

# JOURNAL

ALABAMA DEFENSE LAWYERS ASSOCIATION | VOL. 38 | NO. 1 | SPRING 2022

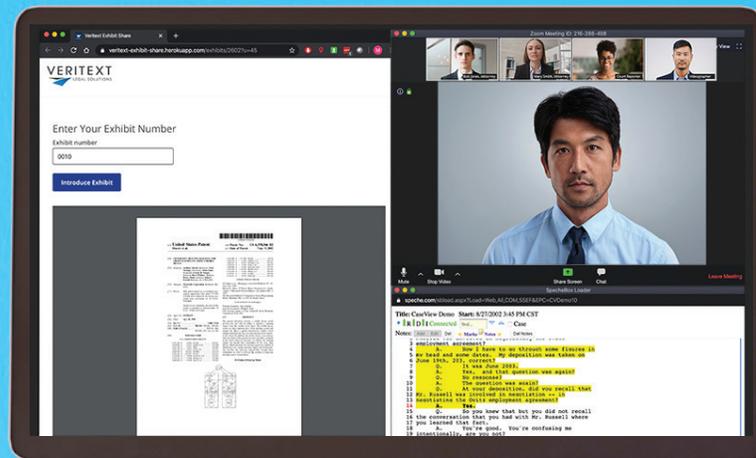


ADLA member Jansen Voss demonstrates with thorough preparation and well-planned discovery, TBI cases can be evaluated quickly for trial or settlement.



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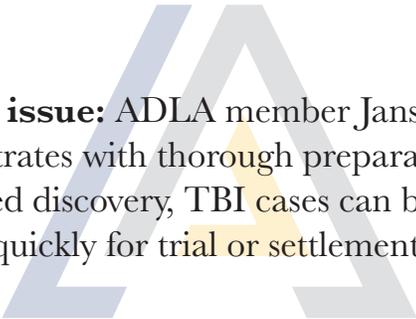
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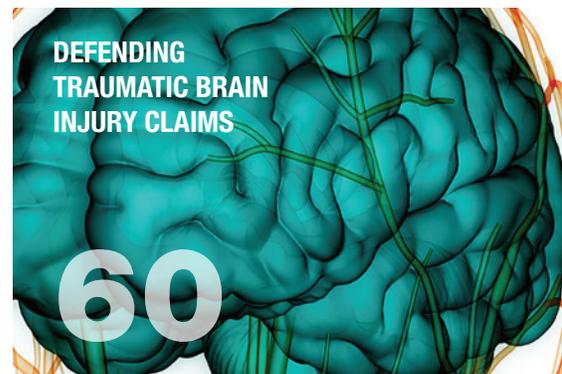
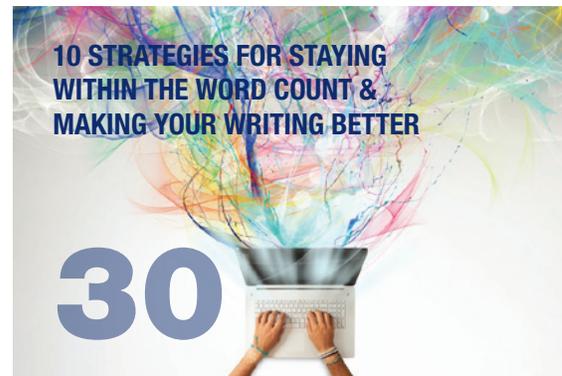
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**GERALD C. SWANN, JR.**  
President

**W**hen I began practicing law some thirty-five years ago and joined the Alabama Defense Lawyers Association, the thought of serving as ADLA's President never entered my mind. As I am completing my term, the privilege of holding this position has undoubtedly been one of the greatest honors and joys of my legal career. I am truly appreciative of the trust and confidence

extended by the members of ADLA, which has allowed me to lead this renowned organization.

Fortunately, in 2021, we did not face the same challenges experienced in 2020. However, the obstacles of 2020 afforded our community to get creative and enhance ADLA's abilities of best serving its members. In 2021, we returned to in person events. May and June of 2021 proved to be essential months for our organization. The Deposition Bootcamp and Annual Summer Meeting both returned with incredible success and carried momentum into the summer and fall. Additionally, the Bibb Allen Memorial Trial Academy was held in August, which proved to be vital to our mission of mentoring young lawyers by offering opportunities to collaborate and learn from veteran lawyers. As the year progresses, ADLA will continue to promote in-person events, by offering district network mixers. Along with district meetings and social events, Deposition Boot Camp was held in Montgomery on March 16-17, 2022. I am hopeful each of you have taken the advantage of this beneficial opportunity for professional development of your young lawyers. In coordination with Deposition Boot Camp, I am happy to share that our Women in the Law Section traveled to Atlanta, Georgia, to attend the Southeastern Women Litigators Conference. Finally, I am looking forward to our Annual Meeting in Gulf Shores. I have seen Stephen Still's agenda and program, which looks outstanding. The Annual Meeting will be held June 16th-18th, 2022.

Over the course of 2021, we have continued offering numerous webinars and Lunch and Learns. ADLA provided unique and specific programs such as the E-Evidence Lunch and Learn with **Circuit Judge Johnny Hardwick** and the **AOC Technology Department**. Furthermore, the YLS led Associate to Partner series has been overwhelmingly successful. Moving forward, ADLA will maximize and increase the number of webinar events and learning

opportunities for our members to take advantage and be a part of.

Along with creating and presenting various professional learning opportunities and social events, volunteerism played an integral role in 2021. Without the extensive number of volunteer hours, ADLA would not function and operate as smoothly as it does. Under the leadership of District Chairpersons: **Daniel Beasley, Amber Courtney, Baines Fleming, Logan Matthews, Megan McCarthy, Jordan Jenkins, John Browning, and Rance Hare**, October was a highlight for ADLA. The previously named chairpersons spearheaded our inaugural week of community service projects. Throughout the week of October 11th-22nd, ADLA's members exhibited a commitment to our communities by partnering with four esteemed nonprofit organizations. The community service projects included serving The Hunstville Downtown Rescue Mission, and providing Birmingham City Schools with nutritional after-school snacks for students. The commitment to our communities also included donating business attire for Our Sister's Closet, located in Mobile, and presenting an abundance of diapers and

wipes for Montgomery's Express-O of Love. It is my sincerest hope for the community service initiative to become an annual event and spread further across the state. ADLA reached another great milestone. The Spring 2020 issue of the ADLA Journal received a 2021 APEX Award recognizing the outstanding work of Executive Director **Jennifer Hayes**, and ADLA Journal Editor **Gaby Reeves**, and the editorial board.

As we transition into 2022, **Stephen Still** will assume the role of President. I am confident your ADLA membership will continue to serve you well and provide you with excellent services.

I also expect more content and learning and networking opportunities to be offered and encouraged. Throughout the upcoming year, I am hopeful each of you will actively seek any and all opportunities you may have to serve ADLA.

As I close my final message, I want to leave you with a challenge. As you read below, many of you may immediately recognize these words, while others may read them for the first time:

"This is the beginning of a new day. God has given me this day to use as I will. I can waste it or use it for good. What I do today is important, because I am exchanging a day of my life for it. When tomorrow comes, this day will be gone forever, leaving something in its place I have traded for it. I want it to be gain, not loss, good not evil, success, not failure- in order I shall not forget the price I paid for it."

The preceding poem was a yearly message delivered by Coach Paul Bryant to his teams. As we navigate each day, may we never forget what a gift that day is, and what price we have paid for our actions and efforts. 🙏

God Bless each of you,

*Moving forward, ADLA will maximize and increase the number of webinar events and learning opportunities for our members to take advantage and be a part of.*



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**JENNIFER HAYES**  
Executive Director

**A**DLA is off to a great start this year, thanks to the support and commitment of the membership and our vendor partners. In-person events are back in full swing, which is why the spring *Journal* is a little late going to press this season. As the 2022-2023 membership campaign begins wrapping up in a few weeks, I'm pleased to report that ADLA has welcomed 77 new members since August 1, 2021.

As of April 1st, ADLA membership is 946 members strong. In case you missed it, ADLA launched a new membership software this past August and all dues renewal notices are now electronic. If you need to renew your membership or update your member profile, please visit [www.adla.org](http://www.adla.org).

