



 Protection for the Recreational
 Property
 Landowner:
 The Alabama
 Recreational Use
 Statutes
 Page 18

 The United States Supreme Court's Watershed Ruling in Endrew F. v.
 Douglas County School District and The Effect on Your Client's Special Education Programming
 Page 28

Administrative Law Judge Hearings in Child Abuse and Neglect Cases Page 34

New Elder Abuse Protection Orders Page 42

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On The Cover

Photograph taken in Elmore County of pecan trees silhouetted against winter's setting sun. Camera: Canon 7D Mark II with a Canon EF 24-105 lens

-Photo by Dolan L. Trout, ASB director of information technology

FEATURE ARTICLES

Protection for the Recreational Property Landowner: The Alabama Recreational Use Statutes By George W. Royer, Jr.

18

The United States Supreme Court's Watershed Ruling in Endrew F. v. Douglas County School District and the Effect on Your Client's Special Education Programming By Shane T. Sears and James D. Sears

28

Administrative Law Judge Hearings in Child Abuse and Neglect Cases By W. Gregory Ward and William F. Prendergast

34

New Elder Abuse Protection Orders By John C. Craft, Felicia M. Brooks and Emily T. Marsal 42

Fall 2017 Admittees 53

BOARD OF EDITORS: Melanie M. Atha, Birmingham • J. Pratt Austin-Trucks, Wetumpka • Marc J. Ayers, Birmingham • G. Glasco Baxter, Tuscaloosa • Joseph K. Beach, Atlanta • Jennifer M. Bedsole, Birmingham • D. Edgar Black, Muscle Shoals • Henry L. Cassady, Jr. (Max), Evergreen • W. Lloyd Copeland, Mobile • Ashley H. DeGaris, Birmingham • Aaron L. Dettling, Hoover • Christie Lyman Dowling, Birmingham • Joi T. Christoff, Montgomery • Jesse P. Evans, III, Birmingham • Kira Y. Fonteneau, Birmingham • Sara Anne Ford, Birmingham • Leigh K. Forstman, Birmingham • Hon. William R. Gordon, Montgomery • Steven P. Gregory, Birmingham • Amy M. Hampton, Alexander City • Sarah S. Johnston, Montgomery • Margaret H. Loveman, Birmingham • Mignon A. Lunsford, Mobile • Jennifer Brooke Marshall, The Woodlands, TX • J. Bradley Medaris, Montgomery • Allen P. Mendenhall, Montgomery • Anil A. Mujumdar, Birmingham • Blake L. Oliver, Opelika • Rebecca D. Parks, Mobile • William F. Patty, Montgomery • Sherrie L. Phillips, Montgomery • Katherine T. Powell, Birmingham • Julie H. Ralph, Baton Rouge • Preston Y. Register, Dothan • Tracy L. Richards, Mobile • Christopher E. Sanders, Montgomery • J. Beren Segarra (Ben), Mobile • Jeal P. Smith, Jr., Eufaula • Marc A. Starrett, Montgomery • Mary H. Thompson, Mountain Brook • M. Chad Tindol, Tuscaloosa • Jason B. Tompkins, Birmingham • Henry J. Walker, Jr., Birmingham • Stephen A. Walsh, Birmingham • W. Gregory Ward, Lanett • David G. Wirtes, Jr., Mobile • Barr D. Younker, Jr., Montgomery COLUMNS

President's Page 8

Executive Director's Report 10

Important Notices
12

Memorials 50

Legislative Wrap-Up 60

Disciplinary Notices
62

The Appellate Corner 66

Opinions of the General Counsel 74

About Members, Among Firms 78

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A D V E R T I S E R S

Alabama Court Reporting, Inc3
Alabama Legal & Investigative Services, Inc67
Attorneys Insurance Mutual of the South2
Butler Evans Education, LLC71
Cain & Associates Engineers46
Davis Direct75
J. Forrester DeBuys, III45
The Finklea Group64
Freedom Court Reporting79
GilsbarPRO76
Insurance Specialists, Inc80
LawPay4
The Locker Room15
Montgomery Psychiatry & Associates61
National Academy of
Distinguished Neutrals7
OnBoard Search & Staffing63
Professional Software
Corporation

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PRESIDENT'S PAGE



Evidence of the Changing Times

In my first "President's Page," I wrote about some of the exciting plans for this year:

- A commitment that Executive Director Phillip McCallum and I, along with others in leadership, would take to the highways and backroads of our great state to meet, greet, listen to and break bread with our members;
- An invitation to join us as we took some of the Board of Bar Commissioners' meetings on the road;
- A pledge to work toward our bar's becoming a more engaged and relevant body; and
- An assurance to you that I would guide our bar as well as I knew how during this time of transition and through the continued challenges our profession faces.

In short, I told you that "The Times They Are a-Changin"" at your Alabama State Bar. At this halfway mark in my presidency, I thought it appropriate to check in and see how we are doing in executing the plans I first shared with you back in September. Since we're all lawyers here, let me share with you some hard evidence of the changing times at the ASB.

The commitment that both Phillip and I have to improving relationships and communication between and among all segments of our bar has resulted in the development of a tour we are calling the "State of the Bar." The concept arose out of the belief that the state bar needed to do a better job of educating our members not only about the great benefits of bar membership but also as to issues of particular interest to our profession. So, with that lofty goal in mind, Phillip and I hit the road.

Our first soft rollout of the new "State of the Bar" was with our friends and colleagues of the Tuscaloosa County Bar Association with a maximum capacity crowd. As best I could tell, no one fell asleep during our presentation! Since our time in Tuscaloosa, we have ventured all over the state refining our message. Our "State of the Bar" address has now been presented to numerous constituencies, including the Mobile, Houston/Henry, Lauderdale/Franklin/Colbert, Etowah, Washington/Choctaw/Clarke and Monroe/Conecuh bar associations.

We are also taking two of our Board of Bar Commissioners' meetings out of their traditional Montgomery space in the hope of making our commission meetings more accessible to our members in other parts of the state. On October 13, the University of Alabama School of Law hosted the Board of Bar Commissioners and welcomed us with warm hospitality and genuine enthusiasm. We were joined at that meeting by Chief Justice Lyn Stuart, Justice Mike Bolin, Dean Mark Brandon and a number of other special guests. I deeply appreciate everything Dean Brandon, his staff and our own bar staff did to make that event a great experience for all. We are looking forward to a similar experience with the Mobile and Fairhope bars in March.

At each of these events, our local bar membership has come out in full force. We have encountered attentive and engaged audiences, including local bar leadership and Alabama State Bar Commissioners. In every audience, we've been surrounded by people hungry to know more about the work of the state bar and how the bar might affect and hopefully positively impact their professional experiences and their communities. This has been incredibly rewarding and informative. If the ever-increasing mileage on the vehicles of your bar leadership is any indication, we are working hard to fulfill our commitment to outreach!

We have also engaged with our membership about some of the challenges our bar is facing and the professional transitions we are all navigating. One of the most significant issues confronting our bar involves court costs and adequate funding of our judiciary. The judicial branch is constitutionally mandated to be adequately funded to properly address its mission. However, the reality is that the judiciary is competing with every other agency and group that receives an appropriation from our state's cash-strapped General Fund. The Alabama State Bar believes that appropriate court funding is necessary for the administration of the court system and the administration of justice. If you attended the Grand Convocation at Point Clear last summer, you may remember that in my first few minutes as your state bar president I sought out Chief Justice Stuart in the audience and made a commitment to her that our bar would proactively assist the judiciary in educating our members, who would in turn serve as a resource to our legislative members.

A common misconception is that our court fees go directly to the operation of our court system. Unfortunately, that is not the complete picture: over time, our court fees have been increased by special interest fees and assessments that do not benefit the court system. We may have a unified judicial system, but it is certainly not uniform. As you may know, the fees are different in every county. Of the money you and your clients are paying to utilize the court system, roughly half of those dollars actually support the courts, with the rest going to other causes, agencies and organizations. Please do not misunderstand me; many of these additional fees and assessments support good and worthy causes, but the end result of these additional costs being tacked onto our filing fees is that Alabama has some of the highest court costs in the country. Perhaps even more sobering is the reality that Alabama's excessive court costs have contributed significantly to the access-to-justice issue in our state. It has become too expensive for some to access the system for the help they need. The result is that legal action either is not initiated at all or our lawyers carry the burden of advancing funds for court costs, neither of which is a desirable situation.

Alabama's courts are one of the largest economic engines in our state and a significant contributor to the General Fund. In 2016, our courts collected roughly \$468,500,000... almost a half-billion dollars. The courts of Alabama serve as the largest collection agency in the state, collecting and distributing for everyone. Our court system is vital to Alabama's economy, as are all of the lawyers, judges and court staff who work within the court system.

As lawyers, we should become more educated about the system upon which so many rely and, quite frankly, from which many of us make our living. In doing so, we can serve as a resource to assist our legislators in addressing this issue of fees and costs as well as funding of the courts. This has been one of the key messages of our "State of the Bar" tour, and, without question, it has been the message that has generated the most discussion as we have visited members all over the state. We are encouraged by the level of interest in this issue, and the desire of our members to become fully informed about this topic. To see where your court costs are being disbursed and the economic impact of the courts in your local community, please visit the state bar website, www.alabar.org. Our "State of the Bar" tour is traveling to other bar associations over the next few months, and we welcome the opportunity to come to yours. If you are interested in having us visit, please email Communications Coordinator Alex Rice at *alex.rice@alabar.org*.

I look forward to seeing all of you in my travels and I thank you again for this great privilege and honor of serving as your bar president this year. If you have any questions or issues you want to discuss, please reach out to me (*barpresident@alabar* .org), Phillip (*phillip.mccallum@alabar.org*) or your local bar commissioner.



EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum phillip.mccallum@alabar.org



Pictured above are Tuscaloosa attorney Jim Standridge (center) with ASB President Augusta Dowd and Executive Director Phillip McCallum at the October BBC meeting held at the University of Alabama School of Law. For many years, Standridge has been providing help to attorneys struggling with a substance use disorder. He has participated in numerous interventions and has served as a mentor to many attorneys in early recovery. Because of his life-changing assistance to his fellow attorneys, he was chosen the second recipient of the "Executive Director's MVP Award."



So Much More Than Just a "Mound of Dirt"

If you're reading this, you're a member of the Alabama State Bar.

The bar administers the exam twice a year, collects dues and then regulates its members, right? Sure. There's so much more, though.

I've been traveling across the state promoting our new "State of the Bar" initiative with President Augusta Dowd and other bar leaders. During these presentations, we have partnered with the Local Bar Outreach Task Force to talk about the bar as more than just a licensing and regulatory agency. I commonly compare the bar to an ant hill-on the outside it's a mound of dirt, but when you kick it over, you seen the intricate operation underneath. We have 43 employees spread across 12 departments, all geared toward the betterment of the legal profession.

You're already paying dues, so why not invest in the organization? Below are some opportunities to get more out of your membership: join a section, attend the Annual Meeting and Legal Expo, recommend a lawyer to Leadership Forum, request a free CLE. Call our office or simply drop by-we'd love to hear from you!

More Bang for Your Buck

Ethics

- The Office of General Counsel offers free and confidential ethics opinions.
- Last year, the OGC gave approximately 3,600 informal opinions.

Volunteer Lawyers Program

• Low-income individuals get assistance with basic civil legal issues (divorce, child support, debt collection, housing and probate issues).

CLE

• Free CLE programs include the "State of the Bar" program, Legal Ethics, Practice Management and Casemaker Training, Lawyer Assistance Program and Digital Communications.

Casemaker

- Casemaker is a free, Internet-based legal research service available to all Alabama State Bar members.
- There are three tools to enhance your legal research capabilities: CaseCheck+ Citations, CasemakerDigest and CiteCheck Brief Analyzer, and all are free as a part of the service.

Lawyer Referral Service

- The LRS is an ethical and effective way to generate additional fee-producing work.
- More than 11,900 referrals were made last year. There is a \$100 annual fee to join.

Practice Management-Financial Savings

- Clio is a cloud-based practice management platform that keeps your all-important matters, contacts and documents are available anywhere.
- CosmoLex combines practice management, billing and accounting all in one login, making it the total solution that solo and small law firms can rely on to run their entire practice.
- MyCase is affordable, intuitive and powerful legal case management software designed for the modern law firm.
- Rocket Matter is an online legal practice management and time-and-billing software solution with a simple, unique and beautiful interface.
- Corel offers special savings on custom software solutions. Some of the best products are available at up to 50 percent off! You can get productivity-enhancing tools for word processing, Tables of Authorities creation and PDF publishing–all at special savings.
- LawPay Credit/Debit Card Processing Merchant Account gives you the ability to accept debit and credit cards for legal fees and expenses and is a great way to attract clients, improve cash flow and reduce collection efforts. A LawPay merchant account provides credit card processing designed for attorneys which allows you to direct payments to either your trust or operating account, as appropriate, and also safeguards your trust account.

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The Huntsville-Madison County Bar Association, Inc. offers an associate membership to all members in good standing of the Alabama State Bar for an annual fee of \$150. With an associate membership, you and your employees (30-hour work week) have the opportunity to participate in MD Live (our platinum-level BCBS Health Insurance Plan) and several additional insurance benefits. Effective November 1, 2017, an annual \$25 administrative fee was added for each participant in the plan. The administrative fee and associate dues are billed annually November 1. For participants enrolling during the course of the year, administrative fees will be prorated.

GEICO® Auto Insurance

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ISI Major Medical, Life, Disability, Business Overhead, Umbrella and Other Insurance

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The Principal Financial Group

Individual disability insurance

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Networking

- Annual Meeting and Legal Expo (June 27-30, 2018–Hilton Sandestin)
- This is great opportunity to meet other lawyers and earn at least 12 hours of CLE credit, including two hours ethics credit included with the registration fee, and see the latest products and services for your law office.
- There are 19 committees, 20 task forces, 31 practice sections and 12 attorney specialty areas of law for certification.



IMPORTANT NOTICES

- 🔺 Alabama Lawyers' Hall of Fame
- 🔺 Judicial Award of Merit
- Local Bar Award of Achievement
- J. Anthony "Tony" McLain Professionalism Award
- William D. "Bill" Scruggs, Jr.
 Service to the Bar Award
- ASB Women's Section– Request for Nominations
- Amendment of Alabama Rules of Appellate Procedure
- Notice of Election and Electronic Balloting

Alabama Lawyers' Hall of Fame

May is traditionally the month when new members are inducted into the Alabama Lawyers' Hall of Fame which is located at the state judicial building. The idea for a hall of fame first appeared in the year 2000 when Montgomery attorney Terry Brown wrote state bar President Sam Rumore with a proposal that the former supreme court building, adjacent to the state bar building and vacant at that time, should be turned into a museum memorializing the many great lawyers in the history of Alabama.

The implementation of the idea of an Alabama Lawyers' Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines and provide a recommendation to the Board of Bar Commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004. Since then, 60 lawyers have become members of the hall of fame. The five newest members were inducted in May of this year.

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

Inductees to the Alabama Lawyers' Hall of Fame must have had a distinguished career in the law. This could be demonstrated through many different forms of achievement–leadership, service, mentorship, political courage or professional success. Each inductee must have been deceased at least two years at the time of their selection. Also, for each year at least one of the inductees must have been deceased a minimum of 100 years to give due recognition to historic figures as well as the more recent lawyers of the state. The selection committee actively solicits suggestions from members of the bar and the general public for the nomination of inductees. We need nominations of historic figures as well as present-day lawyers for consideration. Great lawyers cannot be chosen if they have not been nominated. Nominations can be made throughout the year by downloading the nomination form from the bar's website and submitting the requested information. Plaques commemorating the inductees are located in the lower rotunda of the judicial building and profiles of all inductees are found at *www.alabar.org*.

Download an application form at https://www.alabar.org/ assets/uploads/2014/08/Lawyers-Hall-of-Fame-Nomination-Form-2017-Fillable.pdf and mail the completed form to:

Sam Rumore Alabama Lawyers' Hall of Fame P.O. Box 671 Montgomery, AL 36101

The deadline for submission is March 1.

Judicial Award of Merit

The Alabama State Bar Board of Bar Commissioners will receive nominations for the state bar's Judicial Award of Merit through **March 15**. Nominations should be mailed to:

Phillip W. McCallum Board of Bar Commissioners P.O. Box 671 Montgomery, AL 36101-0671

The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation. The award will be presented during the Alabama State Bar's Annual Meeting.

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(Continued from page 13)

Nominations are considered by a three-member committee appointed by the president of the state bar, which then makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.

Local Bar Award of Achievement

The Local Bar Award of Achievement recognizes local bars for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's Annual Meeting.

Local bar associations compete for these awards based on their size–large, medium or small.

The following criteria are used to judge the applications:

- The degree of participation by the individual bar in advancing programs to benefit the community;
- The quality and extent of the impact of the bar's participation on the citizens in that community; and
- The degree of enhancements to the bar's image in the community.

To be considered for this award, local bar associations must complete and submit an application by June 1. Applications may be downloaded from *www.alabar.org* or obtained by contacting Mary Frances Garner at (334) 269-1515 or *maryfrances.garner@alabar.org*.

J. Anthony "Tony" McLain Professionalism Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the J. Anthony "Tony" McLain Professionalism Award through April 15. Nominations should be prepared on the appropriate nomination form available at *www.alabar.org* and mailed to:

Phillip W. McCallum Executive Director Alabama State Bar P.O. Box 671 Montgomery, AL 36101

The purpose of the J. Anthony "Tony" McLain Professionalism Award is to honor the leadership of Tony McLain and to encourage the emulation of his deep devotion to professionalism and service to the Alabama State Bar by recognizing outstanding, long-term and distinguished service in the advancement of professionalism by living members of the Alabama State Bar.

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

William D. "Bill" Scruggs, Jr. Service To the Bar Award

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

Phillip W. McCallum Executive Director Alabama State Bar P.O. Box 671 Montgomery, AL 36101

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

Nominations are considered by a five-member committee which makes a recommendation to the Board of Bar

Commissioners with respect to a nominee or whether the award should be presented in any given year.

ASB Women's Section–Request For Nominations

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

Maud McLure Kelly Award

ТНЕ

This award is named for the first woman admitted to practice law in Alabama and is presented each year to a female attorney who has made a lasting impact on the legal profession and who has been a great pioneer and leader in Alabama. The Women's Section is honored to present an award named after a woman whose commitment to women's rights was and continues to be an inspiration for all women in the state.

Previous recipients include Justice Janie Shores (ret.), Miss Alice Lee, Miss Nina Miglionico, Judge Phyllis Nesbitt, Mahala Ashley Dickerson, Dean Camille Cook, Jane Dishuck, Louise Turner, Frankie Fields Smith, Sara Dominick Clark, Carol Jean Smith, Marjorie Fine Knowles, Mary Lee Stapp, Ernestine Sapp, Judge Caryl Privett (ret.), Judge Sharon G. Yates (ret.) and Martha Jane Patton. The award will be presented at the Maud McLure Kelly Luncheon at the 2018 State Bar Annual Meeting.

Susan Bevill Livingston Leadership Award

This is the third year to solicit nominations for this new award for the Women's Section in memory of Susan Bevill Livingston, who practiced law at Balch & Bingham. The recipient of this award must demonstrate a continual commitment to those around her as a mentor; a sustained level of leadership throughout her career; and a commitment to her community in which she practices, such as, but not limited to, bar-related activities, community service and/or activities which benefit women in the legal field and/or in her



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community. The candidate must be or have been in good standing with the Alabama State Bar and has at least 10 years of cumulative practice in the field of law. This award may be given posthumously. This award will be presented at a special reception. Judge Tammy Montgomery and Maibeth Porter were prior recipients.

Submission deadline is February 15.

Please submit your nominations to Jamie Durham, chair of the Women's Section, at *jamie.durham@hblb.alabama.gov*. Your submission should include the candidate's name and contact information, the candidate's current CV and any letters of recommendations. If a nomination intends to use letters of recommendation previously submitted in 2017, please note your intentions.

Amendment of Alabama Rules of Appellate Procedure

In an order dated October 19, 2017, the Alabama Supreme Court amended Rule 5(b), "Content of Petition; Answer," and adopted Rule 21(f), "Effect on Trial Court Proceedings," Alabama Rules of Appellate Procedure. The amendment and adoption of these rules was effective January 1, 2018. The order amending Rule 5(b) and adopting Rule 21(f) appears in an advance sheet of Southern Reporter dated on or about November 23, 2017. The amendment to Rule 5(b) requires that a petition for permission to appeal have annexed to it an appendix, separated from the petition by a divider or tab, that includes certain specified documents and any parts of the record that would be essential to an understanding of the matters set out in the petition, as well as an index to the appendix. Rule 21(f) states that the pendency of a petition for a writ of mandamus, prohibition or any other extraordinary writ does not stay the proceedings in the trial court. The text of these rules can be found at http://www.judicial. state.al.us, "Quick links-Rule changes."

-Bilee Cauley, Reporter of Decisions, Alabama Appellate Courts

Notice of Election And Electronic Balloting

Notice is given here pursuant to the Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners that the election of these officers will be held beginning Monday, May 21, 2018 and ending Friday, May 25, 2018.

On the third Monday in May (May 21, 2018), members will be notified by email with instructions for accessing an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 4, 2018) requesting a paper ballot. A single written request will be sufficient for all elections, including run-offs and contested president-elect races during this election cycle. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 25, 2018) immediately following the opening of the election.

Nomination and Election of President-Elect

Candidates for the office of president-elect shall be members in good standing of the Alabama State Bar as of February 1, 2018, and shall possess a current privilege license or special membership. Candidates must be nominated by petition of at least 25 Alabama State Bar members in good standing. Such petitions must be filed with the secretary of the Alabama State Bar no later than 5:00 p.m. on February 1, 2018.

Nomination and Election of Board of Bar Commissioners

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

- 2nd Judicial Circuit
- 4th Judicial Circuit
- 6th Judicial Circuit, Place 2
- 9th Judicial Circuit
- 10th Judicial Circuit, Place 1

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

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2018 and vacancies certified by the secretary no later than March 15, 2018. All terms will be for three years.

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A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 27, 2018).

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 1, 4 and 7. Petitions for these positions, which are elected by the Board of Bar Commissioners, are due by April 2, 2018.

