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NOVEMBER 2018 | VOLUME 79, NUMBER 6

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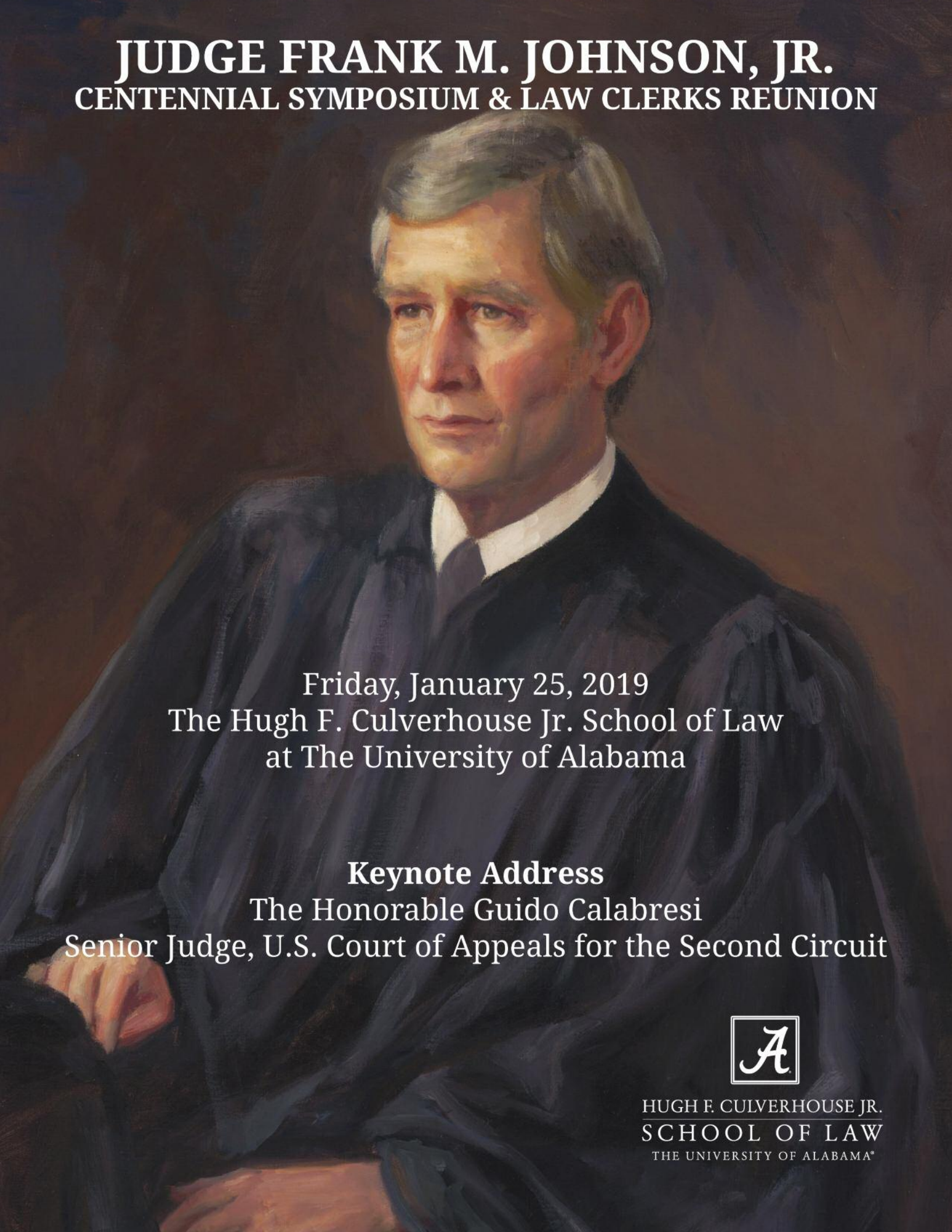

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**Keynote Address**
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"Autumn Sunburst" taken in Auburn by Robert Fouts

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PRESIDENT'S PAGE

***Sam Irby***
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*(251) 929-2225*

# The Future of Our State Bar Is Young

Young lawyers make up only about 17 percent of the Alabama State Bar, but they are vitally important to the future of this organization and to the legal profession as a whole. New bar members are often intimidated by the state bar. Their first interaction with the bar is applying to take the bar exam. They are soon thereafter made aware of its disciplinary might. However, the ASB is much more than a regulatory body.

While the ASB's regulatory role is important, during my presidency I want to also focus on its equally-important service role. The ASB is a membership organization which should provide the member services that are needed and wanted by its members. This can be difficult because the needs and wants of our members not only tend to vary by age, but also do not remain static.

The challenge for the ASB is to adapt as the needs and wants of our members evolve and change over time. The resources and programs we provide should continually change as different

generations move in and out of the legal profession. We are now experiencing a shift away from the large Baby Boomer group and smaller Gen-X group to the new Millennials made up of lawyers who were born between 1981 and 1996. This younger group will soon dominate the workforce. The career landscape they face will inevitably differ from that faced by their predecessors since the world around us is constantly changing.

I want to see the ASB do more to engage these younger members of our organization. I believe that it is important to get them involved and keep them involved as they move through their careers and eventually become leaders in the legal profession. We can help them in that journey, and we can learn from them. These newer members of the bar bring a wealth of talent, energy and new ideas.

To the young lawyers out there, my advice is to take advantage of what the ASB has to offer now, and, if there is more you need or a better way of doing things, then take an active role in bringing about the necessary changes. Through your involvement, you can help steer the ASB in the direction that it needs to go and play a part in setting the standards of our bar. The more you put into your professional organization, the more you will get out of it.

The ASB can benefit you by being a resource for substantive information, free legal research and affordable CLE. The Practice Management Assistance Program and the Office of General Counsel are sources of helpful advice and tools that will assist you in your practice. An effort is made to provide services and programming relevant to young lawyers. If there are areas or topics that are not being adequately covered, let us know.

You can also benefit from the mentoring and networking opportunities available through attendance at ASB events and involvement with any of the various practice sections. Your presence and engagement will allow you to mingle with and learn from more experienced lawyers and judges. As legal professionals, it is important that we get to know our colleagues. Doing so benefits us all by increasing the degree of camaraderie and professional respect.

Many of you became lawyers because you wanted to have an impact on the world around you. The ASB provides young lawyers with opportunities to use your law degree in meaningful ways that can make a difference to the public. Through your contributions to, and active involvement with, the Alabama Law Foundation and the Volunteer Lawyers Program, you can help to improve the quality of life in Alabama.

*(Continued from page 389)*

Recognizing that its newest members are its future, the ASB provides young lawyers with opportunities to develop their leadership skills. The Young Lawyers' Section is an excellent place to start. Open to lawyers aged 36 and under and those with three years or less of experience, the section has approximately 700 dues-paying members. Attendance at their annual meeting, service on one of their committees or participation in their programming will allow you to network and develop relationships that last throughout your career. Additional information about the section and who to contact about getting involved is available on the ASB website.

Once you have a few years of practice under your belt, consider applying for the ASB's nationally-recognized Leadership Forum. Each year a small membership class gets training and hands-on experience designed to help them develop into better leaders in the bar, the community and the state. Information about the forum and the application process is available on the ASB website. Ed Patterson, who has ably led the forum since its inception in 2005 and has been the moving force behind its successful development, is retiring in the next few months. I thank Ed for his tremendous contributions to the bar. He will be missed, but this great program that he started will continue to develop.

Young lawyers quickly learn that being successful as a lawyer can be difficult. While it is easy to get caught up in the day-to-day challenges of your practice, I caution you not to ignore the big picture of your career and profession. Take time to become involved with the ASB. Not only can this benefit you in your career, but it can also be a way for you to affect the organization that affects you. Your involvement is the best way to ensure that the ASB continues to serve you well during all phases of your career, no matter how the legal profession evolves and changes in the years ahead.

I thank Mobile lawyer Mary Margaret Bailey for her assistance in preparing this article. ▲

# A Fond Farewell to Laura Calloway

The Alabama State Bar has lost a tremendous leader with the retirement of Laura Calloway. I have had the pleasure of working with Laura over the last several years. She is a trusted professional who has worked for the Alabama State Bar for more than 21 years and she has been a great help to me. For many years, Laura has assisted lawyers in the state with office practice management issues and has traveled throughout Alabama presenting CLEs on office practice management. Her leadership has helped make the Alabama State Bar run smoothly.

*Calloway*

Ed Patterson, assistant executive director, said, "I have known Laura for more than 25 years. She is not only a trusted professional in our organization, but also my friend. She has been singularly devoted to her responsibilities at the bar as they have evolved. She has done great work at the state and national levels in her fields of expertise. The bar is losing another chunk of institutional wisdom with her departure. While all of us can be replaced, she cannot be duplicated."

Kristi Skipper says of Laura, "I've been blessed to work with Laura for 11 years, and she is truly the best boss I've ever had. She is a hard worker and a team player, but most of all, she is a friend. Laura has worked beside me 'in the trenches,' never leaving until the job was completed. She has always strived to do what is best for the organization as a whole, and has worked hard to develop and maintain valuable programs to benefit the profession. Laura appreciates the talent and skills of those around her, and has utilized those talents and skills to the benefit of the bar. She has always made me feel highly valued and appreciated, and I am a much better person having served on her team. I wish everyone could be so lucky to have a boss like Laura." ▲

–President Sam Irby

**Laura, we will miss you. You and your leadership have made the Alabama State Bar a better bar.**

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EXECUTIVE DIRECTOR'S REPORT

***Phillip W. McCallum***
*phillip.mccallum@alabar.org*

# You're Never Too Old to Learn or Inspire

Sara Dominick Clark has always been remarkable.

At the age of 16, she entered Birmingham Southern College. From there, she enrolled at the University of Alabama Law School. She got married, had three daughters and was a successful lawyer. She took a break from her law practice to raise her children, but found that once they were grown, she longed to fill a professional void. In the spring of 1976, she approached Dean Donald Corley of Cumberland School of Law and asked for a job. She didn't know that this decision would be life-altering.

*Clark*

Decisions that color your biography are not limited to your 20s or 30s, where every choice seems to carry consequences for decades to come. They are around every corner and crossroad, ready and waiting to take you by surprise. This was the case for Professor Clark–to me she will always be known as "professor" because she taught me property law at Cumberland. She had an impact on me, both personally and professionally, with her kindness, wit and listening ear, in *and* out of the classroom. Her time at Cumberland School of Law was the pinnacle of a unique career, but what makes her different is the character she has exhibited all her life. Her former students, colleagues, friends and family all echo the same sentiments: Sara Clark has inspired many because she genuinely cares about people. She's invested in others. She's a listener. She inspires future interest in the legal field.

Today, she is still an active member of the Alabama State Bar. Yes, you read that correctly. She is our bar's oldest member and turned 100 this year. Though Professor Clark has not practiced law for many years, she has maintained her membership with the bar. To me, this is significant and a reminder that the Alabama State Bar is an organization for life-long learning. Often lawyers think of the bar as a temporary professional need, but as Professor Clark has demonstrated, it can be much more. We are honored by the continued membership of Sara Dominick Clark and the contributions she has made to the legal profession over the decades she has served her community and Cumberland School of Law.

Thank you, Professor Sara Dominick Clark, for inspiring me and so many others to dedicate themselves to serving this profession and the Alabama State Bar. ▲


## JACK FLOYD ON

# Being a Lawyer for 65 Years

***By Margaret H. Loveman***

On any given day, if you walk just down the road from the Etowah County Courthouse, you will find Jack Floyd practicing law like he has been for the last 65 years. Age has made no difference to him.

Born on October 9, 1928, Floyd enrolled at the University of Alabama Law School in 1950, after three years of undergraduate studies. Three and a half weeks into his first semester, he was called away to the Korean War, where he spent the next two and a half years as a platoon leader and infantry officer. Upon his return to law school, Floyd learned that he had been given an entire semester's credit for his prior three and half weeks.

After graduating from law school, Floyd returned to Gadsden to practice law with Col. E.G. Pilcher, in a small office above a men's department store. On that first day, Pilcher and Floyd went to the drugstore to get coffee at 10:00 a.m. All the attorneys in Gadsden enjoyed this ritual as there was no office coffee pot in 1953. At the drugstore, a man abruptly walked in and yelled, "Col. Pilcher, you treated me wrong in court yesterday and I'm gonna beat your backside." Never one to be pushed around, 65-year-old, brass-knuckle-carrying Pilcher stood up, took off his coat and glasses, took out his dentures, undid his tie, put down his cigar and replied, "Let's get at it." The man, thinking better of his threat, turned and walked away. Thus was the beginning of a

*Floyd*

beautiful legal partnership that lasted several years.

Someone once told Floyd that transforming oneself from a law school graduate into a practicing attorney is not a comfortable process. Floyd learned early on that there is no shortcut to becoming a good lawyer. It takes discipline, hard work and hours long beyond the 9-5. Sixty-five years in, he still shows up at the office every day at 6:30 a.m. and brings work home with him at least two days per week. Floyd says that there is an art to practicing law that is knowing when to answer, which answer to give and how to tactfully say "go to h_ _ _." Floyd believes there is no better way to become a real lawyer than to be handed a case and sent to try it. "You'll learn even if you get your rear end kicked." Such was the case with Floyd when he lost his first three jury cases. He learned, though. As he tells it, those three losses "made a lawyer out of me."

Shortly after those three losses, Floyd was told to defend a murder suspect in a criminal trial. Floyd's client, a bootlegger of white whiskey from Whitney Junction in St. Clair County, was charged with the murder of his brother-in-law. There was no question that Floyd's client shot and killed his brother-in-law. The question was whether it was justified. The prosecutor told the all-male jury during his opening statement that calling the defendant "nothing but an S-O-B" did not give the defendant a right to shoot the decedent. After the prosecutor sat down, Floyd stood up, pushed aside his previously prepared opening statement and pounced on the opportunity afforded to him by asking the jury one question: "What would you do if someone called you nothing but an S-O-B?" One of the jurors, so enraged by the question, replied, "Well, I'd have shot the S-O-B!" The jury returned a verdict of not guilty.

In the years since, Floyd has tried numerous criminal and civil cases, settled landline disputes, planned estates, mediated domestic disputes and argued cases before dozens of tribunals and courts, including the United States Supreme Court. He has helped clients from every socioeconomic class in cases large and small and he will continue to do so as long as he wakes up in the morning and wants to kick someone who needs it. All along the way, he has tried to hold true to the late Drew Redden's words, "Ours is a profession of servants. It is a calling, not a job, an art, not a business. We are always instruments in God's own hands."

In addition to the practice of law, Floyd found the time to love his wife, Jane Vaughan Floyd (also an ASB member), for 56 years, raise two children, serve in the Alabama Senate, be president of the Etowah County Bar, serve as president of the Gadsden City Board of Education, represent the Etowah County Commission for 20 years, act as chair of the Board of Stewards for the First United Methodist Church, serve as a district governor in Civitan International and help make lawyers out of law school graduates. In spite of all of these accolades, Floyd remains humble, remembering his father's sage advice that it does not matter how important you are, or think you are, the size of your funeral will depend on the weather. ▲


**Margaret H. Loveman**

Margaret Loveman practices at Butler Snow and is a member of the firm's labor & employment and commercial litigation practice groups. She regularly counsels businesses in all aspects of employment law, as well as contractual business disputes.



- **Alabama Lawyers Hall of Fame**
- **Judicial Award of Merit**
- **Local Bar Award of Achievement**

# 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 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 then provide a recommendation to the Board of Bar Commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004.

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

Inductees to the Alabama Lawyers Hall of Fame must have had a distinguished career in the law. This could be demonstrated through many different forms of achievement–leadership, service, mentorship, political courage or professional success. Each inductee must have been deceased at least two years at the time of their selection. Also, for each year, at least one of the inductees must have been deceased a minimum of 100 years 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/2018/03/Lawyers-Hall-of-Fame-Nomination-Form-2018-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

*(Continued from page 397)*

the state bar seal and the year of presentation. The award will be presented during the Alabama State Bar's Annual Meeting.

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*. ▲

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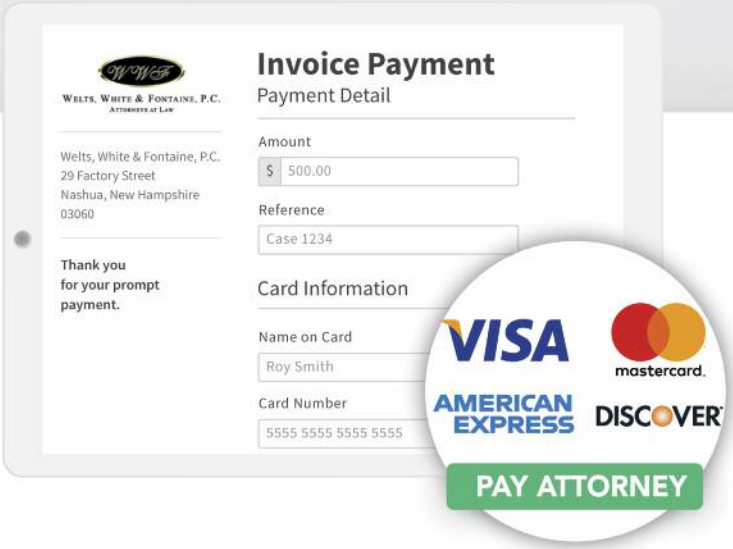


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# Update on Private Judging in Alabama

***By Circuit Judge J. Scott Vowell, retired***

Alabama's Private Judge Act allows litigants to hire certain qualified former judges to hear certain types of cases and to enter final judgments, bypassing the court system. It is designed to streamline the litigation process. In 2012, the Alabama Legislature enacted Alabama Act 2012-266, dealing with the appointment of private judges. The statute was amended by the latest session of the legislature, Alabama Act 2018-384. The amendments have become effective this summer and the Acts are now codified at *Ala. Code* (1975) §12-11A-1 *et seq.*

The 2018 amendments expanded the scope of the Act by including probate judges who are lawyers among those former judges who may be eligible to serve as a private judge. The amendments have redefined the type of cases which are subject to private judging. Finally, the amendments have addressed the question of the private judges' continuing jurisdiction over post-judgment matters.

Private judging provides a

method of legal dispute resolution as an alternative to both litigation and to arbitration. Since its effective date in 2012, the Act has been used primarily in domestic relations cases and it has seldom been used in other civil cases. Because of the 2018 amendments, private judging is now available in all civil actions. While it may not be suitable for use in all civil cases, it is an alternative method of dispute resolution which should be considered by the legal profession and their clients.

The statute authorizes the appointment of a private judge if he or she meets certain requirements. Private judges must: (1) have been, but are not actively serving as, a judge of a district, circuit or probate court and have served in the capacity of judge for at least six consecutive years; (2) be admitted to the practice of law in Alabama; (3) be an active member in good standing with the Alabama State Bar; and (4) be a resident of Alabama.

