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On The Cover

Pictured on the cover is the famous boll weevil monument located in downtown Enterprise, Alabama. It is the only statue built to honor an agricultural pest.

Photograph by David Dial, www.daviddialphotography.com

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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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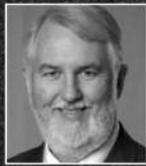
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Listening Is Difficult

Listening is difficult. Maybe because we get bored. Maybe we are more interested in ourselves than about the person speaking to us. I have caught myself playing with my iPhone as someone speaks to me. How rude is that? We are accustomed to listening on our own terms. Typically, we prefer speaking to listening. However, quite often it is best for us to close our mouths and resist the urge to immediately respond.

During my term as state bar president, while I certainly wanted to inspire and set a course for the state bar that would impact a generation of lawyers, I thought the most important thing I could do this year was to listen to you. Fortunately, you were willing to speak to me—either on the phone, in person or by email. A great number of the projects we pursued this year were because you told me what was important to you. I hope that I listened well.

I listened to a renewed desire to emphasize professionalism among our bar. There were some passionate emails and phone calls sent to me about this subject. As I considered professionalism in the bar, I read the Preamble to the *Rules of Professional Conduct* which included these words:

“A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs. A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the

rectitude of official action, it is also a lawyer's duty to uphold the legal process."

I doubt too many of you have read these words before, but, even if you have, external rules, while valuable, only point us to the standard. For this rule to take hold, though, we must believe it internally so that it naturally flows externally to others. I suppose this is one of the reasons I pointed our bar to "love your neighbor." I believe that someone who is inclined to love others will more often than not display integrity, kindness and empathy toward others. On the other hand, someone who is inclined to be apathetic toward others will be easily offended when they engage with lawyers and the public.

Please know that I was proactive to address this issue that was important to so many of you. I spoke to lawyers and judges about professionalism. I asked the Bar Commissioners to discuss professionalism with the lawyers and judges in their circuits. I received some great reports about steps that would be taken to address professionalism. If we really want to change the way we interact with one another, though, then each of us must look internally at our hearts and determine if we have a genuine love for others.

I listened to you as you expressed frustration with the practice of law. Most of the lawyers who contacted me about this issue expressed their enjoyment of the actual practice of law, but too many of our lawyers in our state are hurting economically. I don't think it is big news to state that the law has changed drastically in the last 10 years. One lawyer told me that he isn't able to live paycheck to paycheck anymore because his clients are not able to pay for his services. Another lawyer spoke about his lack of health coverage. Through all of this, though, I heard this refrain, "I am proud to be a lawyer. I like my local judges and fellow lawyers."

Fortunately, the state bar has been able to begin to address some of these issues. Many of the issues are systemic and cannot be resolved in a year. After all, it took us longer than a year to get into the mess and it will take us longer to get out of it. Lawyers are smart and are critical thinkers, though, and we will succeed.

The state bar offers a number of services that can help your law practice. I asked our **Local Bar Task Force** to go to your bar and speak about bar services that can help you. I also asked them to listen to you about what else the bar could do to help.

Additionally, **Lawyer University** is up and running quite successfully. Lawyer University was created to practically help our bar members in this new era of practicing law. We have had and will continue to host classes that address the business of practicing law, available technologies to help you practice law efficiently and emerging areas of law to consider as you expand your firm's footprint.

After a great deal of research into the health insurance availability for our members, we were able to work out an agreement with the **Madison County Bar Association** that offered outstanding health insurance for our members. This was the best option available and I am grateful for the labors of many, especially the MCBA.

I listened to you as you spoke sympathetically about lawyers you practice around who are struggling

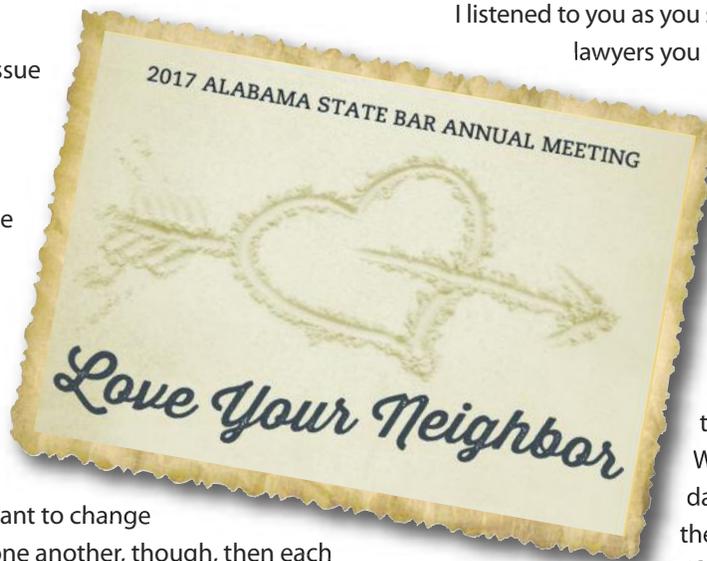
with work stresses. While we have a fantastic resource for lawyers who are suffering from depression, the **Alabama Lawyer Assistance Program**, I also encourage us to focus on positive ways that Alabama lawyers can deal with stress. We want to educate and encourage our members to be sound in mind, body and spirit. We have firmly established the foundation for this important work with the establishment of the **Quality of Life, Health and Wellness Task Force**.

You will see the fruits of our labors in the coming years. This program will make a tremendous difference in many lives.

I listened to you as you expressed gratefulness for the unselfish acts of lawyers who help the public. This year alone we have had the opportunity to help our fellow lawyers in Louisiana who were affected by the terrible flooding. We experienced an incredible year with our pro bono efforts across the state. Selfless volunteers are working on initiatives to help vulnerable foster children in our state. We gathered food for citizens of our state who are destitute and in need of a daily provision. We understand as lawyers we have a responsibility to be advocates for the public and we take this responsibility seriously because it reflects who we are as a profession.

I love being a lawyer—not every single day or every single moment, but I love what I do. Yes, there are many frustrations—a lack of a balanced life, work stresses and tough losses—but even those setbacks are good for me. They produce life lessons, lessons that I hope I can pass along not only to my children, but to lawyers I interact with in my practice.

Thank you for giving me the opportunity to serve as your president and to listen to you. You have taught me well. And I hope that I have encouraged you to love your neighbor. ▲





EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
phillip.mccallum@alabar.org



Photo by Eric Chapman Photography
www.ericchapmanphoto.com

From the cover of the September 2012 issue of *The Alabama Lawyer* are Phillip W. McCallum and wife Kelley, center, and their children (left to right), Murphy, Caitlin and Savannah.

Meet Your New Executive Director

In May 2017, the Alabama State Bar welcomed its new executive director, Phillip W. McCallum. Phillip is a native Alabamian and a graduate of Cumberland Law School.

Prior to taking the helm of the state bar, Phillip was in private practice for 15+ years with McCallum, Methvin & Terrell PC in Birmingham. He maintained a general civil litigation practice, and, of late, enjoyed a thriving mediation practice. In addition to private practice, Phillip was a prosecutor for the City of Vestavia Hills and an assistant Jefferson County DA in his early years.

Phillip is not new to the state bar as, most notably, he served as state bar president in 2012-2013.

If you know Phillip, chances are you have enjoyed time with him, his firm and guests at his yearly crawfish boil. You also know about his passion for this state and its lawyers that is only surpassed by his

passion for his family. Phillip has been married to a fellow lawyer, **Kelley**, for 25 years. They met when she was an assistant attorney general with the Department of Human Resources and he was an assistant Jefferson County District Attorney assigned to family court. They have three children, **Caitlin**, **Savannah** and **Murphy**.



After a recent BBC meeting, Alabama State Bar President Cole Portis congratulates Phillip McCallum on being named the next state bar executive director.

*Katie Powell, a member of
The Alabama Lawyer
Editorial Board, recently sat
down to interview Phillip
McCallum for the July issue.
Phillip was so pleased with
the results that he adopted
it for his first message.*



Presidents Jim Pratt (2011-12), Anthony "AJ" Joseph (2013-14) and Phillip McCallum (2012-13)



ASB executive directors, past and present: Judge John Scott, Keith Norman, Reggie Hamner and Phillip McCallum

(Photo by Dolan L. Trout)



Kelley and Phillip McCallum

Caitlin is a recent Auburn graduate with a degree in interior design and is working in Los Angeles. Savannah will be a junior at Auburn and is a nursing major. Murphy is a recent graduate of Vestavia Hills High School and will be attending Auburn in the fall with plans to major in engineering.

We recently sat down with Phillip to go beyond what is just on paper so that the Alabama State Bar can get to know its new executive director.

Powell: In taking on your new role as executive director, you are leaving behind an almost-30-year career as a lawyer, the majority of which has been in private practice. What are you going to miss *most* about that career?

McCallum: That's easy—the firm/family atmosphere of the entire **McCallum Methvin & Terrell** staff! I'll certainly miss my friend, **Bob Methvin**, with whom I started a law firm from scratch. I've seen our families grow, and we've maintained a great friendship first, and a law partnership second. In recent conversations about my departure and the excitement of a new adventure (for both of us), and reflecting on our deep mutual appreciation of our significant personal and professional growth, Bob and I realized that we have never had a cross word or an ill thought toward each other. I'll also really miss my partners and my great staff, but there is no way to truly express how much I'll miss my long-time secretary, **Christie Archer**, who has been a rock for me!



Phillip McCallum and long-time assistant Christie Archer at the 2013 Annual Meeting

Powell: What are you going to miss *least* about private practice?

McCallum: That's easy, too—law firm lines of credit and expenses!

Powell: What prompted you to apply for the position of state bar executive director?

McCallum: **Tony McLain** made me do it! Seriously, I had not thought of applying for the position until Tony approached me and said, "I know you won't do it, but you need to apply." Over the next few weeks I couldn't stop considering it. So, I went back and told Tony I was thinking about applying for the job and he embraced me and genuinely encouraged me. I told him he had to help me present the idea to my sweet wife, though. I applied and then he was nowhere to be found to help explain this dramatic career change to Kelley! Smart man, whom we all miss.

Powell: What are you most looking forward to in your new job?

McCallum: Simply put, I'm looking forward to representing Alabama lawyers every single day.

Powell: How did your time as state bar president prepare you for this new responsibility?

McCallum: As president, I had the opportunity to travel the state and speak with numerous bar associates, as well as work quite closely with the bar staff and become involved, as reflected by most of my initiatives, with the operations and marketing of our bar. Although that exposure was helpful, there is so much more to learn, particularly with and through the invaluable resources of similarly-situated executive directors throughout the country.

Powell: What do you hope to bring to the Alabama State Bar?

McCallum: Our state bar has had the benefit of many great leaders through the years, not only from within our organization, but as volunteers. I would expect to "stand on the shoulders of these giants" in addressing the future needs of the Alabama State Bar and its members. My singular mission outside of taking care of the Alabama State Bar from "the inside" is to spend significant time speaking to, visiting with and working with lawyers all over the state. I pledge not to forget where I came from and promise to help lawyers succeed in practice and in life!

In talking with Phillip, one thing is clear—his desire to serve the Alabama State Bar is very evident. He is committed to carrying on the organization in its continued service, support and betterment of lawyers in this state and the people that they serve. Welcome to Phillip McCallum as the Alabama State Bar's new executive director!





IMPORTANT NOTICES

▲ Harold Albritton Pro Bono Leadership Award

▲ Reminder—We're Going Paperless!

Harold Albritton Pro Bono Leadership Award

The Harold Albritton Pro Bono Leadership Award seeks to identify and honor individual lawyers who through their leadership and commitment have enhanced the human dignity of others by improving pro bono legal services to our state's poor and disadvantaged. The award will be presented during Pro Bono Month 2017 (October).

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

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

substantially to legal services to persons of limited means or low-income communities.

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

To be considered for the award, nominations must be submitted by **August 1, 2017**. For more information about the nomination process, contact Linda Lund at (334) 517-2246 or linda.lund@alabar.org.

Reminder—We're Going Paperless!

As stated last year, the **2017-18 Annual Fee and Reporting Statement** will be paperless. An email will be sent to members who have an email address on record with the bar notifying you when online payments are available beginning September 1, 2017. We encourage you to pay your occupational license fee or special membership dues online with a credit card or ACH transaction. You may also join sections and pay your client security fund assessment at the same time, avoid penalties or late fees and have your payment processed more quickly.

If you prefer to pay with a check, you will be able to print a voucher from your MyDashboard page on www.alabar.org beginning September 1 and mail it to us with your payment. Please contact us at ms@alabar.org with questions or comments. ▲

ALABAMA STATE BAR



ANNUAL MEETING

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17

GRAND HOTEL

POINT CLEAR

Thank you very much for planning so many family activities and making the meeting so kid-friendly. My whole family had a blast.

Overall, the conference was excellent, well organized, quality speakers and panels and plenty of networking opportunities.

Join us for the Alabama State Bar's 140th Annual Meeting

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Love Your Neighbor

- TRACK PROGRAMMING: Business of Law; Future of the Profession; Helping the Public; Mind, Body, Spirit, Wellness
- American Bar Foundation Dinner
- KEYNOTE SPEAKERS: Mike Ethridge, Paul Mellor, Ashby Pate, William Haltom, Artur Davis and more
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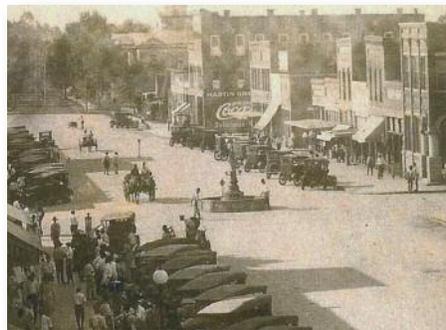
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LESSONS OF THE BOLL WEEVIL: A Story of Prosperity

By M. Dale Marsh



I would be less than honest

if I did not tell all you fellow lawyers that I believe I practice law in the best spot in Alabama—the town of Enterprise in Coffee County. Our city is the home of a world-famous statue—the only statue in the world honoring an insect, the boll weevil. This statue

exemplifies and honors the adversity, determination, diversity and triumph the people of Enterprise and Coffee County faced more than 100 years ago.

From humble beginnings, Enterprise has grown at a faster pace than neighboring towns with more industry, population and transportation assets, and stands as a symbol of what can be accomplished by dedicated people to make their town better in every way.

Let me tell you a little bit about how the boll weevil statue came into being:

Southeast Alabama (now called the Wiregrass), which includes the

counties of Covington, Coffee, Geneva, Houston and Henry, was once Creek Indian territory. When the Indians ceded their lands in southeast Alabama, pioneers took over, but found the most fertile parts of Alabama already taken. These pioneers were left to settle in those Wiregrass counties known as “cow counties” because of the apparent unproductivity of the soils, the inaccessibility to markets, the lack of transportation and the impoverished condition of the meager population.¹ They wrestled with infertile red clay and sandy soils covered by grass so tough they called it “wiregrass.”

Most of the settlers were poor and did not have the money to buy large tracts of land and the fertilizer necessary to produce cotton. These pioneers turned their efforts toward raising cattle and hogs.

After the railroad came to town in 1898, the price of fertilizer decreased, making it possible to plant and grow cotton in the poor soils of the Wiregrass. Cotton then became the principal money crop of our farmers.

Enterprise was located in a long-leaf pine forest served by two small roads in 1881 when John Henry Carmichael moved there and built a small store and his residence on what is now North Main Street. The first post office was in his home.

Prior to the coming of the Mexican boll weevil, farmers planted as much cotton as they could and depended on their efforts and the Good Lord to produce a good crop in the fall. In the late summer of 1915, the Coffee County cotton

yield averaged about 35,000 bales each year. Cotton was “king,” and until the arrival of the boll weevil, was the most dependable crop. Our farmers knew little about growing anything but cotton and raising food for cattle and hogs. There were hundreds of families in Coffee County who farmed for a living—both black and white. Families with many children were especially desirable as this meant more available hands at cotton-picking time. That was the only way they knew to make a living, and if the cotton crop failed, farmers could not meet their financial obligations to banks that held notes and mortgages on their farms.

The first year the boll weevil made his appearance in Coffee County, the cotton yield was cut to



about 60 percent of normal, due to the ravages of the insect. Farmers did everything they could to fight back against the insect. They used homemade remedies and entire farming families took to the fields and pinched the bugs off the plants by hand and killed them. These attempts to fight the boll weevil failed.

Despite the production loss in 1915, the farmers planted for a

bumper cotton crop in 1916 and continued to combat the boll weevil. In that year, less than one-third of a crop was harvested. The conditions that confronted the farmers in Coffee County and the Wiregrass confronted farmers throughout the entire Cotton Belt from Texas to Georgia. Farmers were unable to repay their crop loans, and merchants/advancers who sold to farmers on credit with debt to be paid from the proceeds of the fall cotton crop could not pay their suppliers or the banks—a financial domino effect—with the bankers and merchants left “holding the bag.”

Several Enterprise bankers, merchants and farmers heard about the success of peanuts, which were being grown in the Carolinas and Virginia so they proceeded to check into the matter. In 1915,

Coffee County farm agent John Pittman and local banker Horatio Moultrie (H.M.) Sessions, president of Farmers & Merchants National Bank (F&M) in Enterprise, visited North and South Carolina and Virginia to study a crop then unknown of in Alabama, the peanut. Sessions was impressed with what he saw in South Carolina, and bought peanut seed

there and had them shipped to Enterprise. They arrived in October 1915. He made arrangements with C.W. Baston, who was indebted to Sessions and Farmers & Merchants National Bank, to raise the first crop of peanuts, and he guaranteed their purchase. Sessions and Pittman knew that the Coffee County loose sandy soil was ideally suited for the growing of peanuts. In 1916, Baston planted

his 125-acre farm in peanuts, and made a huge peanut crop of 8,000 bushels. Sessions agreed to pay Baston \$1 per bushel for the crop and Baston was able to pay his debt to F&M Bank, with a good amount of money left over. Baston and Sessions proved that peanuts could be grown successfully in the sandy soil of Coffee County and that farmers no longer had to depend on “King Cotton.” Sessions, referred to as the “father” of the peanut crop, installed a mechanical peanut sheller in 1917, and bought and shelled peanuts and later crushed peanuts for peanut oil.² Sessions and family members formed Sessions Company, Inc. in the 1930s.

In the spring of 1917, hundreds of farmers, encouraged by Baston’s



success, planted peanuts, including my grandfather, C.A. Marsh. The fall peanut crop was outstanding and in 1917 Coffee County grew and harvested more than a million pounds of peanuts for market, selling for \$5 million. It is said that the peanut market ruled higher in Enterprise Saturday, October 13, 1917, than in any market in the peanut belt of the state.³ Enterprise citizens began to refer to their town as the “Peanut Capital of the World.” As high as \$102 and nothing lower than \$85 per ton was paid. To this day, Coffee County still is the unit mentioned when comparisons are made in peanut production. Cotton then began to take second place to peanuts as the farmers’ top money crop.⁴

An article of *The Peoples Ledger*, dated October 16, 1917, read: “Nearly every vacant building in the town of Enterprise is being used to store peanuts, hay and corn. Nothing like it has ever been known here before. More

than fifteen rail cars are loaded and shipped from this point daily, and this amount will increase every day during the season.”⁵

When farmers came to town to do their business on Saturdays, they often visited the store of R.O. (Bon) Fleming on Main Street, talking and chatting about crops, family, church, politics and farming. Bon Fleming began to tell people about his idea to erect some type of monument in honor of the prosperity brought about by the boll weevil. This monument was to be erected at the intersection of Main Street and College Street in downtown Enterprise. Many farmers, merchants, bankers and citizens of Enterprise gave donations to help fund the project. Someone sketched a semblance of a proposed statue, and as local legend has it, that sketch was sent to Italy for final design and manufacture. The statue arrived in Enterprise after several months, but was stored in the railroad depot there

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until such time as the final cost could be raised by donations to take possession of the statue. It was reported the monument alone cost \$1,795, and by the time the work to erect it and provide a protective wall and pool around it was completed, the total cost was about \$3,000, a large sum of money in those days.

The world-famous monument was dedicated on Main Street on December 11, 1919, a year and a month after the end of World War I, in front of a crowd of 5,000 people, including several farmers and shellers from Virginia and the Carolinas who had met earlier with Sessions and Pittman about the feasibility of growing peanuts in Coffee County.

The keynote speaker for the event was to be the famed peanut scientist from Tuskegee Institute, Dr. George Washington Carver.⁶ Unfortunately, Dr. Carver had to cancel his appearance due to heavy rains which shut down the railroad track between Columbus, Georgia and Montgomery, and he could not travel to Enterprise. At the very last minute, one of the guests attending the event, Luther Fuller, an agricultural agent for the Southern Railroad, volunteered to give the speech of dedication, in which he called the “boll weevil, a blessing in disguise . . . it pauperized the South . . . what the pest caused in damage, and what he did to refashion agriculture into a sound program of diversified farming is well known.”⁷

The Boll Weevil Monument stands only 13 ½ feet high in a circular fountain. The figure is that of a lady with her arms raised high, symbolizing the prosperity brought about by the peanut. Many years later, a replica of the boll weevil was cast and placed in the arms of the lady figure. On the base of the monument these words can be found on a brass plate:

In profound appreciation of the Boll Weevil and what it has done as the herald of prosperity this monument was erected by the citizens of Enterprise, Coffee County, Alabama.