Submission of Nominations

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

Phillip W. McCallum Secretary Alabama State Bar P.O. Box 671 Montgomery, AL 36101

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

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

Election rules and petitions for all positions are available at *www.alabar.org*.

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Protection for the Recreational Property Landowner:

The Alabama Recreational Use Statutes

By George W. Royer, Jr.

The Alabama Recreational Use Statutes are contained in

Ala. Code §§ 35-15-1, et seq. (Chapter 1), and 35-15-20, et seq. (Chapter 2). These two groups of Alabama statutes deal with the same subject matter, i.e., the level of conduct required for liability arising from the use of non-commercial recreational property and "are to be read complimentary [sic] to each other." Grice v. City of Dothan, 670 F. Supp. 318, 321 (M.D. Ala. 1983). As discussed in this article, the Recreational Use Statutes provide substantial protection to the owners of non-commercial recreational property for injuries sustained by users of such property. The policy behind the Recreational Use Statutes has been declared by the legislature in Ala. Code § 35-15-20 to be: "[T]hat it is in the public interest to encourage owners of land to make such areas available to the public for non-commercial purposes by limiting such owners' liability towards persons entering thereon for such purposes [and] that such limitation on liability would encourage owners of land to allow non-commercial public recreational use of land which would not otherwise be open to the public . . ."

The statutes have wide application to users of non-commercial recreational property. The statutes are specifically applicable to claims of minors as well as persons of full legal age. See Ala. Code § 35-15-21(4) defining "person" for the purposes of the statutes as: "Any individual, regardless of age, maturity or experience." See also Grice, 670 F. Supp at 322 ("It is obvious to this court that the Alabama legislature did not intend for minors to be treated any differently from adults relative to the duty owed to them by landowners under §§ 35-15-20 through 28."); Ex parte City of Geneva, 707 So. 2d 626 (Ala. 1997) (applying protections of the Recreational Use Statutes to claims brought on behalf of 11-year old minor plaintiff). Employees and "agents" of a non-commercial recreational property owner are also entitled to assert the protections of the Recreational Use Statutes. Independent contractors are, however, not covered. Ala Code § 35-15-21(1) states, in this regard, as follows: "For the purpose of this Article, an employee or agent of the owner, but not an independent contractor while conducting activities upon the outdoor recreational land, is deemed to be an owner." (emphasis added).

Although the Recreational Use

Statutes offer protections for landowners and their employees for non-commercial recreational use of property, the fact that the property owner may charge an admission or other fee for use of the property does not preclude application of the protections of the statutes. The issue is whether the facility is intended to be operated for the purpose of making a profit. *Ala. Code* § 35-15-26 states that "[t]he liability limitation provisions of this Article shall not apply in any cause of action arising from acts or omissions occurring on or connected with land upon which any commercial recreational enterprise



Although the **Recreational Use** Statutes offer protections for landowners and their employees for non-commercial recreational use of property, the fact that the property owner may charge an admission or other fee for use of the property does not preclude application of the protections of the statutes.

is conducted." The Recreational Use Statutes define "commercial recreational use" as: "Any use of land for the purpose of receiving consideration for opening such land to commercial use where such use or activity is profit-motivated." Ala. Code § 35-15-21(5). (emphasis added). Construing these provisions of the Recreational Use Statutes, the supreme court has held that the property owner's intent, not its accounting, determines whether the usage of recreational property is profit-motivated. "Whether actual profit is derived from the acts imputed to the defendant . . . is not a material inquiry . . . the inquiry is, was it the purpose to derive profit?" Owens v. Grant, 569 So.2d 707, 711-12 (Ala. 1990).

Chapter 1 of the Recreational Use Statutes

Sections 35-35-1 through 5 "define and limit the duties of an owner of recreational land in relation to a person using the premises for recreational purposes." *Poole v. City of Gadsden*, 541 So.2d 510, 512-13 (Ala. 1989). Section 35-15-1 states as follows:

An owner, lessee or occupant of premises owes no duty of care to keep such premises safe for entry and use by others for hunting, fishing, trapping, camping, water sports, hiking, boating, sightseeing, caving, climbing, repelling or other recreational purposes or to give any warning of hazardous conditions, use of structures or activities on such premises to persons entering for the above stated purposes, except as provided in § 35-15-3.

(emphasis added).

Section 35-15-3 provides as follows:

This article does not limit the liability which otherwise exists for wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity; or for injury suffered in any case where permission to hunt, fish, trap, camp, hike, cave, climb, rappel, or sight-see was granted for commercial enterprise for profit; or for injury caused by acts of persons to whom permission to hunt, fish, trap, camp, hike, or sight-see was granted to third persons as to whom the person granting permission, or the owner, lessee, or occupant of the premises owned a duty to keep the premises safe or to warn of danger.

(emphasis added).

Federal and state courts in Alabama have interpreted § 35-15-3 of Chapter 1 to provide that liability against an owner, lessee or occupant of property used for recreational purposes may only be imposed in the event that there is a "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity . . ." Clark v. Tennessee Valley Authority, 606 F. Supp. 130, 131 (N.D. Ala. 1985) (emphasis in original); Poole, 541 So.2d at 513-14 (Ala. 1989). ("An owner, whether public or private, owes no duty to users of the premises except for injury caused by willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.") (emphasis added). See also Ex parte City of Geneva, 707 So.2d 626, 628 (Ala. 1997) (same). Because of the limitation of liability contained in §§ 35-15-1 and 3, "an owner, whether public or private, owes no duty whatsoever to provide safe premises to users." Clark, 606 F. Supp. at 131.

Chapter 2 of the Recreational Use Statutes

Chapter 2 of the Recreational Use Statutes is contained in *Ala. Code* §§ 35-15-20 through 28. Although Chapter 1 does not contain a definition of what type of property comes within the protections of the Recreational Use Statutes, Chapter 2 does contain such a definition. Chapter 2 defines "Outdoor Recreational Land" for the purposes of the statutes as: "Land and water, as well as buildings, structures, machinery, and such other appurtenances used for or susceptible of recreational use."

The substantive provisions of Chapter 2 of the Recreational Use Statues providing protections to non-commercial landowners are as follows:

§ 35-15-22. Inspection and warning not required.

Except as specifically recognized by or provided in this article, an owner of outdoor recreational land who permits non-commercial public recreational use of such land owes no duty of care to inspect or keep such land safe for entry or use by any person for any recreational purpose, or to give warning of a dangerous condition, use, structure, or activity on such land to persons entering for such purposes.

§ 35-15-23. Limitations on legal liability of owner.

Except as expressly provided in this article, an owner of outdoor recreational land who either invites or permits non-commercial public recreational use of such land does not by invitation or permission thereby:

(1) Extend any assurance that the outdoor recreational land is safe for any purpose;

(2) Assume responsibility for or incur legal liability for any injury to the person or property owned or controlled by a person as a result of the entry on or use of such land by such person for any recreational purpose; or

(3) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

(emphasis added).

The Alabama Supreme Court has recognized that the intent of the legislature in adopting Chapter 2 of the Recreational Use Statutes was to provide even greater protection than that afforded by Chapter 1. In *Poole*, 541 So. 2d at 513, the supreme court stated:

Sections 35-15-20 through 28, adopted in 1981, apply to owners of noncommercial public

recreational land, such as the City here, and provide such landowners with even greater protections than §§ 35-15-1 through 5.

(emphasis added). See also *Ex Parte City of Geneva*, 707 So. 2d at 628. (Same).

Federal district courts sitting in Alabama and applying Alabama law have also recognized that §§ 35-15-20 through 28 of Chapter 2 were intended by the legislature to be applied in conjunction with the willful and malicious requirements of § 35-15-3 of Chapter 1 to provide greater protection to public and governmental landowners who make their premises available to the public for non-commercial recreational use. In Clark v. Tennessee Valley Authority, 606 F. Supp. 130 (N. D. Ala. 1985), the plaintiff alleged negligent and wanton misconduct in the maintenance, operation and supervision of a dam and reservoir. The defendants asserted that they were entitled to the protection afforded by both §§ 35-15-1 through 5 and 35-15-20 through 28. The plaintiff contended that the defendants could be liable absent an allegation or proof of willful and malicious conduct because 35-15-20 through 28 repealed §§ 35-15-1 through 5. The United States District Court for the Northern District of Alabama rejected the plaintiff's argument as follows:

Sections 35-15-20 through 28, *Code of Alabama* (1975) (1984 Supp.) applies to noncommercial public recreational landowners such as defendants, and provides them with even tighter limitations than §§ 35-15-1 through 5, as to their exposure to liability to recreational users. This 1981 piece of legislation recognizes a public policy in Alabama to encourage public owners to allow the opening up and promotion of their facilities without exposing themselves to law suits. This court will not second guess this legislative intent.

There is nothing among the undisputed facts of this case, nor, for that matter among the disputed facts, which provides Clark a way around this combination of Alabama statutory limitations on defendants' liability.

Clark argues that the 1981 Act (§ 35-15-20 through 28) repealed the prior Act (§ 35-15-1

through 5) because of alleged inconsistencies between the two acts in light of the repealer clause included in the 1981 Act. The court disagrees and finds that while the two acts perhaps overlap, both provide limitations on defendants' liability under the facts of this case.

Clark, 606 F. Supp. at 131-32. In *Grice v. City of Dothan*, 670 F. Supp. 318 (M.D. Ala. 1987), the Court considered the applicability of the Recreational Use Statutes to a claim involving the death of a minor who drowned in a city park The Court in *Grice*, holding that the municipal defendant was shielded from liability under the Recreational Use Statutes, agreed with the Court's holding in *Clark v. Tennessee Valley Authority*, and also held that the enactment of Chapter 2 of the Recreational Use Statutes was not intended by the legislature to repeal §§ 35-15-1 through 5. The Court held that in the absence of facts which would indicate malicious or willful behavior, the defendant municipality could have no liability. The Court stated:

There are no facts before this Court, submitted by the plaintiff, which would indicate malicious or willful behavior on the part of the defendant herein. Indeed, willful and/or malicious conduct has not been pleaded by the plaintiff in this case. (Citation omitted.) Further, §§ 35-15-20 through 28, Code of Alabama (1975) (1984 Supp.), further limits the liability of owners of land who dedicate their property for non-commercial recreational use. This Court is of the opinion that the defendant City of Dothan falls squarely into the coverage provided by §§ 35-15-20 through 28, supra. These sections declare that the public policy of Alabama is to encourage the donation of non-commercial recreational property without exposing the owners of such property to liability. As the Court stated in Clark, supra at 131, this Court will not question the clear expression of this legislative intent. (Citation omitted.) This Court finds, as did the Court in Clark, that Articles 1 and 2 of Chapter 15 are to be read complimentary to each other and that the provisions of Article 2 do not repeal the provisions contained in Article 1.

Grice, 670 F. Supp. at 321. See *Russell v. Tennessee Valley Authority*, 564 F. Supp. 1043, 1047 (N.D. Ala. 1983) (willful and malicious conduct is required to be shown by plaintiff to overcome the protections of the Alabama Recreational Use Statutes); *Poole*, 541 So.2d at 513 (citing *Grice* and *Clark* with approval and noting that "[a]n owner, whether public or private, owes no duty to users of the premises except for injury caused by a willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.") (emphasis added). See also *Ex parte City of Geneva*, 707 So.2d at 628 (same).

Exceptions to the Protections of the Recreational Use Statutes

The Alabama Legislature has by statute "carve[d] out an exception to the liability limitations provided" under the Recreational Use Statutes. *Ex parte City of Geneva*, 707 So.2d at 629. This exception is contained in *Ala. Code* § 35-15-24(a). Section 35-15-24 provides as follows:

- "(a) Nothing in this article limits in any way legal liability which otherwise might exist when such owner has actual knowledge:
 - "(1) That the outdoor recreational land is being used for non-commercial recreational purposes;
 - "(2) That a condition, use, structure, or activity exists which involves an unreasonable risk of death or serious bodily harm;
 - "(3) That the condition, use structure, or activity is not apparent to the person or persons



...persons who have suffered injury on non-commercial recreational property frequently contend that the defect which caused injury to their client was an unreasonably dangerous defect which was "not apparent to the persons or persons using the outdoor recreational land..." using the outdoor recreational land; and

- "(4) That having this knowledge, the owner chooses not to guard or warn, in disregard of the possible consequences.
- "(b) The test set forth in subsection (a) of this section shall exclude constructive knowledge by the owner as a basis of liability and does not create a duty to inspect the outdoor recreational land."

(emphasis added).

In attempting to come within the exception contained in § 35-15-24 to the protections afforded by the Recreational Use Statutes, persons who have suffered injury on non-commercial recreational property frequently contend that the defect which caused injury to their client was an unreasonably dangerous defect which was "not apparent to the persons or persons using the outdoor recreational land" and thus excluded from the protections of the statutes by §§ 35-15-24(a)(2) and (3). The supreme court has held that before a condition can constitute a condition which is "not

apparent to the person or persons using the outdoor recreational land" under § 35-15-24(a)(3), the condition must constitute a "hidden danger, pitfall or trap . . . that a person could not avoid by the use of reasonable care and skill." *Ex parte City of Geneva*, 707 So.2d at 629-30.

In *Ex Parte City of Geneva*, the supreme court considered the meaning of the term "not apparent" as used in § 35-15-24(a)(3). In that case, an 11-year old girl accompanied by five girlfriends and an adult chaperone entered a municipal park in the late afternoon. 707 So.2d at 628. The minor plaintiff testified that when she entered the park there was still some daylight and that she saw and easily stepped over a

cable at the entrance to the park. Id. After watching some baseball games, the group decided to leave sometime around 8:30 to 9:00 p.m. *Id*. When the girls reached the park entrance they began to run toward the chaperone's car, which was parked on the other side of the cable. Id. As the group of girls approached the cable, the chaperone called out to remind the girls of the cable. Several girls successfully jumped over the cable, but the minor plaintiff and one of her friends hit the cable and fell. Id. The minor plaintiff suffered a broken leg as a result of her fall. Id. The minor plaintiff testified that while she did hear the chaperone's warning, she heard it only when she was right at the cable. Id. The minor plaintiff in *Ex Parte City of Geneva* claimed that she could not see the cable due to the darkness. The minor plaintiff stated that upon hearing the warning she did see the cable and tried to jump over it, "but she said that because of the darkness she had not seen the cable in time to stop or jump all the way over it." Id.

Based upon the foregoing facts, the supreme court in *Ex Parte City of Geneva* held that "the plaintiff failed to present substantial evi-

dence that the condition that caused her injury was 'not apparent' within the meaning of § 35-15-24(a)(3) *Ala. Code* 1975." 707 So.2d at 631. This court stated that the plaintiff in that case "did not present substantial evidence indicating that the cable [the minor plaintiff] fell over was a condition that a person could not avoid by the use of reasonable care and skill." *Id.* at 630.

As noted above, an argument is sometimes made that the enactment of the exception contained in § 35-15-24 to the protections of the Recreational Use Statutes operated to repeal the requirement of proof of



...in the absence of facts which would indicate malicious or willful behavior, a property owner could have no liability for injury to users of noncommercial recreational property. willful and malicious conduct contained in Chapter 1. There is a split of authority in the federal courts in Alabama on this issue. As noted above, in Clark v. Tennessee Valley Authority, 606 F. Supp. 130 (N.D. Ala. 1985), and Grice v. City of Dothan, 670 F. Supp. 318 (M.D. Ala. 1987), United States District Courts in the Northern and Middle Districts of Alabama have held the enactment of the exception to the limitation of liability provided in § 35-15-24 in Chapter 2 was not intended by the legislature to repeal §§ 35-15-1 through 5 of Chapter 1, and that in the absence of facts which would indicate malicious or willful behavior, a property owner could have no liability for injury to users of non-commercial recreational property.

The contrary authority in support of the contention that the "willful and malicious" requirement of § 35-15-3 is inapplicable to the exception contained in § 35-15-24(a), is *George v. United States*, 735 F. Supp. 1524 (M.D. Ala. 1990). In *George*, the Court rejected the argument that the "willful and malicious" standard of Chapter 1 remained applicable following the enactment of § 35-15-24. 735 F. Supp. at 1535. The Court stated:

"Despite language in Articles 1 and 2 that provides a land owner owes no duty to those using his land for noncommercial recreational purposes, the plain language of § 35-15-24 states that existing liability is not limited when the elements of this section are met. Accordingly, this Court finds that § 35-15-24 does not require a willful and malicious act on the part of the land owner in order for liability to attach." *Id*. The Court stated that it was of the belief "that the Legislature did not intend to further restrict the plain meaning of § 35-15-24 by imposing the willful or malicious standard upon this section." *Id*.

A good argument exists, however, that George is an outlier and was incorrectly decided. This is so for several reasons. First, no case other than George has reached this conclusion. Second, the Court in George specifically recognized the existence of a new duty created by § 35-15-24. The Court stated: "Defendant argues that, by enforcing § 35-15-24 as written, this Court is creating a duty of the land owner which otherwise would not exist. This Court cannot agree. The Alabama legislature created that duty by the passage of § 35-15-24, not this Court." 735 F. Supp. at 1535. However, Ala. Code § 35-15-24(c) expressly prohibits § 35-15-24 from having the field of operation found by the Court in George. Section 35-15-24(c) provides that: "Nothing in this Article shall be construed to create or expand any duty or ground of liability or cause of action for injury to persons on property." (emphasis added). Nevertheless, the Court in George appears to have completely ignored this limiting language of § 35-15-24(c) and held that the legislature did in fact create a new duty by its enactment of \S 35-15-24(a).

The third reason that *George* seems to be incorrectly decided is that if the George court's reading of § 35-15-24 is correct, that Code section would completely cancel and annul the protections of § 35-15-3. This result would be completely at odds with the rule that Articles 1 and 2 of the Recreational Use Statutes are to be read "complimentary [sic] to each other," Grice, 670 F.Supp. at 321, as well as the rule recognized by the Supreme Court in Ex Parte City of Geneva and Poole that Article 2 of the Recreational Use Statutes "provide [recreational] landowners with even greater protections than § 35-15-1 through -5." In addition, the Alabama Supreme Court has observed that the provisions of Article 2 do not impair the protections of Article 1. See Kennedy v.Graham, 516 So. 2d 572, 575 (Ala. 1987) ("We see no reason why Article 2 should limit the application of Article 1").

The protections of the Alabama Recreational Use Statutes have been held to apply even though the injured person was not engaged in recreational activities at the time of his injury, as long as the injured person was on the premises for the purpose of recreation. This issue was considered in *Cooke v. City of Guntersville*, 583 So. 2d 1340 (Ala. 1991) in the following context: If a person is on noncommercial public recreational land for recreational purposes, but then enters another part of that land for ostensibly nonrecreational purposes, is the property owner liable for any injury that results? In Cooke, a child was skateboarding outside of a city neighborhood center, but he injured himself inside the neighborhood center when he entered to get a drink of water. Id. at 1341-42. The plaintiff first argued that the child's skateboarding was not defined as a "recreational purpose" or "recreational use" of the facility under Ala. Code § 35-15-21(3). That Code provision defines "recreational purposes of recreational use" as "Participation in or viewing activities including, but not limited to, hunting, fishing, water sports, aerial sports, hiking, camping, picnicking, winter sports, animal or vehicular riding, or visiting, viewing or enjoying historical, archeological, scenic or scientific sites, and any related activity." The Court in Cooke rejected the plaintiff's limited reading of the statute, finding that the list of activities in § 35-15-21(3) was "clearly not exhaustive." Id. at 1342. Further, the Court disregarded the plaintiff's argument that the child's presence in the neighborhood center for a glass of water was nonrecreational, noting that it was undisputed that the child was on the grounds of the neighborhood center to ride his skateboard. Id. On this basis, the court affirmed the trial court's grant of summary judgment in the city's favor. Id.

Ex Parte City of Guntersville

The most recent pronouncement from the supreme court regarding the Recreational Use Statutes is Ex parte City of Guntersville, So.3d, 2017 WL 2303161 (Ala. May 26, 2017). This case is significant for several reasons. The first important aspect of the decision is that the supreme court recognized for the first time that a denial of a motion for summary judgment asserted under the Recreational Use Statutes is interlocutorily reviewable as a matter of right by petition for writ of mandamus. Previously, the supreme court had recognized that immunities such as peace officer immunity and state-agent or, as it is frequently referred to, Cranman immunity, can be reviewed as a matter of right on a petition for writ of mandamus in the event of an unsuccessful motion for summary judgment. See, e.g., Ex Parte Harris, 216 So. 2d 1201, 1206 (Ala. 2005) (peace officer immunity under § 6-5-338

reviewable on petition for mandamus); *Ex parte Rizk*, 791 So.2d 911, 912 (Ala. 2000) (state-agent immunity reviewable by mandamus). However, prior to *Ex parte City of Guntersville*, no case had ever characterized the protections of the Recreational Use Statutes as an immunity entitling a party who was unsuccessful on a motion for summary judgment to immediate interlocutory review. In recognizing the right of immediate review by mandamus from an order denying summary judgment under the Recreational Use Statutes, the supreme court in *Ex parte City of Guntersville* stated:

While the general rule is that the denial of a motion for summary judgment is not reviewable, the exception is that the denial of a motion for summary judgment grounded on a claim of immunity is reviewable by petition for writ of mandamus . . .

This Court has stated that the recreational-use statutes provide immunity to qualifying land owners.

2017 WL 2303161 at * 2-3 (emphasis in original).

The second significant aspect of *Ex parte City of Guntersville* was the holding by the supreme court that actual knowledge by the landowner of the existence of the physical condition claimed to constitute a hidden danger under § 35-15-24, is insufficient to impose liability without proof of actual knowledge that the claimed defect actually posed a dangerous condition. Ex parte City of Guntersville involved a claim by a city park visitor who suffered injuries offer she tripped over a diagonal crossbar supporting a vertical pole which delineated the boundaries between a parking lot and the grassy area of a lakeside city park. At the edge of the parking lot were a number of vertical poles with holes at the top through which steel cabling had been previously run. Some of the poles were supported by diagonal crossbars. See 2017 WL 2303161 at * 1.