The Women in the Law Committee has worked hard over the past year to recruit new female members and provide networking and CLE events to focus on their interests. Currently, there are 245 female members, representing a little over 25% of the entire membership. Female membership in ADLA increased by 5% since last spring. I'd like to thank WITL President **Martha Thompson** of Balch and the members of her committee for continuing to find creative ways to keep this group active and growing during the last year of the pandemic.

The Young Lawyers Section has been busy planning other projects and webinar programs tailored to young lawyer professionals. As of April 1st, there are 254 young lawyer members, representing 27% of the membership. Thank you to Young Lawyers Section President **Hannah Torbert Kennedy** of Lloyd, Gray, Whitehead & Monroe, PC for leading the section over the past year. The popular *Associate to Partner* CLE webinar

series continues to ramp up its programming and grow attendance. If you would like to catch up on all *Associate to Partner* CLE webinars, and other webinars held over the past year, be sure to take advantage of the CLE Library on the website and earn quality on-demand education credit. Thank you to **Ashley Scarpetta** of Watkins & Eager, PLLC and **Hannah Stokes** of Carr Allison for planning the young lawyer CLE programs and attracting dynamic speakers. Don't forget that ALDA's annual Trial Academy will be held on August 11th-12th at Cumberland School of Law in Birmingham. Online registration opens in late May. We strongly encourage all young lawyers to attend.

Now let's switch gears to something we all love- the beach! If you haven't already, make plans to join us on June 16th-19th for another excellent Annual Meeting at our new location, **The Lodge at Gulf State Park in Gulf Shores, Alabama**. We are excited to welcome **Dr. Kevin Elko** as this year's keynote speaker. As always, the conference is family friendly with entertaining beach activities and new networking opportunities are on this year's agenda. The meeting agenda, online registration, and hotel reservation information are on the website's event page at [www.adla.org](http://www.adla.org). Make your reservation early; the hotel is expected to sell out. Support ADLA's contracted room block and receive discounted rates. The room block **cut-off date is May 16th**, based upon availability.

Please take the time to visit the website often and look for ADLA's electronic newsletter, the *Wednesday Briefcase*. It's our goal to make sure you stay informed of all association news and events. Don't forget to follow ALDA on Twitter, LinkedIn, and Instagram. In this issue of the *Journal*, catch up on recent ADLA events, news, and member highlights. As always, if there is anything ADLA can do for you, please reach out to me directly at [jhayes@adla.org](mailto:jhayes@adla.org) or call the office at 334-395-4455. 📧

## STAY UP TO DATE WITH ADLA'S *Wednesday Briefcase*

It's important to us to keep our members informed. Members will receive timely information on association events, legislative updates, important news bites and more. If you're a member and not receiving the e-newsletter, please send an email to [adla@adla.org](mailto:adla@adla.org).

# FLORIDA CHANGES RULE TO ALLOW FOR APPEALS ON PUNITIVE DAMAGE AMENDMENTS

By: **Kansas R. Gooden**, Boyd & Jenerette PA | Miami, FL



**R**ecently, the Florida Defense Lawyers Association (“FDLA”) secured a win for defense lawyers in Florida. However, it was not in a case. It involved a rule change to the Rules of Appellate Procedure.

The Florida Bar’s Appellate Rule Committee submitted a proposed rule which would allow an immediate, interlocutory appeal of an order granting or denying an amendment to add a claim for punitive damages. The Florida Supreme Court allowed members of the bar to comment. Numerous individuals and the Plaintiff’s Bar opposed the rule and maintained that plaintiff’s have a right to a speedy resolution of their cases and the proposed rule would only delay proceedings.

The FDLA submitted the only comment in support of the rule change. The FDLA urged the Court to adopt the proposed rule because it would protect the constitutional rights of defendants. Under the Florida Constitution, there is a strong right of privacy. Financial information and documentation falls within this fundamental right of privacy as there is a legitimate expectation of privacy. The law at the time prevented a defendant from testing the sufficiency and truthfulness of the proffer submitted to obtain the amendment for punitive damages. In other words, it could have been based on entirely false or hearsay information. However, defendants were required to wait until the end of the case to test the sufficiency. At that point, the defendant’s constitutional right had already been invaded and

ultimately destroyed.

The Florida Supreme Court heard oral argument from the commenters. Elaine Walter, a FDLA board member, appeared on behalf of the Florida Bar’s Rule Committee to explain how the rule came about. Kansas R. Gooden, the current President of the FDLA and chair of the amicus committee, presented argument on behalf of the FDLA. FDLA maintained that the want for speedy proceedings should not trump a defendant’s fundamental, constitutional rights. A constitutionally protected right should take precedent and the Court should adopt the amendment to protect that right.

The Florida Supreme Court agreed with the FDLA and adopted the proposed rule. The rule now allows for an immediate appeal on orders that “grant or deny a motion for leave to amend to assert a claim for punitive damages.” In re Amendment to Fla. Rule of App. Proc. 9.130, 47 Fla. L. Weekly S1 (Fla. Jan. 6, 2022). The rule goes into effect on April 1, 2022.

One justice dissented with concerns that the rule will create unnecessary delays in civil actions. He noted that plaintiffs will forego meritorious punitive damages claims in order to avoid a timely appeal and bring their cases to final resolution.

This rule will be a game changer in Florida. It will allow punitive damage claims to be tested early on appeal. Defendants will be allowed to test the sufficiency and accuracy of the proffer. And, most importantly, their fundamental, constitutional rights will be protected.



**Kansas R. Gooden**, a Board Certified Appellate Specialist and AV Rated attorney, serves as the firm's Appellate Practice Group Leader. She has extensive experience handling all types of civil appellate proceedings, including extraordinary writs and plenary appeals, in state and federal courts. She also provides litigation and trial

support to attorneys throughout the state. Ms. Gooden is on the board of the Florida Defense Lawyers Association as the President and serves as the chair of the organization's Amicus Committee. On behalf of the organization, she authors and co-authors amicus briefs in important cases impacting tort, litigation, and insurance issues.

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“The most valuable of all talents is that of never using two words when one will do.”

Thomas Jefferson.

Makes me wonder if Thomas Jefferson was really a lawyer. Then again, he had to write by

hand. On parchment paper. With a quill.

Legal writing is difficult. Legal briefs, especially appellate briefs, require a lawyer to clearly explain the application of statutory and case law, (often ambiguous), to a Gordian knot of facts and to craft a compelling argument supporting his client’s position in as few words as possible. The “in as few words as possible” rule is the problem for many of us – at least it is for me. I constantly have to remind myself that the strength of my argument does not increase in direct proportion to the number of words in my brief.

In the 2021 Spring *Journal*, we published **Mary Margaret Bailey’s** article giving practical advice for complying with the Alabama Supreme Court’s October 1, 2020 amendment of Ala. R. App. P. 32 adopting Century Schoolbook 14-point font. The October 1, 2020 amendment also replaced page limits with word limits. In this edition of the *Journal*, Mary Margaret shares strategies for complying with the Alabama Supreme Court’s mandated word limits by identifying unnecessary words and offering other useful tips for clear, concise legal writing.

In *Defending Traumatic Brain Injury Claims*, **M. Jansen Voss** discusses how the complications in diagnosing, treating, and providing a prognosis for the various types of TBIs make evaluating and defending such cases particularly challenging for a lawyer. Jansen shares his strategy for addressing these difficulties and explains why successful defense of a TBI requires a calculated combination of tailored discovery and collaboration with the right medical expert. Based on his experience in defending TBI claims, Jansen provides a clear road map for successfully defending not only TBI claims, but also cases involving other serious injuries.

Writing a succinct explanation of a legal topic in the absence of applicable case law poses a different challenge. In 2015, the Alabama State Legislature repealed the “Restrictive Covenant Act” replacing it with Ala. Code § 8-1-190, *et seq.* In *Recent Developments in the Enforcement of Restrictive Covenants*, **Andrew M. Townsley** tells us that since the new Act became effective on January 1, 2016, the Supreme Court has written only three opinions regarding the new Act since it became effective on January 1, 2016, none of which offer much guidance regarding its application. Andrew explains how researching other reliable source and monitoring application of similar statutes in other States and countries can overcome a dearth of case law. Andrew’s logical prediction of the Court’s future application of the new Act proves that his “working outside the box” method is effective.