The monument has been featured in numerous newspaper and magazine articles and on television, and



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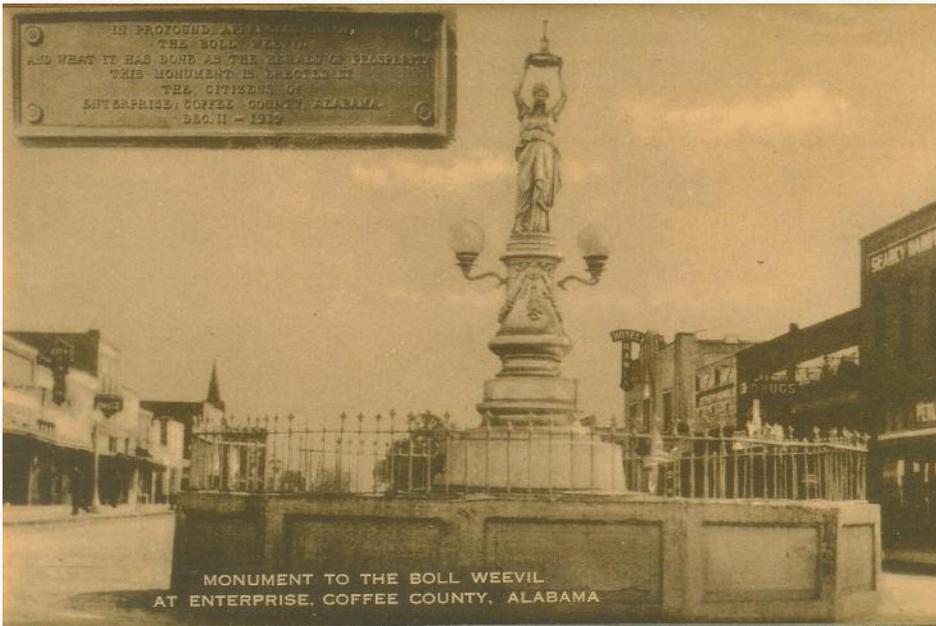
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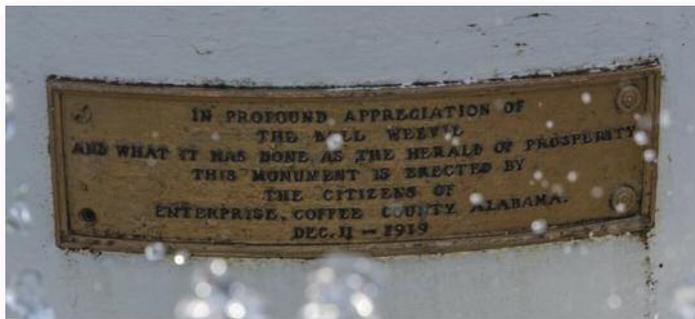


it holds a special place in the heart of those of us who call Enterprise home. Today, Enterprise continually seeks a proper balance between diversified agriculture and industry, and her monument stands as a symbol to the thinking and the vision of those in our past who helped create prosperity out of chaos and near despair.⁸

Conclusion

What are the lessons to be learned from the boll weevil and how can we fight them in our lifetime? The legacy of the boll weevil stands for the character and behavior of early Enterprise men and women pioneers and the lessons they taught for generations to follow:

- People must have a vision and the will to carry out that vision.
- People must have both moral and physical strength to stand up to adversity and meet repeated



reversals and set-backs with courage and determination.

- United people working together can be the architects of solutions.
- Be generous with your time, talents and finances to promote the greater good and “pay it forward.”
- Be kind, considerate and fair to all people, and take up the challenge of the Apostle Paul to “give thanks in all circumstances.”
- Never, never, never give up.

Are there boll weevil lessons for lawyers? Our profession faces huge technological, cultural and institutional changes. To overcome these challenges and prosper, we must have a deep understanding of both the black letter law and human

nature. We must use our training, our ethical duty to clients and the courts and our commitment to justice to create legal solutions to the many problems that face modern society. We practice in uncertain times, and when we are faced with a “boll weevil” moment—disguised as a difficult witness, client, judge or jurors—we must act quickly and use our best skills and legal education to make law work and to create conditions which foster successful results for our clients. In 1915-17, the profession of farming did not change—the process and the end result of growing a peanut crop instead of a cotton crop were what changed. Although the legal processes and products lawyers provide have changed and will continue to change, the one constant in our profession that remains the same is the need for advice and counsel which only lawyers can provide. Lawyers, like the pioneer farmers of Enterprise, must have the insight to be aware of the need for change in their everyday practice in order to obtain a more prosperous future. Lawyers must continue to be hardworking, courageous, creative, willing to reconsider our viewpoints, willing to take calculated risks, demonstrate the continued will to win and succeed and, above all, *persevere*. ▲

Endnotes

1. Coffee County, Alabama, Ancestral Homeland, compiled by Bill and Sue Tubbs, Jasper, Alabama 06-2005.



2. Sessions Company, Inc. (Sessions) is still headquartered in Enterprise and purchases farmers' peanuts at various locations in Alabama, Florida and Georgia. The current chair of Sessions is H. M. Sessions, Jr. and the president is William T. Ventress, Jr. both great-grandsons of founder H. M. Sessions, who died in 1927. Since its early beginnings, Sessions has been represented by the author's firm, Marsh & Cotter LLP and its predecessor firms.
3. "From Pest to Prosperity," heritage article by Emmett Burnett, May/June 2015, *Alabama Living* magazines.
4. See *Enterprise, The First 110 Years* by Roy Shoffner, pages 62-64, 66-71, and *Coffee Grounds, A History of Coffee County, Alabama 1841-1970* by Fred S. Watson, pages 93-95.
5. *The Peoples Ledger*, dated October 16, 1917.
6. I always thought this was a most progressive step for the people of Enterprise and Coffee County to invite Dr. Carver to speak in 1919, at a time when many other communities and counties, due to Jim Crow laws and Southern customs, would not have invited a black speaker.
7. Shoffner at pages 68-71.
8. Another success story is the National Boll Weevil Eradication Program which was responsible for the eradication of the boll weevil in the southeastern states, including Alabama, and helped

thousands of U.S. cotton-growers become more competitive. Enterprise continues to successfully raise cotton without the set-backs resulting from boll weevils.

M. Dale Marsh



Dale Marsh, a graduate of the University of Alabama School of Law, is a civil trial lawyer in Enterprise, where he has practiced since 1974. Marsh is licensed in Alabama and admitted to practice in the Northern and Middle District Courts of Alabama, the 11th Circuit and the United States Supreme Court. His ancestors settled in Coffee County in the 1850s, and began to farm the land, growing both cotton and peanuts. Marsh owns the farm his grandfather, C.A. Marsh, purchased in December 1905. He has a lifelong interest in the history of both Coffee County and the State of Alabama. The author expresses his gratitude for the able assistance and editing by James H. Tarbox, an associate with Marsh & Cotter LLP of Enterprise.

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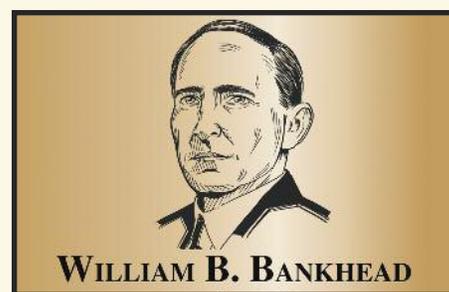
Hall of Fame

The Alabama State Bar recently inducted five new members into the Alabama Lawyers Hall of Fame.

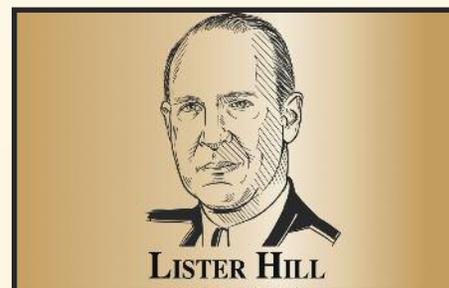
“The attorneys inducted into the Alabama Lawyers Hall of Fame today spent their lives dedicated to improving the lives of others and the legal profession,” said Alabama State Bar President J. Cole Portis. “It’s a privilege to participate in the Hall of Fame program and to honor these outstanding lawyers for their commitment and service to our state, local communities and our nation. This program and its purpose are at the heart of the bar’s motto: Lawyers Render Service.”

The five lawyers inducted into the 2016 Alabama Lawyers Hall of Fame include:

- **William B. Bankhead (1874-1940)**—Member of one of Alabama’s most prominent political families and arguably the state’s most important political figure during the first half of the 20th century; practiced law in Jasper and served two years in the Alabama Legislature prior to his election to Congress in 1916; served

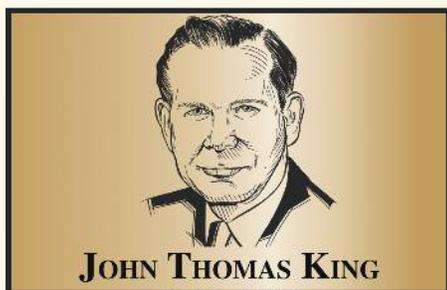


24 years in the House of Representatives until his death; a Roosevelt loyalist who took an active role in helping pass New Deal legislation; elected House majority leader in 1935 and speaker of the House in 1936, a position he held until his death; father of early star of stage and screen, Tallulah Bankhead.



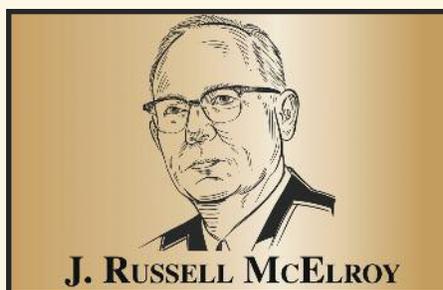
- **Lister Hill (1894-1984)**—Considered Alabama’s premier lawmaker of the 20th century; practiced law in his hometown of Montgomery following his return from World War I; served in the U.S. House of

Representatives (1923-1938) and U.S. Senate (1938-1968); was an active New Dealer in his early career; sponsored 80 pieces of major legislation during his 45 years in Congress including the Hill-Burton Act (1941), the Library Services Act (1956) and the Defense Education Act (1958); leading proponent for federal funding of medical research as well as major advocate for spreading medical knowledge worldwide by helping create the National Institute of International Medical Research (1959).

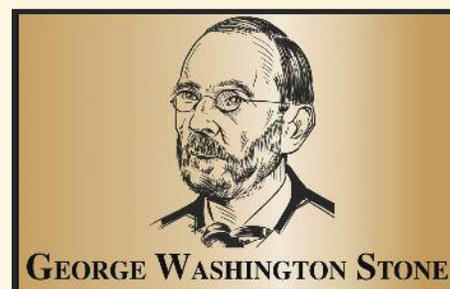


- **John Thomas King (1923-2007)**—Received his undergraduate and law degrees from the University of Alabama; served the U.S. Army in the Pacific theater during World War II, achieving the rank of major; practiced law in Birmingham and served a term in the Alabama Senate where he sponsored major legislation that included the New Judicial Article; a progressive whose two mayoral campaigns during the racial turmoil of the early '60s would help serve as a

catalyst to change Birmingham's repressive commission form of government to the more representative mayor-council form of government.



- **J. Russell McElroy (1901-1994)**—Practiced law briefly before appointment at age 25 as Birmingham circuit judge; served continuously as circuit judge for 50 years (1927-1977) until his retirement from the bench and recognition as the Most Durable Judge by the Guinness Book of World Records for his long tenure; authored *The Law of Evidence in Alabama*, the most widely-used and regularly cited legal treatise in Alabama practice; taught law school and served on the board of numerous community organizations.
- **George Washington Stone (1811-1894)**—Practiced law for 32 years in Talladega County, Lowndes County and Montgomery with a reputation as a lawyer “who observed the most upright and correct rules of conduct;” served as a circuit judge



in Montgomery before becoming an associate justice of the Alabama Supreme Court (1856-1865, 1874-1884) and later chief justice (1884-1894); responsible for helping shape post-Civil War common law of the state by writing a total of 2,449 opinions as a member of the Alabama Supreme Court.

The Alabama Lawyers Hall of Fame inducted its first class in 2004, and has since inducted 60 Alabama lawyers including this year's inductees. Inductees must have a distinguished career in law and each must be deceased at least two years at the time of their selection. In addition, at least one of the inductees must be deceased a minimum of 100 years.

The newly unveiled plaques honoring each inductee are on display in the Alabama Lawyers Hall of Fame located on the lower level of the Heflin-Torbert Judicial Building.

More information on all of the inductees can be found at <https://www.alabar.org/membership/alabama-lawyers-hall-of-fame/>.





A RIGHT TO REFUSE?

The Legalities of a Pregnant Patient's Refusal of Medical Treatment

By R. Rhett Owens

On August 5, 2016,

a Jefferson County, Alabama jury awarded \$16 million to plaintiffs in a case involving claims arising from injuries that one of the plaintiffs sustained as a result of the birth of her fourth child. Plaintiffs alleged that defendants, a hospital and its employees, engaged in medical negligence and fraud by advertising that the hospital was open to facilitating “natural” births, but in plaintiffs’ case (and against the plaintiff mother’s will), the defendants compelled the mother to give birth in a manner different than she desired, and had planned with her obstetrician.

This verdict raises interesting questions about how medical providers should confront a situation in which an expectant mother’s wishes and medical science diverge.

For example, if a woman wants to deliver naturally, but her doctors determine it is medically necessary for her baby to be delivered by C-section (“C-section”), are the woman’s doctors obligated to honor her wishes, or are there legal interests that prevail over such wishes, thus authorizing the doctors to deliver the baby via C-section despite the woman’s objections? As might be expected, the answer to this hypothetical is not entirely clear.

The Right to Refuse Treatment

Medical providers are required to obtain informed consent from patients prior to performing a medical procedure, informed consent being defined as “the willing and un-coerced acceptance of a

medical intervention by a patient after adequate disclosure by the physician of the nature of the intervention, its risks and benefits, as well as of alternatives with its risks and benefit.”¹

Importantly, a “logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment.”² Following the lead of the U.S. Supreme Court, a number of state courts have acknowledged a patient’s right to refuse medical treatment.³ However, that an individual has the right to refuse medical treatment “does not end the inquiry: whether [] constitutional rights have been violated must be determined by balancing [] liberty interests against the relevant state interests.”⁴

Predictably, in cases involving a pregnant woman’s refusal of treatment, and specifically in cases where a woman refuses to give birth via a medically necessary C-section (a common situation confronted in applicable case law), courts have struggled to consistently balance a woman’s constitutional right to refuse treatment and the state’s interest in preserving life under circumstances where recommended treatment, including the performance of a C-section, is necessary to preserve either the woman’s life or the life of her unborn fetus.

Some Cases Hold State’s Interest in Preserving Life Trumps Right to Refuse Treatment

In *Pemberton v. Tallahassee Memorial Regional Medical Center, Inc.*,⁵ the plaintiff (over her objection) was ordered by a Florida state court to submit to a C-section deemed necessary to avoid a “substantial risk” that her baby would die during delivery. Following the successful delivery of her baby, the plaintiff brought suit, claiming that her hospital and its physicians



... courts have struggled to consistently balance a woman’s constitutional right to refuse treatment and the state’s interest in preserving life under circumstances where recommended treatment, including the performance of a C-section, is necessary to preserve either the woman’s life or the life of her unborn fetus.

violated her constitutional rights via the compelled C-section. In granting the hospital’s motion for summary judgment, the *Pemberton* court recognized the “important constitutional interests...implicated” by the situation, but nonetheless held that “[w]hatever the scope of [plaintiff’s] personal constitutional rights...they clearly did not outweigh the interests of the State of Florida in preserving the life of the unborn child.”⁶ In support, the *Pemberton* court relied on a principle announced in *Roe v. Wade*, namely, that “by the point of viability—roughly the third trimester of pregnancy—the state’s interest in preserving the life of the fetus outweighs the mother’s own constitutional interest in determining whether she will bear a child.”⁷

A similar decision was issued by the Supreme Court of Georgia in *Jefferson v. Griffin Spalding Cty. Hosp. Auth.*⁸ There, a woman in her 39th week of pregnancy presented herself to the Griffin Spalding County Hospital for pre-natal care and was informed that she had a “complete *placenta previa*,” i.e. the woman’s after-birth was lodged between the fetus and her birth canal, that there was a 99 percent probability that the fetus would not survive natural childbirth, that the chances of the woman surviving natural childbirth were no greater than 50 percent and that a C-section performed prior to delivery would have almost a 100 percent chance of preserving the life of the woman and her fetus.⁹ Notwithstanding these opinions, the woman, citing religious beliefs, refused to submit to a C-section. Relying on its policy to treat any patient seeking emergency treatment, the hospital sought a court order to “administer medical treatment to [the woman] to save the life of herself and her unborn child.”¹⁰ In ordering the woman to submit to a C-section, the trial court held that Georgia had “an interest in the life of this unborn, living human being,” and “that the intrusion involved into the life of [plaintiffs] is outweighed by the duty of the State to protect a living, unborn

human being from meeting his or her death before being given the opportunity to live.”¹¹

The woman and her husband moved for a stay of the order, which was denied by the Supreme Court of Georgia. Although no majority opinion was issued, the *Jefferson* Court did issue two concurring opinions. While the first of these concurring opinions recognized that a court’s power to order a competent adult to submit to surgery was “exceedingly limited,” it nonetheless indicated that the “unborn child’s right to live” outweighed the mother’s “right...to practice her religion and to refuse surgery on herself.”¹² The second concurring opinion focused on the fact that the compelled C-section was the “least burdensome alternative” for preserving the state’s “compelling interest in preserving the life of [the] fetus.”¹³

A more recent decision, issued in 2010 by the Florida District Court of Appeals, presents a framework for balancing the interests implicated in a situation in which a pregnant woman refuses medical treatment. In *Burton v. State*,¹⁴ a pregnant woman initially refused to submit to medically necessary treatment, including anticipated delivery via C-section. Operating under a procedure set forth in a 1994 decision, *In re Dubreuil*,¹⁵ the State of Florida, having received notification of the woman’s refusal of treatment, determined that a sufficient state interest was at stake and obtained an order to compel the woman to submit to the recommended medical treatment. Although the woman’s appeal of the order was mooted by her eventual submission to the treatment, including delivery via C-section, the *Burton* court decided to exercise jurisdiction over the appeal, as the situation at issue—a medical situation requiring immediate resolution—was “capable of repetition yet evading review.”¹⁶

In attempting to sum up Florida law on the issue, the *Burton* court held that “the test to overcome a woman’s right to refuse medical intervention in her pregnancy is whether the state’s compelling state interest¹⁷ is sufficient to override the pregnant woman’s constitutional right to the control of her person, including her right to refuse medical treatment.”¹⁸ The *Burton* court further held that where the state’s “compelling interest” outweighed the woman’s right to refuse treatment, the state had to show “that the method for pursuing that compelling state interest is narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual.”¹⁹

Some Cases Hold Treatment Decisions of Competent Woman Control

There is a body of common law holding contrary to the previously-discussed decisions, the rationale for which is set forth in two cases decided in the first half of the 1990s: *In re A.C.*²⁰ and *In re Baby Boy Doe*.²¹

In *A.C.*, the District of Columbia Court of Appeals vacated a trial court’s order that a pregnant woman submit to a C-section. In summarizing its decision, the *A.C.* court held that a trial court’s first task in a case involving a pregnant woman’s refusal of treatment was “to determine...whether the patient is capable of making an informed decision about the course of her medical treatment.”²² A finding of competency ends the inquiry, as the woman’s “wishes will control in virtually all cases.”²³ Conversely, a finding that the woman is “incapable of making an informed consent (and thus incompetent)” forces the court to make a “substituted judgment” in which it must “ascertain as best it can what the patient would do if faced with the particular treatment question.”²⁴

Four years later, in *In re Baby Boy Doe*, the Illinois Court of Appeals affirmed a trial court’s denial of a petition to compel a woman to submit to a C-section. In so holding, the *Baby Boy Doe* court emphasized that, consistent with Illinois law, “a woman’s right to refuse invasive medical treatment...is not diminished during pregnancy” and that “potential impact upon the fetus is not legally relevant,” i.e. the woman’s rights were not subordinate to that of her unborn baby.²⁵

The *Baby Boy Doe* court, citing the Supreme Court’s opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*,²⁶ also addressed the issue of balancing the interests in preserving the life of the mother and that of her unborn fetus. Specifically, in discussing *Thornburgh*, the *Baby Boy Doe* court noted the Supreme Court’s characterization of the Pennsylvania statute as impermissibly requiring a “trade-off” between a woman’s health and the survival of her fetus, and stressed that “the woman’s health is always the paramount consideration, i.e. any degree of increased risk to the woman’s health is unacceptable.”²⁷ Thus, the *Baby Boy Doe* court held that a compelled C-section, which, “by its nature, presents some additional risks to the woman’s health,” when

“recommended solely for the benefit of the fetus... cannot pass constitutional muster.”²⁸

Other Authorities Suggest Pregnant Woman’s Wishes Control

The above-discussed decisions constitute the majority of what is a surprisingly sparse body of law on the issue of whether, and under what circumstances, a pregnant woman may be compelled to submit to medically necessary treatment. As can be seen, these cases provide support for both sides of the issue. Thus, we are forced to turn to other sources. The first such source is case law addressing whether a pregnant woman can be compelled to undergo other medically necessary treatment as part of her pre-natal care, for example, a blood transfusion. As could be expected, while certain jurisdictions hold that a competent patient’s refusal of treatment carries the day, notwithstanding the likelihood that said refusal will jeopardize the patient’s life and/or the life of her unborn fetus, other jurisdictions hold that the state has an interest in preserving the life of the unborn fetus and, thus, under certain circumstances, can compel a patient to undergo a blood transfusion.²⁹

In light of this split in authority, the opinion of physicians most directly involved in these cases presents reliable authority which can influence an analysis of potential liability. A recent committee opinion issued by the American College of Obstetricians and Gynecologists establishes that the medical community is firmly in the camp of adhering to treatment decisions made by competent pregnant women:

The most suitable ethical framework for addressing a pregnant woman’s refusal of recommended care is one that recognizes the interconnectedness of the pregnant woman and her fetus but maintains as a central component respect for the pregnant woman’s

autonomous decision-making. This approach does not restrict the obstetrician-gynecologist from providing medical advice based on fetal well-being, but it preserves the woman’s autonomy and decision-making capacity surrounding her pregnancy. Pregnancy does not lessen or limit the requirement to obtain informed consent or to honor a pregnant woman’s refusal of recommended treatment.³⁰

What about the Father?