The plaintiff was injured when she was returning to her vehicle in the nighttime from the grassy area of the park where she had viewed the city's annual fireworks show. The plaintiff presented expert testimony claiming that the lighting in the park and the route of travel taken by the plaintiff was "unreasonably dangerous at the time of [the plaintiff's] fall." See 2017 WL 2303161 at * 2. The plaintiff's expert also testified that because the diagonal crossbar was painted a dark color, it was virtually invisible in the darkness. The city's parks and recreation maintenance supervisor testified that the poles and diagonal crossbars had been installed in the park for more than 19 years prior to the incident. He further testified that there had never been a complaint that the crossbars constituted a trip hazard and that nobody had ever claimed to have tripped over a pole either in the day or nighttime hours. *Id*.

The city moved for summary judgment based upon the Recreational Use Statutes. The city argued that because the testimony of the city's parks and recreation maintenance supervisor was undisputed that there had never been a complaint that the diagonal poles constituted a trip hazard nor had anyone ever fallen over them, the city had no "actual knowledge" as was required by § 35-15-24(a)(2) and (3) that a "condition . . . exist[ed] which involve[d] an unreasonable risk of death of serious bodily harm" and that "the condition, use, structure or activity is not apparent to [a] person or persons using the outdoor recreational land." See 2017 WL 2303161 at * 4.

In response, the plaintiff's counsel contended that since the crossbar was readily apparent in the parking lot, and that the plaintiff's expert had given testimony that the lighting was inadequate resulting in the crossbar being "practically invisible" in the nighttime hours, the requirements of § 35-15-24 were satisfied. The city countered by contending that the plaintiff's argument was, in effect, that the city should have known prior to the plaintiff's fall that the crossbar constituted an "unreasonable risk of death of serious bodily harm" in the darkness. See 2017 WL 2303161 at * 4. The city contended that this contention was insufficient to impose liability on the city because it was, in essence, an argument that the city had constructive knowledge of the alleged dangerous condition. The city contended that under § 35-15-24(b) any such contention was insufficient to establish liability on the part of the city. Section 35-15-24(b) provides: "The test set forth in subsection (a) of this section shall exclude constructive knowledge by the owner as a basis for liability and does not create a duty to inspect the outdoor recreational land." (emphasis added). Id.

The supreme court agreed with the city. The court

stated that: "[T]he City does not deny that it had actual knowledge of the existence of the diagonal crossbar over which [the plaintiff] allegedly tripped. Instead the City argues that [the plaintiff] failed to present substantial evidence that the City had actual knowledge that the diagonal crossbar presented a 'condition, use, structure or activity . . . which involves an unreasonable risk of death of serious bodily harm." 2017 WL 2303161 at * 4. The supreme court noted but dismissed the plaintiff's expert's opinion that "the light in question and the route of ingress/egress (including the pole and [diagonal crossbar]) were unreasonably dangerous." Id. at *2. The supreme court further noted that while "such evidence may be relevant to a showing that the City had constructive knowledge of 'a use, condition, structure or activity . . . which involves an unreasonable risk of death or serious bodily harm' § 35-15-24(b) specifically states that '[t]he test set forth in subsection (a) of this section shall exclude constructive knowledge by the owner as a basis of liability" *Id*. at *5. (emphasis in original). The court stated that nothing in the plaintiff's expert's "testimony rebuts [the maintenance supervisor's] testimony indicating that the City did not have actual knowledge that the

diagonal crossbar presented a 'condition, use, structure or activity . . . which involves an unreasonable risk of death or serious bodily harm." *Id*. The court stated that, accordingly, it "conclude[d] that [the plaintiff] has failed to present substantial evidence in support of § 35-15-24(a)(2) and, thus, has not demonstrated that she is entitled to maintain her action against the City." *Id*.



First, as previously discussed, the fact that an entrance fee is charged at public recreational land will not remove the land from the protections of the **Recreational Use** Statutes unless the plaintiff can produce evidence showing that the operation of the activity on the land was intended to make a profit.

Conclusion

From the cases discussed above, several guidelines regarding the applicability of the Recreational Use Statutes can be gleaned. First, as previously discussed, the fact that an entrance fee is charged at public recreational land will not remove the land from the protections of the Recreational Use Statutes unless the plaintiff can produce evidence showing that the operation of the activity on the land was intended to make a profit. See Ala. Code § 35-15-21(5); See Owens, 369 So.2d at 711-12. Second, the scope of protection provided by the Recreational Use Statutes is broad, providing immunity even when a person is injured when performing non-recreational routine activities, i.e., getting a drink of water or going to the bathroom, as long as that person was present on the property for recreational purposes. See Cooke, 583 So. 2d at 1342. Third, if the plaintiff is unable to produce any evidence that the municipality or other public body has actual knowledge that a claimed defect constituted an unreasonable risk of death or serious bodily injury, the property owner will likely be entitled to summary judgment even if the property owner had actual knowledge of the physical existence of the defect. See Ex Parte City of Guntersville, 2017 WL 2303161 at *5.

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The United States Supreme Court's Watershed Ruling in *Endrew F. v. Douglas County School District* and the Effect on Your Client's Special Education Programming

By Shane T. Sears and James D. Sears

The IDEA

In passing the Education of Handicapped Children Act of 1975 (now known as the *Individuals with Disabilities Education Act* or IDEA) in 1975, the United States Congress found that:

[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.¹

The primary purposes of the Individuals with Disabilities Education Act were to ensure that children with disabilities received appropriate educational services, in their least restrictive educational environment, and in a public-school program that has adequate financial support.²

Abrogation of State Sovereign Immunity

The 11th Amendment to the United States Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The United States Supreme Court in *Kimel v. Florida Bd. of Regents*³ interpreted the 11th Amendment to the United States Constitution to prohibit lawsuits against a state by its own citizens.

In furthering the purpose of the IDEA, Congress appropriated funds to support special education programming and related activities.⁴ As a stipulation to the receipt of these funds the receiving states and local education agencies had to conform to the requirements of, inter alia, the abrogation clause of the IDEA. This clause states, "[a] State shall not be immune under the 11th amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter."⁵ In effect, if a state accepts the federal government's money, the respective state is waiving its right to sovereign immunity and, therefore, consents to be sued for a violation of the IDEA.

State of Alabama

The IDEA provides federal assistance to states that provide a Free Appropriate Public Education (FAPE) to children who have disabilities by offering each eligible student special education and related services an individualized education plan ("IEP").⁶ By accepting federal funding under the IDEA, each state is required to maintain procedures in accordance with the IDEA.⁷ Alabama codified its procedures for compliance with the IDEA in the *Alabama Administrative Code* at section 290-8-9-.00.

State of Alabama local education agencies ("LEAs" or public school systems) are required to locate, evaluate and identify children, from birth to 21 years of age, who are in need of special education services (a process under the IDEA known as "Child Find").8 Child Find also applies to children with disabilities who are home-schooled, attend private schools, including children attending religious schools, migrant children, homeless children and children who are wards of the state.⁹ The duty of finding these children who need services is imposed upon the LEA and not upon the parents to come forward with their concerns.10

When one thinks of children with "special needs," many of those "special needs" or "disabilities" are addressed under the IDEA. In conforming to federal law, Alabama recognizes 13 disability classifications: autism, deaf/blindness, developmental delay, emotional disturbance, hearing impairment,

intellectual disability, multiple disability, orthopedically impaired, other health impairment, specific learning disability, speech language impairment, traumatic brain injury and visual impairment.¹¹ However, other disabilities that are not specifically identified are included within the listed eligibility categories, most often under the classification of "other health impairment." The following disabilities are also addressed under other health impairment: attention deficit/hyperactivity disorder, epilepsy, asthma, Tourette syndrome, diabetes, sickle cell anemia and tuberculosis.

After a child has been identified as eligible as a student with a disability, the LEA must provide the child with a disability a free, appropriate public education ("FAPE").

FAPE

The IDEA represented "an ambitious federal effort to promote the education of handicapped children and was passed in response to Congress' perception that a majority of handicapped children in the United States were either totally excluded from schools or were sitting idly in regular classrooms awaiting the time when they were old enough to 'drop-out.'"¹² The IDEA was enacted by Congress in 1975 to ensure that children with disabilities receive a FAPE.¹³ FAPE has been defined in the law to be an educational program, including special education and related services, that has been provided to the child with a disability (a) at public expense, (b) under public supervision and direction and, (c) without charge.¹⁴

Individual Education Program (IEP)

The most critical element of the child's educational program is the IEP. If the child is eligible for special education services, an IEP must be developed by the school district.¹⁵ An IEP is a written individualized education program that specifies the needs of the child including present levels of educational performance, annual measurable educational goals, behavioral goals, special education services and related services like physical therapy, occupational therapy and speech, so that he or she can advance both socially and academically in the school environment.16

The statement of annual measurable goals includes academic and functional goals that are designed to meet the child's needs and to make progress in the general education curriculum.¹⁷ Further, the annual goals must meet each of the child's "other educational needs" arising from the child's disability.¹⁸ An IEP provides the IEP team a roadmap of educational action to be taken on behalf of the child with a disability and, further, provides a means of objective accountability. Progress reports provided to the child's parents during the school year demonstrate whether the child is making progress toward the annual goals created by the IEP team.

The IDEA encourages the child's parents to be active participants of the IEP team.¹⁹ The IDEA further requires that the IEP team includes (a) one general education teacher, (b) one special education teacher, (c) an individual who is capable of interpreting test results and (d) one representative of the local education agency who is qualified and knowledgeable about the availability of resources of the LEA.²⁰

Violations of FAPE

Regrettably, not all children with disabilities receive an educational program that complies with the IDEA. The LEA may be considered to be in violation of the IDEA if it fails to (a) locate an eligible child with a disability, (b) evaluate the child, (c) identify the child as being eligible for special education and related service and/or (d) provide the eligible child a free, appropriate public education. If the child's parents believe that a violation has occurred they may seek a remedy through one of three different strategies available under the IDEA: file a complaint with the Alabama State Department of Education, enter into mediation with the LEA or file a request for an impartial due process hearing.²¹

Due Process Hearing

The parents of a child with a disability initiate a request for a due process hearing by filing their request with the superintendent of the Alabama State Department of Education.²² He will, in turn, appoint an administrative law judge/hearing officer (ALJ) to conduct the due process hearing.²³ Should the parties to the due process hearing not resolve the issues related to the request for due process hearing, the ALJ will conduct a hearing, where the ALJ will receive evidence and hear testimony related to the issues of the request.²⁴ At the completion of the hearing, the ALJ will render a decision "on substantive grounds based on a determination of whether the child received a free appropriate public education."²⁵

If either party disagrees with the outcome of the due process hearing, that party may appeal the decision by filing a lawsuit in state court or in the United States District Court.²⁶ A party to a due process hearing may appeal an unfavorable decision to the 11th Circuit Court of Appeals, and to the United States Supreme Court.

One such case, *Endrew F. v. Douglas County School District*,²⁷ was recently decided by the United States Supreme Court. The *Endrew F.* decision, a unanimous decision authored by Chief Justice Roberts, focused on the notion of what constitutes an "appropriate" IEP under the IDEA. The predecessor to *Endrew F.* was *Hendrick Hudson Board of Education v. Rowley*.²⁸ The *Rowley* case also focused on what constitutes an "appropriate" IEP under the IDEA.

The *Rowley* Decision

Aside from issues of identification, most all other litigation revolves around the appropriateness of the child's IEP. The IDEA does not define the term "appropriate education."²⁹ "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children."³⁰ The IDEA does define that a FAPE consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services that are necessary to permit the child "to benefit" from the instruction.³¹ *Hendrick Hudson Board of Education v. Rowley*³² was a landmark 1982 United States Supreme Court case that laid the groundwork for establishing standards for measuring the success of special education programs, especially the appropriateness of IEPs.

The facts of Rowley involved a child who was hearing impaired with minimal residual hearing.³³ The basic issue of the case revolved around whether or not the child with a hearing impairment should have an interpreter available to her in all of her academic classes.³⁴ The facts of the *Rowlev* case further revealed that the child was fully integrated into her general education classes and was making more than satisfactory progress.³⁵ The parents sought to have the type of educational opportunity for their daughter that would allow her to reach her maximum potential.³⁶ A divided Court disagreed with the parents and opined that the Act "... did not intend to achieve strict equality of opportunity or services for handicapped and non-handicapped children, but rather sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education."37

The benefits attainable by children at one end of the spectrum will differ dramatically from those attainable at the other end.³⁸ *Row-ley* required a two-part test: First, has the state complied with the procedure set forth in the Act? Second, is the IEP calculated to

enable the child to receive educational benefits? ³⁹

Notwithstanding, the *Rowley* court did not define the term "educational benefits." However, it concluded that the evidence firmly established the child was receiving an "adequate education" because she was performing better than the average child in her class and was advancing from grade to grade.⁴⁰

Courts' Interpretation of "Educational Benefits"

The 11th Circuit Court of Appeals pre-*Endrew F*. had interpreted *Rowley's* "educational benefits" language to provide a "basic floor of opportunity."⁴¹ "The IDEA does not require the educational services offered maximize the child's potential." ⁴²

Rather, the services offered only have to confer "some benefit."⁴³ "If the educational benefits are adequate based on surrounding and supporting facts, the IDEA requirements have been satisfied."⁴⁴ "Adequacy is determined on a case-by-case basis in light of the child's individualized needs."⁴⁵ The Tenth Circuit and other Courts had interpreted the standard as one providing "merely more than *de minimis* level of services."⁴⁶

Nevertheless, Alabama district courts have continued to analyze the child's unique needs to determine whether a FAPE was being provided.⁴⁷ In *Bowens*, the court concluded that an independent clinic's recommendations (which were accepted by the school district) placed an obligation on the LEA to provide a FAPE consistent with those recommendations.⁴⁸ The clinic recommended full-time placement while the LEA only offered placement two to three times per week.⁴⁹ The court concluded that the LEA's recommendation fell significantly short of satisfying the child's "unique needs."⁵⁰

In DeKalb v. Manifold, involving almost identical facts to Row*ley*, the administrative law judge concluded that the LEA did not adequately consider the testimony and reports of two outside experts who offered opinions that the child needed speech-to-text technology for her educational needs.⁵¹ Moreover, the LEA's choice of technology, an FM system, was not reliable enough and there was not sufficient evidence presented to show it was used across the entire spectrum of the child's classes.⁵² "The court finds it especially persuasive that both outside

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experts brought to observe A.M. at school were in agreement that A.M. and D.M.'s belief that an IEP without CART or another speech-to-text method was not providing her sufficient access to lectures, discussions, and classroom materials. The Board has not pointed to any other facts to contradict those experts and show that the IEPs it provided were sufficient for A.M.'s needs."⁵³

In Lolita v. Jefferson County Board of Education, the administrative law judge concluded that the LEA had provided an IEP with an adequate statement of the child's present level of academic achievement and functional performance, articulated measurable goals, and were reasonably calculated to provide educational benefit in the least restrictive environment.⁵⁴ The child made meager, but not de minimis progress, and the meagerness of the progress may have been attributed more to his cognitive level, his lack of effort, his failure to complete homework assignments, his refusal to re-take tests he had failed and his tendency to skip classes than to an inadequate IEP or the absence of appropriate special education services.55

The *Lolita* court concluded that a portion of his meager progress was attributable to the inappropriate IEPs to the extent that they were not tailored to meet his unique needs. ⁵⁶ Moreover, the child did not receive personalized transition services, but instead received vocational and career based training along with the rest of his class. ⁵⁷ Therefore, he did not receive adequate transition services. ⁵⁸ The court reversed part of the administrative law judge's decision and affirmed part.⁵⁹

Endrew F.'s Interpretation of "Educational Benefits"

The United States Supreme Court's ruling in Endrew F. did not expressly overrule its decision in Rowley. In fact, the Court specifically distinguished the facts in the Endrew ruling from the facts in Rowley. Highlighting the difference in facts, the Court opined that the Rowley Court, "...carefully charted a middle path."60 It had confined its analysis only to the facts before it and no further.⁶¹ Therefore, the Court had "declined to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."62

In Endrew F., the parents had become dissatisfied with the progress of their autistic child.63 He had some strengths, but also many behaviors which impeded his ability to access learning in the classroom environment.64 The child's parents contended that his IEP largely carried over the same basic goals from one year to the next, indicating he was failing to make meaningful progress.65 Consequently, they removed him from public school and placed him in a private program where he began making significant behavior and academic progress which had evaded him in public school.66

Subsequently, the school district presented the parents with another IEP which was similar to prior IEPs before he departed to the private program even though the success in that program indicated a different approach was more successful.⁶⁷ A due process complaint was filed against the school district asserting that the final IEP was not calculated to enable Endrew to receive educational benefits.⁶⁸ The administrative law judge disagreed and denied relief.⁶⁹ The parents sought review in the United States District Court.⁷⁰

The United States District Court affirmed, noting that although Endrew's performance under past IEPs "did not reveal immense educational growth," the annual modifications to his IEP revealed that he was making at least minimal progress as *Rowley* demanded.⁷¹ The Tenth Circuit affirmed, citing the *Rowley* standard that *Endrew* had been provided "some educational benefit."⁷²

The Endrew F. Court concluded that a much different fact pattern existed in Rowley because the child in Rowley was performing better than her peers in her class.⁷³ The Court was not concerned with "precisely articulating a governing standard for closer cases."74 Here, the Court noted the incongruent thinking that the IDEA aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than de minimis progress for those who cannot.75 "When all is said and done, a student offered an educational program providing 'merely more than de minimis' progress from year to year can hardly be said to have been offered an education at all."76

Consequently, the educational program must be "appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have a chance to meet challenging objectives." ⁷⁷ Under this new standard, school representatives should be able to offer a "cogent and responsive explanation" for their decisions which shows that the IEP is reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances.⁷⁸

The Effect on Your Client's IEP

The *Endrew F*. Court's ruling appears subtle but its effect is dramatic. Although a child with special needs is not entitled to the "Cadillac of IEPs," the prior standard was allowing the school district to provide only the "Ford Pinto." The recent United States Supreme Court ruling in *Endrew* has now raised the bar to require an IEP resembling more of a "Chevrolet Impala."⁷⁹

For the legal practitioner, the analysis should now include: first, whether his or her client's IEP is individualized for his or her unique needs and, second, is it "appropriately ambitious" or only providing de minimis progress? The *Endrew* standard is markedly more demanding; thus, a more stringent analysis must be applied. If your client's IEP only allows him or her to make de minimis progress, then filing a due process complaint (or the lesser utilized mediation process) may be your best way to obtain an appropriate IEP for your client to provide a FAPE which is mandated by the IDEA.

Endnotes

- 1. 20 U.S.C. § 1400(c)(1).
- 2. 20 U.S.C. § 1400(c)(2-3).
- 3. 528 U.S. 62 (2000).
- 4. 20 U.S.C. § 1411, generally.
- 5. 20 U.S.C. § 1403(a).

6.	20 U.S.C. § 1415(a).
7.	20 U.S.C. § 1415(a)&(b).
8.	20 U.S.C. §1412(a)(3)(A).
9.	ld.
10.	Jamie S v. Milwaukee Public Schools, 519 F.Supp.2d
	870,880 (E.D. Wis. 2007).
11.	Alabama Admin Code §290-8-9.03(1)-(13).
12.	Hendrick Hudson Board of Education v. Rowley, 458 U.S.
4.2	176, 179 (1982).
	20 U.S.C. § 1412(a)(1)(A).
	20 U.S.C. § 1401(9)(A).
	20 U.S.C. § 1412(a)(4).
	20 U.S.C. § 1414(d).
17.	20 U.S.C. § 1414(d)(d)(1)(A)(i)(II)(aa).
18.	20 U.S.C. § 1414(d)(d)(1)(A)(i)(II)(bb).
19.	20 U.S.C. § 1414(d)(1)(B).
20.	20 U.S.C. § 1414(d)(1)(B)(ii)-(iv).
21.	See generally, 20 U.S.C. § 1415.
22.	Alabama Administrative Code § 290-8-9.08(9)(a)1.
23.	20 U.S.C. § 1415 (f)(3)(A); See also, Ala. Admin. Code § 290-8-9.08(9)(c)4.
24.	Ala. Admin. Code § 290-8-9.08(9)(c)12.(i)(XVII).
25.	20 U.S.C. § 1415(f)(3)(E).
26.	20 U.S.C. § 1415(i)(2)(A).
27.	580 U.S (2017).
28.	Rowley, 458 U.S. 179.
29.	<i>ld.</i> at 187.
30.	<i>ld</i> . at 189.
31.	<i>ld</i> . at 188-189.
32.	<i>ld.</i> at 179.
33.	<i>ld</i> . at 184.
34	ld

- 34. *Id*.
- 35. *Id*. at 185.
- 36. *Id*. at 186.
- 37. *Id.* at 177.
- 38. *Id*. at 202.
- 39. *Id*. at 206-207.
- 40. *Id*. at 209-210.
- 41. Phyllene W. v. Huntsville City School Board, 630 Fed.Appx.917, 920 (11th Cir. 2015).
- 42. *Id*. at 919.
- 43. *Id*. at 920.
- 44. *Id*.
- 45. *Id*.
- 46. Endrew F. v. Douglas County School District, 580 U.S. ______, 8 (2017).
- 47. Blount County Board of Education v. Bowens, 929 F.Supp.2d 1199, 1207 (N.D. Ala. 2013).
- 48. Id. at 1208.
- 49. *Id*.
- 50. *Id*.
- DeKalb County Board of Education v. Manifold, 4:13-CV-901-VEH, 6 (Ala. N.D. June 16, 2015).

54. Lolita v. Jefferson County Board of Education, 977 F.Supp.2d 1091, 1107 (N.D. Ala. 2013).

55.	<i>Id</i> . at 1107.
56.	<i>Id</i> . at 1119.
57.	<i>Id.</i> at 1122.
58.	ld.
59.	<i>Id</i> . at 1129.
60.	Endrew F. v. Douglas County School District, 580 U.S. at 5.
61.	<i>Id</i> . at 6.
62.	ld.
63.	<i>Id</i> . at 6.
64. <i>la</i>	l.
65.	<i>Id</i> . at 7.
66.	ld.
67.	ld.
68.	<i>Id</i> . at 7-8.
69.	<i>Id</i> . at 8.
70.	ld.
71.	ld.
72.	ld.
73.	<i>Id</i> . at 10.
74.	<i>Id</i> . at 10.
75.	<i>Id.</i> at 14.
76.	ld.
77.	ld.
78.	Id.

79. The analogy being drawn is that the *Endrew* standard is still not for the child to be given the "luxury car" (Cadillac) of IEPs and not the worst (Pinto) either, but somewhere in between, i.e., the Impala.