Whatever your writing style, please consider submitting an article to the *Journal*. Don’t worry; there’s no word limit. 

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## Endnotes

<sup>1</sup> Mary Margaret Bailey, *Finally a New Font! HOW BEST TO COMPLY WITH THE ALABAMA SUPREME COURT’S LATEST FORMATTING REQUIREMENTS*, Alabama Defense Lawyers Association *Journal*, Spring 2021, at pp. 30-33.

<sup>2</sup>Alabama Rule of Appellate Procedure 32(b).



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# 2022 ANNUAL MEETING

••••• *June 16-19, 2022* •••••

THE LODGE AT GULF STATE PARK  
GULF SHORES, ALABAMA

Alabama Defense Lawyers Association

••••• **2022 ANNUAL MEETING** •••••

June 16-19, 2022 at the Lodge at Gulf State Park

Stephen Still, Jr., Program Chair

**THURSDAY, JUNE 16**

2:30 pm-5:30 pm **Registration Desk Open** | The Burrow

6:30 pm-8:30 pm **Beach Bonfire Experience** | Beachside

**FRIDAY, JUNE 17**

**ADLA & TDLA Joint CLE Session** | Azalea Ballroom

7:00 am **Women in the Law Section Meeting Mimosas & Conversations**

7:30 am **Sign-In & Strolling Breakfast** for CLE Registrants & Exhibitors

7:50-8:00 am **Welcome** ADLA President Gerald Swann, Jr. of Ball Ball Matthews & Novak PA & TDLA Program Chair Kenneth D. Veit of Leitner Williams Dooley & Napolitan

8:00-8:30 am **Alabama State Bar Update** Hon. Terri Lovell, ASB Executive Director

8:30-10:00 am **Keynote Speaker | How to Achieve Greatness at Work and in Life** Dr. Kevin Elko

10:00-10:10 am **Introduction of Exhibitors and Sponsors | Prize Drawings**

10:10-10:45 am **Break & Visit with Exhibitors | Specialty Bar**

10:45-11:45 am **\*Leadership: Building Your Skills for Empathy in Communication** *Moderator*-C. Meade Hartfield of Bradley; *Panelists*-Mark Debro of Grace Matthews & Debro LLC, Jay Ezelle of Starnes Davis Florie LLP, Melissa Hunter of Galloway Wettermark & Rutens LLP, and Jay Watkins of O'Hara Watkins LLC

11:45-12:15 pm **Top 10 Technology Traps** Hal Mooty of Bradley

*Afternoon free for family and beach activities*

1:30 pm **ADLA & TDLA Annual Golf Tournament** | Craft Farms- Cypress Bend

**All Day Women in the Law Exclusive Beach Day** | Beachside- Private Group of Chairs & Umbrellas

1:30-4:30 pm **Deep Sea Fishing Trip** | Zeke's Marina

6:30-8:30 pm **Tiki Party and Kids Glow Party & DJ Blowout**

**SATURDAY, JUNE 18**

7:30 am **Sign-In & Strolling Breakfast** for CLE Registrants & Exhibitors

7:50-8:00 am **Welcome** Gerald Swann, Jr.- ADLA President

8:00-9:00 am **\*YLS Appellate Judges Panel – A Discussion of Best Practices, Best Procedures and Preserving Issues for Appeal** *Moderator*- Hannah Torbert Kennedy of Lloyd Gray Whitehead & Monroe PC and Presiding Judge, Hon. William C. Thompson, Hon. Terry Moore, Hon. Christy O. Edwards, Hon. Chad Hanson, & Hon. Matt Fridy of the Alabama Court of Civil Appeals

9:00-9:10 am **Introduction of Guest Judges**

9:10-9:40 am **State of Judiciary** The Honorable Tom Parker, Chief Justice, and panel members comprising of the attending members of the Supreme Court and Court of Civil Appeals

9:40-9:50 am **Introduction of Exhibitors and Sponsors | Group 2 Prize Drawings**

9:50-10:30 am **Break & Visit with Exhibitors | Specialty Bar**

10:30-11:30 am **Recent Civil Decisions of the Alabama Supreme Court** Jansen Voss of Christian & Small LLP

11:30-12:00 pm **ADLA Annual Membership Meeting & Elections**

*Afternoon free for family and beach activities*

1:30-3:30 pm **Young Lawyers Cruisin' Tikis Beach & Boat Cruise** | Zeke's Marina, Orange Beach

2:00-3:00 pm **Sand Castle University 101** | Beachside

6:00-7:00 pm **Bourbon & Wine Tasting**

7:00-10:00 pm **Luau & Karaoke Family Night with Light Travelers Band**

**SUNDAY, JUNE 19**

**Depart for Home**

*\*Agenda subject to change*

*\*This course or a portion thereof has been approved by the Mandatory Continuing Legal Education Commission of Alabama for a maximum of 6.0 hours' credit, including 2 hours of ethics.*



# Light Travelers

## SATURDAY NIGHT ENTERTAINMENT

ADLA welcomes back  
John Keuler and Karl Langley

### ACTIVITY HIGHLIGHTS

#### FRIDAY

**\*ADLA & TDLA Annual Golf Tournament**  
Craft Farms, Cypress Bend

**Women in the Law Exclusive Beach Day**  
Network and relax in private area beachside

**\*Deep Sea Fishing Trip**  
Zeke's Marina

#### SATURDAY

**\*Young Lawyers Cruisin' Tikis Beach & Boat Cruise**

Sand Castle University 101

**\*Bourbon & Wine Tasting**

*\*Ticketed Event*

### EVENING HIGHLIGHTS

**Thursday Night Beach Bonfire**



Balloon Artist

Beach Games

Fire Dancer

Island Drummer

Smores



**Friday Night Tiki Party**

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••• AUTHOR, CONSULTANT & SPEAKER •••

Dr. Elko is a nationally known Performance Consultant, Speaker and Author. He received his Bachelor's Degree in Biology, Education and Coaching from California University of Pennsylvania where he later received the Alumni Professional Achievement Award in 2000. He then went on to West Virginia University where he received two Masters and a Doctorate and was later inducted into The West Virginia University Hall of Fame.

In Sports he has consulted for various Professional and Collegiate Teams and has earned 30 championship rings. Currently, he works with the University of Alabama Football Team, the Philadelphia Eagles and the University of Louisville Baseball Team among others.



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# RECENT TRENDS IN THE ENFORCEMENT OF RESTRICTIVE COVENANTS

By: **Andrew M. Townsley**, Lanier Ford Shaver & Payne, PC | Huntsville, AL



In 2015, the Alabama Legislature passed comprehensive legislation “to clarify and restate the law relating to restrictive covenants; and to repeal [the Restrictive Covenant Act].”<sup>1</sup> Long considered a vague statute with a host of conflicting case law applying its provisions, Ala. Code § 8-1-1, (also referred to as “the Restrictive Covenant Act”), led one Alabama attorney to comment, “[T]o advise a client on the enforceability of a non-compete agreement under Alabama law is to flirt with malpractice.”<sup>2</sup> In light of this sentiment, the new Act, codified at Ala. Code § 8-1-190, *et seq.*, which included clearer guidance for drafting and applying restrictive covenants such as presumptively reasonable time limits, was a welcome sight for many attorneys. Shortly before the new Act went into effect on January 1, 2016, four members of the Act’s drafting committee published an article in the *Alabama Lawyer* outlining the history of the Restrictive Covenant Act and providing a section-by-section description of the new Act.<sup>3</sup> The article succinctly captures both the substance of the new Act and its effect on prior case law interpreting the Restrictive Covenant Act and has often served as my starting point when asked to evaluate the enforceability of a restrictive covenant.