Any qualified judge who wishes to serve as a private judge must register with the director of the Alabama Center for Dispute Resolution in Montgomery. The director determines whether the judge is qualified under the Act and whether the judge will be added to the list of registered private judges. The list of qualified judges is available to the public. See *www.alabamaprivatejudges.org*. There are currently 19 judges registered with the center.

For a private judge to be appointed in a case, all the following must occur: (1) all parties to the action must file a written petition with the circuit clerk of the court in which the action is pending or is to be filed, requesting a private judge and naming the person whom the parties wish to have as a private judge. The petition must be accompanied by a form signed by the selected private judge consenting to the appointment, (2) the case is one over which the court in which the former judge served would have had subject matter and monetary jurisdiction and (3) the case is one which is assigned a CV or DR case number by the Alabama Administrative Office of Courts.

A person who serves as a private judge has the same powers of a circuit court in relation to court procedure, deciding the outcome of the case, attendance of witnesses, punishment for contempt, enforcement of orders, administering oaths and giving all necessary certificates for the authentication of the records and proceedings.

In addition to paying the usual filing fees to the clerk, there is an additional fee of $100 for each petition filed. This fee is divided between the Administrative Office of Courts and the circuit clerk with whom the petition is filed.

The clerk must forward the petition to the presiding judge of the circuit in which the action is pending or is to be filed. The presiding judge must verify that the former judge is registered with the Alabama Center for Alternative Dispute Resolution. The presiding judge must then issue an order granting the petition appointing the private judge selected by the parties.

The petition may be filed contemporaneously with the filing of the complaint or in a pending case at any time before the beginning of the trial.

The amendments expanded the type of civil cases eligible for private judging. Before the amendments, the case must have been "founded exclusively on domestic relations, contract, tort or a combination of contract and tort." Now it applies in any civil action or domestic relations case which is assigned a CV or DR case number.

Any trial under the Act must be conducted without a jury. A person who serves as a private judge has the same powers of a circuit court in relation to court procedure, deciding the outcome of the case, attendance of witnesses, punishment for contempt, enforcement of orders, administering oaths and giving all necessary certificates for the authentication of the records and proceedings.

The appointed private judge enjoys the same immunity in the

same manner and to the same extent as a sitting judge. The proceedings are of record and all pleadings must be filed with the clerk of the county of proper venue under the *Alabama Rules of Civil Procedure*. The proceedings must be made available to the public in the same manner as other circuit court records. The *Alabama Rules of Civil Procedure* and the *Alabama Rules of Evidence* apply in all actions brought before the private judge. The sheriff of the county where the case is filed must provide the same services related to service of process as for any other case in the county.

The judge maintains jurisdiction over all matters brought before him or her to the same extent as other matters before a trial court, including all post-trial proceedings and subsequent proceedings between the same parties arising from the same case. Before the recent amendments, the private judge retained jurisdiction of the case "until the order is deemed final and appealable as defined by the *Alabama Rules of Civil Procedure*." It was feared that that language could deprive the private judge of jurisdiction to address various post-judgment proceedings.

The presiding judge may allow the use of a courtroom for the trial of a case with a private judge, but that is discretionary. I would suggest that the courthouse which has security would be appropriate in a case in which the feelings are especially high, but this must be done in consultation with the presiding judge or with the appropriate county officials.

The private judge may be compensated for his services upon any terms agreed to by the parties and the judge. The parties are also responsible for compensating all personnel and costs of the facilities and materials that are used in relation to the case.

The private judge statute provides a needed additional method for the parties to resolve their disputes. It seems especially useful in complex civil litigation. The legal dispute can be

disposed of as quickly as the parties would like, considering the needs of each case. The use of a private judge should result in substantial savings of expenses, fees and time. The parties also may choose a judge who has expertise in the particular subject matter of the litigation or a judge in whom the parties have confidence for various other reasons. Unlike arbitration, private judging allows for meaningful appellate review of an adverse ruling.

Parties to certain contracts should consider including a reference to private judging as an alternative to litigation. If the parties agree, the contract may point out that any dispute under the contract may be covered by the Alabama Private Judge Act and, if so, the parties may agree to proceed under the provisions of that Act. If all parties do not agree to use the Private Judge Act, then the parties could proceed under the usual arbitration provisions contained in the contract. Note that the Alabama appellate courts have not addressed this issue.

In summary, private judging provides a method of ADR which could be a good choice in certain civil litigation. It provides another alternative to litigation and to arbitration and helps the parties reach the goals of the *Alabama Rules of Civil Procedure*: to obtain a just, speedy and inexpensive conclusion of their legal disputes. ▲

### Circuit Judge J. Scott Vowell, retired

Judge Scott Vowell, a native of Calhoun County, received his B.S. degree from Auburn University and his law degree from the University of Virginia. Judge Vowell practiced in Birmingham for approximately 30 years as a general practitioner and litigator. In 1994, he was elected to fill a vacancy on the Circuit Court in the Birmingham Division of Jefferson County, where he served in the Civil Division for three six-year terms. He was elected to serve as presiding judge from 2003 until his retirement in 2013. Since retiring from the bench, Judge Vowell has engaged in a fulltime ADR practice in Birmingham.

# A Primer on Alabama Administrative Appeals and Judicial Deference

***By Marc James Ayers***

Challenging or defending the decision of an Alabama administrative agency involves unique procedures, theories and strategies often not present in standard litigation. While there are many other aspects of Alabama appellate jurisprudence in the administrative law context worthy of discussion, this article is intended to present a quick overview of the main topics practitioners should keep in mind when engaged in judicial review of an administrative agency decision.

## I. The Purpose of Administrative Agencies

Administrative agencies are governmental entities typically created by statute[1] established to exercise regulatory "expertise in a specific area."[2] For example, where the legislature enacts a statute covering "highly technical, specialized interstitial matter[s],"[3] it may delegate to a specialized administrative agency the power to make the required findings, rules and rulings necessary to implement the statute.[4] In doing so, the agency is intended to have "specialized competence in the field of operation entrusted to it,"[5] and is expected to apply not just its expertise, but also its ever-increasing experience when making findings or issuing decisions.

Understanding the purpose and powers of administrative agencies is important because, as discussed in more detail below, such an understanding is key to advancing or defending against a judicial challenge to an agency's decision–and especially to navigating the deference given to agency interpretations of governing statutes and regulations.

# II. Appellate Procedure

Appeals from decisions of administrative agencies are often subject to special rules of procedure. "A fundamental concept of judicial review of administrative action is that it is a limited review, delineated by statute and court-established standards relating to the nature of the issues or questions open to judicial review, or to the particular method or means by which review can be had."[6] Ultimately, by statute, the Alabama Court of Civil Appeals has jurisdiction to hear appeals stemming from decisions of administrative agencies,[7] and further review by the Alabama Supreme Court would be discretionary by way of the writ of certiorari. However, the method by which an appeal from an administrative agency is taken *prior* to arriving at the court of civil appeals can differ substantially.

### A. Early practice

Historically, appellate review of administrative decisions was available through the common law writ of certiorari (barring some express statutory provision allowing an appeal by another means, such as by mandamus[8]). This writ was first reviewed by the circuit court acting in an appellate capacity, and then by the appellate courts. In such a circumstance, review was limited in a manner consistent with the nature of certiorari as an extraordinary remedy:

> [C]ourts will issue certiorari to make a limited review of the quasi-judicial acts of administrative boards and officers. That limited power is to determine whether the acts in question were supported by any substantial evidence, or, otherwise stated, whether the findings and conclusions are contrary to the uncontradicted evidence, or whether there was an improper application of the findings viewed in a legal sense.[9]

This standard was in many respects incorporated by the legislature in the Alabama Administrative Procedure Act.[10]

### B. The Alabama Administrative Procedure Act

Enacted in 1981,[11] the Alabama Administrative Procedure Act ("AAPA")[12] serves as the default set of procedural rules for challenging administrative agency decisions, among other things (such as providing the parameters for agency rulemaking, etc.). The AAPA was based upon the Revised Model State Administrative Procedure Act, a uniform model statute promulgated by the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws).[13] As expressly stated by the legislature, the AAPA was "intended to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public,"[14] and is to be "construed broadly to effectuate its purposes."[15] The AAPA applies to "[e]very state agency having express statutory authority to promulgate rules and regulations,"[16] but does not govern "agencies whose rules or administrative decisions are subject to approval by the Supreme Court of Alabama and the Department of Insurance of the State of Alabama."[17]

With regard to appeals from agency decisions, the AAPA is intended "[t]o simplify the process of judicial review of agency action as well as increase its ease and availability."[18] The AAPA's general procedure for obtaining judicial review of agency decisions is set forth in *Ala. Code* 1975, § 41-22-20, which provides, among other things, for a deferential review akin to the historical practice (unless by separate statute the legislature has provided for *de novo* review):

> 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.[19]

### C. Special provisions providing for judicial review

"Nothing in the [AAPA], however, relieves agencies of the duty to comply with additional procedural requirements otherwise established by law."[20] And, in fact, the legislature has, at times, created additional, unique avenues of judicial review for decisions of particular administrative agencies.

One example would be found in appeals from final tax orders issued by the Alabama Department of Revenue, a procedure that has undergone several revisions over the years. Under the original form of the Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act ("TBOR"),[21] enacted in 1992, judicial review of certain final determinations of the Department of Revenue was obtained through filing of a notice of appeal in circuit court or in the department's administrative law division (which was then followed by an appeal to circuit court),[22] with further appellate review as of right in the Alabama Court of Civil Appeals. However, in 2014, the legislature abolished the department's ALD and created the Alabama Tax Tribunal,[23] a three-person tribunal "separate from and independent of the authority of the Commissioner of Revenue and the Department of Revenue."[24] The Alabama Tax Tribunal is expressly not "subject to the declaratory judgment, declaratory ruling, or contested case provisions of the Alabama Administrative Procedure Act."[25] Under the new structure, appeals from final orders of the Department of Revenue can still be filed in circuit court, but they can also be heard before the independent tribunal.[26]

Another example is appeals from agencies wherein the legislature has removed the circuit courts' role altogether, and has directed that any appeal will go directly to the Alabama Court of Civil Appeals. This is true with regard to, for example, appeals from disciplinary decisions of the Alabama Board of Medical Examiners[27] and from the state Health Planning and Development Agency concerning the issuance of certificates of need.[28] In such appeals, the administrative record is compiled by the agency and transmitted directly to the court of civil appeals as the record on appeal.[29]

A word of caution: where the legislature has provided a specific statutory avenue of appeal, one should assume that that avenue provides the sole appellate remedy and must be strictly followed to preserve one's appellate rights. "'Appeals from decisions of administrative agencies are statutory, and the time periods provided for the filing of notice of appeals and petitions must be strictly observed,' on pain of dismissal."[30]

## III. Standards of Judicial Review of Administrative Agency Decisions

As it is in any appeal, determining and applying the applicable standard of review in the appeal of a decision of an administrative agency is crucial. Depending on the type of agency decision at issue, that standard of review can vary.

### A. True "trial de novo"

Some statutes direct that judicial review of an agency decision will be by "trial *de novo*." Under this standard, the parties would essentially be allowed to start completely from scratch–from a true "blank slate." The reviewing court will attach no weight or presumption of correctness to the agency's decision and the reviewing court can take evidence (even evidence not submitted before the agency), hear new witnesses, etc.[31] "Alabama cases have consistently held that a trial de novo means an entirely new trial, as if no trial had ever been had, and just as if it had originated in the circuit court. A trial de novo ... means trying anew the matters involved in the original hearing as if they had not been heard before and as if no decision had been previously entered."[32]

Some examples of statutory language providing for judicial review by true trial de novo include:

- Appeals from decisions of the Commissioner of Agriculture and Industries regarding licenses for application of pesticides ("The court shall have jurisdiction to affirm, set aside or modify the action of the commissioner and the board, and such proceedings in the circuit court shall determine by trial de novo whether the applicant is entitled to the license under the requirements of this article.");[33]
- Appeals from decisions of the Board of Zoning Adjustment ("In case of such appeal such board shall cause a transcript of the proceedings in the action to be certified to the court to which the appeal is taken, and the action in such court shall be tried de novo.");[34] and
- Appeals from decisions of the Department of Public Health concerning food safety permitting ("Judicial review shall be by trial de novo in circuit court in accordance with provisions of the Alabama Administrative Procedure Act...").[35]

In these situations, a reviewing court commits reversible error if it fails to hold a trial *de novo* and applies a higher procedural standard–such as determining instead only whether the agency's action was "arbitrary and capricious."[36]

### B. "Trial de novo, but the agency decision is prima facie correct"

Some administrative appeal provisions direct that judicial review is to be by trial *de novo* in a sense, but not in the pure "blank slate" sense as discussed above. Instead, as in the case of appeals from decisions of the Alabama Tax Tribunal for example, the administrative agency's decision is to be considered "prima facie correct":

> The appeal to circuit court from a final or other appealable order issued by the Alabama Tax Tribunal shall be a trial *de novo*, except that the order shall be presumed prima facie correct and the burden shall be on the appealing party to prove otherwise. The circuit court shall hear the case by its own rules and shall decide all questions of fact and law. The administrative record and transcript shall be transmitted to the reviewing court as provided herein and shall be admitted into evidence in the trial de novo, subject to the rights of either party to object to any testimony or evidence in the administrative record or transcript. With the consent of all parties, judicial review may be on the administrative record and transcript. The circuit court shall affirm, modify or reverse the order of the Alabama Tax Tribunal, with or without remanding the case for further hearing, as justice may require.[37]

This means that the agency decision begins with a substantive presumption of correctness that can be relied upon and advanced by the agency and which must be overcome by the challenger. Procedurally, however, that challenge is not limited to the administrative record and can proceed with the taking of new evidence as in a standard *de novo* trial.[38]

### C. No "trial de novo"

With regard to other agency decisions, however, the legislature has directed that judicial review is not to be *de novo* in any sense. In such situations, no new evidence may be heard (with the possible exception of arguments touching on fundamental due process rights, as discussed below), the review is limited to the administrative record, and reversal of the agency decision is possible only for certain circumscribed reasons. For example, judicial review of decisions of the state Oil and Gas Board is governed by such a provision:

> Any interested person aggrieved by any rule, regulation or order made or promulgated by the board under this article and who may be dissatisfied therewith shall, within 30 days from the date said order, rule or regulation was promulgated, have the right, regardless of the amount involved, to institute a civil action by filing a complaint in the circuit court of the county in which all or part of the aggrieved person's property affected by any such rule, regulation or order is situated to test the validity of said rule, regulation or order promulgated by the board. Such civil action shall be advanced for trial and be determined as expeditiously as feasible, and no postponement or continuance thereof shall be granted except for reasons deemed imperative by the court. In such trials, the validity of any rule, regulation or order made or promulgated under this article shall be deemed prima facie valid, and the court shall be limited in its consideration to a review of the record of the proceedings before the board, and no new or additional evidence shall be received.
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> The reviewing court shall limit its consideration to the following:

(1) Whether the rule, regulation or order is constitutional;

(2) Whether the rule, regulation or order was without or in excess of jurisdiction;

(3) Whether the rule, regulation or order was procured by fraud;

(4) Whether the rule, regulation or order is reasonable; and

(5) Whether the rule, regulation or order is unsupported by the evidence.[39]

When the legislature has set forth specific grounds limiting judicial review in this manner, a reviewing court has no authority to reverse an agency decision on a different ground.[40]

However, regardless of the type of review, a party claiming that the agency's decision amounted to a denial of due process will be allowed to submit evidence outside the administrative record in support of that claim.[41] Indeed, the AAPA specifically provides that, even where the review is not *de novo*, "evidence may be introduced in the reviewing court as to fraud or misconduct of some person engaged in the administration of the agency or procedural irregularities before the agency not shown in the record and the affecting order, ruling, or award from which review is sought, and proof thereon may be taken in the reviewing court."[42]

### D. Deference to agency interpretations of law

In certain circumstances, courts will defer to an administrative agency's interpretation of statutes and regulations. In the federal courts, this doctrine of deference has developed over time in response to the rise of the administrative state. Understanding the basic types of deference developed in the federal courts can be helpful in questions arising in Alabama state courts.