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^{52.} Id.

^{53.} *Id*. at 7.



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Administrative Law Judge Hearings in Child Abuse and Neglect Cases

By W. Gregory Ward and William F. Prendergast

So, your client is under investigation

by the Department of Human Resources (DHR or the department for short) for the abuse or neglect of a child, and she works in or volunteers at some facility that is involved with children. She could be a teacher, a volunteer or a highlypaid coach. Or, she may come in to tell you that she has an upcoming hearing before an administrative law judge and she wants you to represent her. She has been told that if she loses, her name will be placed on a central registry, and that could have a serious impact on not only her current job, but on her future job prospects. She is panicked, and you've never dealt with such. What to do?

For many lawyers, this is the first time they have been presented with a situation like this. Many have never represented a client with this very specific set of problems, and most have never attended a hearing where the administrative law judge is required to apply such an issuespecific set of rules.

With this being a legal problem, you know that there are traps for the unwary, and can see troubled shoals ahead. So, what do you do?

You immediately recognize that there is more involved and more at risk than may appear at first blush. You also recognize that the laws involved in her situation are scattered between the Alabama Code and the Alabama Administrative *Code*, and you know that it is likely that there are some appellate decisions of which you should be aware. Figuring out where to look and what laws apply can be daunting. And, if things progress to the need for a hearing before an administrative law judge, there is a whole other set of rules that applyeven evidentiary rules-and having to learn all of that can overwhelm even seasoned litigators.

Focus of this Article

The two authors of this article are the two administrative law judges employed by the State of Alabama Department of Human Resources, who, between them, hear all of the requests that a hearing officer review an indicated finding. They have heard hundreds of such cases, and, over time, have noticed how difficult it is for lawyers who have never handled one of these cases to have a grasp of the specialized process and the special rules required by that process, and, more importantly, the rights their client has.

While we will discuss the legal architecture of these matters—how these cases get to the department, what the department does when a case comes in, what notice your client is entitled to and things like that—the focus of this article is the law around the administrative hearing itself and, yes, the thorny thicket of laws that apply to those hearings.

Mandatory Reporting

These cases usually begin with a report to the local office of the Alabama Department of Human Resources.

When are those reports made? When a child is "known or suspected of being abused or neglected" and that known or suspected abuse is found by a hospital, clinic, sanitarium, doctor, physician, surgeon, medical examiner, coroner, dentist, optometrist, chiropractor, podiatrist, nurse, school teacher, school official, peace officer, law enforcement official, pharmacist, social worker, daycare worker or employee, mental health care professional, member of the clergy "or any other person called upon to render aid or medical assistance to any child", any of those people or institutions "shall be required" to make a report.¹ *Shall* is a strong verb. It means that the person or entity had no choice—they have to act. And anyone else *can* make a report.²

So these cases begin with a report that could have come in from any number of places.

As you think like a lawyer and jump way ahead in the game, what about the doctrine of privileged communication? A physician is a mandatory reporter, and surely when a physician suspects abuse, or when a parent tells a doctor that they suspect their child has been abused, that gives rise to a privileged communication that the doctor may be precluded from disclosing. And, you continue to reason, surely other privileges apply.

Under the statutes, it doesn't quite work that way. The doctrine of privileged communication has been statutorily limited to two areas—the attorney-client privilege³ and clergy privilege⁴—and "any other privilege shall not be a ground for excluding any evidence regarding a child's injuries or the cause thereof."⁵

What Has to Be Reported?

Basically, a report has to be made of any known or suspected incident of child abuse or neglect⁶. The term *child* is defined as anyone under the age of 18,⁷ and the department only investigates the allegation on that child if the person alleged to have committed the abuse or neglect is himself or herself 14 years of age or older.⁸ Though the department does not accept child abuse and neglect reports (called CA/N reports) on unborn children, it does accept reports on newborn children who test positive for fetal alcohol syndrome or who undergo drug withdrawal at birth.⁹

Since the report is often mandatory, and since it is required even if the abuse or neglect is only suspected, it is no great leap to imagine that when someone sees something suspicious, and that person has their livelihood and maybe even criminal charges on the line, they are going to pull the trigger and make a report to DHR even when what they have seen appears marginal.

The legislature has supplied us with handy (though broad) definitions of the most important terms. Abuse is defined as "harm or threatened harm to a child's health or welfare."¹⁰ Neglect is defined as "negligent treatment or maltreatment of a child."¹¹ While one would think that whether something is abuse or neglect would be easy to determine, the waters surrounding those terms can be surprisingly murky. And around the margins of those murky waters lie room for interpretation–and the need for hearings.

Civil and Criminal Liability of Reporters

To ensure that reports of abuse or neglect are made– remember the use of the term *shall*¹²–the legislature has provided both a carrot and a stick.

The carrot is that when someone makes a report, they are given a cloak of protection. By statute, when a report is made "in good faith," that person is immune from either civil or criminal liability.¹³

The stick is that any person who knowingly fails to make a required report can be found guilty of a misdemeanor and punished by up to six months in jail and ordered to pay a fine of up to \$500.¹⁴

So reports come in.
Who Investigates?

When the report comes in, things start happening. If the report is of inappropriate "disciplinary or corporal punishment" in a public or private school or state-operated child residential facility, the allegations are to be investigated by law enforcement authorities and the operating state agency.¹⁵ The results of those investigations are turned over to the department.¹⁶

All other reports are to be investigated by the department.¹⁷

However, experience teaches that most of these investigations are done as a cooperative effort between law enforcement and the department. And our courts have noted that those efforts are often combined:

In order to protect children whose health and welfare may be adversely affected through abuse and neglect, the legislature hereby provides for the reporting of such cases to the appropriate authorities. It is the intent of the legislature that, as a result of such efforts, and through the cooperation of state, county, local agencies and divisions of government, protective services shall be made available in an effort to prevent further abuses and neglect, to safeguard and enforce the general welfare of such children and to encourage cooperation among the states in dealing with the problems of child abuse.¹⁸

The department's authority to investigate is strong, and the net that it casts is wide. The Avcock court went on to hold that the child abuse statutes were enacted to give a specific grant of authority to the department (among others, to investigate allegations of child abuse and neglect under § 26-14-7), that the specific grant to the department controls the general statutory grant to a school board (to control activities occurring at schools and involving school children under §§ 16-8-8 and 16-11-9), and concluded that the department cannot only enter school grounds when the school board has a policy forbidding such, but the department can interview children suspected of abuse or neglect without a representative of the school even being present.¹⁹ The court held "we find that the statute directs DHR to conduct a thorough investigation, and implicit within the mandate is the authority of DHR to determine what is thorough."20

Other Laws

The Alabama Legislature gave a broad grant to the Department of Human Resources to enable it to "establish

such regulations as may be necessary to implement this chapter."²¹ The department's *Administrative Code* § 660-5-34.01 through 34.14 sets out in detail the department's regulations regarding protective services for children, including its investigative protocols and due process rights²² for individuals under investigation by the department.

While we are going to look at some, it would be a good idea to become familiar with all of them.

When Your Client Comes Under Investigation

Reports can be found to be *indicated* (meaning that the department decides that in its judgment your client "is responsible for child abuse or neglect"²³); they can be found to be *not indicated* (the department decides that in its judgment it can't "substantiate that an alleged perpetrator is responsible for child abuse or neglect"²⁴); or they can be found to be *unable to complete* (when the CA/N worker cannot secure sufficient information to enable them to reach a disposition²⁵).

If the report is not indicated, and if there are no further reports concerning them, in five years your client can ask that her name be expunged from the central registry.²⁶

If the report is indicated, the department places it in a central registry designated for that purpose, and that registry is kept confidential.²⁷ That report "may" be available to your client's "employer, prospective employer or others."²⁸ The department "may" notify the perpetrator's licensing or certifying agency or group.²⁹ Anyone who receives a copy of the report is required to maintain its confidentiality,³⁰ and the failure to do so is a Class A misdemeanor.³¹

These cases come to an administrative hearing after someone who works in the field of caring for children gets notice that the report made against them was found to be indicated.

Your client then has a great deal at stake.

a. Those Who Work in State-Licensed Facilities

When someone either works for or volunteers at or is even "connected with any facility, agency, or home which cares for and controls any children"³² and which holds a state license, and they come under investigation or accusation, that person has due process rights.³³ Those rights include the right to be notified that an investigation has begun³⁴ and the right to be notified of the results of the investigator's conclusions.³⁵ Your client then has 10 departmental working days from the receipt of their notification to request a hearing, the request has to be actually received at the office within those 10 days and the request has to be in writing.³⁶ Your client's employer is not to be notified of the investigator's conclusions until after the hearing.³⁷

b. Those Who Do Not Work in a State-Licensed Facility

Individuals who are not entitled to a hearing-basically, everyone else-are entitled to a record review. This is basically a review of the department's documents in the CA/N record and a review of the written response of the individual under investigation to determine if the written record supports, by a preponderance of the evidence, the department's indicated disposition.

As a practice pointer, if your client shows you a letter from the department offering her an administrative record review, make a thorough inquiry regarding any licenses she may hold, her profession, any boards she may sit on, her educational status, volunteer activities, employment history and things of that nature. Sometimes a careful review of your client's situation may unearth facts (generally unknown to the department) that entitle your client to an administrative hearing.

The Hearing

When an individual is notified that the department has concluded its investigation and that the preliminary determination is indicated, she will receive written notice of that finding and, if the department had determined that she is entitled to a hearing, she will be notified that she must request in writing a hearing within 10 departmental working days.³⁸ Failure to make such a written request is considered a waiver of her right to a hearing.³⁹ When the local county department receives that written hearing request, the department's determination letter and the hearing request are forwarded to the Office of Administrative Hearings. This begins the hearing officer's role in the process.

The administrative law judge will work with counsel for the department and counsel for the accused to find a mutually convenient time for the hearing. The hearing is held at the local DHR office where the investigation was conducted. Unlike many state agencies where the department's commissioner or board retains final decision-making authority, in these cases the hearing officer is the final decision-maker for the department.⁴⁰

At the Hearing

At the hearing, the ALJ is authorized to direct the hearing;⁴¹ take testimony;⁴² administer oaths and examine witnesses and receive evidence;⁴³ order an independent medical assessment;⁴⁴ decide on the admissibility of evidence;⁴⁵ issue subpoenas for witnesses and documents;⁴⁶ grant or deny continuances and deadlines for briefs;⁴⁷ grant, deny or limit motions to amend or to intervene;⁴⁸ reprimand or exclude witnesses when appropriate;⁴⁹ and issue discovery orders.⁵⁰ When two or more persons ask for a hearing and their issues arise from the same facts, the ALJ can combine the hearings.⁵¹

At the hearing, the alleged perpetrator has the right to:

- Be represented by counsel or self-represent.⁵²
- Present written evidence, oral testimony or witnesses.⁵³
- Have from the department a short, written statement outlining the matters the department intends to present at the hearing.⁵⁴
- Have a copy of any statement made by them to the department, but only if they ask for it in advance.⁵⁵
- Inspect exculpatory evidence,⁵⁶ and have the administrative law judge conduct an *in camera* inspection of evidence to determine whether it is exculpatory.⁵⁷
- Review all non-confidential department documents pertinent to the case, including written policies and rights.⁵⁸
- Cross-examine witnesses at the hearing.⁵⁹
- Request subpoenas, but the request must be made no later than 10 calendar days before the hearing.⁶⁰
- Review and copy all documents in the hearing officer's file.⁶¹

Special Evidentiary Rules

The administrative hearing has its own rules of evidence, including:

- The rules of evidence followed by the circuit court apply, "but strict adherence is not required."⁶²
- Hearsay evidence is admissible at the hearing officer's discretion if it is a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.⁶³
- All witnesses may testify "without prior qualification."⁶⁴
- The hearing officer is to determine the weight and credibility of all witnesses.⁶⁵

- Videotaped, deposition or recorded testimony is allowed.⁶⁶
- Leading questions may be allowed.⁶⁷
- Testimony admissible in criminal prosecutions of crimes against children under *Ala*. *Code* §§12-15-65 (g), 15-25-1 through -6 and 15-25-30 through -40, are admissible.⁶⁸
- The department bears the burden of proof by a preponderance of the evidence.⁶⁹
- The rules of discovery "as followed by the courts of this State do not apply to the hearing."⁷⁰

At the conclusion of the hearing the hearing officer has 30 days to render a final decision.⁷¹ That final decision must contain findings of fact and conclusions of law separately stated.⁷²

Any party to the contested case aggrieved by the final order may, within 15 days of the entry of that order, file an application for rehearing.⁷³ That application must specify in detail the grounds for relief and authorities in support thereof.⁷⁴ Replies can be filed within 10 days.⁷⁵ Within the 30 days from the filing of the application for rehearing, the hearing officer may set a hearing on the application for rehearing without a hearing or grant or deny the application. If the hearing officer enters no order regarding the application shall be deemed to have been denied.⁷⁶

The Effect of a Simultaneous Criminal Case

These cases often run on two tracks at once: a DHR investigation and a criminal investigation.

The DHR administrative hearings are usually stayed pending the outcome of the criminal charges. That is generally done for several reasons:

A. If there is a criminal case and your client is convicted, that bodes ill for her in an administrative hearing. After a conviction, the fact that there was a finding by a juvenile court judge or by a criminal court that child abuse or neglect has occurred shall be presumptive evidence that the report should be marked indicated.⁷⁷

The legislature did not inform us as to whether that presumption is conclusive, but if a person is found guilty beyond a reasonable doubt (a high standard), and the burden of proof in a hearing before the administrative law judge is proof by a preponderance of the evidence (a lower standard), the logic behind applying a strong presumption appears to be difficult to overcome.

When the alleged perpetrator is also facing criminal charges, she can ask that the ALJ hearing be stayed pending a resolution of the criminal charges by asserting that a civil trial would violate her privilege under the *Fifth Amendment of the United State Constitution* and *Article I*, § 6, *Ala. Const. 1901*. The United States Supreme Court and the Alabama Supreme Court have each recognized that this right applies even in an administrative hearing.⁷⁸

B. If there is a criminal case and your client is not convicted, that bodes ill for the department. After an acquittal, DHR "shall expunge any record of the information or report and any date developed from the record."⁷⁹

If the department's records have to be expunged, can the indicated report remain? Can a not-indicated report remain? Can the department move forward with a hearing, or does it have to be dismissed? What does all of this mean?

The Alabama Attorney General was asked to weigh in on this back in 2003, and the position of that office is clear. Its opinion is that a) the expungement provision of § 26-14-3 (e) applies to mandatory child abuse or neglect reports; b) however, it applies "only in cases where DHR *is notified* of a case where the indictment, information, or complaint is dismissed after jeopardy attaches or the defendant is acquitted"; and c) the expungement provision applies to both "indicated" and "not-indicated" reports.⁸⁰

The Effect of Losing the Hearing

The effect of losing a hearing can be life-changing for your client. As shown above, your client's case will be placed on a statewide central registry, which includes all information in the department's written report.⁸¹ The name of your client and information in the report may be made available to your client's employer, prospective employers or others if the department determines it is necessary for the protection of children.⁸² That information can also be made available to law enforcement and other governmental entities having a need for the information.⁸³

Chief Justice Hooper in his dissent in *Ex parte Gibert*⁸⁴ pointed out the effect of losing such a hearing.

"The effect of this administrative hearing on the Giberts is not inconsequential. Mr. Gibert's name now appears on a list of those reported to certain agencies and other listed in *Ala. Code* 1975, § 26-14-8, for child abuse. Mrs. Gibert has lost her business. These consequences for the Giberts are almost as harsh as the consequences of a criminal conviction."⁸⁵

Indeed, it can be argued that the consequences in certain circumstances may be harsher than a criminal conviction. In the case of criminal conviction, a possibility of pardon is present. There is no provision in law to erase an indicated disposition after you have exhausted all appeals.

Avenues of Appellate Review of the Hearing Officer's Decision

A. To the Circuit Court

Alabama's Administrative Procedure Act, §§ 41-22-1 through -27, governs appeals from any ALJ's decision. Any person who feels aggrieved by a final decision of an administrative law judge can seek judicial review under this chapter,⁸⁶ and the notice of appeal must be filed within 30 days.⁸⁷ The notice of appeal does not in and of itself effect a stay of the order, but one must be generally sought from the circuit court.⁸⁸

When an ALJ opinion is appealed to a circuit court, the ALJ's order is to be "taken as prima facie just and reasonable" and the circuit court "shall not substitute its judgment for that of the agency as to the weight of the evidence on question of fact...."⁸⁹

Generally, the case is due to be affirmed unless the ALJ prejudiced the substantial rights of the appellant for one of seven specific reasons.⁹⁰

Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) In violation of any pertinent agency rule;
- (4) Made upon unlawful procedure;
- (5) Affected by other error of law;
- (6) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (7) Unreasonable, arbitrary or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

B. To the Appellate Court

If we haven't had enough appeals already, anyone who is not satisfied with what the circuit court decided can appeal "to the appropriate court to which the appeal or review lies," and the appeal must be filed within 42 days.⁹¹

The *Alabama Rules of Appellate Procedure* should be consulted before any such appeal is filed.

Conclusion

With a little effort, any lawyer can develop an internal mapping system to help them navigate through one of these hearings.

Endnotes

- 1. Ala. Code § 26-14-3 (a) (1975).
- 2. 26-14-4.
- 3. § 26-14-10.
- 4. §26-14-3 (f) ("a member of the clergy shall not be required to report information gained solely in a confidential communication privileged pursuant to Rule 505 of the *Alabama Rules of Evidence*, which communication shall continue to be privileged as provided by law"). *See* C. Gamble, McElroy's Alabama Evidence § 419.01 (4th ed. 1991).
- 5. §26-14-10.
- 6. §26-14-3 (a).
- 7. § 26-14-1 (3). See also Ala. Admin. Code r. 660-5-34-.02 (2) (a); 660-5-34.-.04 (1).
- 8. Ala. Admin. Code r. 660-5-34-.04 (3).
- 9. § 660-5-34.02 (10).
- 10. § 26-14-1 (1).
- 11. § 26-14-1 (2).
- 12. § 26-14-3 (a).
- 13. §26-14-9.

- 14. § 26-14-13.
- 15. §§ 26-14-3(c), 26-14-6.1(1),(2).
- 16. § 26-14-3 (c).
- 17. § 26-14-6.1 (3).
- 18. § 26-14-2 quoted in Decatur City Bd. of Educ. v. Aycock, 562 So. 2d 1331, 1332 (Ala. Civ. App. 1990).
- 19. Id at 1334, 1335.
- 20. Aycock, 562 So. 2d at 1334.
- 21. § 26-14-12.
- 22. Ala. Admin. Code r. 660-5-34-.08.
- 23. § 26-14-8 (a) (1). See also, Ala. Admin. Code r. 660-5-34-.07 (1).
- 24. § 26-14-8 (a) (2). See also, Ala. Admin. Code r. 660-5-34-.07 (3).
- 25. See also, Ala. Admin. Code r. 660-5-34-.07 (2).
- 26. § 26-14-8 (e).
- 27. § 26-14-8 (c).
- 28. § 26-14-8 (d).
- 29. § 26-14-7.1 (11) (b).

- 40. Ala. Admin. Code r. 660-1-5-.08 (b) (8).

- 51. Ala. Admin. Code r. 660-1-5-.11, 12.
- 52. § 26-14-7.1 (7) a.
- 53. § 26-14-7.1 (7) b.

- 56. § 26-14-7.1 (7) f.
- 57. Ala. Admin. Code r. 660-1-5-.21 (d).
- 58. § 26-14-7.1 (7) g.
- 59. § 26-14-7.1 (7) h.
- 60. § 26-14-7.1 (7) i.

- 30. § 26-14-8 (g)
- 31. § 26-14-8 (h).
- 32. § 26-14-7.1. See also Ala. Admin. Code r. 660-5-34-.08.
- 33. Id.
- 34. §26-14-7.1(1).
- 35. §26-14-7.1 (2).
- 36. §26-14-7.1 (4).
- 37. §26-14-7.1 (5).
- 38. § 26-14-7.1 (4).
- 39. Id.
- 41. Ala. Admin. Code r. 660-1-5-.08 (b) (1)
- 42. Ala. Admin. Code r. 660-1-5-.08 (b) (3).
- 43. Ala. Admin. Code r. 660-1-5-.08 (b) (4)
- 44. Ala. Admin. Code r. 660-1-5-.08 (b) (5)
- 45. Ala. Admin. Code r. 660-1-5-.08 (b) (6).
- 46. Ala. Admin. Code r. 660-1-5-.08 (b) (9).
- 47. Ala. Admin. Code r. 660-1-5-.08 (b) (10).
- 48. Ala. Admin. Code r. 660-1-5-.08 (b) (11).
- 49. Ala. Admin. Code r. 660-1-5-.08 (b) (12).
- 50. Ala. Admin. Code r. 660-1-5-.08 (b) (13).

- 54. § 26-14-7.1 (7) c.
- 55. § 26-14-7.1 (7) d.

- 61. § 26-14-7.1 (7) j.
- 62. Ala. Admin. Code r. 660-1-5-.20 (1).
- 63. Id.
- 64. Ala. Admin. Code r. 660-1-5-.20 (2).
- 65. Ala. Admin. Code r. 660-1-5-.20 (3).
- 66. Ala. Admin. Code r. 660-1-5-.20 (4).
- 67. Ala. Admin. Code r. 660-1-5-.20 (5).

- 68. Ala. Admin. Code r. 660-1-5-.20 (6).
- 69. Ala. Admin. Code r. 660-1-5-.20 (7).
- 70. Ala. Admin. Code r. 660-1-5-.21.
- 71. § 41-22-16 (a), (b).
- 72. § 41-22-16 (a)

77. § 26-14-7.1 (9).

79. § 26-14-3 (e).

81. §26-14-8 (b).

82. §26-14-8 (c).

85. Id at 565.

86. § 41-22-20.

87. § 41-22-20 (d).

88. § 41-22-20 (c).

89. § 41-22-20 (k).

22-20 (k).

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91. § 41-22-21.

83. §26-14-8 (c) 1.

- 73. Ala. Admin. Code r. 660-1-5-.14; § 41-22-17 (a).
- 74. Id.
- 75. Id.
- 76. Ala. Admin. Code r. 660-1-5-.14 (4); § 41-22-17 (e).