In the six years since it went into effect, Alabama appellate courts have issued just three opinions addressing the new Act. Unfortunately, those cases do not provide much insight on how to analyze a challenge to a restrictive covenant under the new Act. In the first case, *Ex parte*

*PT Solutions Holdings, LLC*, the Alabama Supreme Court considered the enforceability of an outbound forum selection clause in a non-compete agreement.<sup>4</sup> While the party opposing enforcement of the forum selection clause invoked a section of the new Act to support her position, the Court rejected that argument and applied general common law principles on the enforceability of forum selection clauses.<sup>5</sup> Three years later, in *Devos v. Cunningham Group, LLC*, the Alabama Supreme Court considered an appeal of a trial court’s order granting a preliminary injunction in favor of former employer seeking to enforce a non-solicitation agreement.<sup>6</sup> In reversing the trial court’s order, the Court cited the trial court’s failure to comply with Rule 65 of the *Alabama Rules of Civil Procedure* and the common law requirements for preliminary injunctions as the basis for its holding.<sup>7</sup> In the final case, *Roger v. Burch Corporation*, the Alabama Supreme Court dismissed the appeal as moot because the non-solicitation provision at issue expired before the Court considered the appeal; therefore, the Court did not provide any insight into how it would analyze a challenge to a restrictive covenant based on the language of the new Act.<sup>8</sup>

This dearth of Alabama appellate court opinions interpreting or applying the new Act has left many practitioners to rely on the committee members’ article, federal district court opinions, and Alabama case law applying the Restrictive Covenant Act in developing arguments for or against the enforcement of restrictive covenants. The purpose of this



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article is three-fold. First, the article will explore possible explanations for this absence of case law interpreting the new Act. Second, the article will consider the two federal district court opinions interpreting the new Act and their impact on the defense of similar cases. Finally, the article will consider an emerging issue – the enforceability of worldwide non-compete agreements – and how Alabama appellate courts may apply the new Act in that situation.

### **I. Why so few cases?**

Because the new Act has been in effect less than ten years, it certainly is not surprising that an extensive body of Alabama case law interpreting it has yet to develop. However, time alone likely cannot explain this scarcity of case law. There are several alternative explanations.

First, by design, the new Act makes litigation less likely. The Act's clear language, especially on topics like time limits, likely has assisted attorneys and their clients in drafting restrictive covenants that have a higher likelihood of being enforced in court, thereby reducing appeals challenging those agreements.<sup>9</sup> Similarly, the ability of trial courts, pursuant to Ala. Code § 8-1-193, to blue pencil agreements so as to void overly broad or unreasonable portions while reforming restrictive covenants to preserve protectable interests provides parties with results that, while perhaps not ideal, are favorable enough to forego an appeal. Second, as was true in

the years leading up to the repeal of the Restrictive Covenant Act, many cases involving the enforcement of restrictive covenants are either filed in or removed to federal district courts.<sup>10</sup> In federal court cases that address the new Act, there has yet to be an occasion where a court has found it appropriate to certify a question to the Alabama Supreme Court.<sup>11</sup>

Even when a case is filed in state court and a defendant believes that he or she has a strong argument to oppose enforcement of a restrictive covenant, there are countervailing considerations that often dissuade the defendant from litigating and appealing these issues. In many cases that seek enforcement of restrictive covenants, particularly in employment agreements, the parties can expend considerable sums of money preparing for hearings on temporary restraining orders or preliminary injunctions. These expenses only rise when the trial court allows expedited discovery, sometimes leading to multiple depositions before a hearing on a motion for preliminary injunction is even conducted. In my personal experience, the prospect of five-figure legal bills within the first few weeks of a case has led several of my clients to agree to the entry of consent orders to forgo costly preliminary injunction hearings and discovery. These financial considerations do not disappear when the case includes the defendant's new employer. Unless an employee brings a substantial book of business from his or her former employer or has a unique skill set integral to the new employer's business, it is often more financially advantageous to

terminate the defendant than litigate the enforceability of the restrictive covenant.

When a party does decide to move forward with a preliminary injunction hearing and then receives an adverse ruling, they face an uphill battle on appeal. “The decision to grant or to deny a preliminary injunction is within the trial court’s sound discretion. In reviewing an order granting a preliminary injunction, the Court determines whether the trial court exceeded that discretion.”<sup>12</sup> Therefore, a trial court’s ruling on a motion for preliminary injunction is entitled to “great deference” and is only overturned if it is “plainly and palpably erroneous.”<sup>13</sup> This demanding standard of review deters some appeals and makes it more likely that those who move forward with an appeal will simply have the trial court’s order affirmed with no opinion.<sup>14</sup>

Finally, some courts have not applied the new Act to restrictive covenants made before it became effective on January 1, 2016.<sup>15</sup> It is difficult to quantify the prevalence of this viewpoint in state and federal courts. However, there are two observations worth noting about this view. First, based wholly on the passage of time, the impact of this view will only decrease as more of the restrictive covenants litigated are executed after the January 1, 2016 effective date. Second, this view is contrary to the drafters’ intent. The Act states that it “shall become effective on January 1, 2016, following its passage and approval by the Governor, or its otherwise becoming law.”<sup>16</sup> Interpreting this section, at least four members of the drafting committee have stated that the new Act “will apply to actions filed after that date, even if the contract at issue was written and entered into prior to January 1, 2016.”<sup>17</sup>

The notes on use section of the Alabama Pattern Jury Instructions on business restrictive covenants echo the committee members’ interpretation.<sup>18</sup>

## II. *Erie* Guesses

With the absence of Alabama Supreme Court case law interpreting the new Act, federal courts have been left to make *Erie* guesses, particularly where the statute substantially departs from the Restrictive Covenant Act and the common law developed prior to 2016. This section will address two recent federal cases applying the new Act and the implications of those decisions for the defense of similar cases.

In *Cajun Steamer Ventures, LLC v. Thompson*, a federal district court addressed the enforceability of a non-solicitation provision in an employment agreement.<sup>19</sup> While non-solicitation provisions are generally void, the new Act provides an exception for

[a] contract between two or more persons or businesses or a person and a business limiting their ability to hire or employ the agent, servant, or

employees of a party to the contract where the agent, servant, or employee holds a position uniquely essential to the management, organization, or service of the business.<sup>20</sup>

In the comments to this exception, the drafters explain that the phrase ‘uniquely essential’ “reflects the intent to limit the use of the exception to circumstances in which the employee in question holds a position which is not only important to the business, but in which the agent, servant or employee’s services would be very difficult to replicate.”<sup>21</sup> In *Cajun Steamer*, the non-solicitation provision included a blanket prohibition on “recruit[ing], solicit[ing], or induc[ing] any person or entity, who was an employee, agent, independent contractor or representative of the Company. . . to cease their employment, engagement or other relationship with the Company or solicit the services of such person. . .”<sup>22</sup> Citing Ala. Code § 8-1-193 and prior case law endorsing a trial court’s power to blue pencil overly broad agreements, the employer asked the court to modify the non-solicitation provision to make it comply with Ala. Code § 8-1-190(b)(1).<sup>23</sup> The district court rejected the employer’s argument and held that the provision was void under Alabama law.<sup>24</sup> In support of its holding, the court drew a distinction between using Ala. Code § 8-1-193 to reform a restraint that is overly broad in duration or geographic scope and reforming one that is unreasonable in substance.<sup>25</sup> The court reasoned that because the substance of the non-solicitation provision did not fall within the limited exception set out in Ala. Code § 8-1-190(b)(1), it had the authority to void the provision in its entirety.<sup>26</sup>

The district court’s decision in *Cajun Steamer*, if followed by other

courts, could have a substantial impact on the defense of similar cases. Employment agreements including non-solicitation provisions are typically written in broad language like that in *Cajun Steamer*. Voiding these non-solicitation provisions could quickly shift the momentum in favor of the defense in a case where the primary allegation is that the employee lured other employees to work for a competitor. However,

the district court’s reasoning in *Cajun Steamer* is not necessarily limited to non-solicitation provisions. For example, Ala. Code § 8-1-190(b)(5) provides that “[a]n agent, servant, or employee of a commercial entity may agree with such entity to refrain from soliciting current customers, so long as the commercial entity carrier on a like business, subject to reasonable time restraints.”<sup>27</sup> Applying the reasoning in *Cajun Steamer*, a restrictive covenant which limits the ability of an employee to solicit current and former customers would not fall within the narrow exception set out in Ala. Code § 8-1-190(b)(5) and would therefore be void even though it could be easily reformed to comply with the statute. Based on the wide-ranging po-

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tential application of this reasoning, the court's decision in *Cajun Steamer* is likely the most significant federal court decision applying the new Act.