1. Deference in the federal courts

The governing standard of deference in the federal courts comes from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under "*Chevron* deference," a reviewing court first asks "whether Congress has directly spoken to the precise question at issue" and "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[43] In other words, deference to an agency interpretation is not even a relevant issue where the meaning of the statute is clear.[44] However, if the reviewing court determines that the statute at issue "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[45] "In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole."[46]

"*Chevron* deference"–determined through an analysis of the above test, often affectionately referred to as the "*Chevron* two-step"–is typically applied to formal agency interpretations of statutes that have the force of law (for example, through a formal regulation). Agency interpretations that do not have the force of law, however, can qualify for the weaker form of deference set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). As currently applied, under "*Skidmore* deference" "[i]nterpretations such as those in opinion letters–like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law–do not warrant *Chevron*-style deference."[47] Instead, such interpretations are "'entitled to respect' ... but only to the extent that those interpretations have the 'power to persuade.'"[48] Under *Skidmore*, such an administrative interpretation might be given some weight "depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[49]

Finally, an agency's interpretation *of its own regulations* is generally entitled to deference under the principles set forth in *Auer v. Robbins*, 519 U.S. 452 (1997), which was an application of the Supreme Court's decision in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Under "*Auer/Seminole Rock* deference," an agency's interpretation of its own regulation has controlling weight unless it is "plainly erroneous or inconsistent with the regulation," or unless "there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment."[50]

2. Deference in the Alabama courts

With regard to an agency's interpretation of statutes and regulations, Alabama courts have generally followed the "*Chevron* two-step" model.[51] That is, Alabama courts put a heavy focus on determining the plain

meaning of the statute or regulation at issue, and will consider deference to an agency interpretation only where the meaning of the statute is truly ambiguous:

> [A] reviewing court will accord an interpretation placed on a statute or an ordinance by an administrative agency charged with its enforcement great weight and deference. Notwithstanding this rule of construction, however, where the language of the statute or ordinance is plain, this Court will not blindly follow an administrative agency's interpretation but will interpret the statute to mean exactly what it says. Although a court should give deference to an agency's interpretation of an agency rule or a statute implemented by the agency, that deference has limits. When it appears that the agency's interpretation is unreasonable or unsupported by the law, deference is no longer due.[52]

Thus, the rule in Alabama is–as in the federal courts–no deference can be given to an agency interpretation that is directly contrary to the statute at issue. "An administrative agency cannot usurp legislative powers or contravene a statute."[53] "This is because an administrative board or agency is purely a creature of the legislature, and has only those powers conferred upon it by its creator."[54]

If the statute or regulation at issue is truly ambiguous, then the question becomes whether the agency's interpretation is at least one reasonable interpretation, although others might exist:

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute.
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> . . .
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> Under the formulation now familiar, when we confront an expert administrator's statutory exposition, we inquire first whether "the intent of Congress is clear" as to "the precise question at issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). If so, "that is the end of the matter." *Ibid.* But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 843, 104 S.Ct., at 2782. If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment "controlling weight." *Id.*, at 844, 104 S.Ct., at 2782.[55]

In determining whether a statute is ambiguous–and thus whether any reference to an administrative agency's interpretation is even relevant–Alabama courts engage the established rules of statutory interpretation (or at least those rules that do not themselves depend on a finding of ambiguity).[56] These rules likewise apply to the interpretation of agency regulations. "'[T]he construction of administrative rules is governed by the same basic rules as those applicable to the construction of statutes; that is, we are bound to look to the plain meaning of the language used in the rule when construing it.'"[57]

Of course, it is axiomatic that ambiguity does not exist simply because the parties advance differing interpretations of a statute; that circumstance will virtually always exist in practice, but says little about whether there is one, or more than one, *objectively reasonable* interpretation of the statute.[58] Rather, a reviewing court always has a constitutionally-grounded obligation to use established rules of construction to determine whether a statute's meaning is clear or whether there is in fact more than one reasonable interpretation (thus creating a true "ambiguity").[59] As the Alabama Supreme Court explained when declining to defer to an interpretation of a zoning code provision in *Ex parte Chestnut*, 208 So. 3d 624 (Ala. 2016): "This is not a case where the agency's interpretation is reasonable, even though it may not appear as reasonable as some other interpretation. Here, the zoning-enforcement coordinator's interpretation contravenes the clear intent of Article 73.7.4. ... The deference given an administrative agency's interpretation of its own rule or regulation is not boundless."[60] Indeed, the Alabama Supreme Court and the Alabama Court of Civil Appeals have made clear that they will reverse an agency's interpretation that is contrary to the plain language of the statute, even where that interpretation has been applied by the agency over a number of years.[61]

Additionally, deference is not proper where an agency's interpretation of its governing statute actually expands its jurisdiction beyond the limits set forth in the statute. "Because an administrative agency may not expand its own jurisdiction by its interpretation of a statute (or by any other means), courts deciding whether to give deference to an agency's interpretation of a statute must first determine whether the agency's interpretation is operative

within the agency's particular sphere of statutory authority."[62] This "authority" analysis is somewhat similar to what has been referred to as "*Chevron* step zero," where the reviewing court asks whether the issue at hand is truly one that the legislature should be presumed to have desired agency interpretive control and influence, given that it concerns significant, fundamental policy-making.[63]

3. Asking the "why?"–what types of interpretations get deference?

Far too often, practitioners fail to use the doctrine of deference to their benefit–or, if they are attempting to overturn the decision of administrative agency, fail to properly navigate around deference–because they did not ask *why* deference should or should not apply to a certain agency interpretation. However, asking the "why" is actually quite important and can possibly turn the analysis of a case in one's favor.

As stated above, the basic justification for giving deference to an administrative agency's interpretation is the notion that the agency is an expert body in a particular regulated field, and has obtained real-world experience about what works and what does not through performing that regulatory activity. Accordingly, then, parties involved in an administrative appeal should always make sure that the statute at issue calls for, and the type of interpretation at issue is the type that actually utilizes and reflects, an exercise of the relevant expertise, experience and deliberation that was intended when the agency was created. If not, then deference might not be appropriate.

For example, take a statute that contains an express *limitation* on the authority or jurisdiction of the agency to do something. Asking the "why" in this circumstance could bolster an argument that deference might be lessened or improper.[64] Interpreting such a statutory limitation is more purely a judicial function that is by nature a guard against possible agency overreach, and tends to involve primarily an exercise of *judicial* expertise (i.e., in reading statutes).[65] Assuming a delegation of interpretive authority to an administrative agency as to a limiting or jurisdictional statute could therefore raise substantial separation of powers concerns.[66] Such a situation is quite different in nature from, for example, interpreting a statute setting forth factors as to whether there is truly a "need" for a new medical service in a particular area, which involves more of an exercise of the substantive, particularized expertise of the agency. It is more natural to believe that the legislature intended to use broad language concerning a matter truly within the agency's particular area of expertise, with the expectation that the agency will fill in the technical details.

Another reason to ask why deference should be applied concerns the type of administrative agency interpretation being offered. Is it a properly adopted, formal administrative rule or regulation construing a statutory provision? Is it an informal, perhaps purely internal agency position in a manual, handbook, letter, etc.?[67] Is it a position that has been consistently held[68] in various matters in various cases litigated cases for many years,[69] or is it a position being advanced for the first time in litigation?[70] The level of deference that is appropriate will likely change depending on how much actual and consistent expertise and experience is found to have been exercised in arriving at the interpretation at issue. As the United States Supreme Court has stated, "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."[71] Therefore, asking *why* deference is appropriate in a particular case–rather than simply jumping straight to generalized deference standards in the abstract–can help give practitioners avenues to argue for or against deference in that case.

4. *De novo* review and deference

One area of confusion concerns the application of deference where the judicial review in a circuit court proceeding is "trial *de novo*." Even in a "trial *de novo*" review, the agency's interpretation of relevant *provisions of law* is entitled to deference (where otherwise appropriate under the particular deference doctrine).

The same principle applies when a circuit court's ruling on an agency decision is then reviewed "*de novo*" by one of Alabama's appellate courts under this oft-cited standard: "This court reviews a circuit court's judgment as to an agency's decision without a presumption of correctness [i.e., *de novo*] because the circuit court is in no better position to review the agency's decision than is this court."[72] This does not mean that the appellate court always reviews the facts and the applicable regulations *as though it were the administrative agency*. Instead, in this context, "*de novo* review" by an appellate court means that when an appellate court is reviewing the circuit court's review of an agency decision, the appellate court gives no credence to the decision of the circuit court and instead

performs its own "*de novo*" application *of whatever deferential standards apply to the agency's findings and interpretations*.[73]

### *E. Review of Agency Fact Findings*

Where the appeal of an administrative agency decision is not by trial *de novo*, the agency's factual findings arrive at the reviewing court with a heavy presumption of correctness.[74] A court may not "substitute its judgment for that of the administrative agency as fact-finder; the judiciary is required to give the agency's factual findings due deference."[75] This is true "even in cases where the testimony is generalized, the evidence is meager, and reasonable minds might differ as to the correct result."[76] "In no event is a reviewing court 'authorized to reweigh the evidence or to substitute its decisions as to the weight and credibility of the evidence for those of the agency.'"[77] As long as there is "substantial evidence" in the record to support the agency's fact findings–notwithstanding the existence of some contrary evidence–the findings will not be disturbed. In the administrative context, "substantial evidence" is "relevant evidence that a reasonable mind would view as sufficient to support the determination."[78]

Furthermore, "considering [an agency's] recognized expertise in [its] specialized area, the weight and significance of any given piece of evidence presented ... is left primarily to [the agency's] discretion."[79] Accordingly, for example, where an agency has heard relevant testimony from competing experts and has weighed one expert to be more convincing than the other, that "weighing" is going to be entitled to deference.[80] Or if a statute requires the agency to make a finding based on the balancing of certain statutory *factors*, unless the legislature expressly states that one or more factors has priority or is in fact a requirement (rather than a mere factor), the balancing of those factors–as to each of which the level of evidence will differ–is generally left to the agency, and not a reviewing court, to perform.[81]

Putting together these standards reveals the difficult–but not impossible–burden carried by a party seeking to challenge the factual findings of an administrative agency in a non-trial *de novo* appeal. In such appeals, "[r]egarding factual matters, a circuit court may reverse [the agency's] decision if the decision is '[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record' or is '[u]nreasonable, arbitrary, or capricious.'"[82]

# IV. Conclusion

Practitioners desiring to appeal the decision of an administrative agency should first examine the statutes governing the agency to determine whether the statutory framework contains a specific procedural provision governing judicial review of the agency decision. As discussed herein, many such statutes provide not only a particular procedure, but also an applicable time frame and a standard of review. (A potential appellant should also examine the regulations adopted by the agency concerning judicial review, which may contain more detail.[83]) If there is no governing statute specifically addressing judicial review of that agency's decisions, then the default provisions of the AAPA should be followed. Of course, in accord with one of the golden rules of appellate law–to be risk-averse–if there is any confusion concerning the proper avenue for seeking appellate review, a party should timely try multiple, alternative routes (such as through filing both under the AAPA and by way of common law writ of certiorari) to be safe.

After determining the proper procedure and timing, parties should evaluate whether the agency's decision can either be attacked or defended under the deferential standards discussed above. This evaluation should cover both the agency's factual findings and its legal interpretations. And, with regard to the latter, the focus should not simply be reciting abstract standards of deference, but also in being prepared to answer *why* deference should or should not be given to the particular interpretation at issue. ▲

## Endnotes

1. Agencies can also be established by constitutional provision, by executive order, etc.
2. *City of Brundidge v. Alabama Dep't of Envtl. Mgmt.*, 218 So. 3d 798, 805 (Ala. Civ. App. 2016) (internal quotations omitted).
3. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90 (2007).
4. *See Alabama Surface Min. Reclamation Comm'n v. Jolly*, 362 So. 2d 919, 920 (Ala. Civ. App. 1978) ("From this provision it may be seen that there is a general power of sub-delegation of its authorized acts and duties, except for specific limitation. There is ample authority in federal jurisdictions that there is nothing inherently wrong with the sub-delegation of power and authority by agencies created and empowered by legislative act to serve a public purpose.").
5. *Ex parte Chestnut*, 208 So. 3d 624, 640 (Ala. 2016). *See also Kids' Klub, Inc. v. State Dep't of Human Res.*, 874 So. 2d 1075, 1082 (Ala. Civ. App. 2003) (noting that an agency is tasked with regulating in a "field of competence that has been entrusted to the agency by the Alabama Legislature") (internal quotations omitted; emphasis added).
6. *Alabama State Tenure Comm'n v. Mountain Brook Bd. of Educ.*, 343 So. 2d 522, 524 (Ala. 1976).

7. Ala. Code 1975, § 12-3-10 ("The Court of Civil Appeals shall have exclusive jurisdiction of ... all appeals from administrative agencies other than the Alabama Public Service Commission....").

8. *Alabama State Tenure Comm'n*, 343 So. 2d at 524-25 (applying statute that allowed judicial review through mandamus).

9. *Baker v. Denniston-Boykin Co.*, 245 Ala. 407, 411, 17 So. 2d 148, 151 (1944); *see, e.g.*, *Stewart v. Hilyer*, 376 So. 2d 727, 729 (Ala. Civ. App. 1979) ("The circuit court exercises a limited function on certiorari to review the order of an administrative agency.").

10. *See Personnel Bd. v. King,* 456 So. 2d 80, 81-82 (Ala. Civ. App. 1984) (noting the parties' agreement that "the standard of review by the circuit court on certiorari is essentially the same as the standard of review set forth in the AAPA", and stating that "our task is to determine whether there was any legal evidence before the [agency] to support its findings. In making such determination it is not within this court's prerogative to pass upon the truthfulness of conflicting testimony or to substitute our judgment for that of the [agency].").

11. 1981 Ala. Acts 855.

12. Ala. Code 1975, 41-22-1 *et seq*.

13. *See generally* Uniform Law Commission website at *www.uniformlaws.org*; *see also Alabama Cellular Serv., Inc. v. Sizemore*, 565 So. 2d 199, 202 (Ala. 1990) ("[I]t is necessary to set out the history of the [AAPA]. The National Conference of Commissioners on Uniform State Laws first adopted a Model State Administrative Procedure Act in 1946; the National Conference followed with the Revised Model State Administrative Procedure Act in 1961. The National Conference later conducted a complete reexamination of the act, which took two years and resulted in their adoption of the Model State Administrative Procedure Act (1981).") (footnote omitted). Furthermore, parts of what became the AAPA were adopted (sometimes in modified form) from the federal APA or from the administrative procedural codes of other states, a fact which could help inform how the statute should be interpreted. For example, *see* Ala. Code 1975, § 41-22-2 cmt. ((("The first two paragraphs of this section are adopted from Iowa Code § 17A.1 (1976 Cum.Supp.).").

14. Ala. Code 1975, § 41-22-2(a); *see Alabama Cellular Serv., Inc. v. Sizemore*, 565 So. 2d 199, 202 (Ala. 1990) ("[T]he APA seeks to make the process of review of state agency actions fairer and more efficient, not to alter the substantive rights of a person affected by a rule."); *see also, e.g., Benton v. Alabama Bd. of Med. Examiners*, 467 So. 2d 234, 236 (Ala. 1985).

15. Ala. Code 1975, § 41-22-25; *see* Ala. Code 1975, § 41-22-2 cmt. ("Thus, it is the intent of this act that the specific purposes enumerated in this section shall be applied to the actions of all agencies not specifically exempted from the provisions of this act, and to the courts, in interpreting any ambiguity in the language of this act for the purpose of giving effect to the requirements of its sections.").

16. Ala. Code 1975, § 41-22-2(d).

17. Ala. Code 1975, § 41-22-2(e).

18. Ala. Code 1975, § 41-22-2(b)(7).

19. Ala. Code 1975, § 41-22-20(k). *See, e.g.*, *Benton*, 467 So. 2d at 236 ("Code 1975, § 41-22-20, sets out a process by which an aggrieved party may seek judicial review, in circuit court, of an agency's final decision or order.").

20. *Benton*, 467 So. 2d at 236.

21. Ala. Code 1975, § 40-2A-1 *et seq*.

22. *See* former Ala. Code 1975, § 40-2A-9(g) (repealed by 2014 Ala. Acts 146).

23. Ala. Code 1975, § 40-2B-1 *et seq*.; *see State Dep't of Rev. v. Coca-Cola Refreshments, U.S.A., Inc.*, 248 So. 3d 18, 20 n.2 (Ala. Civ. App. 2017) (noting that "the Alabama Legislature abolished the department's administrative-law division and created the Alabama Tax Tribunal, an executive-branch agency independent of the department, on October 1, 2014. Act No. 2014–146, Ala. Acts 2014").

24. Ala. Code 1975, § 40-2B-2(b).

25. Ala. Code 1975, § 40-2B-1.1.

26. Ala. Code 1975, § 40-2A-7(b)(5) and -7(c)(5) (current).

27. Ala. Code 1975, § 34-24-367 ("Notwithstanding any other provision of law to the contrary, any action commenced for the purpose of seeking judicial review of the administrative decisions of the Medical Licensure Commission, including writ of mandamus, or judicial review pursuant to the Alabama Administrative Procedure Act, Chapter 22 of Title 41, must be filed, commenced, and maintained in the Alabama Court of Civil Appeals.").

28. Ala. Code 1975, § 22-21-275(6) ("Any aggrieved party to a final decision of SHPDA may appeal the final decision of SHPDA to the Court of Civil Appeals.").

29. *See id.* ("Within 30 days after a notice of appeal is filed, SHPDA shall transmit the administrative record to the clerk, with the appealing party bearing the costs associated with the preparation and transmission of the record and transcript of the hearing and of giving notice to the parties of the transmittal. Upon the transmittal of the administrative record to the Court of Civil Appeals, the appeal shall proceed in accordance with the *Alabama Rules of Appellate Procedure*.").

30. *Brunson v. Alabama State Bd. of Med. Examiners*, 69 So. 3d 913, 914–15 (Ala. Civ. App. 2011) (quoting *Eitzen v. Medical Licensure Comm'n of Ala.*, 709 So. 2d 1239, 1240 (Ala. Civ. App. 1998)).

31. *See Benton*, 467 So. 2d at 236 (interpreting an earlier version of Ala. Code 1975, § 20-3-53, which provided for judicial review from the Alabama State Board of Medical Examiners, as required a true trial de novo: "We find that although this section is somewhat clumsily phrased, the clear intention of the legislature is to provide for a de novo hearing in its truest sense. The language of Code 1975, § 20-2-53, mandates the filing of the record and transcript of the Board's hearing in Montgomery County Circuit Court. However, in stark contrast to the Alabama Administrative Procedure Act, § 20-2-53 specifically authorizes the admission of any new or additional evidence. Furthermore, it stresses that original findings of fact and law are to be made within the trial court's discretion.").

32. *Petersen v. Woodland Homes of Huntsville, Inc.*, 959 So. 2d 135, 139 (Ala. Civ. App. 2006) (internal quotations and citations omitted).

33. Ala. Code 1975, § 2-27-54(b).

34. Ala. Code 1975, § 11-52-81.

35. Ala. Code 1975, § 20-1-33(e).

36. *See, e.g.*, *Benton*, 467 So. 2d at 237 ("[T]he trial court's order stating that the Board's ruling was not 'arbitrary or unreasonable' reveals that the trial court failed to hold a de novo review as required by Code 1975, § 20-2-53, but rather, merely chose to search the Board's decision for any abuse of discretion. The trial court's failure to apply the appropriate standard of review, in this instance, warrants reversal.").

37. Ala. Code 1975, § 40-2B-2(m)(4). *See also, e.g.*, Ala. Code 1975, § 2-10-32 (appeals from certain decisions of the state Board of Agriculture and Industries: "The matter shall be heard de novo in such court; provided, that the order of the board shall be presumed prima facie correct.").

38. *See* Ala. Code 1975, § 5-2A-82 (appeals from decisions of the Bureau of Loans: "Trial thereof shall be de novo, but on such hearing the act or order of the supervisor shall be prima facie correct and the burden shall be on the plaintiff to show that the bureau in issuing the order or in taking the action complained of was not justified. Any party to the proceeding may summon witnesses and compel their attendance as in criminal cases and may introduce evidence in addition to that relied upon by the bureau."); Ala. Code 1975, § 5-25-15(a) (appeals from decisions of the state Banking Department of Alabama: "The department's findings shall be prima facie correct, but the circuit court may hear such appeal according to its own rules and procedures, including the taking of additional testimony and staying the order. In the circuit court, the trial shall be de novo.").

39. Ala. Code 1975, § 9-17-15; *see Mize v. Exxon Corp.*, 640 F.2d 637, 640 (5th Cir. 1981) ("The judicial review provided by Alabama law is specifically limited to a consideration of the proceedings and evidence before the Board and is not a trial de novo."). *See also, e.g.*, Ala. Code 1975, § 27-2-32(e) (appeals from decisions of the Insurance Commissioner: "[T]he commissioner's decision or order shall be taken as prima facie just and reasonable. No new or additional evidence may be introduced in the circuit court except as to fraud or misconduct of some person engaged in the administration of this title and affecting the decision or order appealed from, but the court shall otherwise hear the case upon the certified record" and listing specific grounds for reversal).