441, 444, 92 S. Ct. 1653, 32 L.Ed. 2d 212 (1971).

80. Opinion of the Attorney General, 2003-233.

84. Ex parte Gibert, 681 So.2d 564, 565 (Ala. 1996)

78. Ex parte Rawls, 953 So. 2d 374, 380 (Ala. 2006), citing Kastigar v United States, 406 U.S.

90. Ala. Dep't of Human Res. v. Dye, 921 So. 2d 421, 424-25 (Ala. Civ. App. 2005) (citing § 41-

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New Elder Abuse Protection Orders

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Relief for victims of elder abuse and financial exploitation

often comes too late. Once the injury has been inflicted and the money has been spent, there is only so much that can be done to repair the damage to the elderly person's mental, physical and financial health. The Elder Abuse Protection Order and Enforcement Act² ("EPFA") provides an early intervention-a targeted civil-court order-to stop the abuse and continued financial exploitation. For elderly victims who cannot protect themselves, others with legal authority can petition to prevent further abuse. Most importantly, though, under the EPFA, elder

abuse victims can take action to protect themselves from abuse and financial exploitation, and reclaim control of their lives and finances.

Just as the domestic violence Protection from Abuse Act³ ("DVPFA") protects victims of domestic violence by giving them a way to seek court-ordered and court-enforced protection for themselves, the Elder Abuse Protection Order and Enforcement Act is intended to provide maximum protection for victims of elder abuse.⁴ The EPFA "create[s] a flexible and expeditious method" for elder abuse victims to obtain a protective order against their abuser/exploiter.5 In addition, the EPFA gives law enforcement an additional tool to assist victims and prevent further incidents of abuse.6

Alabama's Interagency Council for the Prevention of Elder Abuse⁷ recommended the legislation (SB 274) sponsored by Senators Rodger Smitherman, Bobby Singleton, Priscilla Dunn, Linda Coleman-Madison and William Beasley. After passing both houses unanimously, the bill was approved by Governor Kay Ivey on May 16, 2017 and was effective August 1, 2017. The EPFA sets out the requirements for the sworn petition, the procedure for filing and available court-ordered relief. It creates an enforcement mechanism allowing for arrest and criminal prosecution of a violation of an elder abuse protection order.8 Further, it permits warrantless arrests for violations of elder abuse protection orders in the same circumstances currently allowed for violations of domestic violence protection orders.9

The first part of this article will discuss the particulars of the EPFA. The second part will compare it to existing elder protection laws in Alabama.

Elder Abuse Protection Order and Enforcement Act (EPFA)

Who can petition for an Elder Abuse Protection Order?

First, a petition can be filed by an elderly person in need of protection from elder abuse.¹⁰ "Elderly person" is defined as anyone 60 years of age or older.¹¹ So, victims of elder abuse can seek a protective order for themselves. This cannot be emphasized enough. Elder abuse victims are not likely to self-report to DHR Adult Protective Services, for fear of being deemed vulnerable and in need of "protective placement."

Elder abuse victims are not likely to self-report to DHR Adult Protective Services, for fear of being deemed vulnerable and in need of "protective placement." They are also unlikely to pursue criminal charges against their abusers, as they are often people who are close to them. One major study in New York estimated that only one in 24 elder abuse victims was referred to social service, law enforcement or legal authorities.¹² An elder abuse protection order provides an option for victims who want to regain control and get their abuser away from them and out of their bank accounts.

Second, a petition can be filed by a legal representative on behalf of an elderly person in need of protection from elder abuse, but only if the elderly person lacks the physical or mental capacity to seek protection for themselves.¹³ The following people are authorized to file on behalf of the victim: court-appointed guardian or conservator; court-appointed temporary guardian; agent, co-agent or successor agent under power of attorney; proxy under Advance Directive for Health Care; or an interested person who would have the authority to petition for protective placement/services under the Adult Protective Services Act of 1976 (Ala. Code § 38-9-6).14 If a representative files on behalf of the victim, the following must occur as well:

- the representative must swear to the fact of the victim's physical or mental incapacity;¹⁵
- the representative must file with the petition a copy of the court order, power of attorney or Advance Directive for Health Care used as the basis for their representative capacity;¹⁶ and
- the victim must be served with the petition.¹⁷

What qualifies as "elder abuse" for filing the petition?

A petition for an elder abuse protection order must allege that the elderly person is in need of protection from "elder abuse." "Elder abuse" is defined as the commission of or intent to commit one of the statutorily-proscribed "acts" against an elderly person.¹⁸ Many of the predicate elder abuse acts are identical to the acts found in the domestic violence Protection from Abuse Act: arson, assault, criminal coercion, criminal trespass, harassment, kidnapping, menacing, reckless endangerment, sexual abuse, stalking, theft and unlawful imprisonment.¹⁹ The difference is that elder abuse protection orders do not require the victim be in a qualifying relationship with the defendant like domestic violence protection orders,²⁰ only that the abuse be against an elderly person (anyone 60 years of age or older). A petition under the DVPFA would

be required to allege that the victim and the defendant who assaulted her are, for example, in a dating relationship. A petition under the EPFA, in contrast, would be required to allege only that the victim of the defendant's assault is an elderly person; a relationship between the elderly victim and the defendant is not required.

In addition, the Elder Abuse Protection Order and Enforcement Act incorporates into the definition of "elder abuse" many other acts set out in two other Alabama statutes. First, the EPFA's definition of "elder abuse" includes "abuse" as defined in the Adult Protective Services Act of 1976 ("APS Act"). "Abuse," as drawn from the APS Act, is defined as the "infliction of physical pain, injury, or the willful deprivation by a caregiver or other person of services necessary to maintain mental and physical health."21 The APS Act's definition of abuse contemplates not only the infliction of physical pain or injury, but also the willful deprivation of healthmaintaining and basic living necessities. So, in the standard EPFA petition (see Standardized Forms, *infra*), a petitioner can allege as abuse that the defendant is preventing an elderly person from receiving mental or physical health care, or is depriving them of food, clothing or shelter.

Second, the EPFA's definition of "elder abuse" also includes "emotional abuse" and "financial exploitation" as defined in the Protecting Alabama's Elders Act, which is part of the criminal code. There, "emotional abuse" is defined as the "intentional or reckless infliction of emotional or mental anguish or the use of a physical or chemical restraint, medication, or isolation as punishment or as a substitute for treatment or care of any elderly person."²² The standard EPFA petition includes an allegation that the defendant inflicted emotional or mental anguish on an elderly person. The standard form does not include the latter part of the definition of emotional abuse as a specific option, but a petitioner could use the "other" section of the form to make such an allegation.

The definition of "financial exploitation" in the EPFA is likewise drawn from the Protecting Alabama's Elders Act. "Financial exploitation" is defined as the "use of deception, intimidation, undue influence, force, or threat of force to obtain or exert unauthorized control over an elderly person's property with the intent to deprive the elderly person of his or her property or the breach of a fiduciary duty to an elderly person by the person's guardian, conservator, or agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of the elderly person's property."²³ Paraphrasing, elder financial exploitation involves some type of fraudulent conduct, or breach of fiduciary duty, as a means to appropriating and misusing an elderly person's money or property.

In the standard EPFA petition, the predicate financial abuse "acts" are rolled into a single allegation—in layman's terms—that the defendant "stole" from the elderly person. Attorneys and courts will need to take care to identify which type(s) of financial abuse are being alleged prior to requesting or granting relief. "Theft" as defined *in Ala. Code* §§ 13A-8-2 thru 13A-8-5 would qualify for relief. In addition, the forms of elder financial exploitation defined in the Protecting Alabama's Elders Act, *Ala Code* § 13A-6-191(5), would qualify for relief as well.²⁴

Jurisdiction, venue and relationship to probate courts

The following courts have jurisdiction to issue elder abuse protection orders: circuit courts, special circuit court judges appointed pursuant to *Ala. Code* §§ 12-1-14 or 12-1-14.1 and district court judges designated by a written standing order from the presiding circuit judge.²⁵ Venue is proper where the plaintiff resides or is temporarily located if the plaintiff left his or residence to avoid further abuse, where the defendant resides or where the abuse occurred.²⁶

Although probate courts do not have jurisdiction to issue elder abuse protection orders, they will receive a copy of any (*ex parte* or



final) elder abuse protection order that is entered against a defendant whom the court appointed as the victim's guardian or conservator.²⁷ The EPFA does not give the circuit court issuing the elder abuse protection order the authority to remove the defendant as guardian/conservator. Giving notice to the court that appointed the defendant allows it to consider steps to remove the defendant as guardian/conservator.

Probate courts have a number of tools available to them to either suspend the authority of or remove a defendant who is serving as the victim's guardian or conservator. A probate court, on its own motion, after hearing, may remove the defendant-guardian if to do so is in the best interest of the ward/victim.²⁸ If the court finds that the welfare of the ward/victim

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CONTACT: HAL K. CAIN, PRINCIPAL ENGINEER CAIN AND ASSOCIATES ENGINEERS & CONSTRUCTORS, INC. HALKCAIN@AOL.COM • WWW.HKCAIN.COM 251.473.7781 • 251.689.8975 requires immediate action, a probate court may appoint a temporary guardian, with or without notice, for a period not to exceed six months, thereby suspending the defendant-guardian's authority.²⁹ Conservators may be removed "for good cause" by a probate court, on its own motion, after notice and hearing.³⁰

What can the court order?

A court may grant certain *ex parte* forms of relief without prior notice to the defendant or a hearing.³¹ The same and additional types of relief are available in a final order after notice and hearing.³² Below are the available *ex parte* forms of relief, (1) thru (12), and relief available after notice and hearing, (13) thru (17):

Available ex parte relief³³

- (1) Enjoin the defendant from threatening to commit or committing acts of elder abuse against the plaintiff and any other individual designated by the court.
- (2) Restrain and enjoin the defendant from harassing, stalking, annoying, telephoning, contacting or otherwise communicating, either directly or indirectly, with the plaintiff or threatening or engaging in conduct that would place the plaintiff or any other individual designated by the court in reasonable fear of bodily injury.
- (3) Order the defendant to stay away from the plaintiff's residence, place of employment or any specified place frequented by the plaintiff that the defendant has no legitimate reason to frequent.

- (4) Remove and exclude the defendant from the residence of the plaintiff, regardless of ownership of the residence.
- (5) Order possession and use of an automobile or other essential personal effects, regardless of ownership, and direct the appropriate law enforcement officer to accompany the plaintiff to the residence of the plaintiff or other specified locations as necessary to protect the plaintiff from abuse.
- (6) Prohibit the defendant from transferring, concealing, encumbering or otherwise disposing of specified property mutually owned or leased by the parties or in which the plaintiff had an ownership interest within the last 12 months.
- (7) Prohibit the defendant from transferring the funds, benefits, property, resources, belongings or assets of the plaintiff to any person other than the plaintiff.
- (8) Direct the defendant to refrain from exercising control over the funds, benefits, property, resources, belongings or assets of the plaintiff.
- (9) Require the defendant to provide an accounting of the disposition of the plaintiff's income and other resources, and of the plaintiff's debts and expenses.
- (10) Restrain the defendant from exercising any powers the defendant has been granted as the plaintiff's agent under power of attorney.
- (11) Require the defendant to

Courts are required to grant or deny petitions for ex parte elder abuse protection orders within three business days of filing.

comply with the instructions of the plaintiff's guardian, conservator or agent under power of attorney.

(12) Order other relief as it deems necessary to provide for the safety and welfare of the plaintiff and any individual designated by the court.

Available after notice and hearing³⁴

- (13) Grant [any of the available forms of *ex parte* relief].
- (14) Require the defendant to return custody or control of the funds, benefits, property, resources, belongings or assets to the plaintiff.
- (15) Order restitution.
- (16) Prohibit the defendant from possessing a firearm or other weapon specified by the court, except when the weapon is necessary for employment as a law enforcement officer or military personnel.
- (17) Order the defendant to pay attorneys' fees and court costs.

The EPFA requires a hearing be held within 10 days of the perfection of service or upon the request of the defendant.³⁵ At the final hearing, the plaintiff must prove the allegations of elder abuse by a preponderance of the evidence.³⁶ A final elder abuse protection order is of permanent duration unless the court specifies otherwise.³⁷

Ex parte elder abuse protection orders may be granted if the court makes two findings. One, that it is necessary to protect the victim from elder abuse.³⁸ And two, that the defendant represents a risk of imminent potential harm to the victim.³⁹ Courts are required to grant or deny petitions for *ex parte* elder abuse protection orders within three business days of filing.⁴⁰ Ex parte elder abuse protection orders are temporary and effective until the final hearing date,41 unless otherwise specified by the court.

Standardized Forms

The Administrative Office of Courts has developed and made available forms in .pdf format for use by the public, attorneys and courts. The forms are available at eforms.alacourt.gov under Civil Forms. There are four forms: Petition for Elder Abuse Protection Order (C-90), [Defendant's] Request for Hearing (C-90A), Ex Parte Elder Abuse Protection Order (C-91) and [Final] Elder Abuse Protection Order (C-92). The plaintiff does not bear any court costs or other fees for the filing or service of a petition or issuance of witness subpoenas; however, the court may assess costs and fees against the defendant.42

Comparison to Existing Elder Protection Laws

Adult Protective Services Act Of 1976

The Elder Abuse Protection Order and Enforcement Act does not alter or implicate the Adult Protective Services Act of 1976. The APS Act is intended to provide care and protection for adults over 18 whose health or safety is in danger.43 The State Department of Human Resources (DHR) investigates reports of alleged abuse, neglect, exploitation, sexual abuse and emotional abuse of elderly or disabled adults.44 DHR may petition for emergency protective services and placement of adults who, because of their physical or mental disabilities, are unable to provide for their basic needs and whose health or safety is in immediate danger.45 In addition, DHR may seek a court order to protect assets and enter other protective orders as necessary. DHR Adult Protective Services will continue its role in investigating reports of elder abuse and arranging protective services for vulnerable adults.

The APS Act serves fundamentally different purposes than the EPFA. Adult Protective Services brings to bear state services and protection for vulnerable adults. The EPFA allows competent victims of elder abuse to seek relief for themselves. Under the APS Act, concerned family members and others can enlist state resources (DHR) to provide safe living environments and supports for adults who cannot do so for themselves. The APS Act is intended to protect the most atrisk adults in Alabama.

Protecting Alabama's Elders Act

The Protecting Alabama's Elders Act is the elder-specific criminal law in Alabama. It became effective on August 1, 2013 and provides criminal penalties for elder physical abuse, emotional abuse, neglect and financial exploitation.⁴⁶ The penalties range from a Class A misdemeanor up to a Class A felony for physical abuse, and from a Class A misdemeanor up to a Class B felony for financial exploitation.47 Prosecution under the Protecting Alabama's Elders Act can be brought for victims ("elderly persons") 60 years of age and older.48 According to data provided by the Administrative Office of Courts, 399 cases had been prosecuted under the law as of March 2017.49 Recently, a home health nurse was charged with first degree elder financial exploitation for stealing more than \$8,000 from a 91-year-old patient.50

As successful as that is, criminal sanctions are primarily intended to punish the wrongdoer, and specifically and generally deter unlawful behavior. The EPFA, on the other hand, is intended to provide an early intervention to prevent further harm or exploitation of the victim. Take for example the case of Virginia Freck.⁵¹ Freck was financially exploited for more than \$2.5 million by her deceased husband's great-nephew, who had obtained a power of attorney over her. Her great-nephew was prosecuted for his crimes, but only after spending \$53,000 per month of Freck's money on casino gambling, alcohol, motorcycles, a house for himself, a convenience store, a bulldozer and other property. Under the EPFA, Freck herself

could have petitioned for a court

order restraining her great-nephew from "exercising control over [her] funds, benefits, property, resources, belongings, or assets."52 She could also have sought an order restraining him from "exercising any powers [he had] been granted as [her] agent under power of attorney."53 And if she did not have the physical or mental capacity to petition for relief, a representative with authority could have petitioned on her behalf. An elderly protection from abuse order could have been entered in much less time than it took to bring, investigate, prepare and successfully prosecute the criminal case and order restitution. Her great-nephew should still have been punished, and he and others should be deterred, but an Elder Abuse Protection Order might have prevented millions from being wasted and unrecoverable.

Uniform Guardianship and Protective Proceedings Act

The Uniform Guardianship and Protective Proceedings Act is also focused on protecting vulnerable adults. The purposes are to provide a system of general and limited guardianships for incapacitated persons and promote a speedy and efficient system for managing the estates of protected persons.⁵⁴ A judicial finding of incapacity is requisite for the appointment of a guardian or conservator. For the appointment of a guardian, a court must find that the person is "incapacitated"55 which is defined as "impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age . . . to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions."56 Even the

appointment of an emergency temporary guardian requires a finding of incapacity.⁵⁷ For the appointment of a conservator, a court must similarly find the "person is unable to manage property and business affairs effectively for such reasons as mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age⁷⁵⁸

Not all adults who suffer from diminished mental or physical capacity need a guardian or conservator. And not all adults who fall prey to elder abuse or financial exploitation are incapacitated. While declining cognition is associated with a 33 percent increase in scam susceptibility, one in 18 cognitively intact older adults is victim to financial fraud.⁵⁹ Cognitively intact elderly persons who are abused or financially exploited can employ the EPFA for relief. And for elder abuse victims with diminished capacity, a representative can seek the targeted relief afforded by the EPFA rather than a full guardianship or conservatorship. A full guardianship or conservatorship may still be needed for the ongoing care and management of the incapacitated person and their assets, but the EPFA avoids the implications and loss of rights of the adult being declared legally incapacitated, and thereby preserves the adult's autonomy.

Conclusion

The Elder Abuse Protection Order and Enforcement Act gives victims of elder abuse, and their advocates, a new remedy to expeditiously curb abuse and financial exploitation. The EPFA creates a civil elder abuse protection order and penalties for its violation. It serves different purposes than

other elder protection laws in Alabama, which are primarily intended to protect incapacitated and vulnerable adults or punish and deter criminal conduct. The EPFA creates a mechanism for cognitively intact adults to protect themselves and prevent further abuse and exploitation. And for cognitively impaired adults, it provides an alternative to guardianship and conservatorship that preserves the impaired adult's autonomy. Critical to the EPFA's success is not only how it empowers and encourages victims of elder abuse to seek protection from their abusers/exploiters, but also how it promotes their independence.

Endnotes

- 1. The authors serve as members of Alabama's Interagency Council for the Prevention of Elder Abuse.
- 2. 2017 Ala. Acts 2017-284. At the time of writing, the final placement and text of Act 2017-284 was still subject to editorial action of the Code commissioner. Therefore, the authors cite to the Act throughout this article.
- 3. Ala. Code § 30-5-1 (2017).
- 4. Act 2017-284, § 2(1).
- 5. *Id.* at § 2(2).
- 6. *Id.* at § 2(3).
- 7. *See* ALA. CODE §§ 38-9D-1 to -7 (establishing the membership, powers, and duties of the Interagency Council for the Prevention Elder Abuse).
- 8. Act 2017-284, §§ 10, 11.
- 9. *Id.* at § 12.
- 10. *Id.* at § 3(5).
- 11. *Id.* at § 3(4).
- 12. New York State Office of Children and Family Services, Under the Radar: New York State Elder Abuse Prevalence Study, 2 (2011), http://www.ocfs.state.ny.us/main/reports/ Under%20the%20Radar%2005%2012%2011%20final %20report.pdf.
- 13. Act 2017-284, § 6(a).
- 14. *Id*.
- 15. *Id*.
- 16. *Id*.
- 17. *Id.* at § 6(d).
- 18. *Id.* at § 3(2).
- See Act 2017-284, § 3(2) (listing the predicate "elder abuse" acts) and see ALA. CODE § 30-5-2(1) (listing the predicate "domestic violence" acts).

- 20. ALA. CODE 30-5-2(7) (defining the qualifying relationships between a domestic violence victim and the defendant).
- 21. Ala. Code § 38-9-2(1).
- 22. Ala. Code § 13A-6-191(4).
- 23. Ala. Code § 13A-6-191(5).
- 24. The EPFA also incorporates the definition of "financial exploitation" from the Alabama Securities Act. ALA. CODE § 8-6-171(5). That definition is similar to the definition found in the Protecting Alabama's Elders Act.
- 25. Act 2017-284, § 4(a).
- 26. *Id.* at § 4(c).
- 27. Id. at § 9(b).
- 28. ALA. CODE § 26-2A-110(a).
- 29. *Id.* at § 26-2A-107(b).
- 30. *Id.* at § 26-2A-143.
- 31. Act 2017-284, § 8(b).
- 32. *Id.* at § 8(c).
- 33. *Id.* at § 8(b).
- 34. *Id.* at § 8(c).
- 35. *Id.* at § 7(a).
- 36. *Id*.
- 37. *Id.* at § 7(e).
- 38. *Id.* at § 7(b).
- 39. *Id.* at § 8(b).
- 40. *Id.* at § 7(b).
- 41. *Id*.
- 42. *Id.* at § 6(e).
- 43. ALA. CODE § 38-9-4(a).
- 44. Id. at § 38-9-8.
- 45. Id. at § 38-9-5.
- 46. Id. at §§ 13A-6-192 to -198.
- 47. *Id*.
- 48. Id. at § 13A-6-191(3).
- 49. Minutes from the Interagency Council for the Prevention of Elder Abuse meeting on March 16, 2017.
- Ashley Remkus, Nurse accused of stealing more than \$8,000 from 91-year-old Decatur patient, AL.COM (Aug. 28, 2017), http://www.al.com/news/index.ssf/2017/ 08/nurse_accused_of_stealing_more.html.
- John C. Craft, Preventing Power of Attorney Abuse–A Lawyer's Role, 75 Ala. Law. 2, 117 (2014) (telling the story of Virginia Freck).
- 52. Act 2017-284, § 8(b)(8).
- 53. Id. at § 8(b)(10).
- 54. Ala. Code § 26-2A-2.
- 55. Id. at § 26-2A-105(b).
- 56. *Id.* at § 26-2A-20(8).
- 57. *Id.* at § 26-2A-107(a) (starting, "If an incapacitated person has no guardian . . .").
- 58. Id. at § 26-2A-130(c).
- Kelly B. Grant, \$36 billion might be a low estimate for this growing fraud, CNBC.COM (Aug. 28, 2017), https:// www.cnbc.com/2017/08/25/elder-financial-fraud-is-36-billion-and-growing.html (citing and linking to the study published in the AMERICAN JOURNAL OF PUBLIC HEALTH).