In *DJR Associates, LLC v. Hammonds*, a federal district court applied the new Act to a non-compete provision in an employment agreement between an Alabama company and a former employee in Georgia.<sup>28</sup>

Admittedly, the facts in *DJR* read like a law school exam in a conflict of laws course and are therefore difficult to summarize in a concise manner. However, the case provides valuable insight into the application of Ala. Code § 8-1-197 which states that the new Act “expresses fundamental public policies” of Alabama and “shall govern and shall be applied instead of any foreign laws that might otherwise be applicable. . . . when the application of those foreign laws would violate a fundamental public policy.”<sup>29</sup> On its face, this section provides strong protections for the economic interests of Alabama residents and business, particularly in the face of foreign laws that contradict the new Act. In *DJR*, the non-compete provision at issue was enforceable under Alabama law, but unenforceable under Georgia law, thereby implicating Ala. Code § 8-1-197.

In that case, an Alabama-based company entered into an employment agreement with the defendant that included a non-compete and an Alabama choice of law provision. During his employment, the defendant moved to the plaintiff's Georgia office and began servicing customers at that location. The defendant eventually left his employment with the plaintiff and started a competing business. The plaintiff sued the defendant and his new company alleging, *inter alia*, breach of the non-compete and confidentiality provisions of his employment agreement. At first blush, it seems the new Act should have overridden Georgia law. However, the court reached a more nuanced conclusion. Applying Alabama's choice of law rules, the court held that Georgia law applied to the non-compete agreement, but only to the extent that the agreement sought to limit the defendant's conduct in Georgia.<sup>30</sup> To the extent that the plaintiff sought to enjoin the defendant from competing in Alabama, the court held that Alabama law applied.<sup>31</sup> In support of this holding, the court reasoned that Ala. Code § 8-1-197 “mandates that, *within the State of Alabama*, Alabama's fundamental public policy must prevail.”<sup>32</sup> At its core, the opinion in *DJR* illustrates the complexity of the enforcement of restrictive covenants, especially when the parties' conduct occurs in more than one state. While Ala. Code § 8-1-197 can certainly serve as a powerful tool for the application of contrary laws of other states, it should be considered in the context of Alabama choice of law rules as well the laws of other states with an interest in the enforcement of the restrictive covenant.

### III. Worldwide Non-Compete Agreements and Issues for Future Appellate Review

When the Alabama Supreme Court issues its first opinion interpreting specific language in the new Act, there are several aspects of the new Act that could serve as the basis of that decision. Two of those aspects have

been previously discussed in this article – (1) whether the Act applies to restrictive covenants executed before 2016 and (2) whether a trial court's power under Ala. Code § 8-1-193 extends to restrictive covenants which are substantively broader than those permitted in Ala. Code § 8-1-190(b). However, a third issue – the enforceability of worldwide non-compete agreements – also

deserves consideration.

In recent years, the explosion of internet-based businesses and remote working capabilities have brought the issue of the enforceability of worldwide non-compete agreements to the attention of numerous courts, including the Alabama Supreme Court. In a concurring opinion in *Westwind Technologies, Inc. v. Jones*, Justice See left the door open for the enforcement of a worldwide noncompete agreement, stating “[w]ithout expressing a view on this noncompetition clause, I note that the geographic scope of a covenant not to compete is not overbroad simply because it is worldwide. A court should consider the entire restriction in light of the legitimate interest being protected.”<sup>33</sup> Both before and after Justice See's concurring opinion, courts in several other states including New York, Pennsylvania, Delaware, Connecticut, Minnesota, New Jersey, Missouri, Ohio, and Georgia have upheld worldwide non-compete agreements.<sup>34</sup> The courts' reasoning in these cases is fairly consistent, citing the role of the internet and technology in general in fostering global competition in numerous industries.<sup>35</sup> One court considering the enforceability of a global non-compete agreement provided an apt defense of the growing trend toward enforcing those agreements:

The courts that have upheld relatively narrow geographic limitations have generally been dealing with businesses not engaged in internet or global commerce, such as barber shops, beauty parlors, and insurance agents. On the other hand, the law has come to acknowledge the inapplicability of geographic bounds to companies that do business on a national or international basis...A prohibition against competing from a location less than twenty-five miles away, for example, would provide no effective protection to a company engaged in internet commerce.<sup>36</sup>

Another court commented that “[i]n this Information Age, a *per se* rule against broad geographic restrictions would seem hopelessly antiquated.”<sup>37</sup> Accordingly, that court upheld a worldwide non-compete where the relevant industry “involves a world-wide market” and the former employer

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“focuses upon a very narrow specialized niche within which separable geographic zones are indistinguishable.”<sup>38</sup> Based on Justice See’s concurring opinion and the growing body of case law in other states enforcing worldwide non-compete agreements, it would appear likely that the Alabama Supreme Court, if presented with the right facts, would uphold such an agreement.

In 2019, the Alabama Supreme Court was actually presented with an opportunity to address the enforceability of a worldwide non-compete agreement under the new Act.<sup>39</sup> In *Zimmerman v. Dealnews.com, Inc.*, a web-based company with offices in Alabama, New York, and Ireland, sued a former employee who went to work for a web-based competitor based in New York.<sup>40</sup> The non-compete agreement at issue did not include any geographic limitations which, in effect, gave it a worldwide scope.<sup>41</sup> The plaintiff argued that it had competitors around the country and even the world, making it impossible to meaningfully limit the geographic scope of a non-compete agreement.<sup>42</sup> The trial court granted the plaintiff’s motion for a preliminary injunction and entered an order prohibiting the defendant from working for the competitor for the duration of her non-compete agreement.<sup>43</sup> The defendant then appealed, arguing that a worldwide non-compete agreement was overly broad in violation of Ala. Code § 8-1-190(b)(4). The Alabama Supreme Court affirmed the trial court’s order and did not issue a written opinion.<sup>44</sup>

Based on the standard of review and the facts of the case, the Court’s decision to forgo a written opinion certainly is not surprising. As previously discussed, a trial court’s order on a motion for a preliminary injunction will only be overturned if plainly and palpably erroneous. Additionally, to affirm the trial court’s order in this case, the court was not required to reach the issue of the enforceability of a worldwide non-compete agreement because the defendant, although working for a New York based competitor, was working remotely out of her home in Alabama, just as she had for the plaintiff.<sup>45</sup> Therefore, the plaintiff was seeking to enjoin the defendant from competing against it in the exact same county where she worked before, which would certainly be a reasonable geographic scope for the enforcement of the non-compete agreement. In short, while the Alabama Supreme Court could have weighed in on this issue in *Zimmerman*, the standard of review and the facts of the case did not put it in a position where a written opinion would be expected.

## IV. Conclusion

Six years after the repeal and replacement of the Restrictive Covenant Act, the application and interpretation of the new Act remain fluid in many ways. While the new Act provides clearer guidance to courts, interpretations of it likely will vary among state and federal courts until there is a better developed body of case law. This is particularly true on the portions of the new Act that depart from the Restrictive Covenant Act and the common law developed prior to 2016. Until there is a better developed body of case law, attorneys litigating the enforcement of restrictive covenants should account for potentially disparate interpretations of the new Act and advise their clients of this uncertainty.