40. *See, e.g., State Oil & Gas Bd. of Ala. v. Seaman Paper Co.*, 285 Ala. 725, 733, 235 So. 2d 860, 866 (1970) ("We lay aside as surplusage the conclusions of the trial court that Orders 65-28 and 66-5 did not fulfill and satisfy all of the terms and provisions of the Unitization Agreement relating to the enlargement of the Unit Area and that said orders were not in accordance with the law. Those are not among the grounds which the trial court is authorized to consider when reviewing a rule, regulation or order of the Board as provided in [the judicial review statute, now Ala. Code 1975, § 9-17-15].").

41. *See Ex parte King*, 364 So. 2d 318, 318 (Ala. 1978); *W.A.A. v. Board of Dental Examiners of Ala.*, 180 So. 3d 25, 28-30 (Ala. Civ. App. 2015) (discussing *King*).

42. Ala. Code 1975, § 41-22-20(i).

43. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (footnotes omitted).

44. *See, e.g.*, *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015) ("*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers. Even under this deferential standard, however, agencies must operate within the bounds of reasonable interpretation.") (internal quotations and citation omitted); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417-18 (1992) (deference can be given only when "the agency interpretation is not in conflict with the plain language of the statute," and "a reviewing court need not accept an interpretation which is unreasonable").

45. Chevron, 467 U.S. at 843.

46. *National R.R. Passenger Corp.*, 503 U.S. at 417; *see also, e.g.*, *Utility Air Reg. Grp. v. E.P.A.*, 134 S. Ct. 2427, 2442 (2014) ("[R]easonable statutory interpretation must account for both the specific context in which ... language is used and the broader context of the statute as a whole. A statutory provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (internal quotations and citations omitted).

47. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

48. *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001) (applying *Skidmore*).

49. *Mead Corp.*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140).

50. *Christopher v. SmithKline Beechman Corp.*, 567 U.S. 142, 155 (2012) (quoting *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997)). "*Auer* deference" has been the subject of criticism–even from its author, Justice Scalia. *See, e.g., Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1210-25 (2015) (special writings of Justices Alito, Scalia and Thomas discussing problems with *Auer*).

51. Of course, Alabama courts are not bound by federal deference precedent with regard to state agencies. Alabama's appellate courts have expressly followed *Chevron* and its progeny when analyzing decisions of *federal* agencies. *See, e.g.*, *Norfolk S. Ry. Co. v. Williams*, [Ms. 2160823, June 15, 2018] ___ So. 3d ___, 2018 WL 2995699, at *8–9 (Ala. Civ. App.).

52. *Chestnut*, 208 So. 3d at 640 (citations and internal quotations omitted); *see also Kids' Klub*, 874 So. 2d at 1092 ("An agency's interpretation of its own rule or regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation.") (internal quotations omitted).

53. *Ex parte Jones Mfg. Co.*, 589 So. 2d 208, 210 (Ala. 1991).

54. *Ex parte City of Florence*, 417 So. 2d 191, 193–94 (Ala. 1982) ("It is axiomatic that administrative rules and regulations must be consistent with the constitutional or statutory authority by which their promulgation is authorized. A regulation ... which operates to create a rule out of harmony with the statute, is a mere nullity.") (citations and internal quotations omitted).

55. *QCC, Inc. v. Hall*, 757 So. 2d 1115, 1119 (Ala. 2000) (internal quotations omitted).

56. *Chestnut*, 208 So. 3d at 640-42 (relying on expert's use of canons of construction to interpret provision contrary to agency).

57. *City of Mobile v. Lawley*, 246 So. 3d 147, 149–50 (Ala. Civ. App. 2017) (quoting *Brookwood Health Servs., Inc. v. State Health Planning & Dev. Agency*, 202 So. 3d 345, 351 (Ala. Civ. App. 2016)); *see also Alabama Medicaid Agency v. Beverly Enters.*, 521 So. 2d 1329, 1332 (Ala. Civ. App. 1987) ("The language used in an administrative regulation should be given its natural, plain, ordinary, and commonly understood meaning, just as language in a statute.").

58. *See, e.g.*, *Kershaw v. Kershaw*, 848 So. 2d 942, 951 (Ala. 2002) ("The simple fact that a writing is described by adversaries as unambiguous while each insists on a different interpretation does not render the writing ambiguous."); *Wayne J. Griffin Elec., Inc. v. Dunn Constr. Co.*, 622 So. 2d 314, 317 (Ala. 1993) ("The mere fact that the parties argue different constructions of the document does not force the conclusion that the disputed language is ambiguous. Rather, a document is unambiguous if only one reasonable meaning emerges.") (citations omitted); *In re American Home Mortg. Holdings, Inc.*, 637 F.3d 246, 256 (3rd Cir. 2011) ("The fact that the parties proffer different interpretations of the statutory language does not make the language ambiguous.").

59. *See Bama Budweiser of Montgomery, Inc. v. Anheuser-Busch, Inc.*, 783 So. 2d 792, 796 (Ala. 2000) ("A court, in construing a statute, is not limited to choosing among the statutory interpretations advocated by the parties. Instead, the court has a duty to construe the statute correctly, even if the correct construction is not one of the constructions advocated by the parties to the action.").

60. *Chestnut*, 208 So. 3d at 640-41(citation omitted).

61. *See, e.g.*, *Ex parte STV One Nineteen Senior Living, LLC*, 161 So. 3d 196, 207-12 (Ala. 2014) (rejecting agency interpretation of when issuance of "Emergency CON" was proper, and affirming *Daniel Sr. Living of Inverness I, LLC v. STV One Nineteen Sr. Living, LLC*, 161 So. 3d 187 (Ala. Civ. App. 2012)). *Accord, e.g.*, *Utility Air Reg. Grp.*, 134 S. Ct. at 2446 ("We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").

62. *Ex parte State Health Planning & Dev. Agency*, 855 So. 2d 1098, 1102 (Ala. 2002) (declining deference, and stating: "The traditional deference given an administrative agency's interpretation of a statute appropriately exists (1) when the agency is actually charged with

the enforcement of the statute and (2) when the interpretation does not exceed the agency's statutory authority (i.e., jurisdiction)."). *See, e.g.*, *Ex parte Bostick*, 211 So. 3d 825, 834–35 (Ala. 2016) ("The Board, a regulatory licensing entity, was simply not vested with the authority to determine a matter that is essentially a dispute regarding compensation between an employer and a former employee.").

63. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (declining to apply *Chevron* deference to determination of the permissibility of subsidies on federal exchanges, stating: "Whether those credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort."); *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2515-26 (2015) (determining whether the FHA permits disparate impact claims without reference to *Chevron* deference or the Department of Housing and Urban Development's regulation interpreting the FHA to encompass disparate impact claims).

64. Of course, sometimes a statutory provision can be creatively framed as both a grant or a limitation (i.e., by arguing that an express grant of authority to do something is an express limit or prohibition on doing anything else). The validity of such an argument will depend on the particular statutory language at issue, and its context.

65. Indeed, while deference is generally given to agency interpretations of statutes implemented by that agency, one might ask whether an agency truly "implements" a statute limiting its own authority. *But see City of Arlington v. F.C.C.*, 569 U.S. 290 (2013) (applying *Chevron* deference to an agency's interpretation of ambiguous statute relating to scope of the agency jurisdiction).

66. *See* Ala. Const. 1901, Art. III, § 42; *Ex parte Legal Envtl. Assistance Found., Inc.*, 832 So. 2d 61, 67-72 (Ala. 2002) (Moore, C.J., concurring specially) (discussing the non-delegation doctrine and the separation of powers problems raised concerning administrative interpretation of statutes).

67. *See, e.g.*, *Bradberry v. Director, Office of Workers' Comp. Programs*, 117 F.3d 1361, 1366 (11th Cir. 1997) (noting that deference to agency interpretation is particularly due "when the agency has made a written interpretation of the regulation or has maintained a long-standing policy on the subject.") (internal quotations omitted).

68. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (noting that "an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view") (internal quotations omitted).

69. While agencies are not generally bound to give their own prior decisions stare decisis effect, inconsistent decisions can be relevant in determining whether the agency has acted in an arbitrary and capricious manner. *See Ex parte Shelby Med. Ctr., Inc.*, 564 So. 2d 63, 68 (Ala. 1990).

70. *See Chestnut*, 208 So. 3d at 640-41 (refusing deference to unreasonable interpretation, and noting that "there is no showing that the zoning-enforcement coordinator's interpretation was based on any long-standing interpretation by the [agency]"); *Boswell v. Abex Corp.*, 294 Ala. 334, 336, 317 So. 2d 317, 318 (1975) ("The correct rule is that an administrative interpretation of the governmental department for a number of years is entitled to favorable consideration by the courts; but this rule of construction is to be laid aside where it seems reasonably certain that the administrator's interpretation has been erroneous and that a different construction is required by the language of the statute."); *Kids' Klub*, 874 So. 2d at 1098-1100 (discussing cases refusing to apply deference to a "mere litigation position"). *But see Ex parte State Health Planning & Dev. Agency*, 855 So. 2d at 1102 (declining to extend deference where interpretation contravened governing statute, even though the agency had "applied this construction of the statutory language ... for over 10 years.").

71. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (footnotes and citation omitted).

72. *Brookwood Health Servs., Inc. v. Affinity Hosp., LLC*, 101 So. 3d 1221, 1225 (Ala. Civ. App. 2012).

73. *Alabama State Pers. Bd. v. Dueitt*, 50 So. 3d 480, 482 (Ala. Civ. App. 2010) ("The standard of appellate review to be applied by the circuit courts and by this court in reviewing the decisions of administrative agencies is the same. ... [T]his court does not apply a presumption of correctness to a circuit court's judgment entered on review of an administrative agency's decision 'because the circuit court is in no better position to review an agency's decision than this court.'") (quoting *Alabama Bd. of Nursing v. Peterson*, 976 So. 2d 1028, 1033 (Ala. Civ. App. 2007)).

74. *See* Ala. Code 1975, § 41–22–20(k) (providing that, where review is not 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").

75. *State Health Planning & Dev. Agency v. West Walker Hospice, Inc.*, 993 So. 2d 25, 29 (Ala. Civ. App. 2008).

76. *Colonial Mgmt. Group, L.P. v. State Health Planning & Dev. Agency*, 853 So. 2d 972, 975 (Ala. Civ. App. 2002) (internal quotations omitted).

77. *Alabama Bd. of Nursing v. Williams*, 941 So. 2d 990, 999 (Ala. Civ. App. 2005) (quoting *Ex parte Williamson*, 907 So. 2d 407, 416-17 (Ala. 2004)).

78. *Dueitt*, 50 So. 3d at 482 (quoting *Ex parte Personnel Bd. of Jefferson County*, 648 So.2d 593, 594 (Ala. Civ. App. 1994)); *Roberts v. State Oil & Gas Bd.*, 441 So. 2d 909, 912 (Ala. Civ. App. 1983) ("It is the function of the trial court to determine whether there is evidence which supports the Board's ruling. It is not the function of 'appellate courts' to substitute their judgment for findings of fact made by an administrative authority.").

79. *Affinity Hosp., LLC v. St. Vincent's Health System*, 129 So. 3d 1022, 1029 (Ala. Civ. App. 2012).

80. *See Roberts*, 441 So. 2d at 912 ("According to one set of experts, the gas reservoir did not extend onto Roberts's land to any great extent and where it did extend, the gas was in contact with water and could not be commercially productive. The Board found that these experts were more convincing and ruled accordingly. It is not the function of the trial court, nor is it this court's duty, to substitute its judgment for that of the Board's.").

81. *Ex parte HealthSouth of Ala., LLC*, 207 So. 3d 39, 41 (Ala. 2016) (discussing two of the factors to be analyzed in determining whether to issue a CON, and stating: "There is no statute or SHPDA regulation that makes those two considerations 'key' or determinative in every proceeding on a CON application. It is the proper role of SHPDA, not a reviewing court, to weigh those factors and others in determining whether to grant a CON."); *see also Affinity Hosp., LLC v. Brookwood Health Servs., Inc.*, 143 So. 3d 208, 214 (Ala. Civ. App. 2013) ("We hold that the determination of the consistency of a proposed project with the [State Health Plan] is a matter entrusted to SHPDA.").

82. *Affinity Hosp.*, 129 So. 3d at 1029 (Ala. Code 1975, § 41-22-20(k)(6) and (7)); *see also Alacare Home Health Services, Inc. v. Alabama State Health Planning & Dev. Agency*, 27 So. 3d 1267, 1273-74 (Ala. Civ. App. 2009).

83. Of particular interest is the possibility of seeking reconsideration before the agency (and the timeframe for seeking such review). *See Ex parte STV One Nineteen Senior Living*, 161 So. 3d at 203 (discussing *statutory* reconsideration periods and timing issues). However, care should be taken to ensure that any regulations covering review of an agency decision are not inconsistent with the governing statute.

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stereotypes
schemas
biases
attitudes
70"
65"
60"
55"
50"


# Implicit Unconscious Bias

***By Gregory S. Cusimano***

**It was a Thursday afternoon, April 12.** Joe and Ted walked into a coffee shop. Joe walked over to the manager and asked if he could use the restroom. He was told only paying customers could use the restroom, so they took a seat at a table. The manager walked over and asked if he could help with water or other drinks. They thanked him and said they had water and were there for a meeting. Less than four minutes from the time Joe and Ted entered the coffee shop, the manager called the police saying, "There are two gentlemen in my cafe that are refusing to make a purchase or leave."[1] Interestingly, when the dispatcher put out the call to the police, he said, "We've got a disturbance there. A group of males refusing to leave."[2] The police arrived, and the two men were arrested, handcuffed and removed from the coffee shop. A spokesperson for the coffee shop reported, "In this particular store, the guidelines were that partners must ask unpaying customers to leave the store, and police were to be called if they refused."[3]

You probably recognize this story from what happened in Philadelphia in a Starbucks store. Of course, the men were not Joe and Ted. They were Rashon and Donte and they were black. Would the manager react the same way if they were Joe and Ted and white? Would the police act the same way if they were white? Maybe or maybe not. Perhaps this is an example of an unconscious bias.

It is likely the capability to recognize the differences between certain people and particular animals aided in the survival of the human race. Differentiating danger from safety helped our earliest ancestors thrive and survive. It also caused them to quickly and routinely cognitively categorize and group others. This normal human condition was probably the basis of prototypes, bias and prejudice. These mental shortcuts or heuristics are basic, helpful rules of thumb we all use to make decisions and shape judgments. They can become unconscious and are often inaccurate.

Social scientists postulate that we begin to develop biases, prototypes and prejudices at a very young age, even preschool as early as three years old. A bias is not necessarily against something, someone or some group compared to another. It is a tendency to disfavor or favor a person, group or thing to another, often an assessment, judgment or opinion without evidence, information or even reason. A cognitive bias is one resulting from a repetitious pattern or system that is different from the norm or standard–an involuntary way or arrangement of thinking that distorts the way people, situations or environments are perceived. It reflects a leaning to think in a certain way, which frequently is irrational and can cause errors in thinking and conclusion. Cognitive bias is often described as a blunder in reasoning that affects judgments and decisions.

## System 1–System 2

In Daniel Kahneman's book *Thinking, Fast and Slow*, he discusses how we make decisions using the terms "System 1" and "System 2."[4] System 1 is an automatic, intuitive, fast, emotional approach and System 2 is an analytical, slow, logical deliberate approach. Most of our decisions occur in System 1. In many ways, implicit bias is a System 1 process, although some say not to the depth of unconsciousness involved in implicit bias. In years past, System 1 was considered irrational.

Although subject to greater error, it is now accepted that System 1's fast thinking is sometimes useful and may be logical. Since Kahneman's pivotal work, most now agree that most decisions are made or influenced by System 1. This system handles thoughts that occur outside of awareness, for example, riding a bicycle. Once you learn, no one needs to think turn to the left if you are falling left or to the right when falling right. Upon learning how to ride a bicycle, we do it automatically and without effort. Because of the speed and efficiency of System 1, we stay upright.

The same would be true for driving a straight-shift car if one ever learned, so this mental association requires no conscious or effortful thought.[5] Once we learn to read, we cannot unlearn it. In contrast, System 2 is often slow, difficult thinking. Working on a math equation or filling out a tax form requires us to concentrate resulting in mental effort. As are apparent, implicit biases are a part of System 1.

## What Is Implicit Bias?

Implicit Bias/Implicit Association, sometimes called Implicit Social Cognition, relates to the views, schemas, attitudes or stereotypes we hold in our unconscious mind.

A bias is not necessarily against something, someone or some group compared to another. It is a tendency to disfavor or favor a person, group or thing to another, often an assessment, judgment or opinion without evidence, information or even reason.

It often refers to our thoughts, views or feelings about others likely based on race, age, appearance, ethnicity, religion, gender or origin. They are subtle, but persuasive. Implicit biases are spontaneous, cognitive and concealed. They occur in our life beginning early and developing through direct and indirect experiences and messages. They do not arise from a bad intent and are distinguished from explicit biases of which we are conscious.

These biases influence our decisions, conduct and understanding causing us to deduce in a favorable or unfavorable way, which may or may not be accurate. They occur without control or conscious decision and we are unaware they are happening. It is important to understand they are different from biases we might recognize from introspection, but decide they are not recognizable in ourselves. They are different from explicit biases, referring to beliefs and atti-

tudes we may have of which we are conscious or aware. Even so, implicit biases can be discovered through proper testing.

Implicit biases often are different from what we say our beliefs are. They may favor our tribe or group, but can be against our tribe. They are inescapable and universal. We all possess implicit and explicit bias, even judges[6] who claim objectivity.

Those of us who acknowledge fair purposes and work to treat all equally will likely conduct ourselves in ways that mirror implicit rather than explicit biases. Because they are unconscious and involuntary, they have a great effect on decision-making. Although we think of bias resulting from race, gender, age, religion or education, they exist from weight, height, political party, social status, appearance, associations and more. Implicit bias is an unconscious bias, but the term unconscious bias is aptly used as a description.