To add another complicating factor to this analysis, the father of the unborn fetus also has certain rights, though the Supreme Court’s abortion-related decisions suggest these rights are very limited with respect to an unborn fetus.³¹ Thus, if a man cannot compel a pregnant woman, even his wife, to consent to a C-section or other medical necessary treatment, what rights does he have in this complex situation? In sum, depending on the specific facts at issue and the jurisdiction in which he lives, the father can assert tort claims against the medical providers involved in the situation.

The first of these potential claims is a claim for “wrongful birth” of a fetus, which has been recognized by 18 states, including Alabama, and three federal circuit courts of appeal.³²



Pregnancy does not lessen or limit the requirement to obtain informed consent or to honor a pregnant woman’s refusal of recommended treatment.

This claim seeks to impose tort liability on healthcare providers who negligently fail to apprise parents of material information relating to an unborn fetus.³³ Therefore, theoretically, a wrongful birth claim would be unsuccessful in cases where the provider fully and completely informs the mother of the fetus (or, if applicable, its parents) of all aspects of the medical situation, and the mother refuses treatment.

The second of the father’s potential claims is a claim for “wrongful life,” a cause of action “brought by or on behalf of a defective child who claims that but for the defendant doctor’s negligent advice to or treatment of its

parents, the child would not have been born.”³⁴ However, only four states recognize this cause of action.³⁵

Conversely, a majority of jurisdictions in the United States recognize the third potential claim that could be asserted by a father, a cause of action for wrongful death of a fetus.³⁶ In these jurisdictions, a claim for the wrongful death of an unborn fetus is treated in the same manner as is a claim for wrongful death of a person who has been born, i.e. the elements are a defendant’s duty to the fetus; defendant’s breach of such duty via breach of the applicable standard of care; and proximate causation of the fetus’s death by defendant’s breach. Whether the fetus was viable at the time of its death will also be considered, as the majority of jurisdictions recognizing a cause of action for wrongful death of a fetus, absent legislative action to the contrary, require the fetus to have reached “viability” as a condition to maintaining a claim.³⁷ Damages will be determined largely in accord with applicable state law, though it should be noted that an increasing number of jurisdictions allow for the award of both economic and non-economic losses damages in fetal wrongful death cases.³⁸

Conclusion

Based on the above, liability arising from a situation in which a pregnant patient refuses treatment turns in large part on whether the medical provider has

informed the patient of all information material to her refusal of treatment, and has documented both the patient’s competency to refuse treatment, and the refusal itself. Ideally, such choices are made by an undeniably competent patient in a controlled environment well in advance of the time that such treatment will be administered. If, as is more likely, such choices are being made quickly due to medical necessity, the medical provider must nonetheless take steps to inform the patient of all material information relating to her refusal of treatment, and her competency to refuse such treatment must be determined and documented. In such cases, a recording of the applicable proceedings may be necessary to erase ambiguity as to what information was communicated and what decisions were made. If the woman’s legal competency cannot be determined, i.e. she literally cannot express a decision, and/or is impaired to a degree that her decision cannot be afforded credibility, the provider should have in place specific policies for relying on third-party sources to determine the patient’s wishes. However, in implementing such policies, absent a contrary law or regulation, the provider should avoid policies requiring it to inform state officials of the patient’s refusal of treatment. To do otherwise could subject the provider to liability, as a plaintiff in a resultant suit could argue that but for the medical provider’s provision of information to the state, the state would not have been aware of the treatment refusal, and the

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losses associated with the state's attempts to override such refusal would not have occurred. ▲

Endnotes

1. *Bankert by Bankert v. U.S.*, 937 F. Supp. 1169, 1173 (D. Md. 1996).
2. *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 270 (1990).
3. See e.g., *Sekerez v. Rush University Medical Center*, 954 N.E. 2d 383, 394 (Ill. App. Ct. 2011) ("A corollary to the requirement that a patient's consent must be obtained prior to the performance of a medical procedure is that a patient is entitled to refuse medical treatment. In fact, absent consent, a patient cannot be compelled to submit to a medical procedure even where the patient's life is in jeopardy.") (quoting *Curtis v. Jaskey*, 759 N.E. 2d 962, 965 (Ill. App. Ct. 2001)); *Powers v. Floyd*, 904 S.W. 2d 713, 717 (Tex. App. 1995) ("In Texas a physician must make reasonable disclosure of the risks of medical treatment and must secure the authority or consent of the patient to legally perform a medical procedure. This duty is based on the right of every normal adult to determine what shall be done to his or her own body and a recognition that the patient needs adequate information to make an intelligent decision whether to consent to or refuse the treatment."): *Burton*, 49 So. 3d at 265 (quoting *Roe v. Wade*, 410 U.S. 113, 163 (1973) and *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989); see also FLA. STAT. § 390.0111(4) (defining "viability" as "that stage of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb.").
4. *Cruzan*, 497 U.S. at 279 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)).
5. 66 F. Supp. 2d 1247 (N.D. Fla. 1999).
6. *Id.*, at 1251.
7. *Pemberton*, 66 F. Supp. 2d at 1251 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).
8. 274 S.E. 2d 457 (Ga. 1981).
9. *Id.*, at 458.
10. *Id.*
11. *Id.*, at 460.
12. *Id.*, at 460 (Hill, J., concurring).
13. *Id.*, at 461 (Smith, J., concurring).
14. 49 So. 3d 263 (Fla. Dist. Ct. App. 2010).
15. 629 So. 2d 819 (Fla. 1994). In *Dubreuil*, the Florida Supreme Court held, in a case in which a patient refused a blood transfusion on religious grounds (in contravention of a consent form she had previously signed), that "[w]hen a healthcare provider, acting in good faith, follows the wishes of a competent and informed patient to refuse medical treatment, the health care provider is acting appropriately and cannot be subjected to civil or criminal liability." 629 So. 2d at 823-24. The court further held that a state actor could only get involved when the healthcare provider desired to override the patient's refusal: "a health care provider wishing to override a patient's decision to refuse medical treatment must immediately provide notice to the state attorney presiding in the circuit where the controversy arises, and to interested third parties known to the healthcare provider." *Id.*, at 824 (emphasis added). Thus, under *Dubreuil*, as long as the medical provider has fully informed a patient of the consequences associated with her refusal of treatment, and has documented the competency of the patient to refuse treatment, and the refusal itself, a state actor has no grounds to intervene, as *Dubreuil* suggests that a condition precedent to state intervention is the medical provider's desire for the state to become involved.
16. 49 So. 3d at 264.
17. *Burton*, like *Pemberton*, emphasized that a state's interest in preserving the life of an unborn baby became compelling at the point of viability, i.e. when "the fetus becomes capable of meaningful life outside the womb, albeit with artificial aid."
18. 49 So. 3d at 266.
19. *Id.*
20. 573 A. 2d 1235 (D.C. 1990).
21. 632 N.E. 2d 326 (Ill. Ct. App. 1994).
22. 573 A. 2d at 1252.
23. *Id.*
24. *Id.*; see also *Doe v. District of Columbia*, 206 F. Supp. 3d 583, 630-31 (D.D.C. 2016) (holding that the "substituted judgment test" requires courts to consider treatment decisions made by the patient when he or she was competent and, if the patient was never competent to make a treatment decision, a parent or guardian's consent is required).
25. 632 N.E. 2d at 332 (citing *Stallman v. Youngquist*, 531 N.E. 2d 355 (Ill. 1988)).
26. 476 U.S. 747 (1986) (holding as unconstitutional a Pennsylvania statute requiring physicians, in performing post-viability abortions, to utilize the procedure most likely to result in the fetus being aborted alive).
27. 632 N.E. 2d at 403.
28. *Id.*
29. See, e.g., *In re Brown*, 689 N.E. 2d 397, 405 (Ill. App. Ct. 1997) (holding that the State of Illinois could not override a pregnant woman's competently-made decision to refuse a blood transfusion to potentially save the life of a viable fetus); but see *In re Jamaica Hospital*, 491 N.Y.S. 2d 898 (N.Y. App. Div. 1985) (appointing a physician as guardian *ad litem* over unborn fetus and granting physician discretion in this capacity to compel pregnant woman to undergo all treatment necessary to save fetus's life, including a blood transfusion, which the pregnant woman had refused on religious grounds); accord *Crouse Irving Memorial Hosp., Inc. v. Paddock*, 485 N.Y.S. 2d 443 (N.Y. App. Div. 1985); *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 201 A. 2d 537 (N.J. 1964).
30. See American College of Obstetricians and Gynecologists, Committee Opinion Number 664 (June 2016); see also *In re Baby Boy Doe*, 632 N.E. 2d at 335 (noting the American Medical Association's Board of Trustees' recommendation that if a pregnant woman refuses treatment, "the appropriate response is not to attempt to force the recommended procedure upon her, but to urge her to seek consultation and counseling from a variety of sources."): *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) (holding that states could not require a woman to obtain spousal consent before having an abortion); accord *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 897 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.); but see *In re Matter of Raquel Marie X.*, 559 N.E. 2d 418, 424 (N.Y. 1990) (relying on U.S. Supreme Court precedent in holding that "in an adoption proceeding by strangers, an unwed father who has been physically unable to have a full custodial relationship with his newborn child is [] entitled to the maximum protection of his relationship, so long as he promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child."): *See Catherine Palo, J.D., LL.M., Cause of Action for Wrongful Birth or Wrongful Life*, 23 CAUSES OF ACTION 2D 55 at § 4 (2003) (listing jurisdictions recognizing cause of action for wrongful birth).

33. See, e.g. *Keel v. Banach*, 624 So. 2d 1022, 1029 (Ala. 1993) (“The nature of the tort of wrongful birth has nothing to do with whether a defendant caused the injury or harm to the child, but, rather, with whether the defendant’s negligence was the proximate cause of the parents’ being deprived of the option of avoiding a conception or, in the case of pregnancy, making an informed and meaningful decision either to terminate the pregnancy or to give birth to a potentially defective child.”); *Provenzano v. Integrated Genetics*, 22 F. Supp. 2d 406, 414 (D.N.J. 1998) (“a wrongful birth cause of action is brought by parents who claim that “negligent medical advice or treatment deprived them of the choice of avoiding conception or...of terminating the pregnancy.”) (internal citation omitted).
34. *Provenzano*, 22 F. Supp. 2d at 413 (internal citation omitted).
35. See Palo, *Cause of Action for Wrongful Birth or Wrongful Life*, 23 Causes of Action 2d 55 at § 10 (identifying California, Colorado, New Jersey and Washington as the only jurisdictions recognizing cause of action for wrongful life).
36. See 19 AM. JUR. PROOF OF FACTS 3d 107 § 1 (1993) (identifying 36 states permitting a wrongful death action to be maintained on behalf of an unborn child).
37. See, e.g., *Brown v. Contemporary OB/GYN Associates*, 794 A.2d 669, 701 (Md. 2002) (holding that “a cause of action for wrongful death may not be maintained on behalf of a nonviable fetus that is stillborn”); *Coveleski v. Bubnis*, 571 A.2d 433, 435 (Pa. Super. Ct. 1990) (“Where the wrongful death and survival statutes are not explicit regarding the rights of an unborn child, it is sound statutory interpretation to limit the right to assert such an action to a viable

fetus.”); but see ALA. CODE § 13A-6-1(a)(3) (defining “person,” for purposes of the wrongful death statute, as “a human being, including an unborn child in utero at any stage of development, regardless of viability”); accord *Stinnett v. Kennedy*, —So. 3d—, No. 1150889, 2016 WL 7488255, at *10 (Ala. Dec. 30, 2016) (reaffirming its previous holding that Alabama’s Wrongful Death Act permitted claims arising from the death of a pre-viable fetus); cf. *Connor v. Monkem Co., Inc.*, 898 S.W. 2d 89, 92 (Mo. 1995) (“[W]e cannot avoid the conclusion that the legislature intended the courts to interpret ‘person’ within the wrongful death statute to allow a natural parent to state a claim for the wrongful death of his or her unborn child, even prior to viability.”).

38. See 65 AM. JUR. TRIALS 261 § 12 n. 57 and n. 58 (1997) (identifying jurisdictions that, by common law decision and statutory provision, have expanded available damages in wrongful death actions involving children to include both economic and non-economic damages, including punitive damages).

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ADA Title III: Accommodating Disabilities or Encouraging Lawsuits?

By Brooke M. Nixon

From January 1, 2015 to June 30, 2015,

the number of Americans with Disabilities Act (ADA) Title III “access lawsuits” filed in federal court was more than 2,000. Over the same period in 2016, more than 3,400 Title III lawsuits were filed, which is about a 63 percent increase. If the exact same number of lawsuits are filed in the second half of 2016 that would put the total at 6,800 by the end of the year. That would be a 43 percent increase over 2015’s final tally.

In Alabama, more and more often, small businesses, retailers and restaurants are facing a particular type of lawsuit. These lawsuits are ADA Title III access lawsuits where a disabled individual alleges they have been denied access to and enjoyment of places of public accommodation due to conditions that allegedly did not meet federal ADA regulations. Over the last few years, these “ADA access lawsuits” have increased dramatically across the country. Unlike Title I of the ADA, which requires employees

to bring their grievances first to the Equal Employment Opportunity Commission (“EEOC”) prior to bringing a lawsuit, denial of access lawsuits pursuant to Title III of the ADA does not require any government pre-screening or other notice to businesses, thus allowing for the increase in private Title III suits. For businesses, the costs of bringing their establishment into ADA compliance can be significant, but dealing with a Title III suit could be just as costly, if not more so, due to the costs of litigation, settlement payments and attorney fees. As a result, it is important that our clients are knowledgeable about whether their business is subject to Title III of the ADA and, if so, how they can walk the tightrope of compliance without spending unnecessary money on renovations.

Overview of The Americans With Disabilities Act

The ADA was signed into law on July 26, 1990 by President George H.W. Bush. The ADA was the nation’s first “comprehensive civil rights law addressing the needs of people with disabilities, prohibiting discrimination in employment, public services, public accommodations, and telecommunications.”¹ The purpose of the law is to ensure that individuals with disabilities have equal rights

and opportunities as everyone else. The ADA is divided into four titles, each of which addresses the treatment of disabled individuals in specific areas of public life.

Title I

Title I of the ADA includes the employment discrimination provisions.² Title I is designed to help individuals with disabilities access the same employment opportunities and benefits available to individuals without disabilities. Title I requires employees to file their complaints with the EEOC and be granted “right-to-sue” letters before pursuing their discrimination suit in court.³

Title II

Title II requires that state and local governments offer individuals with disabilities an equal opportunity to benefit from all of their programs, services and activities (e.g., public education, employment, transportation, recreation, etc.).⁴

Title IV

Title IV contains a variety of provisions relating to the ADA as a whole, including its relationship to other laws, state immunity, its impact on insurance providers and benefits, prohibition against retaliation and attorney’s fees. It also provides a list of certain conditions that are not considered “disabilities” under the ADA.

Title III

Title III, the center of this article, is the law which requires places of public accommodation to ensure

that people with disabilities have access to those locations. Thus, when an individual brings an ADA Title III lawsuit the plaintiff is typically alleging that they have been denied access to certain public places due to physical access barriers.

Title III sets forth the underlying prohibition against discrimination: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operated a place of public accommodation.”⁵ Discrimination is defined under Title III to include “a failure to make reasonable modifications . . . unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such . . . facilities . . . or accommodations.”⁶ Discrimination also includes a failure to remove architectural barriers in existing facilities where such removal is “readily achievable,” or where removal of a barrier is not readily achievable, “a failure to make such . . . facilities . . . or accommodations available through alternative methods if such methods are readily achievable.”⁷ With respect to a facility or part of a facility that has been *altered* by an establishment in a manner that affects or could affect the usability of the facility, discrimination includes a “failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily

accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.”⁸

Title III applies to businesses and nonprofit service providers that are considered to be a place of “public accommodation,” privately-operated entities offering certain types of courses and examinations and commercial facilities.⁹ A “public accommodation” is defined by ADA regulations to include: “(1) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor; (2) a restaurant, bar, or other establishment serving food or drink; (3) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment; (4) an auditorium, convention center, lecture hall, or other place of public gathering; (5) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; (6) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment; (7) a terminal, depot, or other station used for specified public transportation; (8) a museum, library, gallery, or other place of public display or collection; (9) a park, zoo, amusement park, or other place of recreation; (10) a nursery, elementary, secondary, undergraduate, or post-graduate private school, or other

However, there are different standards that apply depending on whether the property is considered an “existing facility” or whether an addition or new facility is considered “new construction.”

place of education; (11) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and (12) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.”¹⁰

Clearly the list of “public accommodations” is extensive. Places of public accommodation must comply with specific requirements set out in the ADA regulations related to architectural standards for new or altered buildings; provide reasonable modifications to the entity’s policies, practices and procedures; and provide effective communication with people with hearing, vision or speech disabilities who may visit the entity.¹¹ Additionally, places of public accommodation must remove barriers in existing buildings when it can do so without much difficulty or expense.¹²

Complaints of Title III violations may be filed with the Department

of Justice (“DOJ”). However, Title III may also be enforced through private lawsuits, meaning it is unnecessary to file a complaint with the DOJ (or any other federal agency) or to receive a “right-to-sue” letter before filing a Title III access suit.

The Attorney General of the United States is responsible for publishing standards, through regulations, that implement the requirements of Title III. The DOJ originally published its Title III regulations in 1991, which included the 1991 ADA Accessibility Guidelines (the “1991 Standards”).¹³ In 2010, the DOJ published regulations revising the old 1991 regulations, including the adoption of an updated ADA Standards for Accessible Design (the “2010 Standards”).¹⁴ These standards establish design requirements for the construction and alteration of facilities covered by Title III and should be consulted before such construction or alterations begin. Compliance with the 2010 Standards was required for places of public accommodation by March 15, 2012. The 2010 Standards can be found in 28 C.F.R. part 36 and also in a PDF version on [ADA.gov](#).

There are *no exceptions* to ADA compliance for a place of public accommodation. However, there are different standards that apply depending on whether the property is considered an “existing facility” or whether an addition or new facility is considered “new construction.” Compliance with the 2010 Standards is required for all new construction and alterations to buildings and all future construction and alterations made establishments that fall under the

definition of public accommodation. The 2010 Standards include a “safe harbor” under which elements¹⁵ in covered facilities that were built or altered in compliance with the 1991 Standards would not be required to be brought into compliance with the 2010 Standards until the elements were subject to a planned alteration.

In addition to clarifying and enhancing accessibility standards of public accommodations, the 2010 Standards also brought new elements of public accommodation facilities under its compliance umbrella including swimming pools in recreation facilities; team or player seating; accessible routes in court sports facilities, saunas and steam rooms; fishing piers; play areas; exercise machines; golf facilities; miniature golf facilities; amusement rides; shooting facilities with firing positions; and recreational boating facilities.¹⁶

Defending a Title III ADA Accessibility Claim

A “tester” is a disabled individual who seeks out places of public accommodation, commonly businesses, that do not comply with Title III of the ADA. Often their goal is to locate non-compliant establishments and sue them. The remedy sought is some form of an agreement or court order that requires the property to become ADA compliant, and, of course, attorney fees. Some of these “testers” have filed hundreds of such lawsuits, often long distances

away from where they actually reside. The complaints often plead one visit and an intent of the tester plaintiff to return in the future to enjoy the goods or services offered by the defendant establishment. Recent court rulings on motions to dismiss these “tester” cases afford places of public accommodation under attack a variety of defenses. Summarized below are some considerations relating to these affirmative defenses that attorneys should discuss with their clients before deciding to fight the suit or settle.

Tester Standing

The only remedy available under the ADA is injunctive relief, one of the requirements of which is that a plaintiff shows a “real and immediate” threat of injury.¹⁷ Therefore, the most common defense raised in Title III cases is that a tester plaintiff does not have standing to sue. To establish standing, a “plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.”¹⁸ Past exposure to illegal conduct does not present a present case or controversy regarding injunctive relief.¹⁹ Plans “someday” to become exposed to harm has been held not to be the real and immediate threat that establishes standing.²⁰

A four-part test has traditionally been applied by district courts to determine whether a plaintiff can meet the test of standing to bring a Title III claim: (1) proximity to the defendant’s property, (2) past patronage, (3) definitiveness of plaintiff’s plan to return and (4) frequency of nearby travel.²¹

One of the most heavily litigated prongs of the standing test is prong three—the definitiveness of plaintiff’s plan to return to the establishment. Some courts have held that a distance of more than 100 miles makes it unlikely that a plaintiff will return to the property and suffer future harm.²² This presumption is rebuttable, but absent proof from the plaintiff of a continuing connection to the location, such as familial or business ties, courts have dismissed tester complaints for failing to meet the third prong.²³ Similarly, it has been held that just one visit to an establishment creates a further presumption against future injury without some real connection to the establishment.²⁴

The Second Circuit recently affirmed the dismissal of a tester complaint under *Fed. R. Civ. P.* 12(b)(1) for lack of standing under the four-prong standing test.²⁵ The Second Circuit held that a plaintiff who lives thousands of miles away from a location, has only visited it once and who has no specific plans to return lacked standing to file an ADA claim.²⁶

A theme running through many of the decisions dismissing tester cases for lack of standing has been the courts’ assumption, or finding of fact, that the tester’s only motive for returning to an establishment was to test for compliance, not to use the goods and services offered by the establishment.