## Endnotes

- <sup>1</sup> 2015 Al. ALS 465, 2015 Ala. Acts 465, 2015 Al. Pub. Act 465, 2015 Al. HB 352.
- <sup>2</sup> Will Hill Tankersley, et al., *Alabama Enacts a Major Revision of Alabama Code 8-1-1*, 76 Ala. Law. 384 (2015).
- <sup>3</sup> *Id.*
- <sup>4</sup> *Ex parte PT Solutions Holdings, LLC*, 225 So. 3d 37 (Ala. 2016).
- <sup>5</sup> *Id.* at 43-44 (“White’s argument goes to the enforcement of the contract as a whole, *i.e.*, that enforcement of the noncompetition agreement would contravene a strong public policy of the State, not to enforcement of the forum-selection clause itself. . . . Therefore, the possibility that the noncompetition agreement violates Alabama public policy does not prohibit enforcement of the forum-selection clause.”).
- <sup>6</sup> *DeVos v. Cunningham Group, LLC*, 297 So. 3d 1176 (Ala. 2019).
- <sup>7</sup> *DeVos*, 297 So. 3d at 1183-87. While the court cites Ala. Code § 8-1-194, the section of the new Act which addresses the burden of proof, that provision mirrors the burden of proof under the Restrictive Covenant Act. In stating the burden of proof, the court cited *Calhoun v. Brendle, Inc.*, 502 So. 2d 689, 693 (Ala. 1986), which applied the Restrictive Covenant Act, before it cited the new Act.
- <sup>8</sup> *Rogers v. Burch Corporation*, 313 So. 3d 555, 561 (Ala. 2020).
- <sup>9</sup> See Ala. Code § 8-1-190(b)(3)-(5).
- <sup>10</sup> See, *e.g.*, *Affiliated Paper Companies, Inc. v. Hughes*, 667 F. Supp. 1436 (N.D. Ala. 1987); *Nationwide Mut. Ins. Co. v. Cornutt*, 907 F.2d 1085 (11th Cir. 1990); *Benchmark Medical Holdings, Inc. v. Barnes*, 328 F. Supp. 2d 1236 (M.D. Ala. 2004); *Concrete Co. v. Lambert*, 510 F.Supp.2d 570 (M.D. Ala. 2007); *Dawson v. Ameritox, Ltd*, 571 Fed. Appx. 875 (11th Cir. 2014); *DJR Associates, LLC v. Hammonds*, 241 F. Supp. 3d 1208 (N.D. Ala. 2017); *Cajun Steamer Ventures, LLC v. Thompson*, 402 F. Supp. 3d 1328 (N.D. Alabama 2019); *Medline Industries, Inc. v. Stryker Sustainability Solutions, Inc.*, 541 F. Supp. 3d 1305 (N.D. Ala. 2021); *M5 Management Services, Inc. v. Yanac*, 428 F. Supp. 3d 1282 (N.D. Ala. 2019); *Regions Bank v. Wells Fargo Clearing Services, LLC*, 2021 WL 720415 (M.D. Fla. Jan. 12, 2021) (applying Alabama law); *Right at Home, LLC v. Gaudet*, 2021 WL 308237 (D. Neb. Jan. 29, 2021) (same).
- <sup>11</sup> See Ala. R. App. P. 18(a).
- <sup>12</sup> *Rogers*, 313 So. 3d at 560 (quoting *SouthTrust Bank of Alabama, N.A. v. Webb-Stiles Co.*, 931 So. 2d 706, 709 (Ala. 2005)).
- <sup>13</sup> *Ormcro Corp. v. Johns*, 869 So. 2d 1109, 1114-15 (Ala. 2003); see also *Davis v. Hester*, 582 So. 2d 538, 540 (Ala. 1991) (holding that the issuance of a preliminary injunction is “within the sound discretion of the trial court, especially when the...facts are in dispute and the evidence is presented *ore tenus*.”) and *Corner Stone Funeral Chapel, Inc. v. MVMG, LLC*, 170 So. 3d 626, 629-30 (Ala. 2014) (Holding that where evidence is presented to the trial court *ore tenus*, “the trial court determines the weight and credibility of the testimony.”).

<sup>14</sup> The demanding procedural requirements for obtaining injunctive relief under Rule 65 likely also play a role in limiting the number of substantive decisions interpreting the new Act. When a trial court fails to comply with those procedural requirements, the Alabama Supreme Court has no choice but to remand the case without considering the substantive legal issues. *See, e.g., DeVos*, 297 So. 3d at 1183-87 (remanding case to allow trial court to set an appropriate injunction bond amount under Rule 65(c) and determine whether the plaintiff had a reasonable chance to prevail on the merits).

<sup>15</sup> *See, e.g. Medline Industries, Inc. v. Stryker Sustainability Solutions, Inc.*, 541 F.Supp. 3d 1305, 1312 (N.D. Ala. 2021) ("Accordingly, the court must find that the agreement's non-solicitation provision is a restraint on trade voided by the pre-2016 version of Alabama Code § 8-1-1."); *M5 Management Services, Inc. v. Yanac*, 428 F.Supp. 3d 1282, 1291 n.2 (N.D. Ala. 2019) ("Section 8-1-1 of the Alabama Code was revised and replaced with 8-1-190 on January 1, 2016... However, Section 8-1-190 is not applied to this case retrospectively.") and *Regions Bank v. Wells Fargo Clearing Services, LLC*, 2021 WL 720415 (M.D. Fla. Jan. 12, 2021) (applying Ala. Code § 8-1-1), but *see Right at Home, LLC v. Gaudet*, 2021 WL 308237 (D. Neb. Jan. 29, 2021) (applying Ala. Code § 8-1-197 to contract executed prior to January 1, 2016).

<sup>16</sup> Acts of Alabama 2015-465 § 10.

<sup>17</sup> Tankersley, et al., *Alabama Enacts a Major Revision of Alabama Code 8-1-1*, 76 Ala. Law. at 389.

<sup>18</sup> Notes on Use to APJI 9.00 ("Use this and the following instructions in any lawsuit filed after January 1, 2016, even if the agreement was entered into before that date."). Based on these statements, the author would caution against using defenses available under the Restrictive Covenant Act which were abolished by the new Act, even in courts that have been willing to still apply the Restrictive Covenant Act to contracts executed before 2016 as it almost invites an appeal by opposing counsel.

<sup>19</sup> *Cajun Steamer Ventures, LLC v. Thompson*, 402 F. Supp. 3d 1328 (N.D. Alabama 2019).

<sup>20</sup> Ala. Code § 8-1-190(b)(1).

<sup>21</sup> Comments to Ala. Code § 8-1-190.

<sup>22</sup> *Cajun Steamer Ventures*, 402 F. Supp. 3d at 1340.

<sup>23</sup> *Id.* at 1341.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Ala. Code § 8-1-190(b)(5).

<sup>28</sup> *DJR Associates, LLC v. Hammonds*, 241 F. Supp. 3d 1208 (N.D. Ala. 2017).

<sup>29</sup> Ala. Code § 8-1-197.

<sup>30</sup> *Id.* at 1234-35.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1230 (emphasis in original).

<sup>33</sup> *Westwind Techs., Inc. v. Jones*, 925 So. 2d 166, 173 (Ala. 2005) (See, J., concurring).

<sup>34</sup> *See, e.g., Estee Lauder Companies, Inc. v. Batra*, 430 F. Supp. 2d 158, 181 (S.D.N.Y. 2006); *Kelly v. Evolution Markets, Inc.*, 626 F. Supp. 2d 364, 373-74 (S.D.N.Y. 2009); *Quaker Chemical Corp. v. Varga*, 509 F. Supp. 2d 469, 476-77 (E.D. Pa. 2007); *O'Leary v. Telecom Res. Serv., LLC*, 2011 WL 379300, at \*5 (Del. Super. Ct. January 14, 2011);

*Weichert Co. of Pennsylvania v. Young*, 2007 WL 4372823, at \*3 (Del. Ch. Dec. 7, 2007); *Friese v. Fadner Media Enterprises, LLC*, 2017 WL 1238436 at \*7 (Conn. Super. Ct. Jan. 18, 2017); *Simplexity, LLC v. Zeinfeld*, 2013 WL 1457726 (Del. Ch. April 5, 2013); *West Publishing Corp. v. Stanley*, 2004 WL 73590, at \*10 (D. Minn. Jan. 7, 2004); *Gallagher Benefit Servs., Inc. v. Campbell*, 528 F. Supp. 3d 1326, 1341 (N.D. Ga. 2021); *Perficient Inc. v. Gupta*, 2021 WL 2805282, at \*2 (E.D. Mo. July 6, 2021); *Ethicon, Inc. v. Randall*, 2021 WL 2206106, at \*22 (D.N.J. May 28, 2021), *reconsideration denied*, 2021 WL 3144702 (D.N.J. July 26, 2021); *AK Steel Corp. v. ArcelorMittal USA, L.L.C.*, 55 N.E.3d 1152, 1156 (Ohio Ct. App. 2016).

<sup>35</sup> *Id.*

<sup>36</sup> *Friese*, 2017 WL 1238436 at \*7.

<sup>37</sup> *Nat'l Reprographics, Inc. v. Strom*, 621 F. Supp. 2d 204, 225 (D.N.J. 2008) (internal citations omitted).

<sup>38</sup> *Ethicon, Inc.*, 2021 WL 2206106, at \*22.

<sup>39</sup> *Zimmerman v. Dealnews.com, Inc.*, 312 So. 3d 5 (Ala. 2019).