John C. Craft



John Craft is a clinical associate professor of law at Faulkner University-Jones School of Law. Professor Craft is overall director of the law school's clinical and

field placement programs, and teaches and supervises the pro bono Elder Law Clinic. He is past chair of the Elder Law Section of the Alabama State Bar. He is a member of the Alabama Interagency Council for the Prevention of Elder Abuse where he was the inaugural chair of its Legislative Advocacy Committee. Professor Craft received his B.A. degree from Auburn University and graduated *cum laude* from Jones School of Law.

Felicia M. Brooks



Felicia Brooks is deputy attorney general for the Alabama Department of Human Resources. She works closely with DHR's Adult Services Division and is the

DHR Legal Office's representative for the Alabama Interagency Council for the Prevention of Elder Abuse. She is admitted to practice law in Alabama, the U.S. Eleventh Circuit and the U.S. Federal District Courts of Alabama (Southern, Northern and Middle District). She graduated *cum laude* from the University of South Alabama with a B.A. degree in political science, and obtained her J.D. from the University of Alabama School of Law.

Emily T. Marsal



Emily Marsal is general counsel for the Alabama Department of Senior Services. At Senior Services, she advises the commissioner, manages multiple federal

contracts for various programs and represents the agency in fair hearings for the Medicaid Waiver programs that the agency operates. She is also the appointed chair of the Interagency Council for the Prevention of Elder Justice. Marsal graduated from Samford University with a B.A. in English, received a master's degree in political science from Auburn University at Montgomery and received her J.D. from Thomas Goode Jones School of Law.



MEMORIALS

- William Lowe Chenault, III
- 🔺 Gloria Jean Darby
- 🔺 James C. Ingram, Jr.

William Lowe Chenault, III

William (Billy) Lowe Chenault, III passed away on August 30 in his hometown of Decatur. He was born May 5, 1950 and grew up in Decatur. After graduating from Decatur High School in 1968, he matriculated to the University of Alabama, graduating with a B.S. degree in 1971 and a juris doctor degree in 1974. From the time he entered the university, his plan was to go to law school and return to Decatur to practice with his father, who had been a sole practitioner there since 1949. To that end, he went straight through undergraduate and law school, attending every summer session. He returned to Decatur in 1974 and



joined his father in the general practice of law until his father passed away in 1982.

He was president of Chenault Hammond PC, a member of the Alabama State Bar, a past president of the Morgan County Bar Association and a member of the Rotary Club of Decatur. For many years, he was a faithful member of First Bible Church in Decatur and attended a weekly men's Bible study.

Billy is survived by his wife of 47 years, Janet Graham Chenault. They have three children–daughter Jennifer Chenault Barrett and her husband, Shannon, of Suwanee, Georgia; son William Lowe Chenault, IV and his wife, Amanda, of Jackson, Tennessee; and son Paul Graham Chenault of Montevallo. They have eight grandchildren.

I was fortunate to know Billy since high school. During law school, he and Janet became our closest friends. My wife and I were present at the birth of their first child, Jennifer, and we are the godparents of his youngest child, Paul. After practicing outside of Alabama for five years, I joined Billy and his father in 1979 and practiced with him for 38 years. I cannot remember a time during that period that we argued.

His personality was one of kindness and respect for others, with an unshakeable faith in God, and he had a self-deprecating sense of humor that was endearing and beyond amusing. He practiced law with a reasoned and thorough approach, always with respect for his adversaries and dedication to his clients. I would venture to say that Billy did not have an enemy in this world, and I have frequently told people that he was one of the finest men I have ever known. He will be missed, and the legal profession in Morgan County will mourn his loss for a long time.

Gloria Jean Darby

For years to come, people will recall how Jean Darby died. It was memorable. Collapsing in court during her closing arguments in a murder trial, the Florence attorney never recovered and succumbed two days later. The event made local, state and national news. Jean, a very private and unassuming woman, would have been dismayed to know that she had caused such a "fuss," but she would have worried more about how this affected the man she defended.

While the manner of her death was memorable, more notable is how she lived. In the past few days, colleagues have praised her passion for justice. They saw it during the 35 years she practiced in Alabama. We, her long-ago friends and housemates, recognized it even earlier, when we were idealistic, 20-something VISTA workers in North Carolina.

VISTA (Volunteers in Service to America) had its origins in the Lyndon Johnson-era anti-poverty programs. Essentially a domestic Peace Corps, VISTA placed workers, for pittance pay, in various social service and other organizations around the country. The goal was for VISTAs to help those who were disadvantaged learn to help themselves.

In August 1976, VISTA assigned Jean to Robeson County, an area notable for its poverty, illiteracy and volatile race relations. She worked for a state correctional institution, which by its nature limited the change she could effect. However, she forged on and helped set up an inmate library, a weekly movie night and a prison baseball team. She visited inmates' families to prepare them for their loved ones' return home. She recruited community volunteers to help in the men's eventual transition to life outside prison walls. She believed that even though the inmates were on the wrong side of the law, their lives still had value. Many had grown up in harsh circumstances, which contributed to their poor choices and actions. "They are human beings," she often reminded us, and human, but more importantly *humane*, justice obligated us to treat them with grace.

Jean's passion for justice extended to all creation. Her huge, kind heart had a special place for dogs, as well as for people who have been treated like them. Within days of our arrival in North Carolina, we adopted a flea-ridden, mangy mutt. Or, rather, she adopted us. She had been dumped at a roadside motel and left to die. Jean's heart melted and that stray pooch thrived under her love and care. We named the dog VISTA in honor of our community work, which advocated hope.

Life in VISTA was hard. Adjusting to life in North Carolina was harder. Jean sorely missed Alabama–her family, her friends, her beloved Alabama football. She could have left, and considered doing so constantly, but she persisted. She believed that when you make a commitment to something, you follow through. And she was determined to prove to herself that she could tough it out for the entire year. She succeeded, and this steadfastness and determination would serve her well throughout her law career and her life.

Although serious, Jean was also fun. Two of us had never lived in the South. Jean promptly dubbed our Pennsylvania

friend "Yank" and good-naturedly teased her about her accent. She bestowed upon the California friend what she considered a fine Southern name–"Pearlie." It suited, and even today, more times than not, that is what we call her. With her Southern friend, Jean would team up for a bit of lighthearted larceny. If either ran short of cash during a spirited game of Monopoly, she'd yell "Southern Comfort!" and a few bills would slyly be slipped under the table. Days before Crimson Tide kickoffs, she would spout all manner of trash talk. And in the last days before our VISTA year ended, she would bounce from room to room, "threatening" us with dire deeds if we forgot August 26, 1981, the proposed date of our five-year reunion. Our work together in VISTA had brought an unexpected and wonderful benefit–a lasting friendship. Though we would soon be separated, we planned to do our best to continue it.

We had that reunion in Nashville and in many more places over the next decades. Because of family, animal rescue work and legal responsibilities, Jean was able to attend only a few. Each time we met, however, it took just a few moments for us to re-establish our connection, even though it had been years. The values we shared-our concern for justice and our caring for our fellow humans and each other-made the years vanish.

We last saw Jean two summers ago, fittingly in Nashville. We agreed to meet more often from then on because we were all getting older. The next reunion, we said, would be in Florence.

We will make that journey to Florence, visit with some of her family and friends and reminisce about Jean. It will be bittersweet and we will likely shed a few tears, but Jean would not want us to make a "fuss." We will walk around the places she loved best. We will think about how she lived. We will ponder what she thought was most important:

- Just be kind;
- Try to walk a day in someone else's shoes;
- · Give people the benefit of the doubt; and
- Roll Tide!

-Laura Day

James C. Ingram, Jr.

James C. (Jim) Ingram Jr., 68, of Lanett passed away at his home on August 23 after a brief and intentionally private battle with cancer.

Jim was born January 13, 1949 in Rockingham, NC. He is survived by his mother, Mary Dell Ingram of West Point. He was preceded in death by his father, James Carl Ingram, Sr.

Jim graduated from Albemarle High School of Albemarle, NC in 1967 and was named "Most Influential Superlative." He studied at Pembroke University and Lubbock Christian University before transferring to Auburn University. At Auburn, he majored in history and then



MEMORIALS

(Continued from page 55)

graduated in 1971 with a degree in political science. He was a member of Theta Chi Fraternity.

Upon graduating, Jim took a job with a Boston jeweler as regional manager over leased jewelry departments in large stores spanning throughout Virginia to Texas before opening Ingram Jewelers, a family-owned business. Jim then attended jewelry school in New York and California where he became a certified appraiser and master jeweler. Ingram Jewelers grew into three locations, Lanett, downtown La-Grange, Georgia and LaGrange Mall. Jim was very active in the Alabama Jewelers Association and Jewelers of America. He served in various leadership roles, including two years as president of Alabama Jewelers and as executive director for many terms.

Having a soft heart for animals, Jim served on the board of directors of the Chattahoochee Humane Society for several years. Jim loved and cared for many pets during his lifetime.

Jim was the first Republican elected to the Chambers County Commission in 100 years. He served as an alternate delegate in the 1988 campaign to elect George H.W. Bush. He attended the Republican National Convention in New Orleans.

Politics rekindled an interest in law school and Jim commuted to Montgomery to attend the Thomas Goode Jones School of Law. He graduated in 1992 and was a founding member of Delta Law Fraternity.

Following law school graduation, he began practicing law in Chambers County and ultimately closed the family's jewelry stores as his parents retired. Jim's passion was criminal law and he was dedicated to his clients. Being highly respected throughout the years, both his personal and professional communities have been shaken by their loss.

In January 2008, Jim became a member of the staff of the Chambers County Drug Court, a new program formed to address the problems faced by those who had been arrested as a result of their struggles with addiction. Jim poured his heart and soul into representing his clients in this program, and spent many hours advocating for them and encouraging them to make the changes necessary to gain sobriety and recovery. He often told his friends and associates that it was one of the most worthwhile things that he had ever done. Jim continued to practice law until early 2017, when he suddenly fell ill.

Jim's memorial service may be viewed by going to https://www.youtube.com/watch?v=xFtnF68YRHw or by searching "Jim Ingram Eulogy" on YouTube. Condolences may be sent to Mary Dell Ingram at 611 Ave. C, West Point, Georgia 31833.

Alspaugh, Marcus Clay Birmingham Admitted: 1971 Died: October 24, 2017

Boackle, Ronald Edward Birmingham Admitted: 1995 Died: September 23, 2017

Bowden, Matthew Wayne Birmingham Admitted: 1992 Died: October 11, 2017 Byrd, Hon. Robert Lee, Jr. Mobile

Admitted: 1957 Died: October 29, 2017

Chapman, William Thomas, II Evergreen Admitted: 1976 Died: September 5, 2017

> Davis, James K. Hamilton Admitted: 1960 Died: October 4, 2017

Evans, Jane Faulkner Pell City Admitted: 1989 Died: September 25, 2017

Johnson, Carla Terry Midlothian, VA Admitted: 2015 Died: January 9, 2017

Lane, Kalia Spears Montgomery Admitted: 1994 Died: October 17, 2017

Miller, Barbara Currie Seattle, WA Admitted: 1982 Died: September 8, 2017

Miller, George Wayne Falkville Admitted: 1995 Died: January 14, 2017

Moore, Randolph Benjamin, III Montgomery Admitted: 1970 Died: September 16, 2017 Stockman, Lee Grayson Homewood Admitted: 2017 Died: October 20, 2017

Taylor, Leah Oldacre Birmingham Admitted: 1983 Died: October 15, 2017

Terrell, Don Temple Huntsville Admitted: 1962 Died: September 12, 2017

Turner, Christopher Paul Dothan Admitted: 1989 Died: September 2, 2015

ALABAMA STATE BAR FALL 2017 ADMITTEES

Lance Andrew Adams Anna Whitney Akers Alan Michael Albright Robert Charles Alexander, II Sarah Elizabeth Alexander Dana Fleming Allen Gabriella Elise Alonso Brandon Clay Alspaugh Akiesha Nicole Anderson Mollie Harris Anderson Robert Cherre Anderson Antonio Aragon-Perez Charles Bowman Archer John George Archer Alexander Lee Ash Cecilia Klotz Bacon Joshua Aron Baker Christopher Daniel Baldwin Luke Andreas Barry Rebecca Lynn Bartlett Khairul Bashar Hayden Ford Bashinski Nateisha Lasuan Bates Jared Christopher Batte Samantha Semra Baxter Kaleb Dwayne Beams Aneisha Taquiana Bell Travis Anthony Bell Kimberly Karen Bellino Brittany Katherine Bennett Thomas Hart Benton, III Aaron Eli Bern Jesse Harrison Blount William Wilson Blount Joanna Christina Boardman Brian Jay Bogdany Christian Wallace Borek Louvenia Trenese Borom Anthony Adam Lynn Bowling Brittany Alexandra Bryan Kevin Wade Renaud Bufford Wesley Ryan Bulgarella Jacob Adam Burchfield Christopher Steven Burkhalter JoAnna Butler Devan Lanay Byrd

Shelby Bradford Calambokidis Katlyn Stricklend Caldwell Francisco Fidel Canales Paul David Carlson Lieselotte Margaret Carmen-Burks Desharné Carroll John Robert Carter, III Ana Carmen Chambers Garrett Hall Chambless Courtney Caitlin Elizabeth Champion Charles Hudson Cheshire Angelique Antonia Ciliberti Adelaide McGraw Clarke Andrew Clav Florrye McKay Cleveland Rachel Ann Conry Courtney Katharine Cross Rosemary Diana Crotts Kayla Anne Currie Joseph Davis Damrich Elton Herbert Darby, III Katie Elizabeth Davis Kelsey Unruh Davis Lindsey Lee Davis Robert Andrew Davis Jacob Robert Dean Tamir Jonathan Debbi Whitney Jacobs Della Torre Nathan Alexander Dewan Timothy Geoffrey Dillard Christian Blake Dobbins Rosalie Kane Doggett Jason Duke Jane Leigh Dunagin Ryan James Duplechin Whitney Maddox Dyer Jonathan Russell Eagerton Nathan David Edwards Michael Eidson Matthew Ray Elliott Whitley Jordan Elliott William Franklin Ellis Phillip Ensler James Joseph Eufinger Paul Wesley Evans Zachary Michael Evans

Evan James Extine Brandy Nichole Feltman Mark Fereg Kathryn Shirley Firsching Joshua Barnett Fleitas Mary Katherine Flynn James Elisha Folsom, III Derrick Woodrow Forbes Alexander James Ford Bryan Stuart Foster Sarah Elizabeth Fuston Bethany Briana Gaal Julie Ann Gafnea Rory Michael Gallagher LaRae Michelle Ganger Edward Brinkley Garner, III Hunter Scott Garnett William Lee Gilmer Kimberly Michelle Ginty Madeleine Sabol Greskovich Allen Hagood Grier Jacob Albert Griffin Jonathan Albert Griffith Nicolas Andres Gutierrez Austin Mark Hagood Mason Chadwick Hall Nathan Baker Hall Nathaniel Jacob Ryan Hall Amanda Rose Hamilton Taylor Stanton Hardenstein Andrew Reid Harris Bridget Elizabeth Harris Douglas Eugene Harris Andrea Schlotterbeck Hatchcock Tyner David Helms Nathan Curtis Hill Alvin Bene't Hines, Sr. Timothy Adam Hoekenschnieder William Howard Holley Charles Curtis Hooker, II Cynthia Lou Hopkins Lisabeth Fish Howland Brittany Jean Elizabeth Hughes Said Georges Jabbour

(continued on page 54)

(continued from page 53)

Jordan Leigh Jackson Sandra Jean Jackson Sarah Elizabeth Jackson Shruti Jaishankar Holly Miranda James Andrew Benjamin Jett Philip Montgomery Johnson Jeffrey Mark Johnston Emily Suzanne Jolley Arienne Joycil Jones Hilary Lauren Jones Kimberly Sharron Jones Kristine Bobbilyn Jones Svnetria Jones Jillian Ruth Jordan BriAnn Elizabeth Joyner Travis Telken Juneau Daisy Christina Karlson Benjamin Numa Kearns Hillary Virginia Keller Lauren Marie Kellerhouse Samuel Keith Kennedy Dustin David Key Emily Rebecca Kirkpatrick Robert Eric Koch John Rogers Krebs Mary Lauren Kulovitz Mary Elizabeth Lambert Glenn Alan Langner, II Allyson Leigh Lavigne William Chadwick Lewis Lauren Rose Lock Brittni Cheryl Lucas Caitlin Victoria Malone David Stanley Manush Zachary Paul Mardis Alexa Lynn Martini Robert Houston Matthews, III Deidra Dion Mayes Glenn Ivan Mazer Patrick Rodney Riley McCormick Niya Terrel McCray Hannah Rose McGee Joseph Legrand McLean, Jr. Jonathan Rex Mok Daniel Paul Moore Jennifer Marie Moore Lowell Thomas Moore Miya Angele Moore

Tyler Keith Morgan Walter James Morris, II James William Morrow David William Morton Courtney Anne Moseley Katherine Lorhea Moss Irene Susan Motles Adam Bret Murphy Nathan Riley Murphy Elizabeth Ann Naro Mojtaba Niakossary Tucker Rowland North Wade Prescott Norwood Ashlev Vickers O'Neal Toni Adesuwa Otokunrin Eric Michael Palmer Mary Alexandra Parish Jessica Leah Parker William Cameron Parsons, Jr. Hunter Michael Pattison Howard Gardner Perdue, III Christian Antonio Pereyda Patrick Jordan Perry Alyse Brannon Phillips Blake Alexander Piel Justin Allen Pipkins Samantha Jane Pline Grace Jackson Posey Caitlyn Corrine Prichard Ryan Russell Priddy Grace Robertson Prince Patricia Lynn Pulido William Stanley Pylant Jewel Christina Quintyne **Brooke Boucek Rebarchak** Mitchell James Reilly Karean Lashae Reynolds Terri Elaine Reynolds Ronnie O'Brian Rice Jeremy Linn Richards Jonathan Duane Riley James Gregory Risner Gregory Scotch Ritchey, Jr. John Lawson Robinson Matthew Tyler Roden Steven Lamar Rushing, Jr. Sonja Rene Russell Cody T. Rutowski Kirby Wyatt Salter

Meghan Anne Salvati James Lemuel Sanders, III Christopher Brian Saville Curtis Hendrix Seal Jacob Richard Shamblin Zade Athear Shamsi-Basha Michael Antonio Shorey, Jr. Brittaney Lee Short Colin Armstrong Sigler Virginia Havard Sims Darcelle Alexis Skeete Guice Slawson, III Aaron Matthew Smith Alvson Lee Smith Jordan Frank Smith Lucas Charles Snodgrass Diego Armando Soto **Daniel Butler Sparks** Sarah Glass Speaks Haley Bagents Steelman Amy Kay Steiner Robert Christopher Patton Steiner Catelyn Brooke Swindall Charles Millard Taylor Jennifer Stone Taylor Miranda Coley Taylor Alexis Steele Thomas William Thomas Thompson Zack Stanfield Thompson Victoria Owen Todd Luke Monroe Trammell Joi Lynn Travis Jose Tron Frank Stanley Truncali Carlos Porfirio Urdaneta Aubrey DeVore Wakeley Catherine Cameron Waldrop Donovan Jacob Wallace Paul Bomar Wallace, Jr. James Ronald Williams, Jr James Scott Woodard, Jr. Drew Alan Worley Brittney Sharde' Wormely Jefferson Park Wvnn Judson Lamond Yates Amber Nicole Ybarra Millard Vernon Young, IV Jason Patrick Zarzaur



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

EXA 5 $\mathbf{\mathcal{L}}$ BAR [] 20 JULY

Number sitting for exam	454
Number passing exam (includes MPRE deficient and AL course deficient)	268
Bar exam pass percentage	59.0 percent
Bar Exam Passage by School	
University of Alabama School of Law	94.9 percent
Cumberland School of Law	74.5 percent
Faulkner University Jones School of Law	53.1 percent
Birmingham School of Law	1
Miles College of Law	9.5 percent
Certification Statistics*	
Admission by examination	262
Admission by transfer of UBE score	10
Admission without examination (reciprocity)	10

*Statistics of those individuals certified to the Supreme Court of Alabama for admission to the Alabama State Bar for the period May 16, 2017 through October 3, 2017. To be certified for admission, a candidate must satisfy all admission requirements as prescribed by the Rules Governing Admission to the Alabama State Bar.

For detailed bar exam statistics, visit https://admissions.alabar.org/exam-statistics.