The Eleventh Circuit, however, in *Houston v. Marod Supermarkets, Inc.*, held in a split 2-1 panel decision that a plaintiff’s motive behind returning to facility is not relevant to whether or not he has standing.²⁷ As long as the plaintiff can establish as a fact that there is

a reasonable likelihood of returning to a facility, then he has standing to pursue a Title III claim according to the Eleventh Circuit.²⁸ It remains to be seen whether other courts will take prong three as far as the Eleventh Circuit did. However, if courts do adopt the Eleventh Circuit's approach, it may be that a fifth prong will be added to the standing test, which would inquire into the tester's motive for returning.

Finally, because some disability rights organizations will join testers in filing access complaints, it is important to note that standing requirements for organizations are different from individual standing. Where an organization is a co-plaintiff, there may also be a defense that the organization lacks standing. In order for an organization to have standing it must show that: (1) at least one of its members would have standing to sue as an individual, (2) the interests at stake in the litigation are germane to the organization's purpose and (3) neither the claim made nor the relief requested requires the participation of individual members in the lawsuit.²⁹

Defenses for Existing Facilities

Apart from standing, there are other substantive affirmative defenses that can be asserted on behalf of establishments. However, these defenses require that the attorney initially determine whether an establishment is an "existing facility" or a "new construction."

An "existing facility" under the ADA is any establishment that was first occupied before January 26, 1993 (which is the date the ADA became effective after it was passed). The less stringent "readily

achievable" standard in Title III applies to existing facilities. The term "readily achievable" means "easily accomplishable and able to be carried out without much difficulty or expense."³⁰ However, a barrier removal is not considered "readily achievable" if it would fundamentally alter the nature of the public accommodation.

The plaintiff bears the initial burden of production to present evidence that a suggested method of barrier removal is readily achievable—meaning such removal can be accomplished easily and without much difficulty or expense. In order to make a prima facie showing that removal is readily achievable, a plaintiff must "articulate a plausible proposal for barrier removal, 'the costs of which, facially, do not clearly exceed its benefits.'"³¹ The proposal and estimate are not required to be exact or detailed, however a plaintiff must provide at least some estimate of costs.

Once the plaintiff meets his or her burden, the burden then shifts to the defendant to show that barrier removal is not readily achievable—meaning that the costs of plaintiff's proposal would in fact exceed the benefits of the barrier removal.

Therefore, in the case of an existing facility, in addition to standing, several affirmative defenses may be available, including:

- (1) Removal of the alleged barriers is not readily achievable;
- (2) The requested modifications would impose an undue burden on the defendant;
- (3) Removal of the alleged barriers would fundamentally alter

the nature of defendant's public accommodation; and/or

- (4) The defendant adequately provided access through readily achievable "alternative methods" such as customer service.

Many "existing facilities" are small businesses. The U.S. Small Business Administration's Office of Entrepreneurial Development together with the DOJ have published an *ADA Guide for Small Business* to which any small business considering removing architectural barriers in order to comply with the ADA, whether voluntarily or under threat of a lawsuit, should refer.³²

Alterations and New Construction

More stringent maximum standards apply to alterations and new construction. Alterations and new construction must meet the minimum requirements of the ADA Standards for Accessible Design (the 2010 Standards). Alterations must be accessible to the "maximum extent feasible."³³ Newly constructed facilities must be readily accessible to and usable by individuals with disabilities, except where a defendant can demonstrate that it is "structurally impracticable."³⁴

■ Alteration

In determining whether a modification is an alteration, the concept of *usability* is key. The ADA regulations define an alteration as "a change to a place of public accommodation . . . that affects or could affect the usability of the building or facility or any part thereof."³⁵ Minor and superficial changes do not constitute alterations and therefore do not trigger

the sweeping obligations that accompany “alterations.”

“If a plaintiff ‘identif[ies] a modification to a facility and . . . mak[es] a facially plausible demonstration that the modification is an alteration under the ADA,’ the burden shifts to the defendant ‘to establish that the modification is in fact not an alteration.’ If the Court concludes that there has been an alteration, the plaintiff must only ‘identify some manner in which the alteration could be, or could have been, made ‘readily accessible.’ The burden then shifts to the defendant to ‘persuad[e] the factfinder that the plaintiff’s proposal would be “virtually impossible” in light of the “nature of the facility.”’³⁶

However, alterations to the “path of travel” need only be undertaken where they are “not disproportionate to the overall alterations in terms of cost and scope.”³⁷ Also according to the 2010 Standards, “alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20 percent of the cost of the alteration to the primary function area.”³⁸

Thus, in the case where the plaintiff alleges that defendant has made renovations that constitute “alterations” that did not comply with the ADA, in addition to standing, affirmative defenses that may be available include:

- (1) The renovations did not constitute alterations;
- (2) Defendant satisfied the maximum extent feasible standard;
- (3) Plaintiff’s claim is barred by the statute of limitations;
- (4) In the case of a path of travel, the alterations sought

While it is important to know how to defend against an ADA access claim, the best tactic is to try to avoid these lawsuits before they occur.

would be disproportionate to the cost of the overall alteration where the cost exceeds 20 percent of the cost of the overall alteration; and/or

- (5) The alteration sought is technically infeasible.³⁹

■ New Construction

The “new construction” requirements of the ADA apply to any place of public accommodation or commercial facility first occupied after January 26, 1993 for which the last application for a building permit or permit extension was completed after January 26, 1992.⁴⁰ In the case of new construction, a commercial facility or public accommodation must be “readily accessible” to individuals with disabilities to the extent that is not “structurally impracticable.”⁴¹

If a court determines that there is “new construction,” the plaintiff must only identify some manner in which the new construction fails to comply with the ADA’s standards, and then the burden shifts to the defendant to show that meeting the requirements of the ADA would be “structurally impracticable.”

Thus, in a case regarding “new construction,” in addition to standing, affirmative defenses that may be available to the defendant include:

- (1) Compliance would be structurally impracticable; and/or
- (2) Plaintiff’s claim is barred by the statute of limitations.

Advising Clients: Avoiding ADA Lawsuits

While it is important to know how to defend against an ADA access claim, the best tactic is to try to avoid these lawsuits before they occur. As a lawyer, you can help your clients, especially small businesses, become ADA compliant.

To assist businesses with complying with the ADA, Section 44 of the *IRS Code* allows a tax credit for small businesses and Section 190 of the *IRS Code* allows a tax deduction for all businesses. The tax credit is available to businesses that have total revenues of \$1,000,000 or less in the previous tax year or 30 or fewer full-time employees. This credit can cover 50 percent of the eligible access expenditures in a year up to \$10,250 (maximum credit of \$5,000). The tax credit can be used to offset the cost of undertaking barrier removal and alterations to improve accessibility, providing accessible formats such as Braille, large print and audiotape, making available a sign language interpreter or a reader for customers or employees and for purchasing certain adaptive equipment.⁴²

Below is a list of 10 general pieces of ADA compliance advice that an attorney could offer to a business client. For information on more specific ADA standards you should consult the 2010 ADA Standards for Accessible Design that was published by the DOJ.⁴³

- (1) Have the business checked by an ADA-qualified inspector. They can furnish a report that lists any unknown issues.
- (2) If elements of a facility are not compliant with the 1991 Standards, decide whether to bring them into compliance with the 1991 Standards or take advantage of the 2010 Standards' safe harbor. Also bring into compliance with the 2010 Standards any newly-covered elements at the facility.
- (3) Barriers that block access for disabled persons to pass through the business should be removed. In order for persons with disabilities to use an establishment, there must be at least one accessible route that allows wheelchairs or other mobility aids to approach, enter and use each building on a given site. Those routes cannot have, among other things, steep slopes or cross slopes, abrupt level changes or steps. In addition, for persons who are blind or have low vision, none of the pedestrian walkways at an establishment should have objects that project too far into the paths.
- (4) Recommend the business offer a delivery service to customers who are physically unable to come to the

Certain businesses may not be able to take all of these steps without spending a significant amount of money, but the more a business can do, the less likely they are to face a lawsuit.

- business location. Ensure that the business places these notices where they are visible to the public, which will show that the business is making an effort to meet the needs of their customers even if the business establishment is not completely up to ADA code.
- (5) Ensure that handicapped parking is clearly marked and close to the establishment. Also confirm that the spaces are large enough to easily maneuver wheelchairs.
- (6) Restrooms must allow for handicapped access, meaning that the space should be large enough to accommodate wheelchairs. The space recommended to accommodate a single wheelchair is at least 30" by 48". Be sure to also designate individual

restrooms or stalls "handicapped" and equip such areas with appropriate grab bars and safety features.⁴⁴

- (7) Have soap dispensers and paper towel dispensers placed at a height of 48" off the floor. This is actually convenient for everyone (including children), not just disabled customers. All bathroom equipment should require minimal effort to operate: specifically, less than five pounds of force.
- (8) Entrance doors are required to be at least 36" wide and have 32" of space when open, the standard for most modern doors. Doors that do not meet this requirement may have to be replaced.
- (9) The business should have a sales or service counter check that is no higher than 36" tall. If this is not feasible, the business should designate an area where handicapped individuals can receive assistance.
- (10) In a restaurant or other food service establishment, there should be at least five percent of each type of fixed table or a portion of eating counters (i.e.: where no direct service is provided) accessible, providing a 27"-high knee space, at least a 19" depth, with table/counter tops at 28–34" above the floor. These areas should be split proportionately between smoking and non-smoking areas.

Certain businesses may not be able to take all of these steps without spending a significant amount

of money, but the more a business can do, the less likely they are to face a lawsuit.

Conclusion

Even though there is a rapid number of Title III access suits being filed by testers, there are strategies available to repel against an ADA tester attack, as well as strategies to minimize the cost of having to retrofit the targeted facility in order to remove architectural barriers. Attorneys should ensure that their current clients are ADA compliant and understand the risks of being noncompliant. Additionally, attorneys should stay up to date on the case law being developed in this area since access cases are increasingly being decided in courts across the United States. ▲

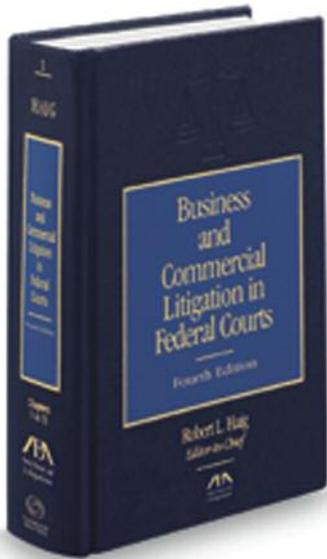
Endnotes

1. *The Americans with Disabilities Act*, EEOC, <https://www.eeoc.gov/eeoc/history/35th/1990s/ada.html> (last visited Oct. 10, 2016).
2. See 42 U.S.C. §§ 12111–12117 (1990).
3. See 42 U.S.C. § 12117.
4. See 42 U.S.C. §§ 12131–12134 and §§ 12141–12150.
5. 42 U.S.C. § 12182(a).
6. 42 U.S.C. § 12182 (b)(2)(A)(ii).
7. 42 U.S.C. § 12182 (b)(2)(A)(iv), (v).
8. 42 U.S.C. § 12183(a)(2).
9. See 42 U.S.C. §§ 12181–12189.
10. 28 C.F.R. § 36.104.
11. See *id.*
12. *Id.*
13. See *ADA Standards for Accessible Designs*, DOJ (July 1, 1994), available at <https://www.ada.gov/1991standards/adastd94-archiv.pdf>.
14. See *2010 ADA Standards for Accessible Designs*, DOJ (Sept. 15, 2010), available at https://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards_prt.pdf.
15. Elements are considered to be parts of covered facilities.
16. *Id.*
17. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 104 (1983).
18. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).
19. See *Wahl v. McIver*, 773 F.2d 1169, 1173–74 (11th Cir. 1985).
20. See *Lyons*, 461 U.S. at 103.
21. See, e.g., *Disabled Patrons of America v. City of Trenton*, No. 073165, 2008 WL 4416459 (D.N.J. Sept. 24, 2008); *Dempsey v. Piston Beef N Beer, LLC.*, No. 08-5454, 2009 WL 3584597 (D.N.J. Oct. 26, 2009). See also *Kramer v. Midamco*, 656 F. Supp. 2d 740, 748 (N.D. Ohio 2009); *Hoewischer v. Cedar Bend Club, Inc.*, 877 F. Supp. 2d 1212 (M.D. Fla. 2012); *Gaylor v. Greenbriar of Dahlonga Shopping Center, Inc.*, 975 F. Supp. 2d 1374 (N.D. Ga. 2013).
22. See *Trenton* at *4; *Jones v. Sears, Robuck & Co.*, No. 05-0535, 2006 WL 2437905, at *3 (E.D. Cal. Nov. 29, 2006); *Delil v. El Torito Restaurants, Inc.*, No. 94-3900, 1997 WL 714866, at *4 (N.D. Cal. June 24, 1997).
23. See *Access 4 All, Inc. v. Wintergreen Commercial P'ship, Ltd.*, No. 05-1307, 2005 WL 2989307 (N.D. Tex., Nov. 7, 2005).
24. See *id.* at *5. See also *Molski v. Kahn Winery*, 405 F. Supp. 2d 1160, 1164 (C.D. Cal. 2005).
25. See *Harty v. Greenwich Hospitality Group, LLC*, 536 Fed. Appx. 154 (2d Cir. 2013) (mem).
26. See *id.* at 155.
27. 733 F.3d 1323, 1332–34 (11th Cir. 2013).
28. See *id.*
29. See *Warth v. Seldin*, 422 U.S. 490, 511 (1975).
30. 42 U.S.C. § 12181(9).
31. *Roberts Silo v. Royal Atlantic Corp.*, 542 F.3d 363, 373 (2d Cir. 2008) (citing *Borkowski v. valley Central School District*, 63 F.3d 131, 138 (2d Cir. 1995)).
32. It can be accessed at <http://www.ada.gov/smbusgd.pdf>.
33. See 28 C.F.R. § 36.402.
34. See 28 C.F.R. § 36.401.
35. 28 C.F.R. § 36.402(b).
36. *Kreiser v. Second Avenue Diner Corp.*, No. 10 Civ.7592 (RJS), 2012 WL 3961304, at *10 (S.D.N.Y. Sept. 11, 2012) (quoting *Roberts Silo*, 542 F.3d at 371–72).
37. 42 U.S.C. § 12183(a)(2).
38. 28 C.F.R. § 36.403(f)(1).
39. Technically Infeasible, “[m]eans, with respect to an alteration of a building or a facility, that it has little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility.” United States Access Board, *ADA Accessibility Guidelines* § 4.1.6(1)(j).
40. See 28 C.F.R. § 36.401.
41. See 42 U.S.C. § 12183 (a); 28 C.F.R. § 36.401(c)(2).
42. For more information about the tax credit visit: <https://www.ada.gov/taxcred.htm>.
43. See *2010 ADA Standards for Accessible Designs*, DOJ (Sept. 15, 2010), available at https://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards_prt.pdf.
44. See *Planning Guide for Accessible Restrooms*, BOBRICK, <http://www.bobrick.com/documents/planningguide.pdf> (2010) for more information on restroom accessibility.

Brooke M. Nixon



Brooke Nixon is a shareholder with Rosen Harwood PA in Tuscaloosa in the areas of labor and employment law and general business law. She provides counsel to develop preventive measures to minimize risks and avoid the expense of litigation. Nixon is licensed in Alabama and Florida. She also serves as an adjunct professor at the University of Alabama and Cumberland School of Law.



BOOK REVIEW

Business and Commercial Litigation in Federal Courts [Fourth Edition]

TREATISE REVIEW

Robert L. Haig, editor-in-chief

Reviewed by Lee R. Benton

Being already familiar with *Business and Commercial Litigation in Federal Courts, Third Edition*, I was pleased to be asked to review this new Fourth Edition, which provides 25 new chapters and enhances earlier sections. This comprehensive revision totals 14 volumes (with an appendix and index) authored by litigators as well as 27 distinguished judges. The benefit of overwhelming practical experience and key insights cannot be overstated.

The new chapters are well worth reviewing and include such meaningful additions as “Declaratory Judgments,” “Negotiations,” “Mediation,” “Arbitration,” “Social Media,” “Securitization and Structured Finance,” “Joint Ventures,” “Fiduciary Duty Litigation,” “Fraud,” “Civil Rights” and many others. Each of these new chapters is insightful and helpful to any federal litigation practitioner. They provide checklists, forms and the substantive basis for each of the particularly relevant subject matters.

I also have found the index to be of real benefit. Of particular importance for underlying authority is the table of cases and appendices. These

are to be updated annually and are a quick reference to find the relevant section, as well as supportive case citations.

Seemingly, the majority of litigation filed in federal court involves an employment law (discrimination) or alleged breach of contract. From my experience, almost every complaint alleging a breach of contract also includes some allegation of fraud, if for no other reason than to increase leverage and expose the possibility of recovery of punitive damages. The new Section 130 on “Fraud” provides a comprehensive analysis of fraud, both from the plaintiff’s and the defendant’s perspective. The strategic considerations, necessity of specificity and how to deal with the inevitable Rule 12 motion (because of an alleged deficiency under Rule 9(b)) are addressed in detail, both as to how to avoid or respond to the circumstance as well as how to raise the potential problem. Even the several elements also identified in the *Code of Alabama* are explained, with substantial case authority addressing each of the elements, remedies, measure of damages and the like. Affirmative defenses to fraud allegations are described, plus the section (like almost all the others) provides both form requests for production, requests for admissions, interrogatories and similar discovery measures to get a practitioner started. While not “basic” in nature, it does contain a simple-to-read, albeit thorough, examination of this common allegation.

Somewhat similarly, because so many contracts in today’s business world contain arbitration clauses, the new Section 52 on arbitration is a must-read for any contract or business litigator. As we all know, federal courts favor arbitration and an arbitration proceeding (whether under the Rules of the American Arbitration Association or otherwise) can be limited and different from ordinary civil proceedings. The section walks a practitioner through the scope of arbitration, procedure, preparation and how to handle the award ultimately entered. This is a very timely inclusion for this new edition.

As before, too, Chapter 29 was written by our own N. Lee Cooper (former president of the American Bar Association) and Scott S. Brown (partner at Maynard, Cooper & Gale). This chapter, entitled “Selection of Experts, Expert Disclosure and the Pre-Trial Exclusion of Expert Testimony,” contains an easy-to-read, nuts-and-bolts approach to the selection and use of experts prior to trial.

In my own practice, I have found Chapter 56, “Bankruptcy Code Impact on Civil Litigation in the Federal Courts,” to be particularly helpful. Many practitioners have little or no hands-on experience with bankruptcy proceedings or the *Bankruptcy Code* and, in a simple but comprehensive section, a practitioner can gain quick insight into the impact as well as limits of the automatic stay imposed by Section 362 of the *Bankruptcy Code*, and the various procedural maneuvers both for the filing debtor as well as the non-debtor parties for the federal court litigation which remains un-stayed. Parallel emphasis on removal, abstention and similarly perceived complex areas are explained so that a practitioner not normally involved in a bankruptcy forum can understand what rights may exist with respect to the pending commercial litigation. Frankly, I have found it to be a wealth of information for my day-to-day practice.

Business and Commercial Litigation in Federal Courts, now in its Fourth Edition, is a great tool that every commercial trial litigator should have. ▲

Lee R. Benton



Lee Benton is a partner with Benton & Centeno LLP in Birmingham. He graduated from Auburn University and Cumberland School of Law, Samford University (cum laude). He is licensed in Alabama and Tennessee and admitted to practice in the U.S. Court of Appeals, the 5th and 11th Circuits and the Supreme Court of the United States.

SUPPORTING EQUAL ACCESS TO JUSTICE:

The Alabama Law Foundation 2017 Grants

The Alabama Law Foundation's yearly grants support programs committed to the foundation's mission of making access to justice a reality for all of Alabama's citizens. The 2017 grants were in three sections: legal aid to the poor, the administration of justice and law-related education. The grants for 2017 totaled \$512,500.

The following programs that provide civil legal services for the low-income residents of Alabama collectively received grants totaling \$470,000:

The Alabama State Bar Volunteer Lawyers Program, which refers cases directly to lawyers in 60 counties and coordinates 2,011 volunteers, received an \$80,000 grant.

The Birmingham Volunteer Lawyers Program, which refers cases to 626 attorneys in the Birmingham area, received an \$85,000 grant.

The Hispanic Interest Coalition of Alabama received a \$45,000 grant to continue providing low-cost, quality legal and immigration services to low-income immigrants.

Legal Services Alabama, which provides legal aid to economically disadvantaged citizens throughout Alabama, received a \$50,000 grant.

The Madison County Volunteer Lawyers Program works with 405 lawyers and received a \$45,000 grant.

The Montgomery County Volunteer Lawyers Program, which works with 390 lawyers to meet the legal needs of low-income clients in Montgomery County, received a \$45,000 grant.

The South Alabama Volunteer Lawyers Program, which refers cases directly to 846 lawyers in Mobile, Baldwin, Clarke and Washington counties, received a \$60,000 grant.

The YWCA of Central Alabama received a \$60,000 IOLTA grant to continue the "Justice on Wheels" program for victims of domestic violence in Blount and St. Clair counties.

The foundation's legal aid grant recipients closed 16,039 cases in 2016.

The Equal Justice Initiative of Alabama, which assists attorneys appointed to capital cases in the post-conviction stage and supplies some representation to indigent defendants, received a \$40,000 IOLTA grant.