Studies illustrating examples of implicit bias:

- More than 500 letters of recommendation were reviewed for a medical faculty of an American medical school and it was noted there was a significant difference in letters written for males and those for females. Those for women raised more doubts, describing them as teachers or students and men as professionals and researchers. The personal lives of the females were more likely included.[7]
- Research sponsored by the Cardiovascular Research Foundation (CRF) revealed that when a stressful life event was recognized as a heart disease symptom it was identified as psychogenic when provided by a female and organic when offered by a male.[8]
- In simulations, Americans are faster and more accurate when firing on armed blacks than when firing on armed whites, and faster and more accurate in electing to hold their fire when confronting unarmed whites than when confronting unarmed blacks.[9]
- Employment of female musicians increased when orchestras

used blind auditions hiding the identities of the applicants.[10] When a criminal defendant is black, they do not seem to get along as well as comparable positioned white defendants. Does that result in bench trials with judges making the decisions as well as well as juries?[11]

We develop stereotypes, schemas, biases and attitudes without even knowing they exist. Research scientists have developed a number of ways to gauge and measure implicit attitudes and biases. The most available and common measure is reaction time used in the Implicit-Association Test (IAT). The IAT can measure the strength of the unconscious association. It is a computer-based test or measure. Those taking the test are requested to quickly tag one of two notions, maybe man and woman. The faster they pair one with the other, that pairing is viewed as being a strong association rather than a weak association of a slower pairing. It is designed to measure the potency of associations between concepts. Possibly good or bad, black people, white people, gay people, etc. For example, they might be asked to sort descriptions (short people, tall people) if the category "Short People" was on the right and an image of a short person materialized on the computer, they would press the key assigned to the right side of the screen. The score is determined by how quickly or how long it took the person being tested to sort and select. These illustrations become clearer after taking the test. You can take the test here: *https://implicit.harvard.edu/implicit/.*

As of late, (IAT) has come under attack. Some report that as a tool, even after an explosion of almost 20 years of use, it hasn't delivered as expected. Few, if any, areas of social psychology have equaled the enchantment of implicit bias. By some estimates, the test that anyone can take on the implicit bias website has been taken by 20,000,000 people. Could it be because it seemed to be a quick easy way to measure unconscious bias? Could it be because it was a simple way of explaining race relations in the United States? Could it be because if a bias is unconscious, it is easier to accept? Could it be because it is easier to blame black disadvantage on implicit bias? For whatever reason, it has been described as revolutionary.

Malcolm Gladwell discussed implicit bias in his best-selling book *Blink: The Power of Thinking Without Thinking*. He described it as a powerful predictor.[12] It is argued by some that this widespread and acclaimed test has failed its own examination of essential scientific standards, that it does not accurately measure unconscious bias and that we definitely have no consensus on how to reduce bias.

When Anthony Greenwald of the University of Washington and Mahzarin Banaji, now at Harvard University, went public with the test nearly 20 years ago, the goal was informing and educating the public about unconscious or hidden biases. There have been numerous workshops, employer HR efforts and other programs, as well as training designed to discover and reduce behavior resulting from implicit bias. However, a 2017 meta-analysis, which examined 494 prior studies, concluded that decreasing implicit bias did not affect behavior.[13] The study used a system called meta-analysis to integrate information from the studies that involved more than 80,000 participants. They established that implicit bias can be reduced, but the effect was not robust. Although it is possible to change implicit bias, the study found slight confirmation that changes in implicit bias resulted in differences in behavior and in explicit bias.[14] The study reported that efforts should continue and be tested to achieve the result of not only a reduction in implicit bias but also an accompanying change in behavior. Intention often conflicts with the result.

## Why Does It Matter?

Our system of justice is based on fundamental fairness and impartiality. The Constitutional protections of due process, equal protection, the right to trial by jury and so many others must be fairly administered. Faith in our justice system is critical to its workings. Implicit bias is not often recognized and less often addressed. Does implicit bias predict behavior? If so, instead of ensuring the likelihood of securing a fair trial, a fair jury and a fair system, implicit bias would do the opposite. Limiting voir dire and access to the courts are steps in the wrong direction. However, allowing oral voir dire without education and training for lawyers and judges is not enough. Remember jurors, actually all of us, do not engage in a thoughtful process to become aware of our implicit mindsets. We do not know we have them, where they come from or even

As part of the judicial system, we should be concerned with educating ourselves and others in ways to ensure the fundamental fairness we hold out our system to be.

why we react the way we do. Accordingly, when a judge instructs a jury to "overlook their senses and feelings," how can they do that when they are not even aware they have them? As part of the judicial system, we should be concerned with educating ourselves and others in ways to ensure the fundamental fairness we hold out our system to be.

Implicit bias matters because it affects our judicial system and society in general in so many ways. There has been significant press concerning the shooting of black people by police officers. For over a decade there has been a plethora of studies on implicit bias, and several such studies have been dubbed "Shooter Bias" Studies. One such study involved college students participating in a simulation. The students saw men paired either with a neutral object like a telephone or with a gun. They had a fraction of a second to shoot or not shoot. They were not to shoot if there was no gun and to shoot if there was. All the students were white and the men they saw were black, white or Asian. The participants incorrectly shot black men who were unarmed more often than either white or Asian men.[15] A law review article by Professor Justin D. Levinson concerning implicit bias or implicit memory bias by judges and juries described the "shooter bias" as the likelihood to fire on black subjects more often and more rapidly than white subjects, and that participants in the studies more quickly recognize phones, tools or other objects not to be weapons if they are in the hands of someone with a white face. Conversely, after seeing a black face, they rapidly recognize handguns as

weapons.[16] Fortunately, there are studies that law enforcement officers and judges with proper training and mental correction can overcome implicit biases.

We must take steps to recognize and remedy the problem of unconscious bias as best we can. The United States District Court, Western District of Washington (March 10, 2017) published a video and jury instructions created by attorneys and judges with the hope and purpose of stressing and reducing the unfair harms of unconscious bias.[17] The bench and bar of the Western District of Washington formed committees committed to the fair and unbiased judicial process. They developed a set of jury instructions specifically addressing the problem of unconscious bias. With the "purposes of raising awareness to the associations jurors may be making without express knowledge and directing the jurors to avoid using these associations."[18] A number of states and jurisdictions have attempted to design instructions concerning implicit bias. Can explicit instructions lessen unconscious expressions of bias? (See the following discussion.)

## How Does Implicit Bias Affect Us?

We lawyers and judges are human (although some may not believe so), and we suffer from implicit bias and attitudes as well. The U.S. Supreme Court has ruled and reaffirmed that the procedures of jury selection must be fair and nondiscriminatory in both civil and criminal litigation and not based on gender and/or racial bias.[19] When challenged, how do we express a rational basis for excluding a juror when we just have a feeling or sense we don't want a person on the jury? How do we express a rational basis if we are unknowingly acting as a result of an implicit bias of our own? It is difficult, but, if asked, we will respond with the most rational sounding reasons we can muster. *Batson* and *J.E.B.* are respected decisions for attempting to eliminate bias in trials, but many ruminate that *Batson, J.E.B* and judge-dominated voir dire make implicit bias worse.[20]

## How Does Implicit Bias Impact Litigation?

Regardless of the kind of law we practice, it is easy to see how implicit bias would have an effect. Without question, the impact of implicit bias on litigation, winning and losing is dramatic. The American Bar Association recognizes the impact of implicit bias on the justice system. The Section of Litigation sponsored a website providing important material and information concerning the neuroscience of implicit bias. The foundation of the site is video.[21]

The mission statement explains:

> "The problem of implicit bias affects all participants in the justice system, including civil and criminal attorneys. By raising awareness, we hope to combat and ultimately eliminate the problem.
>
> An attorney who understands the implications and effects of implicit bias will be better equipped to deal with its personal impact as well as the impact on his or her clients. In other words, an attorney who understands the implications and effects of implicit bias will be a more effective advocate."[22]

Most of us consciously and honestly believe we are not biased, but since we are unconscious of them, it is pretty clear our reporting is not accurate.

The Education Division of the Administrative Office of the Courts for California produced and developed three videos, one hour each, suggesting ways the bar could deal with implicit bias and explaining the science.

We have made great strides in accepting our differences, but the science shows we have a long way to go. We think we can ask direct questions in voir dire and rely on the answers. We believe most people can and will report their true views and attitudes. Most of us consciously and honestly believe we are not biased, but since we are unconscious of them, it is pretty clear our reporting is not accurate. Certainly, we can report, if we are willing, our explicit biases, but not our implicit biases. A question like, "Can you, Mr. Juror, be fair to my client who is gay or a Muslim American or an undocumented alien?" is not very valuable except to begin education awareness. With

study and subtlety, information can be gained, but not if the judge takes over the questioning and asks a juror who has evidenced a bias, "Now Mrs. Smith, can you be fair and decide this case on the facts you hear from the witness stand and the law I will give you?" After an affirmative answer, "OK counsel, let's move on." Of course, we often ask potential jurors in voir dire to reveal their explicit biases and often they do. We should be aware they can only report their explicit attitudes and biases, not their implicit ones. In many ways, based on the admonition to be fair and to put aside preconceptions, jurors are actually discouraged from expressing bias. It is the foundation of our jury system that all the officers of the court, judges and lawyers alike, be committed to empaneling a jury that is as fair and unbiased as possible. When we don't, we all fail at the expense of our clients, ourselves and our entire judicial system. Jurors, from the beginning to the end of trial, view the evidence, testimony, arguments and charges through the filters of their life experiences, perceptions, attitudes and beliefs. Stuart Chase (1888–1985), an American economist, is attributed with saying:

"For those who believe, no proof is necessary; For those who do not believe, no proof is possible." Although Chase was not referring to a jury, it would have been an appropriate statement.

## What, If Anything, Can We Do About It?

Can explicit instructions lessen unconscious expressions of bias? In a now famous study, Daniel Wegner, a cognitive psychologist, wrote about the consequences of suppressing thoughts. He asked college students not to think about a white bear. Stop thinking about a white bear now, no white bear! Of course, they couldn't stop thinking about a white bear. There is something called the rebound effect. When prejudice or bias is suppressed, they rebound and become stronger. Studies have shown many of the methods used to reduce bias actually have the opposite effect. Apparently, the success of prejudice reducing programs may depend on motivation. If the motivation is personal for self-concluded purposes, it is likely to work. If, on the other hand, the program is externally imposed, then the bias is likely to increase. Agendas supporting independent decisions to become aware and reduce bias have a much greater chance of becoming successful. In contrast, programs that people perceive as controlling with external pressure have the opposite result.[23] This is why we should work with experts to design and implement programs. Fortunately, when taught to be mindful or aware of biases we may hold, and not try to suppress or quash them, we have the opportunity to reduce them and show less bias and prejudice.[24]

The first three words in the best-selling book by M. Scott Peck, *The Road Less Traveled,* are, "Life is difficult!" He goes on to say, "…once we truly see this truth, we transcend it. Once we truly know that life is difficult–once we truly understand it and accept it–then life is no longer difficult."[25] Carl G. Jung, the revered Swiss psychiatrist, taught that we cannot change anything unless we accept it. The bench and bar must accept it. We should never allow speed and efficiency to override fairness and justice. Jung also was known to say, "Everything that irritates us about others can lead us to an understanding of ourselves"[26]–a statement worth pondering.

I certainly don't have all the answers. Even though there is some skepticism of implicit bias impacting behavior, there are things that can be done to lessen its likely impact. I think expanded voir dire with proper training would be helpful. Jurors tend to say what they think they should say. The perceived power and prestige of the judge asking the questions encourages jurors to give what they perceive to be acceptable

answers. Lawyers on both sides surely know their cases better than the judge and are in a better position to recognize where bias may exist. This should be an honest effort, on the part of the trial attorney, not one merely to unduly influence the potential jury before they hear evidence.

As discussed above, lawyers, judges and potential jurors should be educated about all bias, including implicit bias. In jury selection and instructions, videos, PowerPoint presentations and even a discussion of implicit bias would probably be helpful. A recognition and acceptance that bias exists even in ourselves is the first step. Understanding that it is powerful, real and pervasive, and raising it to a conscious level is the second step. Possible supplemental juror questionnaires could be regularly used to build a database for recognizing implicit bias. Make sure the questions are fair and neither favor nor disfavor either side. Bars should establish committees to work with experts in the area of biases. Remember, if the motivation to be fair and reduce bias is personal for self-concluded purposes, it is likely to work. If, on the other hand, the program is externally imposed, then the bias is likely to increase. We should all take the test–lawyers, judges and court personnel, as well. Bias is a problem. Implicit bias is a big one, but no longer a mystery to live, but a problem to solve. ▲

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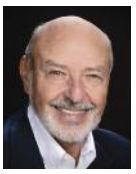
## Gregory S. Cusimano



Greg Cusimano is certified a Diplomat in Trial Advocacy by the National College of Advocacy and the International Academy of Litigators. He is past president and held every office in the Alabama Association for Justice**,** formally ATLA. Cusimano was named as Fellow of the American Bar Foundation, and inducted as a Fellow of the Alabama Bar Foundation, as well as the American Board of Trial Advocates. In 2000, he was awarded the Lifetime Achievement Award by the Association of Trial Lawyers of America. In 2012, Cusimano was the twelfth recipient of the Leonard C. Ring Champion of Justice Award from the American Association of Justice. Cusimano is an owner in the firm of Cusimano, Roberts & Mills LLC in Gadsden.

# Will This Be a Blue Christmas?

***By Robert B. Thornhill***

## Here we are once again– the holiday season is upon us!

For many this is a joyous time of celebration and thanksgiving. For others it is a time of worship and sharing. For most of us it is an opportunity to spend precious moments with family and loved ones. However, there are many for whom the holiday season has become a time to be endured, marred by the recent memory of a lost loved one or associated with painful memories of the past. Still others find themselves in the grip of mental or emotional struggles, such as depression and anxiety or addiction, and no way to cope with these untreated mental health issues.

I believe this holiday season is an opportunity for all of us in the legal profession to be intentionally mindful of our colleagues and loved ones who are struggling, and to reach out and offer our assistance and support. Most lawyers work hard to provide counsel and guidance to their clients, many of whom are struggling with addiction

or mental illness. Sadly, they often fail to recognize or assist when they or a colleague is exhibiting symptoms of impairment. Because of the nature of addiction, these otherwise intelligent men and women often lack the insight needed to recognize that they are in trouble. Lawyers who are struggling with addiction are not "bad people who need to get good." They are "sick people who need to get well." And, they need our help. When we have the genuine love and courage to reach out and tell them what they need to hear and not what they want to hear, then the process that leads to recovery has begun.

The Alabama Lawyer Assistance Program (ALAP) can help with this process. We have a committee of volunteer attorneys, many of whom are in recovery, who are uniquely qualified to reach out to the still-suffering attorney and provide real hope and guidance. We will be happy to take calls of concern and contact the attorney in question. Our mission is to provide ***completely confidential*** assistance to attorneys, law students and judges who may be suffering with a mental health issue or with addiction. We provide referrals for evaluation and treatment, and we offer a comprehensive monitoring program for accountability and long-term support.

What better gift could we give at this time of year than to reach out to a colleague or friend who is lost? If you want to learn more about our program, or about how you can help, please contact our office. We will be happy to answer your questions and provide guidance and support.

From all of us with the Alabama Lawyer Assistance Program, we wish you a happy, joyous and healthy holiday season!

**Robert B. Thornhill**

Robert B. Thornhill, MS, LPC, director, Alabama Lawyer Assistance Program, (334) 517-2238 or (334) 224-6920, *robert.thornhill@alabar.org*


# DISCIPLINARY NOTICES

- Notices
- Reinstatement
- Transfer to Inactive Status
- Disbarments
- Suspensions

## Notices

- **Ben Elton Bruner,** whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of the date of this publication, or thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 2014-1336 and 2016-459 by the Disciplinary Board of the Alabama State Bar.
- **Benjamin Howard Cooper,** whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of the date of this publication, or thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 2015-1600, 2015-1626, 2015-1656, 2015-1671, 2015-1693, 2016-129, 2017-530 and 2017-1186 by the Disciplinary Board of the Alabama State Bar.

## Reinstatement

- Muscle Shoals attorney **Lance Ryan Thomason** was reinstated to the active practice of law in Alabama on June 8, 2018, per the Supreme Court of Alabama. Thomason petitioned to be transferred to inactive status and the petition was granted, effective August 15, 2014. On March 1, 2018, Thomason petitioned for reinstatement to the active practice of law in Alabama and was subsequently reinstated by order of the Supreme Court of Alabama, effective June 8, 2018.

## Transfer to Inactive Status

- North Carolina attorney **James I. Averitt** was transferred to inactive status, effective April 17, 2018, by order of the Disciplinary Board of the Alabama State Bar.

# Disbarments

- Albertville attorney **Steven Vincent Smith** was disbarred from the practice of law in Alabama, effective May 7, 2018, by order of the Supreme Court of Alabama. Smith's disbarment was based upon his guilty plea entered in the United States District Court for the Northern Division of Alabama to one count of receipt of child pornography and the corresponding sentence entered April 11, 2018 ordering Smith to serve 210 months in the custody of the United States Bureau of Prisons. [Rule 22(a), Pet. No. 2018-538]
- Prattville attorney **George Pollard Walthall, Jr.** was disbarred from the practice of law in Alabama, effective June 14, 2018, by order of the Supreme Court of Alabama. Walthall's consent to disbarment contained admissions he filed a document with the United States Bankruptcy Court stating he was a disinterested party when he held a mortgage and promissory note executed by the debtor. Additionally, Walthall admitted he failed to perform the duties for which the Court employed him. Lastly, Walthall admitted the existence of multiple additional disciplinary matters pending against him. [Rule 23(a), Pet. No. 2018-649]

# Suspensions

- Sulligent attorney **Daniel Heath Boman** was interimly suspended from the practice of law in Alabama, effective June 22, 2018. The supreme court entered its order based upon the Disciplinary Commission's order finding Boman's conduct is continuing in nature and is causing, or likely to cause, immediate and serious injury to a client and/or to the public. Boman was found to have mishandled client funds, including personal injury settlement funds, resulting in multiple violations of the *Alabama Rules of Professional Conduct.* [Rule 20(a), Pet. No. 2018-709]
- Birmingham attorney **Virgil Eric Hunter, II** was suspended from the practice of law for two years in Alabama by the Supreme Court of Alabama, effective June 13, 2018. The supreme court entered its order based upon the Disciplinary Board's report and order, wherein Hunter was found guilty of violating Rules 1.4; 1.15(a), (e) and (n); 1.16(d) and 8.1(b), *Ala. R. Prof. C*. Hunter was retained to represent a client in a custody matter. Hunter prepared a petition to modify custody and sent it to the client for her signature. The client returned the executed petition to Hunter for filing. Thereafter, the client had difficulty contacting Hunter and contacted the clerk's office where she learned the petition had not been filed. Hunter later contacted the client and informed her that he could no longer represent her. Hunter failed to refund the unused portion of the $300 filing fee to the client and the funds were not placed into trust, as required. Additionally, Hunter failed to maintain a copy of the client's file, as required. [ASB No. 2017-7]
- Scottsboro attorney **Patricia Sue Lackey** 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 March 28, 2017. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing Lackey's failure or refusal to participate in formal proceedings in a disciplinary matter. After receiving a copy of the suspension order, Lackey filed a petition to dissolve summary suspension and a hearing was held April 7, 2017. Thereafter, on April 11, 2017, the Disciplinary Commission entered an order dissolving the summary suspension. [Rule 20(a), Pet. No. 2017-323]
- Mobile attorney **John Walter Sharbrough, III** was summarily suspended pursuant to Rule 20(a), *Ala. R. Disc. P*., from the practice of law in Alabama by the Supreme Court of Alabama, effective July 23, 2018. The supreme court entered its order based upon the Disciplinary Commission's order that Sharbrough be summarily suspended for failing to respond to formal requests for information concerning a disciplinary matter. [Rule 20(a), Pet. No. 2018-834]
- Hayneville attorney **Logan Ryan Taylor** was summarily suspended pursuant to Rule 20(a), *Ala. R. Disc. P.,* from the practice of law in Alabama by the Supreme Court of Alabama, effective June 18, 2018. The supreme court entered its order based upon the Disciplinary Commission's order that Taylor be summarily suspended for failing to respond to formal requests for information concerning a disciplinary matter. [Rule 20(a), Pet. No. 2018-694] ▲



**Please email announcements to** *margaret.murphy@alabar.org.*

# Among Firms

**The Law Offices of Judy H. Barganier PC** announces a name change to **The Law Offices of Judy H. Barganier and Winston W. Edwards PC.**

**Bradley Arant Boult Cummings LLP** announces that **Andrew J. Shaver** and **Christopher K. Friedman** joined as associates, both in the Birmingham office.