Charles Millard Taylor (2017), Ted Taylor (1966), Leah Catherine Reader (2015), Gordon Sproule (1996), Tracy Sproule (1996) and Chris Reader (2014) Admittee, father, sister, brother-in-law, sister and brother-in-law



Wes Bulgarella (2017), Joseph Bulgarella (1989) and Stephen Bulgarella (2015) Admittee, father and brother



Jacob Albert Griffin (2017), Stephen B. Griffin (1981) and Matthew A. Griffin (2014) *Admittee, father and brother*



McKay Cleveland (2017) and Florrye Smith Cleveland (1988) Admittee and mother



Grace J. Posey (2017) and Robert O. Posey (1980) Admittee and father



Deidra Mayes (2017) and Ralph Mayes (2005) *Admittee and father*



Emily Jolley (2017), Tim Jolley (1981) and Allen Jolley (2015) *Admittee, father and brother*



Robert Charles Alexander, II (2017), Robert Alan Alexander (1984) and Stephanie K. Alexander (1985) *Admittee, father and mother*



Ryan James Duplechin (2017) and D. James Duplechin (1997) *Admittee and father*



Jillian Jordan (2017) and Hon. Dave Jordan (1984) Admittee and father



James L. Sanders, III (2017) and James L. Sanders, II (1994) Admittee and father



Jordan Elliott (2017) and Matthew Elliott (2017) Wife and husband co-admittees



Katlyn S. Caldwell (2017) and Christie S. Estes (2008) Admittee and cousin



Christy Boardman (2017) and Mark Boardman (1982) *Admittee and father*



Grace Prince (2017), Robert Prince (1974) and Dena Prince (1980) Admittee, father and mother



Reid Harris (2017), Cindy Slate Cook (1987), Bill Cook (1987) and Beth Slate Poe (1983) *Admittee, mother-in-law, father-in-law and aunt*



Thomas Hart Benton, III (2017) and Thomas Hart Benton, Jr. (1988) Admittee and father



Luke Monroe Trammell (2017) and Patrick Moore (2002) Admittee and father-in-law



David Morton (2017) and Dent Morton (1987) *Admittee and father*



Lee Gilmer (2017) and Walt Gilmer (1986) Admittee and father



Samantha Baxter (2017) and Michael Stewart (1986) Admittee and father



Garrett H. Chambless (2017) and Karen Phillips (1990) *Admittee and mother*



Sarah Glass Speaks (2017), Trey Speaks (2012), Hon. Bill Speaks (1985) and Hon. Chris Speaks (1991) Admittee, husband, father-in-law and uncle



B. Clay Alspaugh (2017) and M. Clay Alspaugh (1971) *Admittee and father*



Carmen Chambers (2017), Hon. Rosemary Chambers (1984) and Michael Chambers (1979) *Admittee, mother and father*



Matthew T. Roden (2017), Robert B. Roden (1974) and Wesley W. Barnett (2004) *Admittee, father and cousin*



G. Scotch Ritchey, Jr. (2017), Gregory S. Ritchey, Sr. (1988), Bobby H. Cockrell, Jr. (1985) and Ginger D. Cockrell (1986) *Admittee, father, father-in-law and mother-in-law*



Brooke B. Rebarchak (2017) and James Rebarchak (1982) *Admittee and father-in-law*



Othni J. Lathram olathram@ali.state.al.us

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

Co-authored by



Senator Cam Ward, Alabama Law Institute President

Uniform Law Commission: Alabama Annual Report

The Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws, has worked for the uniformity of state laws since 1892. It is comprised of state commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico and the U.S. Virgin Islands. Each jurisdiction determines the method of appointment and the number of commissioners appointed. The statutory authority governing Alabama's delegation can be found at Section 41-9-370 et seq, *Code of Alabama* 1975.

There is only one fundamental requirement for the 300+ uniform law commissioners: that they are members of the bar. While some commissioners serve as state legislators and other state officials, most are practitioners, judges and law professors. Uniform law commissioners serve for specific terms, and receive no salaries or fees for their work with the Uniform Law Commission.

Alabama's statute provides that one member of each chamber of the legislature serves on the commission along with three persons appointed by the governor, the director of the Legislative Services Agency and the deputy director of the Legislative Services Agency Legal Division. The current delegation is Senator Cam Ward, Representative Bill Poole, Judge Scott Donaldson, Judge John Carroll, Paul DeMarco, Othni Lathram and John Treadwell. The Alabama delegation also has a number of life members: Jerry Bassett, Bill Henning and Bob McCurley.

Commissioners study and review the law of the states to determine which areas of law should be uniform. The commissioners promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable. The ULC can only propose–no uniform law is effective until a state legislature adopts it.

The work of the ULC simplifies the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state. Representing both state government and the legal profession, it is a genuine coalition of state interests. It has sought to bring uniformity to the divergent legal traditions of more than 50 jurisdictions, and has done so with significant success.

History

On August 24, 1892, representatives from seven states– Delaware, Georgia, Massachusetts, Michigan, New York, New Jersey and Pennsylvania–met in Saratoga Springs, New York to form what is now known as the Uniform Law Commission. By 1912, every state was participating in the ULC. The U.S. Virgin Islands was the last jurisdiction to join, appointing its first commission in 1988.

Very early on, the ULC became known as a distinguished body of lawyers and has attracted some of the best of the profession. In 1901, Woodrow Wilson became a member. This, of course, was before his more notable political prominence and service as president of the United States. Several persons, later to become justices of the Supreme Court of the United States, have been members: former Justices Brandeis, Rutledge and Souter, and former Chief Justice Rehnquist. Legal scholars have served in large numbers, including Professors Wigmore, Williston, Pound and Bogert. Many more distinguished lawyers have served since 1892.

In each year of service, the ULC steadily increased its contribution to state law. Since its founding, the ULC has drafted more than 200 uniform laws on numerous subjects and in various fields of law, setting patterns for uniformity across the nation. Uniform Acts include the Uniform Probate Code, the Uniform Partnership Act, the Uniform Limited Partnership Act, the Uniform Anatomical Gift Act, the Uniform Interstate Family Support Act, the Uniform Child Custody Jurisdiction and Enforcement Act and the Uniform Prudent Management of Institutional Funds Act.

Most significant was the 1940 ULC decision to attack major commercial problems with comprehensive legal solutions–a decision that set in motion the project to produce the Uniform Commercial Code (UCC). Working with the American Law Institute, the UCC took 10 years to draft and another 14 years before it was enacted across the country. It remains the signature product of the ULC.

Procedures

The ULC is convened as a body once a year. It meets for six or seven days, usually in July or August. In the interim period between these annual meetings, drafting committees composed of commissioners meet to supply the working drafts that are considered at the annual meeting. At each annual meeting, the work of the drafting committees is read and debated. Each act must be considered over a substantial period of years. No act becomes officially recognized as a Uniform act until the Uniform Law Commission is satisfied that it is ready for consideration in the state legislatures. It is then put to a vote of the states, during which each state caucuses and votes as a unit.



The governing body is the ULC Executive Committee, and is composed of the officers, certain ex-officio members and members appointed by the ULC president. Certain activities are conducted by the standing committees. For example, the Committee on Scope and Program considers all new subject areas for possible Uniform acts. The Legislative Committee superintends the relationships of the ULC to the state legislatures.

The ULC maintains relations with several sister organizations. Official liaison is maintained with the American Bar Association, which provides advisors to all ULC drafting committees and many ULC study committees. Liaison is also maintained with the American Law Institute, the Council of State Governments, the National Conference of State Legislatures, the National Association of Secretaries of State, the Conference of Chief Justices and the National Center for State Courts on an on-going and as-needed basis. Liaison and activities are conducted with other organizations as interests and activities necessitate.

Alabama Process

Most Uniform acts considered in Alabama are brought forward to the legislature through the Alabama Law Institute. Prior to being presented, the Law Institute will have formed a local committee of practicing Alabama lawyers, judges and legislators to study the act and modify at as appropriate for enactment. This process is done through regular meetings and the creation of an Alabama act. Once the committee finishes its work the Alabama version is reviewed and vetted by the Law Institute's membership and council. That process culminates in consideration by the Law Institute Council at its annual meeting where a formal vote is take on whether the institute should present the final product to the legislature for consideration.

Enactment Record

Alabama has enacted 105 Uniform acts ranging from the Uniform Commercial Code to the Athlete Agents Act and the Uniform Probate Code to the Foreign Money Judgments Recognition Act.

During the 2018 Legislative Session, the legislature is likely to consider enactment of the Collateral Consequences of Conviction Act, Voidable Transaction Act (formerly known as Fraudulent Transfers) and the Trust Decanting Act.



DISCIPLINARY NOTICES

- A Reinstatement
- Transfers to Disability Inactive Status
- Suspensions
- A Public Reprimands

Reinstatement

• On August 25, 2017, the Supreme Court of Alabama entered an order reinstating former Birmingham attorney **Angela Turner Drees** to the practice of law in Alabama based upon the decision of Panel II of the Disciplinary Board of the Alabama State Bar. On December 16, 2010, an order was entered suspending Drees's license to practice law. [Rule 28, Pet. No. 2017-271]

Transfers to Disability Inactive Status

- Bessemer attorney **Garry Wayne Abbott** was transferred to disability inactive status pursuant to Rule 27(b), *Alabama Rules of Disciplinary Procedure*, effective September 13, 2017, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the September 13, 2017 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to Abbott's request submitted to the Office of General Counsel requesting he be transferred to disability inactive status. [Rule 27(b), Pet. No. 2017-1057]
- Birmingham attorney **William Brian Collins** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective August 23, 2017, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the August 23, 2017 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to Collins's request submitted to the Office of General Counsel requesting he be transferred to disability inactive status. [Rule 27(c), Pet. No. 2017-983]
- Cullman attorney **Zebulon Peyton Little** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective August 23, 2017, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the August 23, 2017 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to Little's request submitted to the Office of General Counsel requesting he be transferred to disability inactive status. [Rule 27(c), Pet. No. 2017-984]

Suspensions

- Huntsville attorney **Vicki Ann Bell** was summarily suspended from the practice of law in Alabama pursuant to Rules 8(c) and 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective August 30, 2017. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing Bell's refusal to respond to a request for information concerning a disciplinary matter. After receiving a copy of the suspension order, Bell submitted her response on September 5, 2017 and filed a petition to dissolve the summary suspension. Thereafter, on September 20, 2017, the Disciplinary Commission entered an order dissolving the summary suspension. [Rule 20(a), Pet. No. 2017-991]
- Birmingham attorney **Guy DeWitt Chappell, III** was suspended from the practice of law in Alabama for 18 months by order of the Supreme Court of Alabama, effective October 27, 2017. The supreme court affirmed the decision of the Disciplinary Board's report and order and issued the certificate of judgment in the matter. Chappell was found

guilty of violating Rules 1.15(a) and (e), 8.1(a) and (b), and 8.4(a), (c) and (g), *Ala. R. Prof. C.*, wherein Chappell represented clients in various matters where he received funds that he knowingly and intentionally misappropriated. [ASB No. 2014-1117]

- Prattville attorney **Christopher Michael Howell** was suspended from the practice of law for five years in Alabama by the Supreme Court of Alabama, effective April 17, 2017. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Howell's conditional guilty plea, wherein Howell pled guilty to violating Rules 1.5(a) and (c), 1.15(a) and (e), and 8.4(c), (d) and (g), *Ala. R. Prof. C.* [Rule 20(a), Pet. No. 2017-415; ASB No. 2016-1260 and ASB No. 2017-220]
- Birmingham attorney Virgil Eric Hunter, II was summarily suspended from the practice of law in Alabama by the Supreme Court of the Alabama, effective September 8, 2017. The supreme court entered its order based upon the Disciplinary Commission's order that Hunter be summarily suspended for failing to respond to formal requests concerning disciplinary matters. [Rule 20(a), Pet. No. 2017-1039]



(Continued from page 63)

- Birmingham attorney **James Stephen Oster** was suspended from the practice of law for four years in Alabama by the Supreme Court of Alabama, effective August 25, 2017. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Oster's conditional guilty plea, wherein Oster pled guilty to violating Rules 1.4(b), 1.15(e), 5.2(a), 5.4(d)(2), 5.5(a), 7.1 and 7.5, *Ala. R. Prof. C.* [ASB No. 2015-1306]
- Birmingham attorney **Mark David Pratt** was summarily suspended from the practice of law in Alabama pursuant to Rules 8(e) and 20(a)(2)(i), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective September 29, 2017. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing Pratt's refusal to respond to a request for information concerning a disciplinary matter. [Rule 20(a), Pet. 2017-111]

Public Reprimands

• The Disciplinary Board determined that Montgomery attorney **Clinton Chadwell Carter** should receive a public reprimand without general publication as reciprocal discipline pursuant to Rule 25, *Ala. R. Prof. C.* Carter engaged in the unauthorized practice of law by representing a client in Tennessee after his license had been administratively suspended. He failed to comply with filing requirements in a medical malpractice action he filed, which was fatal to his client's case. He further failed to inform his client of the dismissal of the lawsuit for a period of more than six months. As a result of this conduct, Carter received a public censure from the Board of Professional Responsibility of the Supreme Court of Tennessee on April 15, 2016 for violating Rules 1.1 [Competence], 1.4 [Communication], 3.1 [Meritorious Claims], 5.5 [Unauthorized Practice of Law] and 8.4 (a)



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300 North Dean Road, Suite 5-193 • Auburn, AL 36830 334.799.7843 • W W W . t a p l i n k . c o m and (d) [Misconduct] of the *Tennessee Rules of Professional Conduct*. Carter also violated Rules 1.1 [Competence], 1.4 [Communication], 3.1 [Meritorious Claims], 5.5 [Unauthorized Practice of Law] and 8.4 (a) and (d) [Misconduct] of the *Ala*. *R. Prof. C.* [Rule 25(a), Pet. No. 2016-644]

• The Disciplinary Commission ordered that Birmingham attorney **Arthur Davis Shores Lee** receive a public reprimand without general publication for violating Rule 1.5(a), *Ala. R. Prof. C.* Lee was retained to represent the administrator of an estate, with the attorney fee to be calculated at a rate of \$250 per hour. During the course of the representation, Lee issued letters notifying 30 financial institutions of the issuance of letters testamentary and the representation of the administrator. The single-page form letters were identical except for the identity and address of the recipient. Lee billed the client for 0.7 hours of services rendered for each letter, a total of 21 hours, all on the same calendar day. The fees Lee charged his clients for these letters and other services rendered during the same representation were clearly excessive. [ASB No. 2015-716]

Montgomery attorney Alfred Dudlow Norris, III was issued a public reprimand with general publication on September 8, 2017 for violating Rules 1.4(a) and (b), 1.5(b), 1.16(d) and 8.4(c) and (g), Ala. R. Prof. C. In November 2016, Norris was paid \$600 to represent a client in a child custody matter. After paying Norris, the client was unable to contact him, he did not return her phone calls and he failed to take any action on her behalf. After the client terminated Norris's representation of her in the matter, he failed to provide her with a refund of the legal fee. [ASB No. 2016-1497]

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THE APPELLATE CORNER



Wilson F. Green

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



Marc A. Starrett

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

RECENT CIVIL DECISIONS From the Alabama Supreme Court

Lambert Procedure; UIM

Travelers Indemnity Company of Connecticut v. Worthington, No. 1150370 (Ala. Oct. 13, 2017)

UIM insurer waived right to raise forfeiture of coverage defense where it had pretrial knowledge (on eve of trial) that its insured has settled claims against the tortfeasor without first providing it with notice; proceeded to trial as the sole remaining defendant; stipulated to the existence of UIM coverage and the tortfeasor's liability; informed the jury that it should return a verdict for damages in favor of the insured; argued that the only issue for the jury is the amount of those damages; and then, after the jury returned a verdict in favor of the insured, argued for the first time in a post-judgment motion that the insured has waived or forfeited her UIM coverage. (Note: the moral of the case may be for the insurer to amend its answer immediately upon obtaining knowledge of the settlement to raise forfeiture of coverage.)

Wills and Estates

Ex parte Taylor, No. 1150236 (Ala. Oct. 13, 2017)

Under *Ala*. *Code* § 43-8-21(b), if multiple proceedings are commenced in more than one probate court and those proceedings involve the same estate, the probate court where the proceeding was first commenced shall hear the matter. That principle is not confined to the issues actually raised in the prior probate proceeding, but instead covers all matters involving the estate.

Class Actions; Attorneys' Fees

Lawler v. Johnson, No. 1151347 (Ala. Oct. 20, 2017)

The court vacated a 40 percent (\$124 million) common-fund attorney fee awarded to class counsel in a \$310 million class-action settlement arising from the MedPartners/ Caremark RX litigation. The court's holdings: (1) objector was not required to intervene to have standing to appeal the decision on the fee award, adopting the rationale of *Devlin v. Scardelletti*, 536 U.S. 1 (2002); (2) because the class short-form notice stated that objections may be interposed "by filing a written objection and/or by appearing at the settlement hearing[,]" objector's failure to meet the deadline for written objections was not fatal, since he appeared through counsel at the fairness hearing–even though the long-form notice, settlement website and preliminary approval order all required written objections; (3) timeline for filing objections worked a denial of due process to class members, because objections were due before the fee petition was due to be filed, and thus class members did not know how much was

being asked for in fees (though the notice stated that class counsel would ask for up to 40 percent of the fund in fees); (4) shortness of time between due date for attorney-fee motion and final hearing (five business days and 10 calendar days) "surely borders on what due process requires"; (5) time expended factor for approval of attorneys' fees was not irrelevant in common-fund situations, and class members were entitled to know the amount of time expended by class counsel to justify the fee.

Zoning

Ex parte Buck, No. 1151011 (Ala. Oct. 27, 2017)

Reversing the trial court and the court of civil appeals, the supreme court effectively invalidated a rezoning ordinance passed in Birmingham for failure to publish proper and accurate notice under *Ala. Code* § 11-52-77 and § 11-52-78.

Rule 54(b)

Ghee v. USAble Mutual Insurance Company, No. 1160082 (Ala. Oct. 27, 2017)

Appeal dismissed from an order certified under Rule 54(b) which granted dismissal of claims based on ERISA defensive preemption, but which afforded plaintiff leave to amend the complaint to assert an ERISA claim; Rule 54 certification was improper because the possibility of amendment to assert a cause of action intertwined with the dismissed claim.

Standing

Morrow v. Bentley, No. 1151313 (Ala. Nov. 3, 2017)

State legislator and state auditor, individually and in their official capacities, brought suit against governor and other interested parties to enjoin alleged unlawful expenditures of state funds in connection with construction of Gulf State Park Conference Center and Hotel, pursuant to the Gulf State Park Projects Act, Ala. Code § 9-14E-1. Among other holdings: (1) state auditor did not allege that unlawful expenditures worked a harm to his ability to perform his official functions or impair his official authority, because alleged harm to the state treasury is not remediable by the auditor and (2) individual legislator lacked standing to assert alleged harm to the institution of the legislature (through an alleged usurpation of the legislature's power of appropriation). The court cautioned that "a legislature as a whole [may] have an interest in seeing its validly enacted laws executed in accordance with their provisions and, thus, standing to bring an action seeking to ensure that executive officials comply with statutory law."

Punitive Damages

Thomas v. Heard, No. 1150118 (Ala. Nov. 3, 2017) On return to remand, the court affirmed a series of three inside-the-ratio punitive damage awards for plaintiffs arising from an MVA in which the driver was voluntarily intoxicated and had minor passengers.

New Trial; Inconsistent Verdicts

Johnston v. Castles and Crowns, Inc., No. 1160171 (Ala. Nov. 3, 2017)

At trial, jury was instructed to consider an unjust enrichment claim only if it found for defendant and against plaintiff on intentional interference and other claims. Jury found for plaintiff on all claims and was then discharged without correcting the error. The trial court attempted to cure the inconsistency by setting aside the verdict on unjust enrichment. Defendant moved for new trial on all claims and counterclaims, which was denied. The supreme court reversed, holding that new trial was required on all claims and counterclaims the jury failed to follow the trial court's instructions, and that the trial court's attempt to reconcile the inconsistency in the jury's verdict was based on mere speculation about the jury's intent.



Survival of Actions and Causes of Action

Shelton v. Green, No. 1160474 (Ala. Nov. 9, 2017)

An action in personal injury survives the death of the plaintiff, but an unfiled personal injury cause of action does not survive the death of a putative plaintiff. Therefore, personal representative's action against tortfeasor for personal injuries not causing death of decedent did not survive and was properly dismissed. Among other holdings, the court rejected PR's argument that the non-survival of causes of action was unconstitutional under the Fourteenth Amendment.

Taxpayer Standing

Ingle v. Adkins, No. 1160671 (Ala. Nov. 9, 2017)

Taxpayer and citizen brought action against board of education and superintendent, seeking to declare illegal and void a compensation agreement between board and superintendent and seeking damages and attorneys' fees. The trial court dismissed the action in all respects. The court held that all individual-capacity claims were properly dismissed on immunity grounds, but that immunity did not apply to a claim that payments under the contract were illegal and due to be enjoined because that claim sought an "injunction ... against State officials in their representative capacity where it is allege[d] that they had acted fraudulently, in bad faith, beyond their authority, or in a mistaken interpretation of law"-which is an exception to section 14 immunity. Moreover, Ingle had taxpayer standing to assert such claims against board members in their official capacities: "this Court has repeatedly recognized that a taxpayer has standing to seek an injunction against public officials to prevent illegal payments from public funds."

Arbitration

Norvell v. Parkhurst, No. 1160696 (Ala. Nov. 9, 2017)

Trial court erred in entering discovery orders relating to merits and merits-related orders after having compelled arbitration; there was no evidence that proponent of arbitration had expressed a clear and unequivocal waiver of right to continue insistence upon arbitration, especially after arbitral process had begun.

Personal Jurisdiction; Conspiracy

Ex parte The Maintenance Group, Inc., No. 1160914 (Ala. Nov. 22, 2017)

Contract between out-of-state parties for purchase of aircraft required that Maintenance perform inspection on aircraft before closing of purchase. Maintenance performed the inspection in Georgia, which noted a number of "discrepancies" in the

aircraft requiring repair or work, after which transaction closed. Thereafter, plane was flown to and from Huntsville, Alabama on multiple occasions. Thereafter, purchaser sued seller, other parties and Maintenance regarding alleged failures to cure items in the discrepancies. Maintenance moved to dismiss for lack of personal jurisdiction, which was denied. The supreme court granted mandamus relief and directed the trial court to dismiss Maintenance for lack of minimum contacts with Alabama. The court rejected purchaser's argument that jurisdiction could be predicated on the "conspiratorial" theory, under which "specific jurisdiction can be based upon the purposeful conspiratorial activity of a nonresident defendant aimed at an Alabama plaintiff." Ex parte Alamo Title Co., 128 So. 3d 700, 713 (Ala. 2013). The court reasoned that flying passengers into and out of Alabama on a routine basis was not a sufficient "overt act" of a co-conspirator in furtherance of any alleged conspiracy, and thus could not be the basis for establishing any nexus between any co-conspirator (or Maintenance) and Alabama.

Venue; Actions against State Officials

Ex parte Carter, No. 1160894 (Ala. Nov. 22, 2017)

Absent statutory authority to the contrary, venue for actions against a state agency or a state officer must be in the county of the official residence of the agency or officer (in this case, Montgomery County).

Judges and the Judiciary; Immunity; Mootness

Wood v. State, No. 1160814 (Ala. Nov. 21, 2017)

Putative class action regarding increase in judicial contribution requirements to retirement fund was barred by immunity with respect to money damage claims, because a favorable result would impact the state treasury negatively. Claims for prospective injunctive relief regarding the rates of contribution became moot upon retirement of class representative judge.