<sup>40</sup> *Zimmerman*, *Brief of Appellee*, 2019 WL 2106564, at \*5.

<sup>41</sup> *Id.* at \*11.

<sup>42</sup> *Id.* at \*45.

<sup>43</sup> *Id.* at \*19-23.

<sup>44</sup> *Zimmerman*, 312 So. 3d 5.

<sup>45</sup> *Zimmerman*, *Brief of Appellee*, 2019 WL 2106564, at \*27.



**Andrew M. Townsley** is an associate at Lanier Ford Shaver & Payne, P.C. in Huntsville where he works with the firm's medical malpractice and general litigation practice groups. He currently serves as President-elect of ADLA's Young Lawyers Section.

# WRAP-UP! STATEWIDE COMMUNITY SERVICE & OUTREACH PROJECT WEEK HELD OCTOBER 11-22, 2021

**A**DLA held its first statewide community service and outreach project event on October 11-22, 2021. Each of ADLA's four districts promoted and led its own outreach effort. Association leaders in each district chose an organization in their local community to support for this year's outreach effort.



## District 1- Mac & Cheese Food Drive | Thanksgiving Meals

Members collected 1,688 boxes of Mac & Cheese for the Downtown Rescue Mission in Huntsville. The Downtown Rescue Mission gives away 1,000 Thanksgiving meals to those in need throughout northern Alabama and southern Tennessee. The outreach program served hundreds of traditional Thanksgiving meals to the men, women, and children in their care.

Thank you to **Amber Courtney** of Tatum Wilson, PC and **Jennifer Bottomley** for coordinating the food drive. Also, thank you to support staff **Cyrena Hodges**, **Heather Ackerley**, and **Donna Gilley** and the kindness of strangers in loading and unloading and taking care of all the little details that made this outreach effort a huge success.

## District 2- SNACKTOBER | Children's Snack Drive

Food insecurity is a major issue facing children in the Birmingham area school system. With lockdowns, quarantines and other challenges facing students reliance on free breakfast and lunch at school may be hard. After school and supplemental snacks are needed to help children get the nutrition they need daily. Members collected enough snacks to feed more than



100 children. Snack bags were distributed to community centers in West End, East Lake, Woodlawn and other areas.

Thank you to **Bains Fleming** of Norman Wood Kendrick &

Turner and **Logan Matthews** of Lightfoot for coordinating the snack drive. Additionally, **Stacy Moon** of Gordon Rees Scully Mansukhani, LLP and **Jansen Voss** of Christian & Small, LLP teamed up with Bains and Logan to help stuff, sort, and deliver the snack bags.



## District 3- Express-O of Love | Diaper Bank Drive

Express-O of Love is a non-profit organization designed to help parents in need by ensuring that every child has an adequate supply of diapers and wipes. As the only monthly diaper distribution center in the Montgomery area, Express-O of Love raises awareness about diaper needs in the community. Over 1,500 diapers and 1,500 wipes were collected and donated to the diaper bank.

Thank you to **Megan McCarthy** of Ball Ball Matthews & Novak, PA and **Jordan Jenkins** of Hill Hill Carter Franco Cole & Black, PC for coordinating outreach effort.



## District 4- Our Sisters' Closet | Professional Clothing Drive

District 4 partnered with Our Sisters' Closet in Mobile by sponsoring a professional clothing drive with member firms in the local area. Members in District 4 collected more than 350 articles of professional clothing. Donated items benefited women, men, and teens that are seeking jobs and workplace training in south Alabama.

Thank you to **John Browning** of Burr & Forman, LLP and **Ranse Hare** of McDowell Knight Roedder & Sledge, LLC for coordinating the clothing collections and delivery to Our Sisters' Closet.





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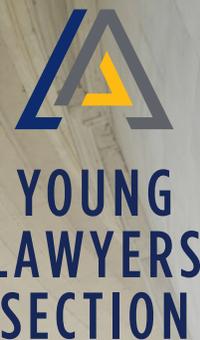
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# YLS IN-HOUSE INSIGHTS SERIES

Ashley C. Scarpetta, Watkins & Eager PLLC | Birmingham, AL



**Christie J. Estes**

*In-House Counsel*

*Quality Correctional Healthcare, Inc.*

*Birmingham*

**A**s defense lawyers and outside counsel for some of our clients, it's no secret we are interested in the in-house world. That is—what it's like to be in-house counsel and what in-house counsel expects from us. We all know it's crucial to adopt a client-centric approach in this incredibly competitive market, but that's just the starting point.

To expand, **Christie Estes** highlights what she expects out of outside counsel. As QCHC's General Counsel & Compliance Director, Christie drafts and reviews all contracts and health care proposals and provides legal advice to the company and its employees. She is responsible for training and compliance activities from a risk management and litigation avoidance perspective, including developing policies and procedures and ensuring compliance. Christie has practiced for thirteen years and received an "AV" rating from Martindale-Hubbell, which is the highest peer-review rating available. She is a Certified Correctional Health Professional (CCHP) by the National Commission on Correctional Health Care (NCCHC). Christie graduated from Samford University and the Cumberland School of Law, in Birmingham, Alabama. She is a member of the Alabama Defense Lawyers Association and is licensed in Alabama, Mississippi, Tennessee, and Kentucky.

## **1. Describe how you knew the time was right to transition from private practice to an in-house position.**

I cannot emphasize enough the importance of ensuring a good fit before making the move to an in-house position. In private practice, there are ample opportunities to work on different cases with different lawyers. That is less likely to be true with an in-house position making it even more important to understand what type of work you will be doing and whether that aligns with your goals and expectations. My current boss was my expert for about five years before I made the transition. In the end, it was essentially a lengthy job interview that allowed me to be very comfortable with my decision.

## **2. What are top qualities and non-negotiables in any outside counsel you retain?**

Work to understand your client's business, their concerns and preferences, and strive to be a problem solver.

## **3. What should outside counsel avoid doing when working with general counsel?**

Creating unnecessary work for me or anyone else in my office. For instance, if you have several files for a client, have your staff check before you request documents (employee handbook, policies, etc.) Also communicate that you have made the effort to determine that you don't already have the information. (i.e. "I already have the 2018 handbook from the Smith case but the events in question in the new Jones case happened in January 2020. Was the handbook updated between 2018 and January 2020?") It is also very important to understand the different departments and who has access to what information. Communicate to determine whether the in-house counsel wants all requests directed to them or sent directly to different departments (Human Resources, IT, etc.).

## **4. Reporting. What do you expect from outside counsel?**

Generally speaking, the reporting requirements are from the insurance company. I much prefer a short synopsis of what has happened, where we are, and what the next steps in the case are. Also, report good news (summary judgment, etc.) immediately. "Reporting" does not have to equate some lengthy and detailed form. Take the opportunity to send short updates and especially when you have good news to share. For instance, "Our expert Dr. Abbott was deposed last week. A more detailed

deposition report is forthcoming but I wanted to let you know that he did an excellent job and we will begin preparing our summary judgment motion once the transcript is received." Always take a proactive approach to client communication.

**5. What are your staffing and billing expectations for a matter referred to outside counsel?**

Understand that once you do something to cause general counsel or the insurance company to question your billing practices, your billing practices are more likely to be questioned in the future.

**6. How do you prefer to develop and build your relationship with outside counsel?**

Treat the relationship like a friendship. Like a friendship, the relationship will take time to develop. Also, be aware of time constraints and personal commitments that exist outside of working hours.

let's connect...



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Alabama Defense Lawyer's Association



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**Ashley C. Scarpetta** is an associate at Watkins & Eager PLLC in Birmingham, Alabama. Ashley chairs the Education Committee and is actively involved in ADLA's Young Lawyer's Section and Women's Section.

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# 10 STRATEGIES FOR STAYING WITHIN THE WORD COUNT AND MAKING YOUR WRITING BETTER

By: **Mary Margaret Bailey**, Frazer Greene LLC, | Mobile, AL

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**N**ow that the Alabama Supreme Court has thankfully switched from page limits to words limits, submissions in both state and federal appellate courts must not exceed a maximum word count. I'm frequently fighting to stay within this mandated word count since appeals in medical malpractice cases so often involve complex factual situations and issues. As a result, I've developed several strategies for tightening up my writing.