The Birmingham International Education Film Festival received a \$2,500 grant for law-related education. ▲



Meet the New Director



Eileen Harris

Judy Keegan, the long-time executive director of the Alabama Center for Dispute Resolution, retired May 31 and Eileen Harris took over the position on June 1. Harris is an attorney and a mediator and was admitted to practice in Alabama in 1999.

She earned her B.A. degree in political science from Valdosta State University and her M.S. degree in

operations management from the University of Arkansas. Harris graduated from the Thomas Goode Jones School of Law in 1998.

She comes to the Alabama Center for Dispute Resolution with extensive management and leadership experience gained while serving in the military and from working in leadership positions for two non-profit organizations. ▲

Mortgage Foreclosure Prevention Grants

“Avoid Foreclosure Alabama” was created in April after receiving \$3.3 million in funds from the Bank of America’s 2014 mortgage settlement with the U.S. Department of Justice to provide foreclosure prevention legal services. The program is a group of legal aid organizations working together to help Alabama homeowners who make up to 250 percent of the federal poverty level keep their homes.

Grants awarded for 2017 are:

Alabama State Bar VLP	\$32,500
Birmingham VLP	\$45,000
Legal Services Alabama	\$112,500
Madison County VLP	\$25,000
Montgomery County VLP	\$32,500
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Total	\$268,500



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IN GOD WE TRUST



The Newly-Created Racial Bias Exception to the General Rule that Precludes Jurors from Offering Testimony to Impeach Their Own Verdict

By Terrence W. McCarthy and Callie D. Brister

Introduction

The “no-impeachment rule” generally provides that a juror may not testify about statements made during jury deliberations if offered to challenge the validity of a verdict or indictment. This longstanding rule has roots dating back to English common law, and is codified in Rule 606(b) of both the *Federal Rules of Evidence* and *Alabama Rules of Evidence*.

While Rule 606(b) lists specific exceptions to this “no-impeachment rule,” the United States Supreme Court has now added a new exception based on the Sixth

Amendment to the United States Constitution. Specifically, on March 6, 2017, the United States Supreme Court in *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017), ruled that where a juror makes a “clear statement” indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, other jurors may be permitted to testify about these statements during an inquiry into the validity of the verdict or indictment even if they occurred during jury deliberations.

This article will give a brief overview of the “no-impeachment rule” and a brief summary of the *Pena-Rodriguez* decision and will conclude with an effort to predict how this decision may impact the Alabama practitioner.

Brief History of the “No-Impeachment Rule” And Rule 606(b)

From a procedural standpoint, the “no-impeachment rule” is most likely to come into play in conjunction with a motion for new trial. If the motion for new trial is based on some form of juror misconduct, the moving party will normally attach supporting affidavits from jurors that describe the misconduct. Victor J. Gold, *FED. PRAC. & PROC. EVID.* § 6076 (2d ed. 2017). *See also*, Charles W. Gamble, Terrence W. McCarthy & Robert J. Goodwin, *Gamble’s Alabama Rules of Evidence*, § 606(b) (Practice Pointer 1) (3d ed. 2014) (“This issue customarily arises when the party attacking the verdict files a motion for new trial and attaches juror affidavits to it.”). The responding party will then likely object and move to strike those affidavits and raise the “no-impeachment rule.”

At common law, long before the adoption of the *Federal Rules of Evidence* or the *Alabama Rules of Evidence*, jurors, as a general rule, were precluded from giving testimony (by affidavit or otherwise) post-trial that would impeach their own verdict. *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). As Dean Gamble has observed, this general exclusionary rule is based on several policies: (1) to preserve the finality of verdicts, (2) to prevent harassment of jurors and (3) to protect the deliberative process and encourage free discussions in the jury room. Charles W. Gamble & Robert J. Goodwin, *McElroy’s Alabama Evidence*, § 94.06(1) (6th ed. 2009).

Over the years, all jurisdictions adopted this “no-impeachment rule” in some form. Ultimately, the “no-impeachment rule” was codified in Rule 606(b) of the *Federal Rules of Evidence* and Rule 606(b) of the *Alabama Rules of Evidence*.

Federal Rule 606(b) begins with a general exclusionary rule that a juror may not testify about statements made or occurrences during jury deliberations if offered during an inquiry into the validity of the verdict or indictment. *Fed. R. Evid.* 606(b)(1). Three exceptions to this general exclusionary rule are listed in the text of the rule. The exceptions provide that jurors may testify about: (A) “extraneous prejudicial information” improperly brought to their attention, (B)

The “extraneous prejudicial information” exception focuses “upon those instances in which facts, not subjected to the purifying fire of the litigation process, make their way to the jury.”

“outside influences” improperly brought to bear on any juror and (C) a mistake on the verdict form.¹ *Fed. R. Evid.* 606(b)(2).

The *Alabama Rules of Evidence* became effective January 1, 1996 and while *Ala. R. Evid.* 606(b) has some differences from the corresponding federal rule, the rules are very similar. The Alabama rule, like the federal rule, contains a general exclusionary rule that prohibits juror testimony about statements made and occurrences during jury deliberations if offered during an inquiry into the validity of the verdict or indictment. *Ala. R. Evid.* 606(b). The Alabama rule also contains the “extraneous prejudicial information” and “outside influences” exceptions. Alabama’s rule, however, does not contain the “mistake on the verdict form” exception that was added to the federal rule by amendment in 2006.

The “extraneous prejudicial information” exception focuses “upon those instances in which facts, not subjected to the purifying fire of the litigation process, make their way to the jury.” *McElroy’s*, at § 94.06(4)(a). If a juror, for example, brought in a newspaper or visited the accident scene, Rule 606(b) would allow post-verdict or post-indictment juror testimony. *See e.g., U.S. v. Brown*, 108 F.3d 863, 866 (8th Cir. 1997) (court properly permitted jurors to testify that jurors had secured newspaper accounts that defendant’s employer had pled guilty for same conduct that was underlying defendant’s prosecution); *Ex parte Arthur*, 835 So. 2d 981, 984-86 (Ala. 2002) (while not referencing Rule 606(b), holding that juror’s consultation with medical textbooks and subsequent injection of this information into jury room was extraneous and prejudicial as a matter of law). *See also Mottershaw v. Ledbetter*, 148 So. 3d 45, 52-53 (Ala. 2013) (affirming trial court’s grant of new trial; while jurors themselves did not bring extraneous

prejudicial information into the jury room, they were exposed to such when admitted exhibits were not redacted pursuant to motion *in limine* order).

As for the “outside influence” exception, it “usually works to admit testimony that some improper statement was made to the jury by a person who was not a member of the jury.” *McElroy’s*, § 94.06(4)(b). *See e.g., Owen v. Duckworth*, 727 F.2d 643 (7th Cir. 1984) (juror received threatening anonymous phone call and informed other jurors of this call); *Salvage Indus. v. Duke*, 598 So. 2d 856 (Ala. 1992) (juror was allowed to state that bailiff instructed jury regarding the form of the verdict).

Like any rule of evidence, Rule 606(b) can also be impacted by the United States Constitution. The Constitution is the supreme law of the land, so it is no surprise that the Constitution can sometimes dictate whether certain evidence is or is not admissible.² Prior to the *Pena-Rodriguez* decision, the United States Supreme Court had “addressed the precise question whether the Constitution mandates an exception to [the “no-impeachment rule”] in just two instances.” *Pena Rodriguez*, 137 S.Ct. at 866.

First, in the often-cited decision of *Tanner v. United States*, 483 U.S. 107 (1987), the high court rejected the invitation to find a Sixth Amendment constitutional exception to the “no-impeachment rule” when some of the jurors were under the influence of drugs and alcohol during the trial. The court placed great emphasis on the “long-recognized and very substantial concerns” supporting “the protection of jury deliberations from an intrusive inquiry.” *Id.* at 127. The court also emphasized that “drugs or alcohol voluntarily ingested by a juror seems no more an ‘outside influence’ than a virus, poorly prepared food, or lack of sleep.” *Id.* at 122.

Second, in *Warger v. Shauers*, 135 S.Ct. 521 (2014), after the verdict was entered in this civil case, the losing party attempted to introduce evidence that the jury foreperson had failed to disclose bias in favor of the defendant during *voir dire*. Specifically, while deliberating the verdict in this case involving a car accident, the juror said that her daughter had been at fault in a car accident where a man died, and that if the daughter had been sued it would have ruined her life. The Supreme Court concluded that juror testimony regarding this statement was not admissible under the extraneous prejudicial information exception to Federal Rule 606(b). The court also declined to find a constitutional reason outside of Rule 606(b) to allow

the testimony. The court did emphasize, however, that the “no-impeachment rule” could have exceptions with “juror bias so extreme that, almost by definition, the jury trial right has been abridged.” *Id.* at 529, n. 3.

Thus, the door has always remained open for constitutional exceptions to the “no-impeachment rule,” and the United States Supreme Court walked through this door with the *Pena-Rodriguez* decision.

The *Pena-Rodriguez* Decision and the Creation Of a New Exception

The *Pena-Rodriguez* case arose out of a criminal prosecution in Colorado. Rule 606(b) of the *Colorado Rules of Evidence*, like the corresponding federal and Alabama rules, generally precludes jurors from giving testimony about statements made during jury deliberations in a proceeding that inquires into the validity of the verdict.

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In *Pena-Rodriguez*, the defendant, a Hispanic male, was charged with harassment, unlawful sexual contact and attempted sexual assault on a child. During *voir dire*, members of the venire were asked repeatedly whether they could be fair and impartial, and at no time did any of the empaneled jurors express any reservations based on racial or any other bias. The defendant was found guilty of harassment and unlawful sexual contact, but no verdict was reached on the sexual assault charge.

The defendant filed a motion for new trial, and attached to that motion were affidavits from two jurors. Those affidavits described numerous biased statements made by a juror identified as “Juror H.C.” For example, Juror H.C. stated that in his experience as an ex-law enforcement officer, “Mexican men had a bravado that caused them to believe they could do what they wanted with women.” 137 S.Ct. at 862. He also said that “I think he did it because he’s Mexican and Mexican men take whatever they want,” as well as several other racially biased statements. *Id.*

Although the trial court recognized and acknowledged the bias of Juror H.C., the motion for new trial was denied because “[t]he actual deliberations that occur among the jurors are protected from inquiry under [*Colorado Rule of Evidence*] 606(b).” *Id.* at 862. This ruling was affirmed by the Colorado Court of Appeals and the Colorado Supreme Court, with both appellate courts relying on the general “no-impeachment rule” of Rule 606(b).

By a 5-3 vote, the United States Supreme Court reversed and remanded the case, essentially creating a new “racial bias” exception to the general “no-impeachment rule.” In writing for the majority, Justice Kennedy acknowledged the long history and policy reasons for the “no-impeachment rule,” but he also emphasized that “[t]ime and again, this Court has been called upon to enforce the Constitution’s guarantee against state-sponsored racial discrimination in the jury system.” *Id.* at 867. The majority then concluded: “A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systematic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.” *Id.* at 869.

The Court then explicitly expressed the new exception as follows: “where a juror makes a clear statement that indicates he or she relied on racial

stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.” *Id.*

Potential Impact of the *Pena-Rodriguez* Decision on the Alabama Practitioner

While the *Pena-Rodriguez* decision answers some questions, other questions remain unanswered. Questions (and attempted answers by the authors) pertinent to the Alabama practitioner that flow from this opinion include the following:

1. *The Pena-Rodriguez decision involved the Colorado Rules of Evidence, so what impact, if any, does it have on Alabama state courts?* The *Pena-Rodriguez* holding is applicable to proceedings in Alabama state courts. The decision was based on the United States Constitution, so the Supremacy Clause prevails. Just like the decision effectively added a new exception to Rule 606(b) of the *Colorado Rules of Evidence*, it did the same to Rule 606(b) of the *Alabama Rules of Evidence* even though the text of the exception is not written in the text of the rule.

2. *How severe do the racially biased statements need to be to trigger this exception?* As the *Pena-Rodriguez* decision explained, “[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry.” *Pena-Rodriguez*, 137 S.Ct. at 869. To qualify, the statements must exhibit “overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict,” and they must tend to show that “racial animus was a significant motivating factor in the juror’s vote to convict.” *Id.* The trial judge is vested with “substantial discretion” in deciding if this threshold showing has been made. *Id.*

3. *How much evidence of racial bias is needed for a motion for new trial to be granted?* The Court specifically declined to address this question, stating that “[t]he Court also does not decide the appropriate standard for determining when evidence of racial bias

It will be left to the courts to determine what is enough, and presumably the standard will differ from jurisdiction to jurisdiction.

is sufficient to require that the verdict be set aside and a new trial be granted.” *Id.* at 870. In declining to address this question, the Court referenced two examples of jurisdictions with differing standards. *Id.* On the one hand, in *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987), the Seventh Circuit described the inquiry as whether racial bias “pervaded the jury room.” On the other hand, the Ninth Circuit has said that “[o]ne racist juror would be enough.” *U.S. v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001). It will be left to the courts to determine what is enough, and presumably the standard will differ from jurisdiction to jurisdiction.

4. If this issue arises, is there any case law a practitioner can go to for guidance other than the *Pena-Rodriguez* decision? Obviously, as time goes by, courts around the country will interpret the *Pena-Rodriguez* decision, which will provide guidance to the Alabama practitioner. In fact, at the time this article was written, at least one court had already distinguished *Pena-Rodriguez*. In *Richardson v. Kornegay*, No. 5:16-HC-2115-FL, 2017 WL 1133289 (E.D.N.C. Mar. 24, 2017), the petitioner filed for habeas corpus relief after he was convicted of first-degree murder. Petitioner, an African-American, raised several juror misconduct issues, including that a black juror said “that he felt being black made other jurors think he initially voted to acquit petitioner because he and petitioner were both black.” *Id.* at *10. In rejecting the petitioner’s argument, the Court observed that “the statements do not pertain to any racial bias against the petitioner,” and there was “no indication that any juror relied on racial stereotypes or animus to convict petitioner.” *Id.*

Furthermore, as the Court mentioned in the *Pena-Rodriguez* decision, at least 17 jurisdictions “have recognized a racial-bias exception to the no-impeachment rule—some for over half a century....” *Pena-Rodriguez*, 137 S.Ct. at 870. In addition, various federal courts had also recognized such a racial bias excep-

tion prior to the *Pena-Rodriguez* decision. Thus, courts in the future will not be writing on a clean slate, as there are a number of decisions from these jurisdictions that Alabama practitioners can look to for guidance.

For example, in *U.S. v. Villar*, 586 F.3d 76 (1st Cir. 2009), a Hispanic man was convicted of bank robbery. Within hours of the conviction, a juror informed defense counsel by email that the minds of most of the jurors were made up from the first day, and that one juror stated, “I guess we’re profiling but they all cause trouble.” In denying the defendant’s motion to set aside the jury’s verdict due to the possibility of bias and prejudice, the trial court observed that Rule 606(b) did not give him discretion to breach the confidentiality of jury deliberations under those circumstances. On appeal, the First Circuit held that “[w]hile the issue is difficult and close, we believe that the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant’s right to due process and an impartial jury.” *Id.* at 87. Thus, the case was remanded for the trial judge to make the determination whether an inquiry into the juror deliberations was necessary to vindicate the defendant’s constitutional rights. *See also, e.g., State v. Brown*, 62 A. 3d 1099, 1110 (R.I. 2013) (concluding that a juror’s racial bias is not “extraneous prejudicial information” or an “outside influence” contemplated by Rule 606(b); agreeing with *Villar* and concluding that “Rule 606(b) does not preclude the admission of such testimony where necessary to protect a defendant’s right to a fair trial by an impartial jury—a right guaranteed by the federal and state constitutions.”); *State v. Hidanovic*, 747 N.W.2d 463, 474 (N.D. 2008) (collecting various authorities and concluding that “[w]e agree with the foregoing authorities that racial and ethnic bias cannot be condoned in any form and may deprive a criminal defendant of a right to a fair and impartial jury.”); *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 357 (Fla. 1995) (“In the instant case, we find the alleged racial statements made by some of the jurors to constitute sufficient ‘overt acts’ to permit trial court inquiry and action.”).

5. Does the *Pena-Rodriguez* holding apply in civil cases? At this time, the answer appears to be “No.” The language of the opinion limits the holding to criminal trials. *See Pena-Rodriguez*, 137 S.Ct. at 869

See *Pena-Rodriguez*, 137 S.Ct. at 869 (“the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”)

(“the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”) (emphasis added). Some may wonder, however, if this holding will follow the path of *Batson v. Kentucky*, 476 U.S. 79 (1986) and ultimately be extended to civil cases. *Batson*, the landmark decision that held that peremptory jury strikes could not be made on the basis of race, was initially limited to criminal cases. A mere five years later, the United States Supreme Court extended the *Batson* holding to civil cases. See *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (applying the *Batson* rule and stating that “a private civil litigant may raise the equal protection claim of a person whom the opposing party has excluded from jury service on account of race” just as in the criminal context).

If the *Pena-Rodriguez* holding is later extended to civil trials, it will likely have to travel a different path

than *Batson*. As discussed above, the *Pena-Rodriguez* decision was based on the Sixth Amendment right of a criminal defendant to be tried by “an impartial jury.” “By its terms, the Sixth Amendment applies to ‘criminal prosecutions’ only and applies equally to the states.” M. Christian King and Wesley B. Gilchrist, *Will Pena-Rodriguez v. Colorado Apply to Civil Cases?*, Law360, March 13, 2017, available at <https://www.law360.com/articles/900903/will-pena-rodriguez-v-colorado-apply-to-civil-cases>. *Batson*, on the other hand, was based on the Equal Protection Clause, finding that race-based peremptory strikes violate the equal protection rights of the prospective jurors. In questioning whether the *Pena-Rodriguez* decision will be extended to the civil context in the future, two prominent attorneys have written as follows:

Before *Pena-Rodriguez* could have a bearing on impeaching civil jury verdicts on the basis of racial bias in state courts that do not already allow it, the Court would have to be asked, among other things, (1) whether a civil litigant’s right to an impartial jury is on par with that of a criminal defendant’s right, (2) whether a juror is a state actor for purposes of the equal protection clause and, ultimately, (3) whether the civil litigant’s right to an impartial jury trumps a state’s interests in the finality of its judgments? There is no clear indication in *Pena-Rodriguez* as to how the Court would answer those questions. So while civil practitioners are wise to familiarize themselves with *Pena-Rodriguez* and keep an eye on any expansion or extended application it gets, it is not a foregone conclusion that it will follow the path of *Batson* into the civil arena.

Id.

6. Does the *Pena-Rodriguez* holding apply to cases of religious, gender or other bias? The language of the opinion limits the holding to racial bias. It remains to be seen whether courts will extend this concept to other types of bias.

Conclusion

The *Pena-Rodriguez* decision is the latest illustration of a concept that is much broader than the limited holding of the case: a practitioner’s evidentiary knowledge must go well beyond the rules listed in the *Federal Rules of Evidence* or the *Alabama Rules of*

Evidence. Statutes, other rules of court and in this instance, the United States Constitution, contain many provisions with evidentiary implications. Time will tell how far this decision will reach and how it will be interpreted, but hopefully this article will provide the Alabama practitioner with some assistance if/when the issue arises. ▲

Endnotes

1. The “mistake on the verdict form” exception was added to FED. R. EVID. 606(b) by amendment in 2006.
2. See e.g., ALA. R. EVID. 402 (stating that “relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or that of the State of Alabama . . .”); FED. R. EVID. 402 (stating that “[r]elevant evidence is admissible” unless, among other sources, the United States Constitution provides otherwise); ALA. R. EVID. 412(b)(3) (recognizing that sexually related evidence regarding a victim in a rape case may be admitted if “the exclusion of which would violate the constitutional rights of the defendant.”); FED. R. EVID. 402 (same); U.S. CONST. AMEND VI (evidence offered against a criminal defendant that violates the Confrontation Clause is inadmissible even if all other rules of evidence are satisfied); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (“where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice”).

Terrence W. McCarthy



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

Callie D. Brister



Callie Brister is a rising second-year student at Cumberland School of Law.

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THE LEADERSHIP FORUM Continues to Prepare Lawyers to Change the Future Today

By Edward M. Patterson

The Leadership Forum recently completed its 13th year. On May 11, at the Capital City Club in downtown Montgomery, ASB President J. Cole Portis, assisted by President-elect Augusta Dowd, presented certificates and gifts to the 29 graduates of Class 13. More than 80 guests mingled during the cocktail reception preceding dinner hosted by Bradley Arant Boult & Cummings LLP. The LF Alumni Section honored this year's graduates with a party in The Cellar at the Capital City Club prior to the evening events.

Class 13 was selected from 62 applicants. The graduation guest

speaker was J. Douglas McElvy, recently-appointed state bar acting general counsel. John W. Clark, chair of the LF Alumni Section, presented Edward A. "Ted" Hosp with the 2017 Edward M. Patterson Servant Leadership Award. Previous honorees include Angela Slate Rawls, Richard J.R. Raleigh, Jr., Rebecca G. DePalma and Othni J. Lathram. The award is presented annually to an outstanding alumnus of the Leadership Forum.