**Christian & Small LLP** announces that **Jordan C. Loper** joined as an associate. The firm also announces the acquisition of **Alford Bolin LLC** and that **Christina May Bolin** joined as a partner and **Helen J. Alford** and **Gaby E. Reeves** joined of counsel. They will continue to operate out of their Daphne office under the Christian & Small name.

**Hall Booth Smith PC** announces that **Rhett Owens** is now a partner in the Birmingham office.

**Haygood, Cleveland, Pierce & Thompson LLP** announces that **Michael E. Short** joined as a partner and the firm name is now **Haygood, Cleveland, Pierce, Thompson & Short LLP.**

**Stone Crosby PC** announces that **Aaron Maples** joined as an associate.

**Whitaker, Mudd, Luke & Wells LLC** announces the firm name is now **Mudd, Bolvig, Luke & Wells LLC.**

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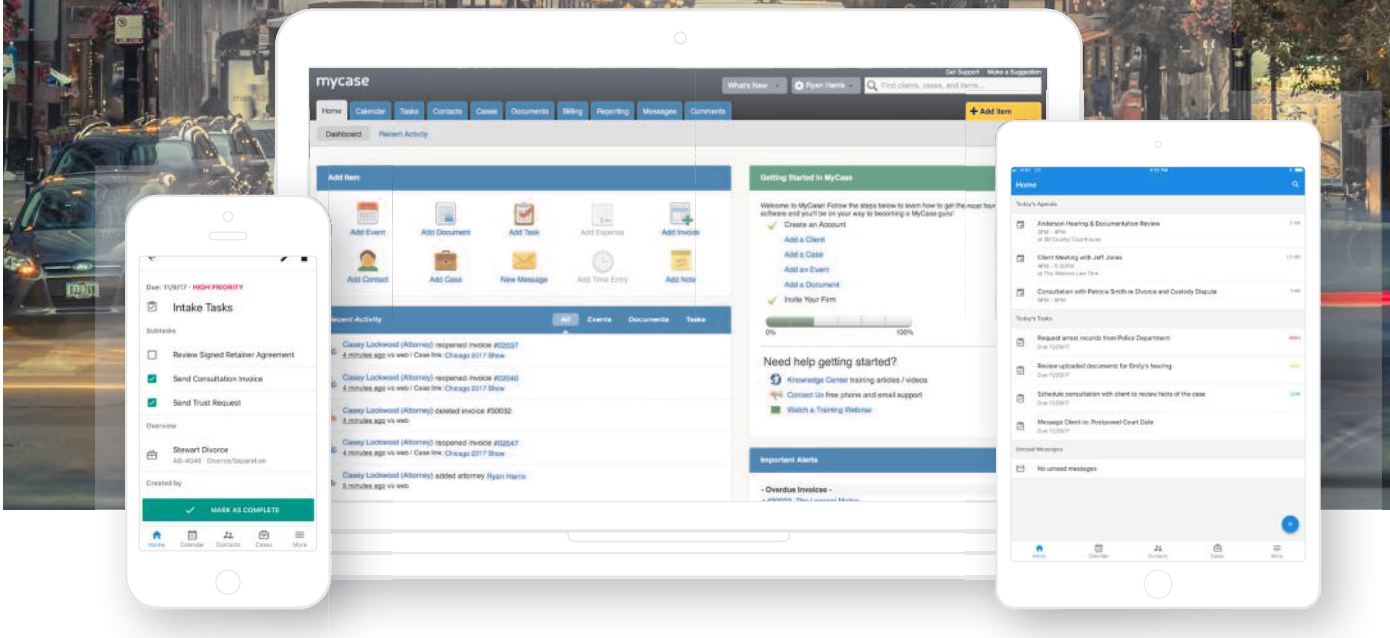


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***Roman A. Shaul***
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# How Your Practice Can Survive a Disaster

Recent large-scale disasters, such as Hurricane Florence in the Carolinas and Hurricane Michael along the Gulf Coast, highlight the need for lawyers to understand that extreme weather events and other calamities have the potential to destroy property or cause the long-term loss of power. Lawyers, in turn, have an ethical obligation to implement reasonable measures to safeguard property and funds they hold for clients or third parties, prepare for business interruption and keep clients informed about how to contact them or their successor counsel.

Specifically, it is important for lawyers to know these *Alabama Rules of Professional Conduct*:

- Rule 1.4 (communication), which requires them to take reasonable steps to communicate with clients after a disaster. To be able to reach clients following a disaster, lawyers should maintain, or be able to create on short notice, electronic or paper lists of current clients and their contact information. This information should be stored in a manner easily accessible.
- Rule 1.1 (competence), which requires them to develop sufficient competence in technology to meet their obligations under the rules after a disaster. Lawyers should

check with the courts and the bar to determine whether deadlines have been extended. Lawyers who continue to provide legal services in the area affected by a disaster have the same ethical obligations to their clients as before the disaster, although they may be able to provide advice outside their normal area of expertise.

- Rule 1.15 (safekeeping property), which requires them to protect trust accounts, documents and property the lawyer is holding for clients or third parties. Lawyers must evaluate in advance storing files electronically so that they will have access to those files via the Internet if they have access to a working computer or smart device after a disaster. To prevent the loss of files and other important records, including client files and trust account records, lawyers should maintain an electronic copy of important documents in an off-site location that is regularly updated.
- Rule 5.5 (c) (temporary multijurisdictional practice), which limits practice by lawyers displaced by a disaster. Out-of-state lawyers may provide representation to disaster victims in the affected jurisdiction only when permitted by that jurisdiction's law or rules, or by order of the jurisdiction's highest court. *See* Subdivision (c) of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.
- Rules 7.1 through 7.5, which limit lawyers' advertising directed to and solicitation of disaster victims. The existence of a disaster, however, does not excuse compliance with lawyer advertising and solicitation rules. Lawyers may solicit in-person to offer pro bono legal services to disaster victims, because the lawyer's motive does not involve pecuniary gain. Additionally, lawyers may communicate with disaster victims in "targeted" written or recorded electronic material in compliance with Rules 7.1 through 7.5. ▲

MEMORIALS

- **Ronald Linwood Clark, Jr.**
- **William Wesley Cole, Jr.**
- **Chief Justice Clement Clay Torbert, Jr.**

# Ronald Linwood Clark, Jr.

Ronald Linwood Clark, Jr. was born May 3, 1952 in New Bern, North Carolina to Mary Gibbs Mitchell Clark and Ronald Linwood Clark. He passed away in Lee County, Alabama on February 24, 2018 at the age of 65.

Ron is survived by his wife, Elizabeth; his son, Taylor Clark; a host of nieces and nephews; a great-uncle; and cousins.

He was preceded in death by his parents and his sister, Ronelle Poudre.

Ron attended high school in North Carolina and later earned several degrees in higher education. He was certified as a polygraph examiner by the Virginia School of Polygraph in December 1979. He was president and CEO of Tidewater Security and Polygraph Services, Greenville, North Carolina, from 1979-1991, and he was a licensed polygraph examiner in North Carolina, Georgia, Virginia and South Carolina. He was also a licensed private investigator in North Carolina.

In 1993 he moved to Montgomery, where he attended Jones Law School and earned his J.D. degree. He practiced law in several counties, but after 2009, his practice was mostly in Chambers County, where he was well-known for his work in juvenile court. His favorite role was guardian ad litem for children.

Ron was a past member of the Academy of Criminal Justice Sciences, American Polygraph Association (1982-1993), North Carolina Polygraph Association (1979-1983), Virginia Polygraph Association (1980-1989), South Carolina Association of Polygraph Examiners (1982-1989) and the International Polygraph Association (1980-1989). Ron was also a member of the Alabama State Bar.

*–W. Gregory Ward, Lanett*

# William Wesley Cole, Jr.

William Wesley Cole, Jr., 88, of Naperville, Illinois, passed away on August 17, 2018.

Bill grew up in Chattanooga, and in the late 1940s, worked on the railroad with his father as a telegrapher at the Wauhatchie signal tower in Chattanooga. In the early 1950s, he served in the 28th Infantry Division of the U.S. Army as a regimental radio operator stationed in Germany. In May 1955, a job for a nighttime telegrapher became available at the train depot in Tuscaloosa, and Bill applied and was hired, and made the decision to attend the University of Alabama. He graduated in 1959 with a bachelor's degree and in 1962 with a Juris Doctor. While at the university, he met and married Joan Ethelyn Walters, who was a student there.

Bill became employed by United States Steel, afterward going to Emory University to attain his master's in laws of taxation (1975). He retired at age 65 as the head of the United States Steel tax division in Chicago.

Bill is survived by his wife of 58 years, Joan; three children, William Wesley Cole, III; Joan Harriet Cole Scott and her husband, Bradley; and Andrew Walters Cole and his wife, Catherine; four grandchildren; and three great-grandchildren.

*–Judge Randall L. Cole, Ft. Payne*

# Chief Justice Clement Clay Torbert, Jr.

The State of Alabama, and the Alabama legal profession, in particular, lost a true giant and accomplished public servant on June 2, 2018 when former Chief Justice Clement Clay "Bo" Torbert, Jr. passed away. Bo was born on August 31, 1929 in Opelika where he lived his entire life.

He attended the U.S. Naval Academy and graduated from Auburn. After Air Force service, Bo graduated from the University of Alabama Law School in 1954 and began his practice with Bill Dickinson, who would go on to serve in Congress from 1965 until 1993. Bo later practiced with Yetta Samford in Opelika. In 1958, he was elected to the Alabama Legislature, where he served multiple terms in both the house and the senate. He was selected in 1959 as the "most outstanding freshman legislator" by the Capital Press Corps.

Bo had many legislative achievements, but the most significant ones dealt with reform of the Alabama Judicial System. Most important of these efforts, as a state senator, Torbert worked closely with Chief Justice Howell Heflin in the 1970s to enact the legislation to completely restructure the state's antiquated legal system and implement the Judicial Article of the state Constitution, which passed in 1973. A very good history of this important work can be found in the *Alabama Law Review* article, "Clement Clay Torbert and Alabama Law Reform" by Freyer, Pruitt and Riser [Vol. 63:4:867]. Their article provides detailed information on Bo's important work in creating the Unified Judicial System still in place today. The Judicial Article was recognized nationally as a model court system. The current Alabama Supreme Court building in Montgomery is named the "Heflin-Torbert Judicial Building" in tribute to the two people most responsible for creating the Alabama judiciary as we know it today.

In 1976, Bo was elected Chief Justice of the Alabama Supreme Court, where he provided leadership as the court system continued to make the transition to a unified system. He served with integrity as chief justice for 12 years. During this time, the Alabama court system was viewed as one of the best in the country. Chief Justice Torbert was recognized nationally and appointed by President Reagan as chair of the first Board of Directors of the State Justice Institute.

After retiring from the court, he joined the Birmingham-based firm of Maynard Cooper & Gale in 1990, where he practiced law until his retirement. Bo also held the Wright Chair of Law at Cumberland and the Sparkman Chair at the University of Alabama School of Law and remained active in bench and bar activities.

A wonderful and engaging storyteller, Bo was a true gentleman and friend to countless people all over the state and country. He was an avid outdoorsman who loved to hunt and fish and loved the land, especially his farm in Society Hill, Alabama.

Bo also loved Auburn and Auburn football, but Bo's family was his real love. In 1952, Bo married the former Gene Hurt of Auburn and they had a beautiful life together. He affectionately referred to her as "Magnolia." She was a great partner for Bo and was his best friend for more than 66 years. They were very proud of their three children, Dixie Alton (Mitch), Shealy Cook (Penn) and Clay Torbert (Cindy). Bo is survived by Gene and the children, as well as five grandchildren and two great-grandchildren.

Bo was a special man, a good friend and an outstanding public servant who dedicated his life to making Alabama a better place. He will be sorely missed, but his impact will last forever.

*–Fournier J. "Boots" Gale, Birmingham*

**Bethea, Barron**
Birmingham
Admitted: 1953
Died: July 26, 2018

**Brooks, James David**
Mobile
Admitted: 1964
Died: June 6, 2018

**Capell, Hon. John Lowery, III**
Montgomery
Admitted: 1964
Died: August 8, 2018

**Freeman, Vernie Edward, II**
Hoover
Admitted: 1986
Died: August 15, 2018

**Garner, Robert Edward Lee**
Huntsville
Admitted: 1982
Died: July 4, 2018

**Lee, Hon. Helen Shores**
Birmingham
Admitted: 1988
Died: July 2, 2018

**Logsdon, Phyllis Jo**
Dothan
Admitted: 1979
Died: June 20, 2018

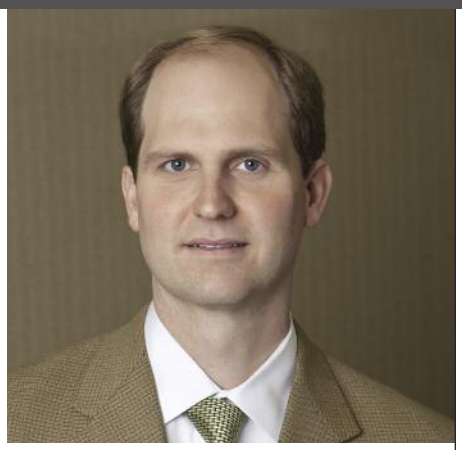
**Mitchell, Billy Farrell**
Birmingham
Admitted: 1969
Died: August 15, 2018

**Pyper, Richard Lee**
Montgomery
Admitted: 1978
Died: July 9, 2018

**Rutledge, Joseph Henry**
Birmingham
Admitted: 2013
Died: July 4, 2018

**Snead, Robert Caldwell, Jr.**
Birmingham
Admitted: 1982
Died: July 28, 2018

**Zeller, Paul William**
Mobile
Admitted: 2007
Died: August 6, 2018



*Wilson F. Green*

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

*Marc A. Starrett*

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

**RECENT CIVIL DECISIONS**

# From the Alabama Supreme Court

## Election Law

***Veitch v. Vowell*, No. 1170723 (Ala. June 1, 2018)**

Jurisdiction stripping statute, *Ala. Code* §17-16-44, under which "[n]o jurisdiction exists in or shall be exercised by any judge or court to entertain any proceeding for ascertaining the legality, conduct, or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute," did not apply to candidate's claim he was wrongfully denied right to have his name included on a ballot, pursuant to an act he alleges is void.

## Forum Non Conveniens

***Ex parte Roy Moore*, No. 1170638 (Ala. Aug. 17, 2018)**

Interests of justice did not compel a *forum non conveniens* transfer of defamation case from Montgomery to Etowah County; some allegedly defamatory statements were made in Montgomery County, and none were made in Etowah County. A specially-convened court decided the case.

## Juror Misconduct

***Ankor Energy, LLC v. Kelly*, No. 1151269 (Ala. Aug. 24, 2018)**

Trial court exceeded its discretion in granting new trial motion based on alleged juror misconduct absent an admissible juror affidavit indicating that her misconduct was prejudicial. One submitted affidavit was not sworn and therefore inadmissible, and subsequent affidavits clarified that juror did not share the results of her improper outside research with other jurors, nor did the research influence even her own decision-making.

## Relation Back of Amendments

***Ex parte Integra LifeSciences Corp.*, No. 1170692 (Ala. Aug.24, 2018)**

Amendment substituting Integra for fictitious party did not relate back; plaintiff failed to exercise reasonable diligence in substituting because plaintiff possessed operative report at time Complaint was filed identifying SurgiMend, and a simple Internet query would have revealed that Integra manufactures that product.

## Immunity

***Ex parte Montgomery County Bd. of Educ.*, No. 1170733 (Ala. Aug. 24, 2018)**

County Board of Education is entitled to Section 14 state immunity.

## Notice of Local Laws

***Burnett v. Chilton County Health Care Auth.*, No. 1160938 (Ala. Aug. 31, 2018)**

Section 107 of the Constitution explicitly requires that any repeal of a local act must specifically be disclosed in a Section 106 notice relating to the new legislation; the Section 106 notice relating to Act 2014-422 did not provide notice of the repeal of Act 2014-162 and was therefore unconstitutional.

## Abatement; Third-Party Claims

***Nettles v. Rumberger, Kirk & Caldwell, P.C.*, No. 1170162 (Ala. August 31, 2018)**

(1) Overruling *Hanner v. Metro Bank & Prot. Life Ins. Co.*, 952 So. 2d 1056, 1060 (Ala. 2006), and following *Hall v. Hall*, 584 U.S. ___, 138 S.Ct. 1118 (2018), judgment disposing of all claims in one of a number of consolidated actions is final as to that action and immediately appealable, because in consolidated actions, the separate actions retain their separate character; (2) *Ala. Code* § 6-5-440 barred claims by Nettles against "Parties" asserted in separate action which fell outside the scope of permissible third-party practice and asserted by Nettles against parties in a prior action, where a non-final summary judgment had been entered on the third-party complaint asserting some of Nettles's claims, because the lack of finality rendered the claims still pending for purposes of section 6-5-440, and the maintenance of two separate actions constituted improper claim-splitting by Nettles.

## Venue; Governmental Entities

***Ex parte Board of Water and Sewer Commissioners of the City of Mobile*, No. 1170400 (Ala. Aug. 31, 2018)**

Even absent a specific statutory venue provision, the general common-law rule is that an action against a governmental entity is properly maintained in the county where the governmental entity officially resides.

## Relation Back; Fictitious Parties

***Ex parte American Sweeping, Inc.*, No. 1170461 (Ala. Aug. 31, 2018)**

Plaintiff failed to exercise due diligence in substituting ASI for the fictitious party; ASI's identity was available even before suit, just after the accident, on the face of the accident report.

