in the indictment did not render the indictment void or defective, and the jury was properly instructed on intent.

Rule 32; Ineffective Assistance

State v. M.D.D., CR-19-0652 (Ala. Crim. App. Oct. 16, 2020)

The court reversed the award of post-conviction relief from the defendant's sodomy conviction under Ala. Code § 13A-6-63. Defendant did not prove that his trial counsel was deficient in failing to call certain witnesses to testify at trial and in not questioning an investigator or the victim about a prior investigation by the Alabama Department of Human Resources.

Rule 32; Untimely Appeal

Watson v. State, CR-19-0689 (Ala. Crim. App. Oct. 16, 2020)

After unsuccessful initial Rule 32, defendant filed a second petition which included a request for an out-of-time appeal from the denial of the first petition. The court remanded for the trial court to consider the out-of-time appeal request, and, after the trial court granted that request, the court directed it to hold the petitioner's remaining claims in abeyance while he pursued his appeal from the first judgment.

Rule 32; Untimely Appeal

Williams v. State, CR-19-0524 (Ala. Crim. App. Oct. 16, 2020)

The court remanded to provide the defendant an opportunity to prove his claim that he was entitled to an out-of-time appeal from the denial of his first Rule 32 petition. His remaining claims were correctly dismissed as successive under Ala. R. Crim. P. 32.2(b).

Probation Revocation; Appeal

Wright v. State, CR-19-0431 (Ala. Crim. App. Oct. 16, 2020)

The trial court's revocation of probation was reversed as based solely on hearsay. Probationer's filing of docketing statements after he was granted an out-of-time appeal was sufficient to invoke appellate jurisdiction. Docketing statements were timely filed and contained all of the information required by Ala. R. App. P. 3(c) for the form and content of a notice of appeal.

Probation Revocation; Constructive Possession

Jones v. State, CR-19-0581 (Ala. Crim. App. Oct. 16, 2020)

Probationer's presence in a home where guns and marijuana were found by law enforcement, without more, was insufficient

to support the revocation of his probation on the basis of constructive possession. Probationer was not in exclusive possession of the home, and the state did not offer evidence to show that the probationer knew of the guns and marijuana.

Double Jeopardy; Felony Murder

Shirley v. State, CR-19-0354 (Ala. Crim. App. Oct. 16, 2020)

Defendant's convictions of felony murder during the course of a robbery and first-degree robbery constituted double jeopardy, thus requiring a remand for the trial court to vacate the robbery conviction and its resulting sentence. Evidence was sufficient to support the remaining felony murder conviction, however, because the jury could reasonably have inferred that the defendant knowingly and intentionally participated in a robbery wherein the victim was killed.

Jury Selection

Battles v. City of Huntsville, CR-19-0116 (Ala. Crim. App. Oct. 16, 2020)

The court reversed the defendant's possession of marijuana conviction due to the prosecution's use of peremptory strikes in violation of *Batson*. ▲

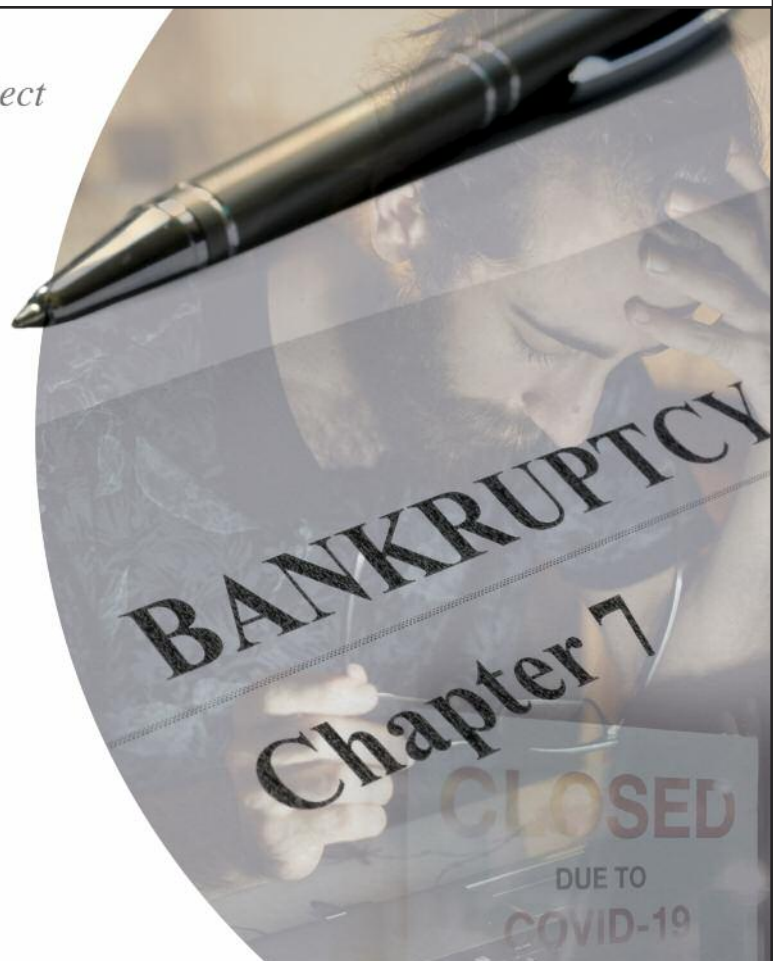
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Among Firms

The **Supreme Court of Alabama Clerk's Office** announces that **Matthew J. Ward** joined as assistant clerk and **Stephanie C. Blackburn** joined as a central staff attorney.

Balch & Bingham announces that **Anna Davis, Grace Hembree, Emily McKee, Aaron Tippetts, Park Wynn,** and **Blake Young** joined the Birmingham office and **Nolan Clark** joined the Montgomery office, all as associates.

Bradley Arant Boulton Cummings LLP announces that **Brook V. Robertson** joined the Birmingham office as an associate.

Burr & Forman LLP announces that **Elena Bauer, Gabriell Jeffreys, Ryli Leader, Tucker Martin, Liz Moore, Lindsey Phillips,** and **Corban Snider** joined as associates in the Birmingham office.

Compton Jones Drescher of Birmingham announces that **J.R. Davidson, Jr.** joined as an associate, and **Lisa H. Dorough** and **Caroline L. Powell** joined as counsel.

Lightfoot, Franklin & White LLC announces that **Rebecca K. Hall, Brooke L. Messina, Richard A. Rosario,** and **M. Wesley Smithart** joined as associates in the Birmingham office.

Maynard Cooper & Gale of Birmingham announces that **Matthew Bowness, Emily Burke,** and **Charles Fleischmann** joined as associates.

Neal Moore, Jack Young, Setara Foster, and **Jeremy Hazelton** announce the opening of **Moore Young Foster & Hazelton LLP** at 1122 Edenton St., Birmingham 35242. Phone (205) 879-8722.

The Rose Law Firm LLC of Birmingham announces that **Katherine W. Haynes** is now a partner.

Sirote & Permutt PC announces that **Austin Boyd, Terrell Blakesley, Mazie Bryant,** and **Nathan Stotser** joined as associates in the Birmingham office.

Smith, Spires, Peddy, Hamilton & Coleman PC announces that **Teresa M. Bray** joined as an associate.

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