Hosp





The average age of Class 13 is 38 years, and eight years practicing law. For the first time, the number of women exceeded men in the class with 62 percent female and 38 percent male. A total of 83 percent were caucasian, but this year the minority percentage increased to 17 percent. Class 13 represents eight Alabama cities, with 52 percent being from Birmingham. Practice diversity continues to be balanced among plaintiff and defense practices with a lesser, but solid representation of corporate/transactional in-house counsel and government/public service/legal education attorneys. Total makeup of the forum always equals or exceeds the diversity statistics of the bar as a whole. In 13 years, the forum has received 862 applications and accepted 387 attorneys. Forty-five percent of those who apply have been chosen. A total of 377 men and

women have graduated since the Leadership Forum's inception. In awarding the Leadership Forum the 2013 E. Smythe Gambrell Professionalism Award, the nation's highest award for professionalism programs, the American Bar Association commended the forum for its innovative, thoughtful and exceptional content, for its powerful and positive impact on emerging leaders and for the extraordinary example it has established that others might emulate. With increased expectations from applicants who commit a substantial time block to participate in the seven days of mandatory sessions in Montgomery, Birmingham and Tuscaloosa during five months, the program committee recognizes the profession is in a period of disruptive change, and now seeks to prepare attorneys to change the future of the profession that is currently unseen, rather than falling into the

trap of trying to simply maximize a spot in the pecking order of the future which is currently seen. These skills require intentionality, deliberation and focused attention. With the help of expert faculty, we seek to establish a class norm of engagement, discussion, respectful debate and even disagreement. The program delivers what it promises: the legal profession has a special role in society to fulfill an opportunity to cultivate leadership skills moving from theory to practice, participation in self-discovery and forcing participants to be contemplative and learn from the inside out. Activities and social events at a number of well-known restaurants and venues throughout the state, including a cocktail party at the historic F.F. Yeates House in Highland Park, the home of Andrew S. Nix (Alumni Class 6) of Birmingham, a tour of the Hyundai Motor





Manufacturing Alabama automotive plant and a tour of Alabama's newest United States Federal Building and Courthouse in Tuscaloosa, led by the Hon. L. Scott Coogler, added immensely to the overall experience. A number of firms opened their pocketbooks as well as their offices to host and support events of the forum.

The forum is designed to aid participants' development into innovative, critical thinkers equipped to respond to disruptive change. While recognizing there are several well-known personal assessment tools, the forum has used the Birkman Assessment Tool for the past four years because it is by far the most effective one for attorneys at this stage of their career. Participants are given the tools they need to help them understand their uniqueness and reach their potential.

This year's primary faculty included Professors Steve Walton

and Michael Sacks of the Goizueta Business School at Emory University, now in their fifth year of teaching. Both observed each new class performs stronger than the previous class because of the group dynamic engaging with them very quickly and robustly. Collectively they continue to reaffirm their belief that, *"Each class we have worked with has been an incredible group of professionals. As the program continues to evolve, the current class seems to be getting more and more out of the program. This year's class, like previous classes, was so dedicated to the work they were doing in the forum. They brought considerable energy and excitement to the sessions. We know how busy everyone is, and we were blown away by their ability to put aside other demands and focus concretely on the important leadership material. This is a group of thoughtful and engaged professionals, eager to*

learn more and apply the material back to their firms. We couldn't wish for a stronger group of participants."

For the second year, 14 hours of MCLE credit was approved, including two hours of ethics/professionalism. The actual program content exceeded more than 55 hours. In response to alumni demand for skills on "how to lead," the core curriculum consists of 60 percent teaching self-awareness, awareness of others, influence without authority, organizational culture, decision-making, leading organizational change, delivering client value and meeting client expectations. Ten percent of the curriculum consists of class discussions on the role of servant leadership, and working on solving complex problems involving hypotheticals based on real-life scenarios. The end result is to teach participants how to lead others through an increasingly uncertain





and changing career landscape. The remaining 30 percent consists of hearing the infinite variety of stories as told by servant-minded judges, policy-makers, legal practitioners, business leaders, scholars and teachers at the community, state and national level who used a variety of teaching methods, as well as hearing from alumni of the forum.

To support the increasing sophistication and intentionality of the forum, we had the largest number of individual, firm and corporate sponsors in the forum's history. Bradley Arant Boult Cummings LLP and Freedom Court Reporting-Freedom Litigation Support were medallion sponsors. Financial and in-kind donations were received from 36 firms, corporations, law schools, bar sections or individuals. The support of the Alabama State Bar has been invaluable. With this combined support, the tuition for a program

of this strength is over half the cost of what similar training programs charge.

Highlights of the seven days during January–May included intense training at Air University's Officer Training School at Maxwell AFB on a challenging reaction course designed to test participants' skills under pressure, a session at the Renaissance Montgomery Hotel, a session in the conference room offices of Balch & Bingham LLP in Birmingham, a session at Hyundai Motor Manufacturing Alabama LLC in Montgomery, an all-day session in the conference room of Rosen Harwood PA in Tuscaloosa, a session in the Hayes Conference Room at the University of Alabama School of Law in Tuscaloosa and a session in the boardroom of the Alabama State Bar.

A partial list of other faculty members included Major General Timothy Leahy, vice-commander

of Air University, Maxwell AFB; Lt. General (ret.) Ron Burgess, former acting director of the U.S. Defense Intelligence Agency and acting principal director of National Intelligence; Stephen Black, director, Center for Ethics and Social Responsibility, University of Alabama, and executive director of Impact Alabama; Diandra Debrosse, Zarzaur, Mujumdar & Debrosse LLC (forum alumni Class 9); R. Ashby Pate, of counsel, Lightfoot Franklin White LLC; J.H. Kim, president, Hyundai Motor Manufacturing Alabama; Hon. Inge P. Johnson (ret.), senior district judge, U.S. District Court for the Northern District of Alabama; Daiquiri J. Steele, director of diversity and inclusion and assistant professor of law in residence, University of Alabama School of Law; Mark E. Brandon, dean, University of Alabama School of Law; LaVeeda Battle, The Battle Law Firm; Clay





Hornsby, Jr., deputy director, Alabama Law Institute; and Hon. W. Keith Watkins, chief judge, U.S. District Court, Middle District of Alabama. New topics were added, including “Shaping the Future by Personal Change,” “Essential Qualities of the Professional Lawyer” and “Implicit Bias in the Context of Leading Organizational Change.”

Leadership Forum Class 14 begins January 2018. Applications will be available in July and Class 2018 will be selected in the early fall. The future of the Leadership Forum is bright. Consistently, the forum has exceeded the expectations of 97 percent of its graduates. In the words of one graduate who speaks for many, *“The most common and overwhelming problem facing us as attorneys is the de-humanizing of our profession. It is my strong belief that if we do not turn back the tide facing us in this regard, we as professionals are*

doomed to a fate that minimizes the value we can bring to society. The forum continues to reinvent itself and evolve as the practice of law and the world around us changes. The forum’s primary focus is to provide participants with the skills to effectuate changes.”

Our passion is to continue to locate and develop talented, mid-level attorneys into better leaders with a generous heart to serve their profession, their clients and their communities in a changing world.

Increasingly, firms and businesses are now aware of the “value added” benefit of encouraging their attorneys to apply and participate. Attorneys benefit from contacts and networking opportunities. This year’s group was extremely committed to the demands of the forum. The bar’s future is bright when it reflects upon the quality of graduates the forum produces each year. Finding a way

for these remarkable attorneys to give back to the profession is one of the bar’s priorities.

Special thanks go to J. Parker Miller, Beasley Allen Crow Methvin Portis & Miles PC, and Starr T. Drum, Maynard Cooper & Gale PC, program committee co-chairs, and R. Thomas Warburton, Bradley Arant Boult Cummings LLP, selection committee chair. ▲





2 0 1 7 L E A D E R S H I P F O R U M

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Bradley Arant Boulton Cummings LLP, Birmingham

Rachel V. Barlotta

Baker Donelson Bearman Caldwell & Berkowitz PC, Birmingham

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J. Reed Williams

Drummond Company, Vestavia

Soo Seok Yang

Beasley Allen Crow Methvin Portis & Miles PC, Montgomery

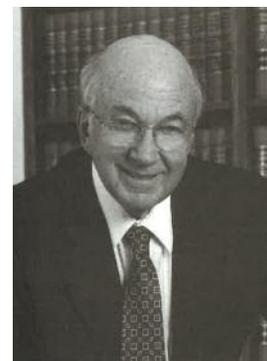


MEMORIALS

▲ Robert F. Lewis

Robert F. Lewis

Robert F. Lewis passed away on March 26, 2017 at the age of 87. Born on February 26, 1930 in Birmingham, Robert Lewis grew up in the Great Depression and World War II as a youth. He grew up on the south side of Birmingham, and his father, Bernard, operated the Lewis Supply Company, a plumbing supply and appliance company. My father never really had an interest in the business. Both he and his brother, Gerald, wanted to spread their wings.



My father often told the story of when he drove out to Stanford University in Palo Alto with a professor at the young age of 17. After one semester, though, he returned home to the University of Alabama to obtain his bachelor's degree in accounting. Gerald, meanwhile, headed to Massachusetts and Harvard for both undergraduate studies and law school, while my father was at his brother's rival school, the Yale Bulldogs, for his law degree—one of the upper classmen, according to my father, was our own Judge Acker.

After a year and a half of law school, my father was called to active duty during the Korean War. He was a Lieutenant Company Commander for the 822 Quartermasters Supply Company in the Army. After completing his service, he returned home to work with his dad and attend Birmingham School of Law. However, he still wanted to complete his law degree, and he decided to enroll at Emory University. He took and passed the bar after completing two years, and he almost went to work with Reuben Garland, a renowned criminal attorney in Atlanta, but, instead, he finished his third year and returned to Birmingham to put out a shingle.

My father always represented the little guy—the underdog. With the exception of serving as a city judge in Birmingham for a few years, he handled mostly personal injury cases with a sprinkling of criminal defense and domestic cases. He loved it. Practicing law was his hobby, and I was fortunate to spend 10 years practicing with and learning from him.

He was a very intelligent and intellectual individual—the smartest man I knew, and he had a big heart. There wasn't a panhandler he didn't help. He loved people, and as my wife, Ashley, said, he would treat the Queen of England the same as the homeless person on the street.

Beyond his legal skills, my dad was very collegial and got along with most in the bar. We couldn't go out to lunch or dinner without seeing someone he knew, and he would talk their ear off, as I'm sure many attorneys and adjusters would attest. He referred to most of those he knew as "A Hail Fellow Well Met," and that would easily describe my dad as well. Since his passing, I have heard from numerous attorneys expressing their condolences, but also more. Some of the comments are:

"I had nothing but admiration for him, and he was always so convivial, good-natured and ready with a funny story."

"Your dad was always quite a character and a very good lawyer. I enjoyed getting to know him and having cases

with him over the years. He loved his clients and was ever the fierce advocate for them."

"Bob had such a good wit and sense of humor."

"I tried one of my first cases against your father, and he was always professional and cordial and fun to be around."

While it is always difficult to lose a parent, it is heartwarming to hear the stories from his colleagues, and now mine. Robert F. Lewis was preceded in death by his wife, Kay G. Lewis, and is survived by his daughter, Sharon S. Lewis; his son and fellow Alabama State Bar member, Jon E. Lewis (Ashley); and his grandchildren, Alec, Leigh and Zachary. ▲

Armstrong, Horace Thomas, Jr.

Scottsboro
Admitted: 1967
Died: April 25, 2017

Boone, Claude David

Mobile
Admitted: 1974
Died: April 4, 2017

Brown, Earl Vincent, Jr.

Riverdale, MD
Admitted: 1977
Died: February 26, 2017

Bush, Peter Austin

Central
Admitted: 1996
Died: March 2, 2017

Crawford, Jarret Charles

Mobile
Admitted: 1989
Died: April 2, 2017

Darling, Shelly Marie Kincaid

Tuscaloosa
Admitted: 2012
Died: April 14, 2017

Greene, John Allen

Birmingham
Admitted: 1995
Died: April 2, 2017

Haas, Thomas Milton, Sr.

Mobile
Admitted: 1952
Died: March 17, 2017

Kimbrough, William Adams, Jr.

Mobile
Admitted: 1961
Died: March 31, 2017

Lane, Johnny Mack

Saraland
Admitted: 1969
Died: April 15, 2017

McCord, Roy Oliver

Gadsden
Admitted: 1982
Died: April 21, 2017

O'Bannon, Arnold Stewart, III

Florence
Admitted: 1982
Died: March 23, 2017

Purchis, Frederick Allen

Irondale
Admitted: 1986
Died: October 4, 2016

Rudd, Nickey John, Jr.

Winder, GA
Admitted: 1991
Died: March 25, 2017

Savage, Morris W.

Jasper
Admitted: 1962
Died: April 10, 2017

Stansell, James Hayes, Jr.

Florence
Admitted: 1977
Died: March 20, 2017

Volz, Charles Harvie, III

Montgomery
Admitted: 1977
Died: February 27, 2017

Whipple, Elizabeth Ann

Tuscaloosa
Admitted: 2017
Died: April 14, 2017



LEGISLATIVE WRAP-UP

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For more information about the institute, visit www.ali.state.al.us.



Senator Linda Coleman-Madison



Senator Cam Ward



Representative Merika Coleman



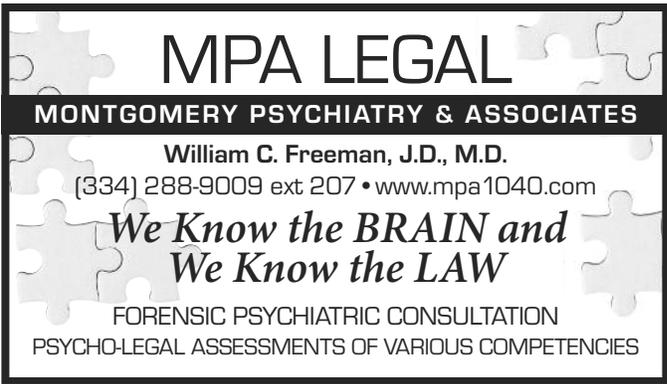
Representative Juandalynn Givan



Representative Mike Jones

On May 19, 2017, the Alabama Legislature adjourned sine die, bringing to a close what had been a tumultuous session. While there are significant issues that need to be addressed every year, 2017 was a particularly straining one. First, the house of representatives was entering its first regular session under the leadership of a new speaker. Second, the legislature came into session with the cloud of impeachment proceedings looming against Governor Bentley. Third, the state was under the obligation to address state legislative redistricting after the federal judiciary had ruled a number of districts to be unconstitutional. Finally, the budgets, while enjoying a year of relative stability, needed to be considered with an eye to the future.

Despite these challenges, the legislature was able to address and pass many pieces of significant legislation. In a departure from my normal post-session wrap-up columns, I am going to break this year's installment into two segments. In this first piece I will cover Law Institute bills that were passed, as well as the reorganization of the legislative staff agencies, and in the September edition I will cover all other legislation of note.



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Alabama Law Institute Legislation

Revised Uniform Fiduciary Access to Digital Assets Act (Act 2017-316)

Representative Juandalynn Givan and Senator Cam Ward

The Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA) modernizes fiduciary law to accommodate our digital lives. Nearly everyone now has digital assets, such as documents, photographs, email and social media accounts. Often, fiduciaries are prevented from accessing those accounts by various means of protection or restrictive terms of service. While digital assets may have value, both monetary and sentimental, they also present novel privacy concerns. The UFADAA provides legal authority for fiduciaries to manage digital assets in accordance with the user's estate plan, while protecting a user's private communications from unwarranted disclosure. A detailed explanation of this act as it was proposed appeared in the March edition of *The Alabama Lawyer*.

Alimony Amendments (Act 2017-164)

Representative Mike Jones and Senator Linda Coleman-Madison

Years of competing alimony proposals and consideration by the legislature culminated in these tweaks to the law. This act continues the court's discretion of awarding interim alimony, but enumerates the factors for the court to consider when determining whether to award interim alimony. Courts may also order the litigation cost and expenses, including attorney fees, necessary to pursue or defend the action out of marital property.

The act also continues a court's discretion of awarding periodic alimony, including rehabilitative alimony after a final decree, while establishing priorities, limitations and factors to be considered when making an award. First, unless the court expressly finds that rehabilitative alimony is not feasible, the

court is to only award rehabilitative alimony, which is limited to five years, absent extraordinary circumstances. Second, if the court determines that rehabilitative alimony is not feasible or has failed, the court may award periodic alimony. Generally, for marriages of less than 20 years, periodic alimony shall be limited to a period not to exceed the length of the marriage. Both rehabilitative and periodic alimony continue to terminate upon remarriage or cohabitation as provided in prior law.

Modification of both rehabilitative and periodic alimony continues to be allowed based on a showing of a material change in circumstances. The act retains prior law that if there is neither an award of alimony nor a reservation of jurisdiction for awarding alimony at the time of the divorce, the court can never subsequently award alimony.

Division of Retirement Benefits upon Divorce Act (Act 2017-162)

Representative Merika Coleman and Senator Linda Coleman-Madison

These modifications to the division of retirement benefits go hand in hand with the amendments to the alimony statutes. Under the act the court retains the discretion to award retirement benefits to the non-employed spouse within certain limitations. The court may not award more than 50 percent of the non-employed spouse's retirement benefits accrued during the marriage, however the proposal eliminates the threshold requirements that the parties must be married for at least 10 years before the court could consider awarding retirement benefits.

The court is granted broad discretion to use any equitable method of valuing, dividing and distributing the benefits, but the proposal eliminates the costly requirement of providing evidence of the present value of the retirement benefits in all cases and provides a more equitable result by requiring that each party equally bear the burden or benefit of the passive gains or losses of the retirement benefits during the time between the award of the benefits and their distribution.

(Continued from page 301)

Legislative Reorganization

Over the past several sessions, the legislature has been working to reorganize its operations and governance and those of its professional agencies. The first step in this process was the passage of Act 2015-408 sponsored by Senator Jimmy Holley and Representative Mike Ball. The primary function of that act was to re-constitute the Legislative Council and set forth its function and authority. The change shrank the council to 20 members: 10 members of the house and 10 members of the senate. Those members serve via various mechanisms including ex officio, appointment and election.

The act further consolidated most of the authority of various legislative oversight and governance committees into the Legislative Council. These functions included the supervision of various agencies and employees, control over the Alabama State House and its operation and maintenance and the IT functions of the legislature. That legislation put budgetary and personnel governance of the Alabama Law Institute, the Legislative Fiscal Office and the Legislative Reference Service under the Legislative Council. The Alabama Law Institute retained its independent governing council that maintains complete control over what projects are undertaken and the final recommendation on those projects to the legislature.

During this past session, the second step of this process was taken with the passage of Act 2017-214 sponsored by Senator Gerald Dial and Representative Randy Wood. That bill created the Legislative Service Agency. This change, which will be effective October 1, consolidated the functions of the Alabama Law Institute, the Legislative Fiscal Office and the Legislative Reference Service into this agency with three divisions. By law, the Code Revision Division shall continue to be known as the Alabama Law Institute and full project control is retained by the Law Institute Council which is a non-partisan board comprised of practicing lawyers from around the state.