## Peace Officer Immunity

***Ex parte City of Montgomery*, No. 1170103 (Ala. Aug. 31, 2018)**

Officer was entitled to immunity for claims arising from MVA where lights and sirens were engaged in responding to emergency call. Plaintiff's testimony as offered to create a factual issue was contradicted by the dashboard video camera evidence and therefore should not have been considered: "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

## Easements; Takings

***Portersville Bay Oyster Company, LLC v. Blanken*ship, No. 1161101 (Ala. Aug. 29, 2018)**

Although no statutory procedure exists for the alleged taking by reason of the dissemination of sediment and silt from the activities of the state contractors, the claim is nevertheless cognizable, overruling *Ex parte Carter*, 395 So. 2d 65, 67 (Ala. 1980). Because leasehold interests can be taken by eminent domain, and therefore by inverse condemnation, it correspondingly follows that easements, another real-property interest allowing the use of a property right held by the owner of the land, can be taken by eminent domain and therefore by inverse condemnation.

## Discovery; Assertion of Privilege

***Ex parte Estate of Elliot*, No. 1170564 (Ala. Sept. 7, 2018)**

Rule 26(b)(6) requires that a party claiming privilege provide a sufficient description of the materials being withheld in order for the party seeking discovery to challenge the claim of privilege; trial court could not properly deny motion to compel when claim of privilege was not supported by any evidence.

## Immunity; Bar Complainants

***D.A.R. v. R.E.L.*, No. 1151080 (Ala. Sept. 7, 2018)**

*Ala. R. Disc. P.* 15 affords absolute immunity from suit to a bar complainant–even for claims that are allegedly intentionally false and malicious. State bar assistant general counsel was entitled to quasi-judicial immunity from suit.

## Discovery; Overbreadth

***Ex parte Dolgencorp, LLC*, No. 1161003 (Ala. Sept. 14, 2018)**

Party opposing discovery made sufficient showing that discovery of substantially similar accidents in nationwide search would be unduly burdensome, requiring about 10,000 hours of work at a cost of between $270,000 and $300,000; trial court on remand was directed to limit the discovery to Alabama stores. Justice Shaw concurred, noting that Alabama-based discovery rather than nationwide discovery is the "default" position in Alabama case law.

## Probate vs. Circuit Court Jurisdiction

***Estate of Williams v. Loveless*, No. 1170392 (Ala. Sept. 14, 2018)**

After will was admitted to probate, interested party petitioned probate court for removal of action to circuit court, which probate court granted, and after which circuit court assumed administration. Held: under *DuBose v. Weaver*, 68 So. 3d 814 (Ala. 2011) and *Ala. Code* § 12-11-41, circuit court never obtained jurisdiction because petition for removal of administration is made to the circuit court, and the circuit court must grant it.

*(Continued from page 439)*

## Future Advance Mortgages; Priority

***GHB Construction and Development Company, Inc. v. West Alabama Bank and Trust*, No. 1170484 (Ala. Sept. 21, 2018)**

The plurality held that a "future-advance mortgage does not create a mortgage lien until some indebtedness is incurred by the mortgagor under the future-advance mortgage." Thus, the plurality opinion concluded that "because WABT's mortgage lien was created after GHB's materialman's lien, WABT's mortgage lien never had priority over GHB's materialman's lien." Justice Shaw's special concurrence noted that the ultimate outcome might be different if, as could possibly be proven, WABT had an obligation to lend some funds upon execution of the future advance mortgage, and nothing in the plurality opinion would foreclose that result. (NOTE: an application for rehearing was pending at press time).

## Trade Fixtures; Security Interests

***Pipkin v. Sun State Oil, Inc.*, No. 1160850 (Ala. Sept. 21, 2018)**

Gas pumps were fixtures which transferred to new owner upon transfer of title, and were not trade fixtures (which retain their personal property status) because they were not provided in connection with a landlord tenant relationship (the opinion explains the provenance of trade fixture status at painstaking length), and (2) because the parties' agreement called for the filing of a UCC-1 (which wasn't done), no security interest in the pumps was not perfected, so the ownership interest of buyer was acquired free of the security interest.

## Imputed Disqualification of Counsel

***Ex parte Utilities Board of the City of Tuskegee*, No. 1170234 (Ala. Sept. 28, 2018)**

Under *Ala. R. Prof. Cond.* 1.11, "a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee." Applying "[a] common-sense assessment of these facts," the supreme court held: (1) the matter in litigation did not appear to be the same "matter" about which there was public-meeting discussion (in which lawyer chaired a state commission), (2) the public meeting discussion did not involve the party the lawyer now represented (UBT), (3) lawyer was not "personally and substantially" involved with the matter given the relatively peripheral activity he conducted in each matter and (4) even if plaintiff had presented some evidence to support disqualification, that disqualification should not have been imputed to lawyer's firm.

## Corporate Opportunity Doctrine

***Mitchell & Aqua Marine Enterprises, Inc. v. K&B Fabricators, Inc.*, No. 1170021 (Ala. Sept. 28, 2018)**

(1) Whether or not an officer has misappropriated a corporate opportunity is a fact question; (2) evidence supported trial court's finding that Mitchell usurped K&B's corporate opportunity for a number of reasons, among them that under Alabama law, when a fiduciary has overlapping obligations as a fiduciary of potentially competing concerns, the law imposes a special duty on the fiduciary to deal fairly with both sides; (3) constructive trust is an equitable remedy imposed by a court that need not be specially pleaded, so long as the facts are sufficient to impose such a trust, and facts were so pleaded in this case; (4) a constructive trust is imposed when property is wrongfully acquired and held, so lack of complicity by present holder of the property will not prevent the imposition of a constructive trust against the holder; (5) purpose of a constructive trust is to capture the profits wrongfully made by the new competitive business, not the profits the plaintiff corporation would have made.

## Medical Liability; New Trial

***HealthSouth Rehabilitation Hospital of Gadsden, LLC v. Honts*, No. 1160045 (Ala. Sept. 28, 2018):**

Trial court erred (warranting new trial) by providing the jury instructions concerning the standard of care for hospitals, when the only testimony in the case and the theory of the case concerned the applicable nursing standard of care. NOTE: this is a two-justice plurality opinion (Sellers joined by Stuart).

## Indispensable Parties

***Ex parte Advanced Disposal Services South, LLC*, No. 1170320 (Ala. Sept. 28, 2018)**

(1) Because the city took title to leachates which allegedly became water contaminants made the basis of suit, the city was necessary party to action by pollution plaintiffs; but (2) it could not be determined whether the city was indispensable or what consequence might follow, because the city could object to venue in Macon County given the exclusivity of *Ala. Code* 6-3-11, at which point the circuit court would have to determine whether to dismiss only the city or dismiss the entire action.

## Trusts

***Barrett v. Barrett*, No. 1170304 (Ala. Sept. 28, 2018)**

(1) Trial court lacked authority to modify trust under *Ala. Code* § 19-3B-412 after the trust terminated by its own terms; (2) trial court erred by holding that agreement to sell stock allegedly in violation of separate shareholders' agreement was

*void ab initio*; even though the shareholder agreement may deem a violative transfer to be void, the parties to the sales agreement were still bound to their separate agreement such that the putative seller could be sued for damages for breach of that agreement, including money paid for shares that might not eventually be delivered.

## State-Agent Immunity; Municipal Employees

***Ex parte Gilland*, No. 1170642 (Ala. Sept. 28, 2018)**

Municipal animal control officer was exercising discretion under municipal code provision in returning stray dog to owner, and was thus entitled to state-agent immunity.

## Will-Contest Procedures

***Burns v. Ashley*, No. 1170565 (Ala. Sept. 28, 2018)**

Before will was admitted to probate, it was contested by filing in the probate court, which was proper under *Ala. Code* 43-8-190. Will-contest proceeding, if removed, was then subject to the removal requirements of section 43-8-198, under which the probate court must be petitioned for removal, and the probate court must enter an order transferring the contest to the circuit court. In this case, the removal petition was made to the circuit court, which granted it, and which caused there to be a jurisdictional defect: a circuit court cannot "reach down" and remove a will contest from probate court when the contest is filed before admission of a will to probate.

## Immunity; Airport Authorities

***Ex parte Birmingham Airport Authority*, No. 1160592 (Ala. Sept. 28, 2018)**

*Ala. Code* § 4-3-47(2) confers immunity on the BAA from any tort action.

## Recreational Use Immunity

***Ex parte Town of Dauphin Island*, No. 1170424 (Ala. Sept. 28, 2018)**

Town was entitled to the immunity found in the recreational-use statutes; plaintiffs have failed to present substantial evidence indicating that town had actual knowledge that the swing that allegedly caused injuries presented an unreasonable risk of death or serious bodily injury. See *Ala. Code* § 35-15-24(a)(2).

# From the Court of Civil Appeals

## Lien Priority

***Alabama Medicaid Agency v. Southcrest Bank*, No. 2170186 (Ala. Civ. App. Aug. 3, 2018, reh'g from June 1, 2018)**

Liens falling behind a mortgage interest are prioritized in order of time the liens were created. However, fees could not be assessed against the Medicaid Agency due to Section 14 immunity.

## State Employment

***Alabama State Personnel Board v. Palmore*, No. 2170090 (Ala. Civ. App. Aug. 3, 2018)**

Substantial evidence supported board's termination of nurse for failure to follow ADPH written protocols.

## Garnishment; Finality

***Ricks v. 1st Franklin Financial Corp.*, No. 2170598 (Ala. Civ. App. Aug. 3, 2018)**

Orders denying debtor's motions to stay a garnishment and to dismiss that garnishment were not appealable because they are not final orders.

## Administrative Law

***GASP v. Jefferson County Bd. of Health*, No. 2170489 (Ala. Civ. App. Aug. 10, 2018)**

Local board of health administering provisions of the Air Control Act, *Ala. Code* § 22-28-23(b), is not subject to the Alabama Administrative Procedures Act for purpose of notice and hearing provisions in actions taken by the board.

## *Res Judicata*; Real Property

***McCrary v. Cole*, No. 2170508 (Ala. Civ. App. Aug. 17, 2018)**

Prior action in circuit court for prescriptive easement did not bar second action in probate court seeking to condemn right-of-way under *Ala. Code* § 18-3-1, because probate court had exclusive jurisdiction over the second claim. Res judicata barred claim in second action seeking to declare public road; that claim could have been brought in the first action.

## Default Judgments

***Reliable Automotive Center v. Jackson*, No. 2170366 (Ala. Civ. App. Aug. 24, 2018)**

If movant presents evidence on each of the three *Kirtland* factors to set aside a default, a denial by operation of law of a motion to set aside is generally reversible, though that does not necessarily mean the default should be set aside.

## *Res Ipsa Loquitur*

***Martin v. Comfort Touch Transport, LLC*, No. 2170288 (Ala. Civ. App. Aug. 31, 2018)**

Because non-negligent causes were possible for abrasions to deceased body while in transport, *res ipsa loquitur* could not be used as basis for liability on family members' claims. Puncture wounds to body, however, were actionable under *res ipsa loquitur* because no non-negligent explanation was offered for those.

*(Continued from page 441)*

## Taxation

***Alabama Department of Revenue v. Scholastic Book Clubs, Inc.*, No. 2161077 (Ala. Civ. App. Sept. 7, 2018)**

Independent of *South Dakota v. Wayfair, Inc.*, ___ U.S. ___, 138 S. Ct. 2080 (2018) (which abolished the physical-presence requirement for state taxation of sales), the version of *Ala. Code* § 40-23-68(b)(9) and (10) controlling during the relevant tax years rendered the distribution of catalogs into the state and the solicitation and fulfillment of orders in interstate commerce not taxable.

## Taxation; Statutory Construction

***Ala. Dept. of Revenue v. Bryant Bank*, No. 2170550 (Ala. Civ. App. Sept. 14, 2018)**

Statute defining a "New Markets Tax Credit" offsetting the Financial Institutions Excise Tax was ambiguous, and therefore the ADOR's interpretation was entitled to deference.

## Workers' Compensation

***Thornbury v. Madison County Comm'n*, No. 2170278 (Ala. Civ. App. Sept. 28, 2018)**

Law-enforcement officer engaged in meth-destroying activity which led to occupational disease was not employee of the commission; judicial estoppel did not bar commission from denying employment based on its settlement of comp claim brought by another officer, because that officer was not employed in the same capacity.

# From the United States Supreme Court

The Court's term began October 1, 2018.

# From the Eleventh Circuit Court of Appeals

## Shotgun Pleadings

***Jackson v. Bank of America*, No. 16-16685 (11th Cir. Aug. 3, 2018)**

In an extensive discussion of shotgun pleadings, the Court affirmed the district court's dismissal of a foreclosure-avoidance complaint as an impermissible shotgun pleading.

## FLSA

***Garcia-Celestino v Ruiz Harvesting, Inc.*, No. 17-12866 (11th Cir. Aug. 2, 2018)**

Migrant workers under H-2A visa program brought collective action against Ruiz Harvesting, Inc. ("Ruiz") and defendant-appellant Consolidated Citrus. Ruiz had hired plaintiffs to pick fruit at Consolidated Citrus's groves. Held: evidence was insufficient to render Consolidated Citrus a joint "employer" of the plaintiffs. Employee status turned on a multiplicity of factors, analyzed by exploring the intersection of "employer" as used in FLSA, the common law and the statute governing the H-2A visa program. Right of control was the predominant, but not the sole, factor.

## ADA; Rehabilitation Act

***Crane v. Lifemark Hospitals, Inc.*, No. 16-17061 (11th Cir. Aug. 2, 2018)**

Crane sued hospital for its alleged failure to provide an American Sign Language ("ASL") interpreter for Crane to effectively communicate during an involuntary commitment evaluation, in violation of the Rehabilitation Act and ADA Title III. Reversing the district court's summary judgment to the hospital, the Court found genuine issues of fact on whether Crane was able to effectively communicate medically relevant information and whether the hospital personnel were deliberately indifferent.

## ADA; FMLA

***Batson v. The Salvation Army*, No. 16-11788 (11th Cir. July 31, 2018)**

In a fact-intensive case concerning a long-term employee who contracted MS, went on FMLA leave, had her position eliminated and then applied for but was not rehired to a former position, the Eleventh Circuit affirmed the district court's summary judgment to defendant as to an ADA hiring claim, but found substantial evidence that TSA's explanations for terminating her were pre-textual and that TSA interfered with her rights under the FMLA, thus reversing on ADA and FMLA retaliation claims and an FMLA interference claim.

## Takings

***Checker Cab Operators, Inc. v. Miami-Dade County*, No. 17-11955 (11th Cir. Aug. 6, 2018)**

District court correctly dismissed claims by taxi medallion holders against county regarding county's allowance of ride-

sharing services, based on contention that allowing ride-sharing (Uber and Lyft) violated the Takings and Equal Protection clauses. Medallions are licenses and do not afford a right to exclude competition in the marketplace.

## False Claims Act; Anti-Kickback Statute

***Carrel v. AIDS Healthcare Foundation, Inc.*, No. 17-13185 (11th Cir. Aug. 7, 2018)**

Anti-Kickback Statute permits payments to employees for their "employment in the provision of covered items or services." In this case, foundation offered financial incentives to some employees who refer patients to other healthcare services operated by foundation, and it offered incentives to patients who use its services. Held: the AKS specifically allowed the employees to receive such incentive payments.

## Arbitration; Arbitral Default

***Hernandez v. Acosta Trailers, Inc.*, No. 17-13057 (11th Cir. Aug. 8, 2018)**

If a party fails to abide by arbitral responsibility to pay fees after that party has compelled arbitration, a district court could reverse its order compelling arbitration, but it is not proper to enter a default judgment in federal court on the merits. If party's arbitral failure is in bad faith, a district court could impose a sanction of a default judgment, but no such finding was made in this case.

## First Amendment

***Stardust, 3007, LLC, v. City of Brookhaven*, No. 16-17176 (11th Cir. Aug. 10, 2018)**

City ordinance restricting adult-themed businesses was constitutional against a variety of First-Amendment and substantive due process attacks.

## First Amendment; Public Employment

***Fernandez v. School Bd. of Miami-Dade*, No. 17-14319 (11th Cir. Aug. 10, 2018)**

School principal and assistant principal of special-needs public school brought First Amendment retaliation claim against board after being disciplined for attempting to convert school to charter school, alleging that the school board's response to their conversion efforts abridged their freedom of speech and association. Held: their speech was not constitutionally protected because it was uttered pursuant to their "official duties" as public employees, and, therefore, granted summary judgment to the board.

## Bankruptcy; Preferences

***In re BFW Liquidation, LLC*, No. 17-13588 (11th Cir. Aug. 14, 2018)**

Under 11 U.S.C. § 547(c)(4), "new value" provided to the debtor does not have to remain unpaid in order to be exempt from a preference claim. Blue Bell could therefore keep the money Bruno's paid it for recent ice cream and product shipments during the preference period as providing "new value."

## Equitable Mootness; Bankruptcy

***Bennett v. Jefferson County, Alabama*, No. 15-11690 (11th Cir. Aug. 16, 2018)**

Equitable mootness doctrine barred appeal from confirmation of county's bankruptcy plan, because new sewer warrants had been issued in reliance on the plan.

## Arbitration; "First Options" and Class Actions

***Spirit Airlines, Inc. v. Maizes*, No. 17-14415 (11th Cir. Aug. 16, 2018)**

Arbitration agreement's choice of AAA rules, standing alone, constituted clear and unmistakable evidence that Spirit intended that the arbitrator decide whether an arbitration agreement which is silent on the allowance of class actions in arbitration can be construed to allow for class arbitration. Note: The Eleventh Circuit is out of line with four other circuits on this issue, which may presage a Supreme Court audience.

## ADA

***A.L. et al. v. Walt Disney Parks & Resorts US, Inc.*, Nos. 16-12647 (11th Cir. Aug. 17, 2018)**

In 30 separate lawsuits, plaintiffs filed claims alleging that Disney, at six of its theme parks, fails to accommodate their disabilities, in violation of Title III of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12182. Plaintiffs allege that their severe disabilities include an inability to comprehend the concept of time, defer gratification and wait for rides, as well as strict adherence to a pre-set routine of rides in a specific order. Plaintiffs therefore contend that access to all of Disney's rides must be both nearly immediate and in each plaintiff's individual, pre-set order to accommodate fully their impairments. The district court granted summary judgment to Disney on all claims. The Eleventh Circuit vacated in part, as to the necessary-modification inquiry under § 12182(b)(2)(A)(ii) of the ADA, remanding for further proceedings.

## Personal Jurisdiction

***Waite v. All Acquisition Corp.*, No. 16-15569 (11th Cir. Aug. 23, 2018)**

Plaintiff lived and worked for decades in Massachusetts, where he was exposed repeatedly to Union Carbide's (UC) asbestos-containing products. Later he moved to Florida, where he was diagnosed with asbestos-related illness and there sued UC. Held: (1) UC was not subject to specific jurisdiction in Florida, because any contacts of UC to Florida relating to Waite was not the but-for cause of his injury, and (2) UC (a New York corporation situated in Texas) was not "at home" and thus subject to general jurisdiction in Florida, despite being registered and having an agent for service in Florida.