From the Alabama Court of Civil Appeals

Workers' Compensation

Ex parte Ampro Products, Inc., No. 2160818 (Ala. Civ. App. Oct. 13, 2017)

Trial court did not exceed its discretion in refusing to dismiss comp claim based on employee's inconsistent testimony between deposition and compensability hearing, because there was sufficient record evidence to support conclusion that employee was confused by certain questions. Compensability determination accompanied by order to pay certain medical benefits was reviewable by mandamus, but employer failed to provide sufficient portion of the record on which to review that determination. However, trial court exceeded its discretion in awarding certain costs to employee (the deposition of the employee's vocational expert, mediation costs, the cost to employ a private investigator to serve a subpoena and the cost to pay a third-party service to order and receive medical records).

Res Judicata; Implicit Adjudication of Counterclaims

Phillips v. Montoya, No. 2160600 (Ala. Civ. App. Oct. 27, 2017)

Res judicata barred second action brought by judgment debtor in prior action, where in prior action judgment debtor asserted counterclaims but suffered adverse default judgment for his non-appearance at trial in district court. District court's entry of default judgment on the judgment creditor's claims for judgment debtor's non-appearance at trial, without adjudicating judgment debtor's counterclaims, was implicit adjudication of those claims.

Fraud; Effect of Merger Clause

McCullough v. Allstate Prop. and Cas. Ins. Co., No. 2160497 (Ala. Civ. App. Oct. 27, 2017)

Presence of merger or integration clause in a contract (in this case, a release and settlement agreement) does not bar a claim of fraudulent inducement of the instrument containing the clause.

Accrual; Conversion

Treadwell v. Farrow, No. 2160667 (Ala. Civ. App. Oct. 27, 2017)

Cause of action for conversion accrues and statute of limitations begins to run when plaintiff loses control and dominion over property. In this case, conversion claim as to personalty did not accrue at time of foreclosure, because undisputed evidence showed that plaintiff continued to exercise dominion over personalty on the foreclosed property for some time thereafter.

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The United States Supreme Court has opened its October 2017 term, but has not yet released significant opinions.

From the Eleventh Circuit Court of Appeals

Trademark

Savannah College of Art & Design, Inc. v. Sportswear, Inc., No. 15-13830 (11th Cir. Oct. 3, 2017)

Sportswear began using the federally-registered service marks of Savannah College of Art & Design ("SCAD") without a license to sell apparel and other goods on its website. SCAD sued, asserting service mark infringement under 15 U.S.C. § 1114, unfair competition and false designation of origin under 15 U.S.C. § 1125 and unfair competition under O.C.G.A. § 10-1-372. The district court concluded that SCAD had failed to establish that it had enforceable rights in its marks that extended to apparel. SCAD, which validly registered its marks only in connection with the provision of "education services," did not show that it had used its marks on apparel earlier than Sportswear in order to claim commonlaw ownership (and priority) over its marks for "goods." The Eleventh Circuit reversed, reasoning that this case did not involve the alleged infringement of a common-law trademark, and, as a result, the date of SCAD's first use of its marks on goods is not determinative. The Court concluded that under Boston Prof'l Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004 (5th Cir. 1975), protection for federallyregistered service marks extends to goods.

First Amendment; Public Meetings

Barrett v. Walker County School Dist., No. 16-11952 (11th Cir. Oct. 2, 2017)

To speak at a Walker County Board of Education meeting, the district requires a member of the public to first go through a process that can consist of several steps. If the entire process is not completed at least one week before the board meeting, the citizen may not speak at the meeting. Yet critically, the board completely controls the timing of a step at the beginning of the process. If the board drags its feet in completing this step, a member of the public cannot finish the rest of the steps in time to be permitted to speak. Barrett, a public-school teacher, sued for injunctive relief, claiming that the district has wielded this policy to unconstitutionally censor speech critical of the board and its employees at school-board meetings. Barrett asserted a variety of First Amendment facial and as-applied claims in order to support an injunction against various aspects of the board's policy governing public comment at its meetings. The district court ultimately granted Barrett a permanent injunction based on some of his facial claims and enjoined the board's public-comment policy. It also allowed a number of Barrett's other claims to proceed to discovery. The Eleventh Circuit affirmed in relevant part and with respect to the facial "unbridled discretion" claim, holding that the policy requiring potential speakers to meet with the superintendent in advance and obtain approval was a prior restraint on speech, leaving the superintendent with sufficient standardless discretion to control the timing of speech under Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, 348 F.3d 1278 (11th Cir. 2003), and running a substantial risk of chilling speech. The Court also concluded that the restraint, though not formally content-based, was in fact content-based because the nature of the superintendent procedure gave the superintendent authority to inquire as to the subject matter of the speech. The case contains a thorough analysis of the law in this area.

ERISA

Secretary, USDOL v. Preston, No. 17-10833 (11th Cir. Oct. 12, 2017)

Six-year statute of repose contained in ERISA Section 413(1), 29 U.S.C. § 1113(1), is subject to express waiver by the employer.

Bankruptcy; Fraudulent Transfer

In re Fundamental Long Term Care, Inc., No. 16-16462 (11th Cir. Oct. 19, 2017)

Estates of deceased patients brought a series of wrongful death actions against a network of nursing homes, the real estate of which was owned by Schron. The judgment debtor engaged in a series of "bust out" transactions to dump its assets into a new entity, which prompted an involuntary Chapter 7 and an adversary proceeding for avoidance of the transfers as fraudulent. Schron was named as a defendant. The bankruptcy court dismissed Schron from the suit, concluding that his alleged connection with the transaction was speculative at best. Claims against several additional defendants survived dismissal, and the case culminated in a 12day bench trial. At its conclusion, the estates settled with the remaining defendants for \$24 million. The bankruptcy court approved the settlement as fair and equitable on the condition that the estates be permanently enjoined from pursuing any additional claims arising from the bust-out scheme against Schron individually. The district court and the Eleventh Circuit affirmed.

Products Liability (Florida and West Virginia Law); Evidence; Medical Devices

Eghnayem v. Boston Scientific Corp., No. 16-11818 (11th Cir. Oct. 19, 2017)

In a products liability case arising from injuries sustained by a transvaginal mesh pelvic floor repair kit, jury returned verdicts of \$6 million for four plaintiffs. On appeal, Boston Scientific Corp. ("BSC") argued that the district court abused its discretion in two distinct ways: by consolidating the four plaintiffs' suits and trying them together, and by excluding all evidence relating to the Food and Drug Administration's clearance of the Pinnacle for sale through its 510(k) "substantial equivalence" process. BSC also claimed that the district court erred in denying it judgment as a matter of law because Eghnayem failed to present sufficient evidence to prove her design defect claim; she failed to present sufficient evidence that the Pinnacle's warnings were not per se adequate, and that the alleged failure to warn was the proximate cause of her injuries; and finally, the relevant statute of limitations barred all of her claims as a matter of law. The Eleventh Circuit affirmed in all respects.

Class Actions; Intervention

Technology Training Assocs. Inc. v. Cin-Q Automobiles, Inc., No. 17-11710 (11th Cir. Oct. 27, 2017)

Putative class representatives in prior-filed class action were entitled to intervene as of right in second-filed putative class action, involving attorney in firm who moved from firm involved in prior-filed action to firm in subsequent-filed action, where second-filed action was promptly settled on a class-wide basis after filing. The Court noted that in general, class members should be entitled to intervene in settlement situations where adequacy of representation might be challenged.

Securities; Broker Discipline

Turbeville v. FINRA, No. 16-11083 (11th Cir. Nov. 1, 2017) As a self-regulatory organization authorized by the 1934 Securities Act, FINRA has sole authority over disciplinary matters pursuant to its own rules and procedures. Therefore, district court (1) properly denied a motion to remand to state court a claim by the broker against FINRA seeking a judicial challenge to FINRA's enforcement scheme, and (2) did not err in dismissing the claims pursuant to FINRA's exclusive authority.

Social Security

Hargress v. Commissioner, No. 17-11683 (11th Cir. Nov. 6, 2017)

The Court affirmed the district court's affirmance of denial of SSI benefits, which Hargress had sought for her type II diabetes, excessive tiredness and anxiety. Among other holdings: (1) the ALJ was entitled to discount the treating physician's opinions: "[t]he ALJ's stated reason for discounting Dr. Odjegba's opinion that it was inconsistent with his own medical records and the record as a whole-was adequate and amounts to good cause[;]" (2) ALJ's conclusion that Hargress could perform a full range of sedentary, unskilled work as defined in 20 C.F.R. §§ 404.1567(a) and 416.967(a) was supported by substantial evidence; (3) there was no error in the ALJ's failure to follow SSR 16-3p in evaluating her subjective symptoms because that rule became effective one year after the ALJ's decision, and the Rule applies only prospectively; (4) Appeals Council properly declined to consider new medical records because they were not chronologically relevant.

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(Continued from page 71)

Qualified Immunity

Hammett v. Paulding County, No. 16-15764 (11th Cir. Nov. 17, 2017)

Defendant police officers executed a search warrant at a private residence, intending to seize methamphetamines suspected to be in the possession of Van Cleve. During the execution of the warrant, a confrontation ensued. Each of the officers fired one shot, two of which struck Hammett, Van Cleve's husband. Hammett died from his injuries, and Hammett's PR brought this suit, alleging that the officers used excessive force against Hammett in violation of the Fourth Amendment. The district court granted summary judgment, determining the officers were entitled to qualified immunity. The Eleventh Circuit affirmed, reasoning that plaintiff offered no substantial evidence that suggests the "split-second judgments" of officers violated the Fourth Amendment as they responded to the "tense, uncertain, and rapidly evolving" events of that day. A district judge sitting by designation dissented in part, reasoning that the majority conceded that the evidence supported a reasonable inference of excessive force as to two officers.

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Trial Procedure; Voir Dire; Sexual Orientation

Berthiaume v. Smith, No. 16-16345 (11th Cir. Nov. 22, 2017) Under the particular circumstances presented, the district court abused its discretion in failing to ask jurors his proposed voir dire question: "Do you harbor any biases or prejudices against persons who are gay or homosexual?" The Court noted that this case involved an alleged domestic battery between former partners of the same sex, and that the sexual orientation of Berthiaume and his witnesses would be central facts at trial and were "inextricably bound up" with the issues to be resolved at trial. Therefore, there was a "reasonable possibility that [sexual orientation bias] might have influenced the jury[,] given the long history of cultural disapprobation and prior legal condemnation of same-sex relationships. The risk that jurors might harbor latent prejudices on the basis of sexual orientation was held to be not trivial.

RECENT CRIMINAL DECISIONS From the United States Supreme Court

Habeas Corpus

Dunn v. Madison, No. 17-193 (Nov. 6, 2017)

Reversing the Eleventh Circuit, the Court concluded that capital murder defendant was not entitled to federal habeas relief from the death sentence on the ground that, due to several strokes, he failed to remember that he killed his victim. The Court found that there was no clearly established federal law barring a defendant's execution because he failed to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment applicable to his case.

From the Court of Criminal Appeals

Restitution

Holderfield v. State, CR-14-1250 (Ala. Crim. App. Oct. 13, 2017)

The court of criminal appeals upheld a judgment ordering the defendant, convicted of assault after biting a police officer, to pay restitution for loss resulting from numerous blood tests undergone by that officer due to the assault. However, it vacated the judgment to the extent that it also ordered restitution for blood tests taken by other officers at the scene, because the assault did not proximately cause the other officers to undergo blood tests.

Hearsay; Co-Defendant's Extra-Judicial Statement

Collins v. State, CR-14-0753 (Ala. Crim. App. Oct. 13, 2017)

Trial court erred under *Bruton v. United States*, 391 U.S. 123 (1968), in the admission of a non-testifying codefendant's statement that implicated the defendant in the murder, but deemed it harmless due to the defendant's confession to all elements of the charges against him.

Double Jeopardy; Conspiracy

Miller v. State, CR-16-0322 (Ala. Crim. App. Oct. 13, 2017) While affirming the defendant's robbery conviction, the court reversed his related conviction for conspiracy to commit robbery. Though the offenses did not violate the double jeopardy test of *Blockburger v. United States*, 284 U.S. 299 (1932) because the elements of each were separate and distinct, *Ala. Code* § 13A-1-8 (b)(2) prohibits convictions of two offenses where one offense consists of only a conspiracy or other form of preparation to commit the other.

Receiving Stolen Property

Madden v. State, **CR-16-0781 (Ala. Crim. App. Oct. 13, 2017)** The court rejected the defendant's post-conviction claim that he did not commit the offense of receiving stolen property under *Ala. Code* § 13-8-16 because he brought stolen motor vehicles from Mississippi to Alabama. He committed the offense by having "retained" the stolen property in Alabama in violation of the statute, regardless that they were stolen in Mississippi.

Capital Punishment; Aggravating Circumstances

Johnson v. State, CR-10-1606 (Ala. Crim. App. Oct. 13, 2017)

The court affirmed the defendant's death sentence, finding it to comply with *Hurst v. Florida*, 136 S.Ct. 616 (2016) because the jury, rather than the trial judge, found the existing of an aggravating circumstance that subjected him to punishment by execution. The fact that the jury's sentence recommendation was not binding upon the trial court was of no consequence.



OPINIONS OF THE GENERAL COUNSEL

J. Douglas McElvy douglas.mcelvy@alabar.org



Lien Reduction and Double-Dipping

QUESTION:

The question before the Disciplinary Commission is whether a lawyer representing a client on a contingency fee basis may enter an agreement for, charge or collect an attorney's fee based on the gross recovery or settlement of a matter, and in the same matter, charge an additional contingent fee for the negotiation of a reduction of third-party liens or claims, for example medical bills, statutory liens and subrogated claims, where the liens or claims are related to, and to be satisfied from, the gross settlement proceeds from that matter?

ANSWER:

Absent extraordinary circumstances, a lawyer may not enter into an agreement for, charge or collect an attorney's fee based on the gross recovery or settlement of a matter, and in the same matter, charge an additional contingent fee for the negotiation of a reduction of third-party liens or claims, where the liens or claims are related to, and to be satisfied from, the gross settlement proceeds from that matter.

DISCUSSION:

Rule 1.5(a), *Ala. R. Prof. C.*, requires "[a] lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee," and identifies nine factors to be considered when determining whether a fee is clearly excessive:

Fees.

- (a) A lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee. In determining whether a fee is excessive the factors to be considered are the following:
 - the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (8) whether the fee is fixed or contingent; and
 - (9) whether there is a written fee agreement signed by the client.

These factors, with the exception of paragraph (9) which provides for consideration of a written fee agreement signed by the client, are identical to those announced by the Supreme Court of Alabama in *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983). While contingent fees are not permitted in criminal defense and domestic matters, see Rule 1.5(d), *Ala. R. Prof. C.*, they are permissible in a wide variety of matters provided they do not call for, charge or result in the collection of a "clearly excessive fee."

More than merely permissible, contingent fee agreements are normal and customary in plaintiff's practice, and particularly prevalent in personal injury representation. Among other requirements, Rule 1.5(c), Ala. R. Prof. C., dictates these agreements must be "in writing" and "state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated." Because all contingent fee agreements must be in writing, it is plainly impermissible for a lawyer to charge or collect a contingent fee for the negotiation of reductions in medical bills or hospital or subrogation liens or other thirdparty claims to be satisfied out of settlement funds if there is no written agreement to do so. Rule 1.5(c), Ala. R. Prof. C.

However, a lawyer may not, even if in writing and signed by the client, enter into an agreement or agreements which



(Continued from page 75)

call for an attorney's fee based on the gross recovery or settlement of a matter and, in the same matter, charge an additional contingent fee for the negotiation of a reduction of third-party liens or claims which are related to, and to be satisfied from, the gross settlement proceeds from that matter. This is because the negotiation of a reduction of third-party liens and claims is incident to normal personal injury representation. Frequently necessary to reach a settlement of a client's personal injury claim, this service is a routine element of case management.

While Rule 1.2, Ala. R. Prof. C., allows for limited-scope representation, the limitations must be "reasonable under the circumstances." Lawyers may not ethically abdicate their duty to timely address liens attaching to settlement proceeds. Rule 1.4(b), Ala. R. Prof. C., requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation." One of the most significant decisions to be made by a personal injury plaintiff is whether or upon what terms to propose or accept a settlement. Without an explanation of his or her obligations with regard to medical bills or hospital or other liens related to the injury giving rise to the claim, and any legal interest a third party may have in the client's settlement proceeds, a client cannot make an informed settlement decision. This is especially the case if the lawyer has a statutory obligation to protect a third party's interest in those funds, for example in the case of hospital or Medicaid liens, or an ethical obligation by virtue of the issuance of a protection letter. See Formal Opinion 2003-02.

It also stands to reason that typically the most advantageous time for negotiation of third-party liens or claims is prior to, rather than after, settlement of a tort claim. Whereas before settlement the lienholder or subrogated insurer will have to face the possibility of receiving no recovery at all, after settlement or judgment the lienholder will have no incentive to reduce its lien except as may be required by the common fund doctrine. A lawyer attempting to negotiate a reduction after settlement may not knowingly make a false statement of material fact or law to a third-party claimant, including a false statement about the settlement status of the related claim or the third party's right to settlement funds therefrom. Rule 4.1(a), Ala. R. Prof. C. Therefore, absent extraordinary circumstances, a lawyer representing a client in a personal injury matter may not enter an agreement with the client to exclude consideration of third-party liens or claims from the scope of representation. Rather, a lawyer's obligation to zealously represent the client's interests requires reasonable efforts to timely seek their reduction in conjunction with settlement.

Furthermore, the Rule 1.5(a) factors require that a fee for the negotiation of medical bills or hospital or subrogation liens, assessed *in addition to* an attorney's fee based on gross recovery, must be supported by some additional benefit to the client. However, as beneficiaries of the lawyer's services, third-party claimants and lienholders routinely reduce their liens or claims on a pro rata basis equal to their share of the attorney's fee paid by the client consistent with the common fund doctrine. A further reduction in a third party's lien upon or claim to settlement funds, in excess of the amount potentially recoverable pursuant to the common fund doctrine, is frequently necessary to for the parties to reach a settlement. A lawyer negotiating these reductions in the process of reaching a settlement is compensated for his services by an attorney's fee calculated as a percentage of the gross settlement.

Thus, a lawyer charging a client a fee for negotiating reductions in third-party claims, including medical bills or hospital or other subrogation liens to be satisfied from settlement proceeds, in addition to an attorney's fee based upon the gross settlement, does so without providing any additional benefit to the client. This negotiation is incident to normal representation and requires no additional time or labor than that required of an attorney representing the client in the underlying claim. See Rule 1.5(a)(1), Ala. R. Prof. C. It is neither normal nor customary for lawyers to charge clients an additional amount for this "service." See Rule 1.5(a)(3), Ala. R. Prof. C. And a lien reduction granted by a medical provider or lienholder to facilitate the global settlement of the underlying claim, or consistent with the common fund doctrine, is the result of action already practically and ethically required of the lawyer and not the result of an additional service. See Rule 1.5(a)(4), Ala. R. Prof. C. It is therefore a violation of Rule 1.5(a), Ala. R. Prof. C., for a lawyer to enter an agreement for, charge or collect such a "clearly excessive fee," which could be described as "double-dipping."

In sum, while circumstances may exist in which it is permissible for an attorney to enter into an agreement for, charge or collect a contingent fee for the reduction of medical bills or hospital or subrogation liens or other third-party liens or claims to be satisfied out of settlement funds, the Disciplinary Commission is of the opinion they are impermissible in routine contingent fee representation where the attorney's fee is based on the gross settlement or recovery. This opinion does not address an agreement for or charge of fees or expenses for the outsourcing of lien resolution in complex matters, for example Medicaid liens or ERISA subrogation, or the apportionment of those costs between the lawyer and client where the both lawyer and client are beneficiaries of the third-party service. [RO-2015-01]



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ABOUT MEMBERS, AMONG FIRMS

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Among Firms

Alexander Shunnarah Personal Injury Attorneys PC announces that Sara Williams is the managing attorney of the firm.

Anderson Crawley & Burke PLLC announces that Joseph McDowell joined as a partner in its Jackson, Mississippi office.

Burr & Forman LLP announces that **Adam Overstreet** joined as counsel in the Birmingham office.

Fuller Hampton LLC announces that Mary Katherine Flynn and Justin Pipkin joined as associates.

Harrison, Gammons & Rawlinson PC of Huntsville announces that Dustin D. Key joined as an associate.

Lightfoot, Franklin & White LLC announces that Gabriella E. Alonso, Bridget E. Harris, Logan T. Matthews and Rachelle E. Sanchez joined as associates in the Birmingham office.

Maynard Cooper & Gale announces that Scott Connally, Baker Findley, Chris Friedman, Carling Nguyen, Kacey Weddle, Carmen Chambers, Michal Crowder, Alison Dennis, Hannah McGee, Jennifer Moore, Riley Murphy, Grace Posey, Alyson Smith, Jennifer Stanley and Millard V. Young joined as associates.

Miller, Christie & Kinney PC announces that R. Brook Meadows, III joined as an associate.

Balch & Bingham announces that Robby Anderson, Wes Bulgarella, Katlyn Caldwell, Whitney Della Torre and Jimmy Williams joined as associates. Huie, Fernambucq & Stewart LLP announces that Madison Davis, Melissa Sinor, Will Thompson and Paul Wallace joined as associates.

Martinson & Beason PC announces that Will Pylant joined as an associate.

McCallum, Methvin & Terrell PC announces that Brooke Boucek Rebarchak joined as an associate.

Reli Settlement Solutions LLC announces that **Robert S. Caliento** joined the Birmingham office.

Samford & Denson LLP announces that Kevin W.R. Bufford joined as an associate.

Starnes Davis Florie LLP announces that Madeleine S. Greskovich joined as an associate.

Thornton, Carpenter, O'Brien, Lawrence & Sims announces that Mary Lauren Kulovitz joined as an associate.

Watkins & Eager PLLC announces that David L. Brown, Jr., H. Lanier Brown and J. Patrick Strubel joined as members in the newly-opened Birmingham office.

Webster, Henry, Bradwell, Cohan, Speagle & DeShazo PC announces that Caitlin Malone and Francisco Canales joined as associates in the Montgomery and Birmingham offices, respectively, and that F. Jackson Rogers joined as of counsel in the Montgomery office.

William V. Linne of Pensacola announces the name of his firm is now William V. Linne and Gary W. Huston Attorneys at Law PLLC. Court Reporting • Videography • Videoconferencing • Worldwide Scheduling • Trial Technology • Conference Rooms

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