Welcome to Phillip McCallum

I first crossed paths with Phillip when he and I were both much younger and in private practice. He has always impressed me with his ability to cut straight to the core of a problem, consider it and act decisively. He is pragmatic, but in a unique way that does not cut off innovation or bold ideas. His energy and passion are strengths and I look very much forward to his bringing them to bear for the benefit of our profession in this new role. ▲



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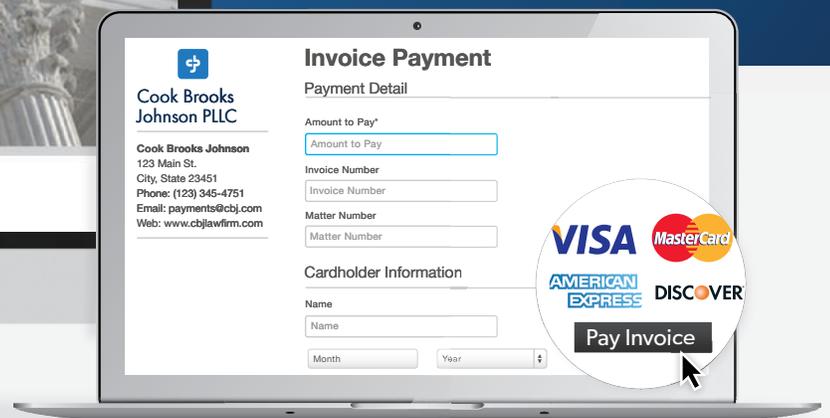
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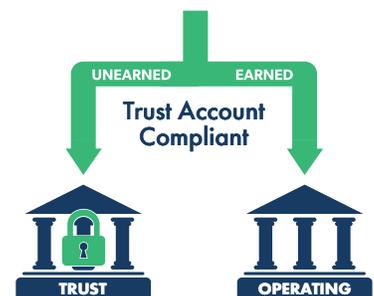
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DISCIPLINARY NOTICES

- ▲ Notices
- ▲ Reinstatement
- ▲ Transfers to Disability Inactive Status
- ▲ Surrender of License
- ▲ Disbarments
- ▲ Suspensions
- ▲ Public Reprimands

Notices

- Notice is hereby given to **Benjamin Downey Chastain**, who practiced in Atlanta and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated April 17, 2017, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2016. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 17-383]
- Notice is hereby given to **Allison Linick Levinson**, who practiced in Birmingham and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated April 17, 2017, she has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2016. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 17-396]
- **Sonya Alexandrial Ogletree-Bailey**, who practiced in Mobile and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 31, 2017, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB Nos. 2016-688, 2016-914, 2016-1034 and 2016-1195, before the Disciplinary Board of the Alabama State Bar. [ASB Nos. 2016-688, 2016-914, 2016-1034 and 2016-1195]
- Notice is hereby given to **Maury Steven Weiner**, who practiced in Mobile and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated April 17, 2017, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2016. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 17-406]

Reinstatement

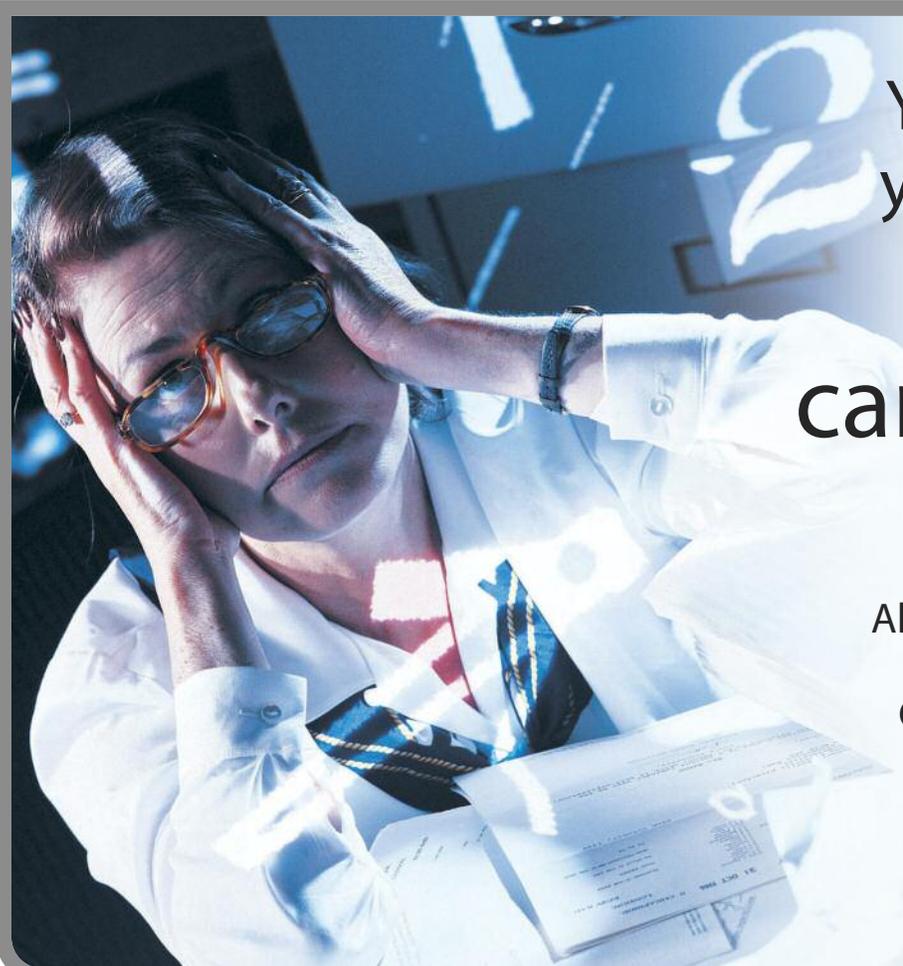
- Northport attorney **William Bankhead McGuire, Jr.** was reinstated to the active practice of law in Alabama on February 21, 2017, per the Supreme Court of Alabama. McGuire had requested to be transferred to disability inactive status on March 6, 2015. On December 6, 2016, McGuire petitioned for reinstatement to the active practice of law in Alabama and was subsequently reinstated by order of the Supreme Court of Alabama, effective February 21, 2017. [Rule 28, Pet. No. 2016-1514]

Transfers to Disability Inactive Status

- Bay Minette attorney **James Daniel Bain** was transferred to disability inactive status pursuant to Rule 27(c), *Ala. R. Disc. P.*, effective February 22, 2017, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the February 22, 2017 order of Panel III of the

Disciplinary Board of the Alabama State Bar in response to Bain's petition submitted to the Office of General Counsel requesting he be transferred to disability inactive status. [Rule 27(c), Pet. No. 2017-176]

- Eclectic attorney **Chrissy Dooley Calhoun** was transferred to disability inactive status pursuant to Rule 27(c), *Ala. R. Disc. P.*, effective March 9, 2017, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the March 9, 2017 order of Panel III of the Disciplinary Board of the Alabama State Bar in response to Calhoun's request submitted to the Office of General Counsel requesting she be transferred to disability inactive status. [Rule 27(c), Pet. No. 2017-152]
- Heflin attorney **Carolyn Pounds Casey** was transferred to disability inactive status pursuant to Rule 27(c), *Ala. R. Disc. P.*, effective January 31, 2017, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c), Pet. No. 2017-76]
- Mobile attorney **Jason Bradley Cosper** was transferred to disability inactive status pursuant to Rule 27(c), *Ala. R. Disc. P.*, effective March 3, 2017, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c), Pet. No. 2017-217]



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(Continued from page 305)

- Decatur attorney **Brent Alden King** was transferred to disability inactive status pursuant to Rule 27(b), *Ala. R. Disc. P.*, effective March 9, 2017, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the March 9, 2017 order of Panel III of the Disciplinary Board of the Alabama State Bar in response to King's petition submitted to the Office of General Counsel requesting he be transferred to disability inactive status. [Rule 27(b), Pet. No. 2017-250]
- Saginaw attorney **Nancy Ingeborge Rhodes** was transferred to disability inactive status pursuant to Rule 27(c), *Ala. R. Disc. P.*, effective March 3, 2017, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the March 3, 2017 order of Panel III of the Disciplinary Board of the Alabama State Bar in response to Rhodes's request submitted to the Office of General Counsel requesting she be transferred to disability inactive status. [Rule 27(c), Pet. No. 2017-219]

Surrender of License

- Anniston attorney **Vaughn Morton Stewart, II** surrendered his license to practice in Alabama, effective January 24, 2017.

Disbarments

- Gulf Breeze attorney **Richard Michael Colbert**, who is also licensed in Alabama, was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective February 21, 2017. The supreme court entered its order based on the Disciplinary Board's order accepting Colbert's consent to disbarment, wherein Colbert acknowledged he pled guilty in the United States District Court, Northern District of Florida, to two felony charges involving a fraudulent scheme to short-sale real estate. [Rule 23(a), Pet. No. 2017-151; ASB No. 2015-1301]
- Northport attorney **Paul Stribling Conger, Jr.** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective March 30, 2017. The supreme court entered its order based on the Disciplinary Board's order accepting Conger's consent to disbarment, wherein Conger acknowledged he pled guilty and was subsequently convicted in the United States District Court,

Northern District of Alabama, to crimes of obstruction in violation of Title 18 USC § 1512(c), gratuity in violation of 18 USC § 201(c) and theft of government property in violation of 18 USC § 641, all of which arose from sexual contact occurring at the federal courthouse in Tuscaloosa between Conger, who was serving as an administrative law judge for the Social Security Administration, and an individual who was seeking to receive retroactive SSI benefits. [Rule 23(a), Pet. No. 2017-331; ASB No. 2017-62]

- Mobile attorney **Thomas Russell McAlpine** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective March 6, 2017. The supreme court entered its order based on the Disciplinary Board's order imposing reciprocal discipline upon McAlpine and disbaring him from the practice of law in Alabama. McAlpine was disbarred for misconduct before the United States Bankruptcy Court for the Middle District of Alabama on or about October 17, 2016. [Rule 25(a), Pet. No. 2016-1424]

Suspensions

- Franklin, Tennessee attorney **Jeffrey Preston Burks** was suspended from the practice of law in Alabama, effective February 27, 2017, for noncompliance with the 2015 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 16-694]
- Mobile attorney **Malcolm Bailey Conway** was summarily suspended from the practice of law in Alabama by order of the Supreme Court of Alabama, effective March 28, 2017. The supreme court entered its order based upon the Disciplinary Commission's order that Conway be summarily suspended for failing to respond to requests for information concerning disciplinary matters. [Rule 20(a), Pet. No. 2017-302]
- Montgomery attorney **Joseph Lee Fitzpatrick, Jr.** was suspended from the practice of law in Alabama for six months by order of the Supreme Court of Alabama, effective March 13, 2017. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Fitzpatrick's conditional guilty plea, wherein he pled guilty to violating Rules 1.1, 1.3, 1.4, 8.1(b), 8.4(d) and (g), *Ala. R. Prof. C.* [ASB Nos. 2016-542, 2016-919, 2016-926, 2016-1138, 2016-1207, 2016-1354 and 2016-1432]

- Birmingham attorney **Mary Margaret McNeil** was suspended from the practice of law in Alabama, effective February 27, 2017, for noncompliance with the 2015 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 16-713]
- Childersburg attorney **William Kenneth Rogers, Jr.** was suspended from the practice of law in Alabama for 91 days by order of the Supreme Court of Alabama, effective March 13, 2017. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Rogers's conditional guilty plea, wherein he pled guilty to violating Rules 1.15(a) and (e) and 8.4(g), *Ala. R. Prof. C.* [ASB No. 2016-777]
- Birmingham attorney **Lee Aubra Rudolph** was suspended from the practice of law in Alabama, effective February 27, 2017, for noncompliance with the 2015 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 16-722]

Public Reprimands

- Birmingham attorney **Jeffrey Leonard Goodgame** was issued a public reprimand without general publication on March 10, 2017 for violating Rules 8.4(c) and (g), *Ala. R. Prof. C.* In July 2015, Goodgame attempted to sell his house without the use of a realtor. There was an offer made to purchase the house, but a foundation inspection was requested by the potential buyer. The potential buyer contacted an engineer to conduct a foundation inspection on the home, which was completed in July 2015. There were some structural issues discovered and a copy of the inspection report was sent to the potential buyer, who forwarded it to her realtor. Based on the inspection, the potential buyer backed out of the purchase. At some point, the potential buyer was provided an official letter signed by the engineer on his letterhead with his stamp. A subsequent potential buyer requested a signed copy of this letter and report. Goodgame contacted the engineer and told him that he had paid for half the cost of the inspection report and that he needed an inked copy to finalize the closing with the new buyer. Goodgame was advised that since he had not requested the initial report, he would have to pay \$500 for a duplicate inspection on the same property. Goodgame subsequently took the position that because he had paid half of the fees the engineer initially charged the first potential buyer, and because the report from the engineer had been digitally signed, he could ink a representation of the digital signature under the U.S. Federal Electronic Signature Act. Goodgame subsequently inked the signature of the engineer and submitted the letter and report to the buyer's agent without permission of the engineer. Afterwards, he admitted that he should not have inked the copy. [ASB No. 2015-1497]
- The Disciplinary Commission ordered that Irondale attorney **John Patrick Graves** receive a public reprimand without general publication for violating Rule 3.1(a), *Ala. R. Prof. C.* Graves filed a medical malpractice lawsuit against three doctors without having reviewed medical records to determine if his client had a viable claim. Due to the natures of the claims, the lawsuit was widely publicized. The allegations and the doctor defendants received national media attention. After receiving the medical records and information which demonstrated initial claims and allegations against one or more doctors were clearly improper, he had an opportunity to amend the complaint, dismiss inappropriately-named defendants and eliminate the plainly false allegations. However, Graves failed to do so, instead filing an amended complaint asserting claims and maintaining allegations that were clearly without merit. At the time the amended complaint was filed, Graves knew or should have known that it contained meritless claims and contentions that served no purpose other than to harass or maliciously injure one or more defendants. [ASB No. 15-1494]
- Enterprise attorney **William Jeffrey Moore** was issued a public reprimand with general publication on March 10, 2017, for violating Rule 8.4(g), *Ala. R. Prof. C.* In March 2016, the Office of General Counsel received a report that Moore followed numerous pornographic Twitter sites using the same Twitter account used to advertise his law practice. There is a link on every Twitter account that allows an individual to see every Twitter account the user follows. In this matter, Moore followed numerous pornographic Twitter accounts while using that same account to advertise his law practice. When questioned, Moore insisted that his Twitter account was hacked and someone else followed the pornographic sites. However, Moore followed similar sites on his Instagram account. [ASB No. 2016-416]
- On March 10, 2017, Hamilton attorney **Oliver Frederick Wood** received a public reprimand without general publication, was placed on probation and ordered to pay any and all costs taxed against him pursuant to Rule 33, *Ala. R. Disc. P.*, including but not limited to a \$750 administrative fee for violating Rules 1.8(a) and 8.4(a) and (g), *Ala. R. Prof. C.* Wood entered into a business transaction with a former client by borrowing money without reducing the loan to writing and complying with the requirements set forth in Rule 1.8(a), *Ala. R. Prof. C.* Additionally, with this conduct, Wood violated Rules 8.4(a) and (g), *Ala. R. Prof. C.*, for violating a rule of professional conduct and engaging in conduct which adversely reflected on his fitness to practice law. [ASB No. 2014-352]





Wilson F. Green

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



Marc A. Starrett

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

Authors' Note: Due to press deadlines applicable to this issue, the cases covered in this article were decided up until May 12, 2017.

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Immunity

Woodfin v. Bender, No. 1150797 (Ala. March 31, 2017)

Birmingham Board of Education members and superintendent appealed trial court's money judgment for "classified employees," based on finding that salaries had been miscalculated. Held: defendants were entitled to section 14 immunity because (1) declaratory judgment exception to immunity was inapplicable because board policy, not statute, was at issue; (2) amount of and entitlement to payment were too unclear and disputed to be sufficiently liquidated; and (3) board members did not act arbitrarily in enforcing their policy.

Motions to Dismiss; Sufficiency of Fraud Allegations

Ex parte Price, No. 1151041 (Ala. April 14, 2017)

Whether additional materials attached to a Rule 12(b)(6) motion will be considered (thus prompting conversion to summary judgment motion) is within the trial court's discretion; attachment of materials to a Rule 12(b)(6) motion does not automatically convert the motion. In this case, the motion was not automatically converted to summary judgment, even though the materials were not referred to by the trial court in its dismissal order (and therefore there was no indication that the trial court had excluded those materials under Rule 12(b)). The complaint adequately pleaded facts giving rise to fraudulent concealment (specifically, allegations of time, place and circumstance of actual discovery of the alleged fraud and inability to discover fraud reasonably before that time) sufficient to toll the statute of limitations under the discovery rule of *Ala. Code* § 6-2-3.

Protective Services

Nix v. Franklin County DHR, No. 1160494 (Ala. April 14, 2017)

Putative ward had created a genuine issue of fact on need for protective services, and thus was entitled to formal hearing within 30 days under *Ala. Code* § 38-9-6.

Slip and Fall

***Barnwell v. CLP Corporation*, No. 1151329 (Ala. April 21, 2017)**

The court reversed summary judgment in a slip-and-fall allegedly caused by two slips: a “slick spot” near the bathroom and by standing water near a counter. CLP failed to demonstrate presence of slick spot was an open and obvious danger (an affirmative defense).

Accrual; Fraud

***Miller v. City of Birmingham*, No. 1151084 (Ala. April 21, 2017)**

Among other holdings, a fraud claim did not accrue, and statute of limitations did not begin to run, until plaintiff should have discovered the fraud, which was at the time she received the benefits booklet after her husband’s death.

Good Count–Bad Count

***Complete Cash Holdings, LLC v. Powell*, No. 1150536 (Ala. April 21, 2017)**

Deferred presentment transaction provider and pawnbroker was not a “debt collector” under FDCPA, thus negating that claim. Special interrogatory made clear that jury’s general verdict was premised in part on a finding of liability on the FDCPA claim, and thus under the good count–bad count rule, new trial on all claims was necessary.

Workers’ Compensation Retaliatory Discharge

***Foster v. North American Bus Industries, Inc.*, No. 1150716 (Ala. April 29, 2017)**

Substantial evidence supported, in context of plaintiff’s comp-retaliation claim, that employer’s proffered reason for termination (violation of absenteeism policy) was pre-textual, given (1) employer’s prior acceptance of manner of notice provided for absence by employee (through third party), (2) inconsistency between employer’s application substance of absenteeism policy as compared to its application to this employee, (3) the proximity in time between the comp claim and the adverse action and (4) affidavit testimony that shortly after accident another employee advised her she might need to look somewhere else, which was not contradictory to plaintiff’s deposition testimony concerning conversations.

Hospital Liens; Damages for Impairment

***Ex parte Alfa Mutual Insurance Co.*, No. 1141343 (Ala. April 29, 2017)**



Where insurer allegedly damages hospital’s entitlement to recover under a hospital lien by paying to insured proceeds for personal injuries treated by hospital subject to lien, measure of impairment of hospital’s lien does not exceed the amount recoverable in the absence of impairment–i.e., in the amount actually paid by the insurer which impaired the lien and which would otherwise be recoverable by the hospital absent the act of impairment.

Fraud; Fiduciary Duty

***Aliant Bank v. Four Star Investments, Inc.*, No. 1150822 (Ala. May 5, 2017)**

Lender to subdivision developer brought action against developer, financial entity operating subdivision’s public improvement district (“PID,” established under *Ala. Code* § 11-99A-1) and that entity’s consulting engineers, claiming that engineers and PID operator were negligent and breached fiduciary duties to the lender, thus damaging lender by compromising the valor of its security interest in the subdivision property, by spending the proceeds of the PID’s bond issue, essentially over-leveraging the subdivision’s infrastructure and causing excessive assessments against subdivision property. In a series of orders, the circuit court dismissed all claims brought by lender. The supreme court affirmed in part and reversed in part, holding in part (there are 13 holdings) that negligence and breach of fiduciary duty claims against PID directors were viable, because given that Alabama is a “title” state, lender’s security interest amounted to a title interest in the subdivision property and the PID operator and its principals had duties to all subdivision property owners to exercise care in operations of PID and because lender did not have actual knowledge of the impairment of its position, under *Bryant Bank v. Talmage Kirkland & Co.*, 155 So. 3d 231 (Ala. 2014), lender’s claims were not time-barred, especially considering the availability of tolling under *Ala. Code* §6-2-3.

(Continued from page 309)

Subrogation; UIM; Opt-Out

Ex parte Allstate Prop. & Cas. Ins. Co., No. 1150269 (Ala. May 5, 2017)

MVA plaintiff reached a settlement with tortfeasor and sought consent from its UIM carrier. Allstate (the carrier) withheld consent and advanced the settlement proceeds, then opted out of the litigation, but did not seek any subrogation recovery. After the statute of limitations expired on Allstate filing a subrogation action against the tortfeasor, plaintiff filed a motion to enforce settlement, to dismiss tortfeasor, and proceed against Allstate directly as the sole named party. Held that the carrier has the right of reimbursement and subrogation, and thus the subrogation action against tortfeasor was not the exclusive remedy. Accordingly, the trial court erred in dismissing tortfeasor and refusing Allstate's effort to remain opted out.

Immunity

Ex parte Terry, No. 1160087 (Ala. May 5, 2017)

DHR social worker was entitled to state-agent immunity on claim concerning failure to properly investigate allegation of physical abuse by guardian (daughter of ward), which allegedly led to ward's death; there was no evidence that social worker violated or deviated from DHR policies. Justice Murdock concurred specially to note that the existing *Cranman* categories are insufficient, and that a more general category of *Cranman* immunity should be established to capture situations in which policies provide discretion to the decision-maker.

Rule 54(B)

Firestone v. Weaver, No. 1151211 (Ala. May 12, 2017)

Appeal was improperly certified as final under Rule 54(b) under the "intertwining" doctrine.

From the Court of Civil Appeals

Restrictive Covenants

Diercks v. Odom, No. 2151011 (Ala. Civ. App. April 7, 2017)

Given rule of strict construction against restrictive covenants landowner was not prohibited from combining two adjacent lots into one lot.

Duty

Glasgow v. Jackson Land Surveying, Inc., No. 2151016 (Ala. Civ. App. April 7, 2017)

A party seeking to recover under a negligence theory based on a contract between others must plead and prove that it relied on the proper performance of the contract.

Inverse Condemnation

Sima Properties, L.L.C. v. Cooper, No. 2160132 (Ala. Civ. App. April 7, 2017)

Valid inverse condemnation action brought against a state official in representative capacity is an exception to Section 14 immunity. Sima asserted valid inverse condemnation action by alleging that Cooper, through ALDOT, and the city interfered with its right of access from Sima's gasoline station to public road.

Land Use

City of Hoover v. Covenant Bank, No. 2160044 (Ala. Civ. App. April 29, 2017)

Circuit court erred by reversing city council's denial of conditional use permit; the matter was "reasonably subject to disagreement," and allowing conditional use of the property as a gasoline service station was "fairly debatable" and thus not subject to reversal.

Default Judgments

DuBose v. McAteer, No. 2150687 (Ala. Civ. App. May 5, 2017)

Rule 55(c) motion to set aside a default judgment did not trigger entitlement to a hearing on that motion, where the motion did not address each of the three *Kirtland* factors.

Boundary Line Disputes; Adverse Possession

Alabama Power Company v. Keller, No. 2150979 (Ala. Civ. App. May 5, 2017)

The trial court employed so-called hybrid adverse possession principles in a boundary line dispute, and Alabama Power cited that as error. The court affirmed, stating: “[a] boundary-line action may include an adverse-possession claim by one of the owners of adjoining properties. An adverse-possession claim in a boundary-line action is subject to “a unique set of requirements that is a hybrid of the elements of adverse possession by prescription and statutory adverse possession.”

Land Use

Shoal Creek Land & Cattle, LLC v. City of Arab, No. 2160040 (Ala. Civ. App. May 5, 2017)

City’s historic preservation commission lacked any rational basis for enforcing arbitrary window-design standards and improperly denied landowner’s application for certificate of appropriateness.

Indispensable Parties

Bradley v. Scott, No. 2160150 (Ala. Civ. App. May 5, 2017)

In action to enforce a public roadway by prescription, action

should not have proceeded in the absence of an affected landowner, who was an indispensable party.

Foreclosure Procedure

Tidmore v. Citizens Bank & Trust, No. 2150834 (Ala. Civ. App. May 12, 2017)

Creditor’s failure to provide notice of intent to accelerate, or a notice which said that the creditor was “intending” to accelerate, did not render foreclosure void; errors in the notice that do not prejudice the mortgagor will not invalidate an otherwise valid foreclosure sale. There was also no error in creditor’s selling multiple encumbered parcels en masse in a foreclosure sale, where the borrower did not request otherwise.