## Punitive Damages, Excessiveness

***McGinniss v. American Home Mortgage Corp.*, No. 17-11494 (11th Cir. Aug. 22, 2018)**

*(Continued from page 443)*

In wrongful foreclosure action regarding commercial rental property, the Court affirmed against a due-process excessiveness challenge an award of $3,000,000 in punitive damages, accompanied by awards of $6,000 for economic injury and $500,000 for emotional distress. Conduct's reprehensibility was high, given the creditor's actions indicating malice; a 5.9:1 ratio was not excessive, notwithstanding the substantial emotional distress damages compressing the ratio, because emotional distress damages are not any different in character from economic damages in serving a compensatory function; and comparable civil sanctions were uninformative.

## Abortion Rights (Alabama Law)

***West Alabama Women's Center v. Williamson*, No. 17-15208 (11th Cir. Aug. 22, 2018)**

The Court affirmed Judge Thompson's permanent injunction barring enforcement of the Alabama Unborn Child Protection from Dismemberment Abortion Act, which forbids a form of abortion colloquially known as "dismemberment abortion" (clinically called Dilation and Evacuation) involving a "living" unborn child. See *Ala. Code* § 26-23G-2(3). The district court found (and its findings were affirmed under clear-error review) that alternative methods of abortion during the 15-18 week phase posed undue risks to the mother or were potentially ineffective, and therefore the state statute posed an "undue burden" to access to abortion services.

## Bail-Setting; Civil Rights

***Walker v. City of Calhoun, GA*, No. 17-13139 (11th Cir. Aug. 22, 2018)**

Municipal court employed a standing bail order for bail as to arrestees, which order envisioned three forms of release depending on the type of offense charged and the financial means of the arrestee. First, arrestees charged with state offenses within the municipal court's jurisdiction were released immediately on a secured bond if they deposited cash bail per the bail schedule or use a commercial surety at twice the scheduled bail. Second, arrestees charged with state offenses who do not post bail immediately must wait for a bail hearing with court-appointed counsel, to take place within 48 hours from arrest; those satisfying indigency at the hearing were released on a recognizance bond. Third, all arrestees charged with violating city ordinances were released on unsecured bond, subject to bail-setting if they fail subsequently to appear. Arrestee brought class action, contending that bail procedures violated arrestee's equal protection rights based on a wealth-based disparity (on the theory that indigents could not bail out for 48 hours at a minimum). The district court granted a preliminary injunction. The Eleventh Circuit held: (1) Younger abstention was inapplicable, because arrestees were not trying to enjoin the ongoing criminal prosecutions, but instead were challenging solely the bail-setting process; (2) under Georgia law, the city had the authority to set policies for bail-setting, and city's acquiescence in municipal court's setting of bail policy was itself a potential establishment of *Monell* policy by the city itself, at least for purposes of a preliminary injunction; (3) merits of the claims were properly analyzed under equal-protection and due-process principles, rather than solely as a function of excessive bail clause; (4) district court erred in applying some unstated form of heightened scrutiny to the wealth-based classification; only rational-basis review was appropriate, and under former Fifth Circuit law, a bond schedule is permissible as long as indigents were given some opportunity to prove indigency and be released without bond (as was in this case); (5) *Bearden v. Georgia* requires courts to apply something akin to a procedural due process analysis in determining the adequacy of procedures for setting bail; (6) city's procedure of allowing indigents to establish indigency with an opportunity to be heard within 48 hours of arrest provides ample notice and opportunity, so the district court abused its discretion in applying an improper legal standard of a bright-line 24-hour rule; (7) city's abandonment of prior admittedly unconstitutional policy and adoption of the standing bail order did not render arrestee's claims for injunctive relief moot; city could be enjoined from not returning to the prior policy. Judge Martin filed a lengthy dissent.

## First Amendment

***Fort Lauderdale Food Not Bombs v. City of Ft. Lauderdale*, No. 16-16808 (11th Cir. Aug. 22, 2018)**

Given FNB's purpose and function, its weekly outdoor food-sharing gatherings in a public park is expressive conduct protected by the First Amendment: FNB's message is "that [ ] society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all."

## Section 1983; Probable Cause with Underlying Criminal Case

***Blue v. Lopez*, No. 17-11742 (11th Cir. Aug. 28, 2018)**

Denial of a directed verdict in a criminal trial, although that establishes probable cause under Georgia law, does not measure whether probable cause for a prosecution existed in a section 1983 case: the credibility, reliability and quality of evidence supporting the prosecution in the first place.

## Reverse Mortgages

***Jones v. Live Well Financial, Inc.*, No. 17-14677 (11th Cir. Sept. 4, 2018)**

This case involved a reverse mortgage issued to a former professional basketball player, Pops Jones of the Philadelphia 76ers (Judge Newsom's opinion duly noted his "legit baller" status). 12 U.S.C. ¶ 1715z-20 states that the HUD Secretary "may not insure" a reverse mortgage unless it defers repayment obligations until the borrowing "homeowner" either dies or sells the mortgaged property–and, importantly, expressly defines the term "homeowner" to include the borrower's spouse. Id. § 1715z-20(j). Issue: whether § 1715z-20(j) prevents a lender from foreclosing pursuant to a reverse-mortgage contract that, by its terms, permits the lender to demand repayment immediately following a borrower's death, even if his or her non-borrowing spouse continues to live in the mortgaged property. Held: the lender's contract rights are independent of the statute.

## Establishment Clause

***Kondrat'yev v. City of Pensacola*, No. 17-13025 (11th Cir. Sept. 7, 2018)**

The Court affirmed the district court's order requiring the city to remove a 34-foot cross from a public park on the ground that the city's maintenance of the cross violates the First Amendment's Establishment Clause. The cross was originally wooden, erected in 1941 by the National Youth Administration as a "focal point" for an Easter sunrise service; it was replaced in 1969 by the local Jaycees with the current concrete version and is used as the location for an annual Easter sunrise program, but it has also been used as a site for remembrance services on Veterans and Memorial days, at which attendees place flowers near the cross in honor of loved ones overseas and in memory of those who died fighting in service of the country. The panel concluded it was bound by *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983), which considered similar facts and held the display unconstitutional. Judge Newsom penned a lengthy (and persuasive) special concurrence arguing that *Rabun* was wrongly decided and that this case should be considered *en banc*.

## Voting Rights Act; Preclearance

***Voketz v. City of Decatur*, No. 17-11941 (11th Cir. Sept. 13, 2018)**

Given the abrogation of Section 5 of the Voting Rights Act in *Shelby County v. Holder*, 570 U.S. 529 (2013), the City of Decatur may implement its 2010 referendum reforming its government and how councilpersons are elected.

## Education Law; First Amendment; Title IX

***Koeppel v. Valencia College*, No. No. 17-12562 (11th Cir. Sept. 13, 2018)**

College did not violate student's constitutional rights nor violate Title IX in suspending him based on allegations of stalking and sexual harassment against another student, substantiated through text messages, occurring largely during a break between summer and fall classes. The Court rejected the argument that the school's enforcement should not extend off campus, agreeing with the Fifth Circuit that "[t]he pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction . . . making any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools." *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 391, 395-96 (5th Cir. 2015) (en banc).

## Qualified Immunity

***Glasscox v. City of Argo*, No. 16-16804 (11th Cir. Sept. 11, 2018)**

District court properly denied qualified immunity to officer who tased diabetic driver four times after pulling over driver for erratic driving caused by diabetic episode. The body-camera and other evidence created a genuine issue of fact especially as to whether multiple tasings were reasonable when the driver was being compliant.

## Arbitration; Class Actions

***JPay, Inc. v. Kobel*, No. 17-13611 (11th Cir. Sept. 19, 2018)**

Although the availabililty of class-action practice in arbitration is a generally a question of arbitrability for the court, the agreement here (which invoked the AAA rules, like in *Spirit Airlines, Inc. v. Maizes*, No. 17-14415 (11th Cir. Aug. 16, 2018)) contained the necessary "clear and unmistakable evidence" to shift the question to the arbitrator.

## RICO

***SunLife Assurance Co. of Canada v. Imperial Premium Finance, Inc.*, No. 17-10189 (11th Cir. Sept. 18, 2018)**

Among other holdings, the "intracorporate conspiracy doctrine" does not apply to civil claims for RICO conspiracy.

## Employment; Retaliation

***Gogel v. Kia Motors Mfg.*, No. 16-16850 (11th Cir. Sept. 24, 2018)**

Among other holdings, the Court reversed a Title VII retaliation summary judgment to Kia in claim brought by a former HR official whose job responsibilities included employee complaint resolutions, holding that her encouragement of an aggrieved employee to bring an action was protected conduct. Judge Julie Carnes dissented, arguing that given plaintiff's unique job position, Kia could properly terminate her for encouraging litigation under former Fifth Circuit law.

## TILA; Filed-Rate Doctrine

***Patel v. Specialized Loan Servicing, Inc.*, No. 16-12100 (11th Cir. Sept. 24, 2018)**

Filed-rate doctrine barred TILA and Florida-law-based claims regarding cost of force-placed insurance.

*(Continued from page 445)*

### Appellate Jurisdiction; Qualified Immunity; Civil Rights; Standing

***J.W. v. Bham Bd. of Educ.*, No. 15-14669 (11th Cir. Sept. 24, 2018)**

SROs (employed by Birmingham police) stationed at schools have the authority to use Freeze +P, an incapacitating chemical spray, on students under certain circumstances. Sprayed students filed excessive-force section 1983 action against the board, the police chief and the SROs, asserting money-damage and injunctive/declaratory claims for both spraying and failures to decontaminate. The district court found for plaintiffs after a 12-day bench trial, awarded damages and provided for injunction. The Eleventh Circuit held: (1) in a section 1983 action, an order "substantially prescribing" the requirements of the training and procedure plan is a final order; (2) assuming the SROs violated plaintiffs' Fourth Amendment rights by failing to adequately decontaminate, SROs were entitled to qualified immunity because the relevant law was not clearly established at the time of their conduct; and (3) plaintiff lacked standing to pursue declaratory and injunctive relief claims for lack of a real and immediate threat of future injury.

### Employment

***Smelter v. Southern Home Care Services, Inc.*, No. 16-16607 (11th Cir. Sept. 24, 2018)**

Substantial evidence supported racially hostile environment claim, given employee's testimony she often overheard co-workers making racist comments culminating in a final-day argument with a co-worker in which an epithet was used, and given evidence of employer's knowledge of the environment.

## RECENT CRIMINAL DECISIONS

# From the Alabama Supreme Court

### Sentencing

***Ex parte State (v. Duncan)*, No. 1170446 (Ala. Aug. 31, 2018)**

The court found no error in the trial court's imposition of incarceration for a possession of marijuana conviction, rejecting the Court of Criminal Appeals' holding that the sentence violated the presumptive sentencing standards. The sentence was not an abuse of discretion due to the interplay between the presumptive standards and *Ala. Code* § 13A-5-8.1, which permits incarceration following a defendant's failure to complete a rehabilitative program.

### Impeachment

***Byner v. State*, No. 1170397 (Ala. Aug. 17, 2018)**

Robbery is a crime of dishonesty or false statement and thus may be used for impeachment under *Ala. R. Evid*. 609.

### Capital Punishment

***Ex parte Lane*, No. 1160984 (Ala. Sept. 14, 2018)**

In this capital murder/death penalty case involving a mentally deficient defendant, the United States Supreme Court had remanded for the trial court to consider the case in light of *Hall v. Florida*, 572 U.S. 701 (2014) which struck a strict IQ cutoff in defining mental disability. After the Supreme Court granted the defendant's petition for a writ of certiorari, the state, expressly conceding that "death is not the proper sentence[,]" joined the defendant in requesting a remand for the trial court to sentence him to imprisonment for life without parole.

# From the Court of Criminal Appeals

### Child Abuse

***Harris v. State*, CR-17-0185 (Ala. Crim. App. Sept. 7, 2018)**

Evidence that the defendant left her six-week-old baby unattended in a car while defendant shopped on hot summer day, with windows and doors locked, was sufficient to constitute child abuse. Such evidence was sufficient to find "willful maltreatment" under *Ala. Code* § 26-15-3, and defendant was not entitled to an instruction on the offense of endangering the welfare of a child as a lesser-included offense.

### Waiver of Right to Counsel

***Flagg v. State*, CR-17-0136 (Ala. Crim. App. Sept. 7, 2018)**

Defendant's decision to waive legal representation was deemed involuntary because the trial court did not fully advise him regarding any specific dangers or disadvantages in waiving counsel as required by *Faretta v. California*, 422 U.S.

806 (1975). Defendant received minor assistance by standby counsel, rather than hybrid representation, thus necessitating a *Faretta* inquiry by the trial court.

## Probation Revocation

***Miller v. State*, CR-17-0644 (Ala. Crim. App. Sept. 7, 2018)**

Trial court erred in revoking the defendant's probation on the ground that he committed a new offense of arson; state failed to present non-hearsay evidence indicating that he committed the offense.

## Ethics

***Hubbard v. State*, CR-16-0012 (Ala. Crim. App. Aug. 27, 2018)**

In a lengthy opinion, the court affirmed all but one of the defendant's convictions for violating ethics statutes related to his conduct as Speaker of the House for the Alabama House of Representatives, finding the evidence sufficient to show that he used his public office for private gain.

## Speedy Trial

***Sanders v. State*, CR-176–482 (Ala. Crim. App. Sept. 7, 2018)**

Defendant's right to speedy trial on rape charge was not violated under *Barker v. Wingo*, 407 U.S. 514 (1972). Approximately two years after his arrest, defendant pleaded guilty to first-degree rape and was issued a split sentence, but sentence was later declared illegal. Defendant then again pleaded guilty, but claimed that his right to a speedy trial was violated by the seven-year delay between his arrest and second guilty plea. The court measured the first *Barker* factor–length of delay–from the date that it had remanded for a determination regarding the legality of the prior sentence to the date of his second guilty plea. This 10-month delay was not presumptively prejudicial. Remaining *Barker* factors also did not weigh in the defendant's favor. ▲



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# We Voted, Now What?

Earlier this month, Alabamians went to the polls to cast their ballots on a number of state officeholders, county officials, four statewide constitutional amendments and 15 local constitutional amendments. While many of us watch the results and move on with our lives, these elections set in motion a sequence of events, deadlines and activities that lead to the transition of state government for the coming four years. While not exhaustive, I will lay out some of the major pieces of that transition below.

## Post-Election Process

### Canvassing

Canvassing of provisional ballots by the canvassing board must commence at noon, Tuesday, seven days after the election by tabulating the provisional ballots which have been certified by the board of registrars. The results must be posted in the courthouse and one copy shall be sealed with the provisional ballots, provisional voter affirmation challenges and certification of the board of registrars and delivered with other records of the election.[1]

All returns required by law to be sent to the secretary of state must, within 22 days after the election, be opened, counted and certified in the presence of the governor, the secretary of state and the attorney general, or any two of them, or by the secretary of state in the presence of any one of the other officers in the case of constitutional amendments. The governor proclaims the results of the election, and the proclamation is published in a newspaper at the state capitol.[2]

Election certificates relating to elections for governor, lieutenant governor, attorney general, auditor, secretary of state, treasurer and commissioner of agriculture and industries are forwarded by the judge of probate to the governor, who delivers them to the speaker of the house. These returns are then canvassed and the results are proclaimed by the speaker of the house, at least 10 days before the time set for a joint session of the legislature, during the organizational session of the legislature in January. The returns are then filed in the office of the secretary of state.[3]

### Contests and Recounts

The law recognizes that the public, as well as the candidates, has a legitimate interest in fair elections. It provides safeguards during an election and grounds for a contest, and it permits individuals to contest the results after the votes are counted.[4]

If the margin of defeat is not more than one-half of one percent of the votes, an automatic recount will be commenced within 72 hours after certification of the results of the election unless, within 24 hours after the certification, a written waiver for a recount is submitted by the defeated candidate. In the case of an election for any federal, state, circuit or district office, or the state senate, state house of representatives or any other office that is not a county office, the written waiver may be submitted to the secretary of state. In the case of an election for any county office, the written waiver may be submitted to the judge of probate.[5]

The canvassing board shall obtain the polling officials necessary to conduct the automatic recount. The polling officials shall be compensated in the same manner and at the same rate as provided by law for vote tabulation in an election that does not result in a recount. Costs shall be kept to a minimum by using county personnel or volunteer workers whenever possible, under the supervision of a trained and certified poll official. The expenses of an automatic recount shall be a state charge if the recount is held for any federal, state, circuit or district office, or the state senate, state house of representatives or any other office that is not a county office. Otherwise, the expenses shall be a county charge.[6]

The automatic recount shall be conducted as simply as the type of equipment and local conditions permit, provided that certain procedural safeguards are observed. Additionally, representatives of opposing interests shall be given at least 24 hours' notice and shall be invited to participate in the recount.

After an automatic recount, the appropriate certifying authority shall amend the initial certification of the election to reflect the results of the recount. The time limit for contesting the election shall be suspended until the vote is recertified, reflecting the results of the automatic recount.[7] If the results of the automatic recount name as a winner a person other than the person initially certified, the outcome shall constitute grounds for an election contest as prescribed by law.

## Timing of Transition

### Legislative Branch

All 140 members of the Alabama Legislature were elected this month to four-year terms. Pursuant to Section 46 of the Constitution of Alabama of 1901, the term of office for members of the legislature commences at midnight on election night. In order to assume the powers of their office, they take the oath contained in Section 279 of the Constitution of Alabama of 1901 as it is administered by the presiding officer of either house or by any other person authorized to administer an oath.

In December, the legislature will gather for an orientation that, since the 1970s, has been jointly sponsored by the Legislative Council and the Alabama Law Institute. The three-day orientation session will be the first opportunity for the new legislature to gather as a complete group. On January 8, 2019, the legislature will convene for its organizational session. This session is where the speaker of the house and president pro tempore of the senate will be elected, rules for the quadrennium passed and committees formed and filled.

### Executive Branch

The following executive branch officers were also elected on November 6: governor, lieutenant governor, attorney general, state auditor, secretary of state, state treasurer, state commissioner of agriculture and industries, one public service commissioner and four members of the State Board of Education. These officers all assume office the day following Inauguration Day, which this cycle will be held on January 14, 2019.

### Judicial Branch

The following judges were elected on November 6: chief justice of the Alabama Supreme Court, three associate justices of the supreme court, three justices of the court of criminal appeals, three justices of the court of civil appeals, all 68 probate judges and various circuit and district judges.

*(Continued from page 449)*

These judicial officers all take office upon being sworn in on the Tuesday following the first Monday after the second Tuesday in January.

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## Endnotes

1. § 17-10-2(f).
2. §§ 17-12-17, 17-12-18 and 17-14-50 through 17-14-53.
3. §§ 17-12-19 and 17-12-22.
4. § 17-16-40.
5. § 17-16-20.
6. § 17-16-20.
7. § 17-16-20.

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