Garnishment; Constitutional Wage Exemption

Merrida v. Credit Acceptance Corporation, No. 2160188 (Ala. Civ. App. May 12, 2017)

Judgment debtors’ periodic wages, which were less than \$1,000 and were consumed in support of their families, were repeatedly exempt as long as there was no accumulation of income beyond the \$1,000 exemption in Ala. Const. Art. X, § 204.

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Taxation

84 Lumber Company, Inc. v. City of Northport, No. 2150876 (Ala. Civ. App. May 12, 2017)

Taxing authorities could not properly use a “sampling technique” to determine where municipal and county taxes were properly owed on deliveries of goods to customer-specified locations, where the individual delivery records could be used to determine the jurisdictions to which taxes were properly owed.

Tax; Appeals

The Shoals Mill Development, Ltd. v. Shelby County Board of Equalization, No. 2160237 (Ala. Civ. App. May 12, 2017)

Ala. Code § 40-1-45 applies to notices of appeal that are required to be filed under any part of the revenue code.

From the United States Supreme Court

First Amendment

Expressions Hair Design, Inc. v. Schneidermann, No. 15-1391 (U.S. March 29, 2017)

New York General Business Law §518, which provides that “[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means[,]” regulates speech and must be analyzed under commercial speech standards.

Labor and Employment

McLane Corp. v. EEOC, No. 15-1248 (U.S. April 3, 2017)

A district court’s decision whether to enforce or quash an EEOC subpoena should be reviewed for abuse of discretion, not de novo.

Sanctions

Goodyear Tire & Rubber Co. v. Haeger, No. 15-1406 (U.S. April 18, 2017)

When a federal court exercises its inherent authority to sanction bad-faith conduct by ordering a litigant to pay the other side’s legal fees, the award is limited to the fees the innocent party incurred solely because of the misconduct.

Indian Law

Lewis v. Clarke (yes, no joke), No. 15-1500 (U.S. April 25, 2017)

In a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest, and thus the tribe’s sovereign immunity is not implicated. An indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak.

Standing; Fair Housing Act

Bank of America Corp. v. City of Miami, No. 15-1111 (U.S. May 1, 2017)

Municipalities have standing to bring action against mortgage lenders for alleged racial discrimination in lending practices which had the effect of triggering higher foreclosures and devaluing municipal properties, causing adverse tax-collection effects and straining the provision of municipal services. The Eleventh Circuit held that the cities had standing, but set out a causation standard under the FHA as one based on foreseeability. The Supreme Court held: (1) the cities were “aggrieved persons” under the FHA with statutory and constitutional standing to seek recovery, and the cities’ interests fell arguably within the zone of interests the FHA was designed to protect, thus conferring standing on the cities; but (2) the Eleventh Circuit’s foreseeability test for causation under the FHA was not sufficient; “foreseeability alone does not ensure the close connection that proximate cause requires.”

From the Eleventh Circuit Court of Appeals

Section 1981

Flournoy v. CML-GA WB LLC, No. 16-10073 (11th Cir. March 27, 2017)

African-American hair salon operator filed section 1981 action against landlord for refusing to allow her to lease contiguous space for expansion. The district court granted summary judgment based on failure to rebut landlord's proffered non-discriminatory reasons for refusal. The Eleventh Circuit affirmed.

Qualified Immunity

Stephens v. Degiovanni, No. 15-10206 (11th Cir. March 30, 2017)

Paul Stephens appealed summary judgment granted to Broward Deputy Sheriff Nick DeGiovanni based on qualified immunity in his 42 U.S.C. § 1983 action, alleging false arrest and excessive force. The Eleventh Circuit affirmed summary judgment granted to Deputy DeGiovanni on the false-arrest claim, but vacated summary judgment on the excessive-force claim, holding that deputy was not entitled to qualified immunity because the force he used in arresting Stephens on misdemeanor charges was excessive under clearly established law.

Labor

Priexa v. Prestige Cruise Services, LLC, No. 16-13745 (11th Cir. April 14, 2017)

Issue: whether, in calculating an employee's hourly rate of pay to determine if he is exempt from federal overtime laws, a district court may allocate the employee's commissions to hours worked outside the periods in which the commissions were earned through averaging methodology. Held: the district court's methodology was erroneous; federal law bars allocating a commission payment across weeks that fall outside the period in which the payment was earned.



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(Continued from page 313)

Injunctions

ADT, LLC v. Northstar Alarm Services, No. 16-15351 (11th Cir. April 14, 2017)

Non-party to injunction (which bought assets from enjoined party) was not bound by injunction when it was not in privacy with enjoined party, and in the absence of any evidence that it had notice of the injunction, *Fed. R. Civ. P.* 65(d)(2).

FMLA; Evidence of Pretext

Jones v. Gulf Coast Healthcare, Inc., No. 16-11142 (11th Cir. April 19, 2017)

Employer's failure to articulate clearly and consistently the reason for an employee's discharge may serve as evidence of pretext.

Asbestos Exposure

Bobo v. TVA, No. 15-15271 (11th Cir. April 26, 2017)

This is a "take home" asbestos case—decedent (Mrs. Bobo) claimed that asbestos exposure to her occasioned by her husband's work at TVA (and his subsequently taking fibers home on his clothing) caused her to contract asbestos-related illnesses, causing her death. The district court (Lynwood Smith) found for plaintiff after a bench trial and awarded damages of more than \$3.3 million. The Eleventh Circuit affirmed in relevant part, holding: (1) any consideration of state-court deposition testimony of Mr. Bobo (who had died in 1997) was harmless error, because it was offered to prove that Mr. Bobo was exposed to asbestos at work, which was proven by other evidence; (2) admission of plaintiff's medical expert testimony was not an abuse of discretion, especially considering that it was a bench trial; (3) under Alabama law, TVA owed a duty to Mrs. Bobo to prevent take-home asbestos exposure (this was an *Erie* determination; the Alabama Supreme Court had declined a certified question request on the subject, and the Court looked to other states' law on the matter)—even though such a duty would put Alabama in the "minority position" on the question after canvassing various states' treatment of the issue; (4) under Alabama law, the proper causation standard, correctly applied by the district court, was whether TVA's conduct, more likely than not, was a substantial factor in causing her harm—and substantial evidence supported the district court's affirmative determination; (5) discretionary-function immunity did not apply because TVA had no discretion to prevent fibers from leaving

the plant, independent of any permissible levels of exposures within the plant; but (6) amount of damages as to medical expenses (just over \$500,000) was error, because it included amounts which providers had written off or for which plaintiffs were not obligated to pay or reimburse to insurers that amounts that were written off by providers under contractual agreements with insurers.

Statutory Damage Claims

Perry v. Cable News Network, Inc., No. 16-13031 (11th Cir. April 27, 2017)

Under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), Perry's alleged violation of a statutory right (Video Privacy Protection Act) was sufficiently concrete, because the nature of the injury (privacy interests) bears a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. However, claims failed on their merits.

Qui Tam; Attorneys' Fees

USA ex rel. Christiansen v. Everglades College, Inc., No. 16-10849 (11th Cir. May 3, 2017)

District court had discretion to reduce the amount of relators' counsel's lodestar by taking into account the degree of success (or lack thereof) in the recovery (in this case, the lack of recovery was in part due to the United States' belated intervention and settlement of the case over the relators' objections).

Statutory Damage Claims

Nicklaw v. CitiMortgage, Inc., No. 15-14216-FF (11th Cir. May 1, 2017)

The Court denied *en banc* review of the panel's decision finding no standing; several separate opinions underscore the unevenness of this terrain.

Section 1983; Deliberate Indifference

Dang v. Sheriff, Seminole County, FL, No. 15-14842 (11th Cir. May 9, 2017)

Medical providers' delays in diagnosing and treating meningitis, which caused pretrial detainee to suffer multiple strokes, did not amount to deliberate indifference, and thus qualified immunity applied.

Disability Law

Silva v. Baptist Health South Florida, Inc., No. 16-10094
(11th Cir. May 8, 2017)

In action brought under the Rehabilitation Act and Title III of the ADA against healthcare providers for alleged failure to offer appropriate auxiliary aids to hearing-impaired patients the district court applied an incorrect substantive standard for liability. For an effective-communication claim brought under the ADA and RA, plaintiff is not required to show actual deficient treatment or to recount exactly what the plaintiff did not understand, but rather that the hospitals' failure to offer an appropriate auxiliary aid impaired the patient's ability to exchange medically relevant information with hospital staff.

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Intellectual Disability; Capital Punishment

Moore v. Texas, No. 15-797 (U.S. March 28, 2017)

Where an IQ score is close to, but above, 70, courts must account for the test's "standard error of measurement." The state court also overemphasized Moore's perceived adaptive strengths and gave insufficient emphasis to other clinically relevant factors.

Restitution Orders

Nelson v. Colorado, No. 15-1256 (U.S. April 19, 2017)

Colorado statutory law, under which a criminal defendant ordered to pay restitution whose conviction is reversed on appeal, without possibility of retrial, cannot recover amounts paid in restitution unless the payor demonstrates his innocence by "clear and convincing" evidence, violates the due process clause.

From the Court of Criminal Appeals

Juvenile Delinquency

W.B.S. v. State, CR-15-0956 (Ala. Crim. App. Apr. 28, 2017)

Writ of error coram nobis, the common-law predecessor to *Ala. R. Crim. 32*, is the proper procedural mechanism by



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(Continued from page 315)

which a juvenile adjudicated delinquent may collaterally challenge that adjudication. Because no statute or procedural rule currently provides for collateral review of a delinquency adjudication, English common-law governed the issue pursuant to *Ala. Code* § 1-3-1.

Juvenile Law; Sufficiency of Charge

***T.B.P. v. State*, CR-16-0270 (Ala. Crim. App. Apr. 28, 2017)**
Juvenile waived alleged error in the delinquency petition by waiting until the state closed its case before objecting to petition. Case remanded for the juvenile court to dismiss, rather than “close,” the case, because there was no finding that the juvenile needed care or rehabilitation.

Capital Punishment

***Callen v. State*, CR-13-0099 (Ala. Crim. App. Apr. 28, 2017)**
There was no Sixth Amendment violation under *Hurst v. Florida*, 136 S. Ct. 616 (2016); under Alabama’s capital sentencing scheme, the jury alone determined the aggravating circumstance. Remand was necessary, however, for the trial court to enter findings of fact regarding two aggravating circumstances.

Capital Punishment

***Smith v. State*, CR-13-0055 (Ala. Crim. App. Mar. 17, 2017)**
New sentencing proceeding was required; victims were permitted to testify directly as to their characterization of the defendant, his crime and the appropriate punishment, and the jury was not instructed regarding the testimony.

Bail Bonds; Youthful Offenders

***A.Z. v. State*, CR-15-0815, 2017 WL 1533367 (Ala. Crim. App. Apr. 28, 2017)**
Youthful offender adjudication is subject to the imposition of bail bond fees under *Ala. Code* § 12-19-311(a)(1).

Hearsay; Medical Records

***D.E.R. v. State*, CR-15-1183 (Ala. Crim. App. Apr. 28, 2017)**
Trial court erred in admitting medical records in this child sexual abuse/sodomy case, because the records, containing

hearsay statements of the victims, were not properly authenticated by the treating physician or adequately certified as having been kept in the regular course of business, and there was no showing that the statements served as the basis for diagnosis or treatment.

Hearsay

***Sheffield v. State*, CR-15-1467 (Ala. Crim. App. Mar. 17, 2017)**
Trial court erred in admitting hearsay statements of the defendant’s wife accusing him of murder, because they were not admissible as statements against interest under *Ala. R. Evid.* 804 (b)(3).

Rule 32

***Banville v. State*, CR-15-1384 (Ala. Crim. App. Mar. 17, 2017)**
Defendant’s filing of initial Rule 32 petition seeking only an out-of-time appeal did not preclude second Rule 32 petition as successive.

Search Incident to Arrest

***Keith v. State*, CR-15-1319, 2017 WL 1032529 (Ala. Crim. App. Mar. 17, 2017)**
Officer’s warrantless search of defendant’s vehicle was not proper under “search incident to arrest” exception, where search took place after defendant’s arrest on outstanding warrants for traffic violations.

Unanimity Instruction

***Campbell v. State*, CR-15-1187 (Ala. Crim. App. Mar. 17, 2017)**
The court vacated one of the defendant’s two sodomy convictions arising from his abuse of a child in his residence, because the state requested, and received, a unanimity jury instruction rather than electing to rely on a single act for its proof. The evidence indicated that the two offenses arose out of the same set of circumstances. ▲



BAR BRIEFS

- **Jere L. Beasley**, principal and founder of Beasley, Allen, Crow, Methvin, Portis & Miles PC, was named to the Lawdragon Hall of Fame. He is among the 45 top lawyers in the nation selected for this honor. The Lawdragon Hall of Fame “celebrates lawyers whose mark on the legal profession is indelible.”



Beasley

- **Kathie Farnell** announces that her memoir, *Duck and Cover: A Nuclear Family*, is being published by University of South Carolina Press and is now available.



- Fish Nelson & Holden LLC of Birmingham announces that senior member **Mike Fish** was elected president of the National Workers’ Compensation Defense Network.



Fish

- **Richard Jaffe** of Jaffe, Hanle, Whisnant & Knight PC received the Larry Sheffield, Jr. Lifetime Achievement Award by the



Jaffe

Greater Birmingham Criminal Defense Lawyers Association.

- The American Bankruptcy Institute announces that **Robert P. Reynolds** of Reynolds, Reynolds & Little LLC was named to a two-year term as ABI vice president-development.



Reynolds

- Christian & Small announces that managing partner **Deborah Alley Smith** was recently elected a member of the American Academy of Appellate Lawyers. The academy limits its membership to only 500 members in the United States.



Smith

- The officers of the 2017 Madison County Volunteer Lawyers Program Board of Directors are:
Tazewell T. Shepard, president
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About Members

Ed Bowron announces the opening of **Ed Bowron Law LLC** at 5 Dauphin St., Ste. 301, Mobile 36602. Phone (251) 694-1700.

Charles E. Calloway announces the opening of his office at 600 S. Court St., Montgomery 36104. Phone (334) 603-1230.

Among Firms

The **Adkins Firm PC** announces the opening of its Houston office.

Anders, Boyett & Brady PC announces that **Jeffrey Patrick Setterstrom** joined as an associate.

Armbrecht Jackson LLP announces that **Timothy A. Heisterhagen** is a partner and **Robert S. Walker** is associated with the firm.

Baker Donelson announces that **Rachel VanNortwick Barlotta** and **Stephen K. Pudner** are now shareholders in the Birmingham office.

Beasley, Allen, Crow, Methvin, Portis & Miles PC announces the opening of an Atlanta office and that **Chris Glover** will be the lead attorney in that office.

Beckum Kittle LLP announces that **Kelly R. Masters** joined as an associate.

Campbell Law PC announces that **Brandon K. Falls** joined the firm.

Clark Partington announces that **William D. Stokes** is a shareholder.

Couch & Firth LLC announces that **Rachel H. Cobble** joined as an associate.

Fuller Hampton LLC announces that **J. Clay Maddox** is a shareholder and that **Anna Parker** is an associate in the Roanoke office.

Grace Matthews & Debro LLC announces that **Bree T. Wilbourn** is a partner and **Sarah F. Henson** joined as an associate.

Hare Wynn Newell & Newton LLP announces that **Brian M. Vines** is a partner in the Lexington office.

Huie Fernambucq & Stewart LLP announces that **Woods Parker** joined as an associate.

The **Office of Governor Kay Ivey** announces that **Bryan M. Taylor** joined as general counsel and **William G. Parker, Jr.** as deputy general counsel.

Lanier Ford Shaver & Payne PC in Huntsville announces that **Joseph FitzGerald, III** is an associate.

Lloyd & Hogan announces that **Kathryn Crawford Gentle** joined as a partner.

Marks & Associates PC announces the opening of its downtown Atlanta office.

Maynard Cooper & Gale announces that **Kenyan Brown** joined the Mobile office as a shareholder and that **Stephen Bumgarner** joined as a shareholder and **Brandt Hill** as an associate, both in the Birmingham office.

Optum announces that **Lavonya Chapman** joined the Tampa office.

Richardson Law Firm LLC of Mobile announces that **David T. Trice** joined as an associate.

Nick Shimoda and **Ron Storey** announce the opening of **Shimoda & Storey, Attorneys at Law**, 186 Belmont Dr., Dothan 36305. Phone (334) 699-2323.

Sirote & Permutt PC announces that **Joshua Hornady** and **Benjamin Little** are shareholders in the Birmingham and Huntsville offices, respectively.

Connie Ray Stockham, Robert E. Cooper and **James A. Potts, II** announce the opening of **Stockham, Cooper & Potts PC** at 505 N. 20th St., Ste. 1111, Birmingham 35203. Phone

(205) 776-9000. **Justin I. Hale** joined as a shareholder and **John K. Pocus** as an associate.

Thompson, Garrett & Hines LLP announces that **Joe K. Whitt, III** is a partner.

Tuscaloosa County District Attorney Hays Webb announces that **Jill Ganus, Hunter Brown, Erin Hardin** and **Kate Furek** joined his office as assistant district attorneys.

White Arnold & Dowd PC of Birmingham announces that **H. Eli Lightner, II** joined as an associate. ▲



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OPINIONS OF THE GENERAL COUNSEL

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Lawyer May Contact Former Employee of Opposing Party Ex Parte unless Contact Is Intended to Deal with Privileged Matter

QUESTION:

"I have filed two complaints against Acme ("Acme"), copies enclosed. The suit in Any County is a proposed class action which alleges improper mortgage balances and interest rates charged to Acme customers. The suit charges Acme with fraud and breach of contract. The crux of the complaint filed in Low County is outrage, slander, invasion of privacy and intentional infliction of emotional distress arising out of the branch manager's treatment of an Acme customer.

"The credit union president, John Don, has been named as a defendant in both suits. Mr. Don's former secretary, Amy Honey, has retained our firm to represent her in connection with sex discrimination arising out of Mr. Don's treatment of Mrs. Honey when she became pregnant and took maternity leave. Upon return after maternity leave, Mrs. Honey learned that she had been replaced.

"As stated, Mrs. Honey was employed by Acme as Mr. Don's secretary. She typed correspondence to and received correspondence from Acme's legal counsel pertaining to the two cases I already have pending. She also had specific conversations with Mr. Don about the two cases I have pending.

"We need a written opinion as to whether Rule 4.2 or any other rule of professional conduct precludes me from asking Mrs. Honey about facts or information she knows concerning the two previously filed cases."

ANSWER:

You are not precluded from communicating with this former employee under the set of facts you have described in your request.

DISCUSSION:

Rule 4.2 of the *Rules of Professional Conduct* prohibits communication about the subject matter of the representation with a "party" known to be represented by other counsel.

Consent of the other counsel obviates the problem. Rule 4.2 is a successor to Alabama DR 7-104(A)(1) and two provisions are substantially identical. In RO-88-34 (also published in *The Alabama Lawyer*), the Disciplinary Commission held that a plaintiff's counsel in a tort claim action could contact and interview current corporate employees/witnesses. There can be no ex parte contact when the employee is an executive officer of the adverse party or could otherwise legally bind the adverse party

by his/her testimony, or if the employee was the actual tortfeasor or person whose conduct gave rise to the cause of action. In any of these situations, prior consent of counsel for the adverse party would be required.

Ex parte contact with a former employee, as here, is not subject to the same scrutiny. In fact, there is a strong argument that Rule 4.2 does not even apply to former employees at any level. A former employee cannot speak for the corporation. The ABA Committee on Ethics and Professional Responsibility in Formal Opinion 91-359 (1991) stated that former employees of a corporation may be contacted without consulting with corporation's counsel because they are no longer in positions of authority and, thus, cannot bind the corporation. The Disciplinary Commission believes that contact with a former employee is ethically permissible, unless the ex parte contact is intended to deal with privileged matter, i.e., the inquiring counsel is asking the former employee to divulge prior communications with legal counsel for the adverse party, and these communications were conducted for purposes of advising the adverse party in the litigation or claim. If the former employee was the actual person giving rise to the cause of action, contact is also permissible so long as that person is not represented by counsel. [RO-92-12] ▲

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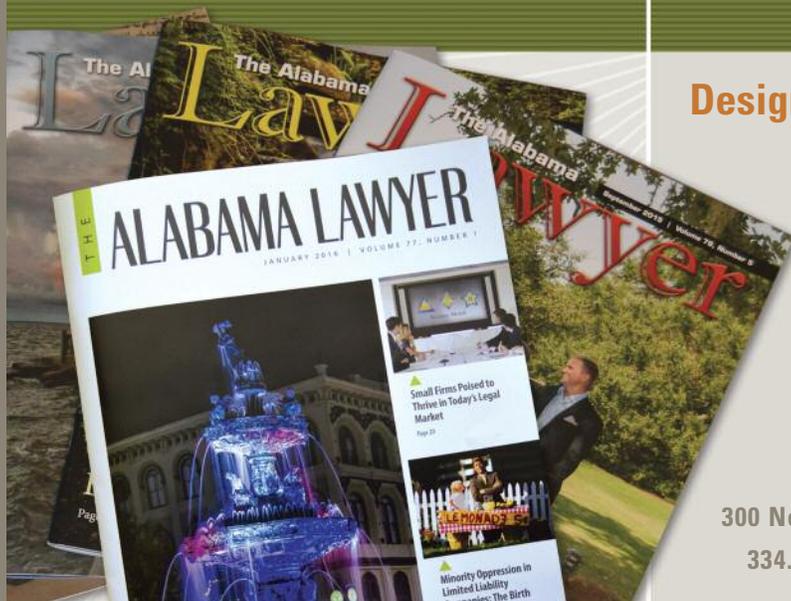
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