My top ten strategies are included below. These are things you can easily look for when you've finished a first draft and are going back through to pare it down. The paring down process is especially important when your first draft is over the word count, but, even when it's not, you should still go through the same editing process. Word selection is always important. The authors of the classic book of writing advice, *The Elements of Style*, tell us to "omit needless words,"<sup>1</sup> explaining we should strive to have "every word tell."<sup>2</sup>

## 1. Overused words

My first suggestion is to search through your document for these four overused words: that, which, then and just. Whenever the sentence makes sense without the word, delete it. I'm especially bad about overusing "that."

## 2. Names & titles

Next, read back through your document and examine your use of names and titles. There are several ways to make your references to people and entities more economical.

Use full names once without initials or designations like Jr., unless necessary to distinguish. After using the full name, either use the party designation (Plaintiff or Defendant) – with an initial cap and no preceding "the" – or use the shortest form of the name that won't cause confusion. If there are multiple people with the same last name, maybe a married couple or brothers, you'll need to use a first and last name for each, but otherwise you can simply use last names. Titles are not necessary unless it matters in the case, like with a medical expert.

Start by referring to "the plaintiff, Bob Smith," (even if his full name is Bob W. Smith, Jr.) and then simply call him either "Plaintiff" or "Smith," if there are no other Smiths in the case. For an expert, start by referring to her as "Dr. Mary Jones," then simply call her "Dr. Jones."

Treat entities the same. If there's only one school board in the case, no need to repeatedly call it as "the Mobile County School Board." You can thereafter refer to it as "the School Board" or "the Board."

Consider using an acronym for any term appearing frequently throughout your document, whether it's the name of an entity or a legal term. Judicious use of acronyms can make a brief less tedious to read; overuse can create confusion and become annoying. Some commonly used acronyms, like IRS and ER, don't require explanation, but most will. Do the explaining in a simple parenthetical the first time the term is used. There's

no need to put quotation marks or include some flowery phrase like "hereinafter referred to as...." Whatever you decide to do, be consistent.

Here's an example from one of my briefs: "Pursuant to the Alabama Medical Liability Act (AMLA), only similarly-situated experts can testify about the standard of care."

## 3. Pronouns & possessives

Also read back through your document to examine where you might use pronouns and possessives. Lawyers often avoid using these out of a fear of being inaccurate but, when properly used, they can tighten your writing. Repeating a name over and over, rather than replacing it with a pronoun every now and then, can make a brief tedious to read.

If you will be discussing the house where the Smiths were living, you could also call it "the Smith's house" or "their house." Likewise, if you will be discussing the opinion of Dr. Jones, you could also call it "Dr. Jones's opinion" or "her opinion." Just make sure there is a clear antecedent for each pronoun.

## 4. Dates

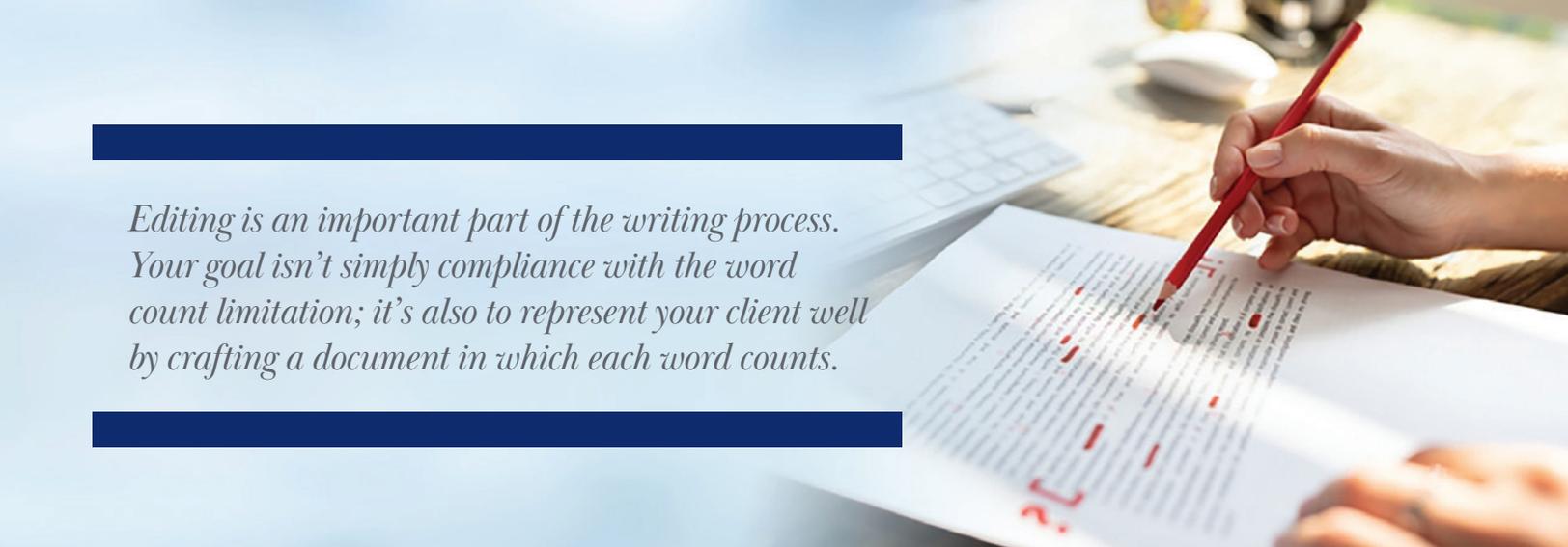
Review your use of dates. That fear of being inaccurate also causes lawyers to use too many dates and to repeatedly use full dates. Too many dates make a brief tedious to read. Only include dates when they matter, and only include so much of the date as necessary.

If I'm going to talk about a particular surgery in a medical case, I'll give the full date the first time I refer to it and then either simply call it "the surgery," if there are no others, or call it "the November surgery" or "the 2017 surgery," depending on whether there are others in the same month or year.

## 5. Citations

You should always review citations as part of the editing process. Make sure you've used proper form, but also consider whether you can tighten up your citations by limiting extraneous and unnecessary information.

*Word selection is always important. The authors of the classic book of writing advice, The Elements of Style, tell us to "omit needless words," explaining we should strive to have "every word tell."*



*Editing is an important part of the writing process. Your goal isn't simply compliance with the word count limitation; it's also to represent your client well by crafting a document in which each word counts.*

Use the least amount of cites necessary and replace full cites with short cites or "Id." whenever possible. Consider eliminating unnecessary string cites. Shorten parentheticals by restating rather than quoting the main proposition. If you're quoting text which itself contains multiple quotations and revisions – replete with internal brackets, ellipses, and quotation marks – consider eliminating the confusing symbols and streamlining the usual explanatory parentheticals into one parenthetical which simply states "cleaned up." This new explanatory parenthetical has been gaining in popularity; just be careful not to change the quotation in ways that misrepresent the original text since your credibility is on the line.

And, don't forget to review your record cites. The most important thing there is consistency, but make sure you're not including more information than necessary. I was in the habit of using the word "at" whenever I needed to refer to a particular part of a record page in my state court appeals – (R. 453, at ¶ 8). Then, in shortening a brief to fit within the word limit, I realized all those at's were unnecessary. I gained an extra 30 words by removing them, and now I no longer include them.

## 6. Hyphenated terms

You should also look to see if there are any terms you've neglected to hyphenate, because Microsoft Word counts anything joined by hyphens as one word. Hyphenate terms like: six-year-old house, properly-supported motion, similarly-situated expert, and post-judgment order. Again, be consistent.

## 7. Redundant phrases

Some commonly used phrases consist of two words which mean the same thing; they're redundant. Both words are not necessary to make the point, and one or the other should be eliminated.

Some examples of redundant phrases are: end result, merge together, many different, each separately, past history, added bonus, close proximity, final outcome, new beginning, still remains, usual custom, mutual cooperation, regular routine, and may possibly.

## 8. Conclusions

Certain words indicate you are stating the conclusion you want the

Court to reach; words like: clearly, obviously, significantly, importantly, etc. By doing this, you risk undermining your credibility and annoying the Court. Either you don't trust your argument, or you don't trust the Court to draw its own conclusion. Consider eliminating these words and clarifying the argument in that section.

## 9. Qualifiers & intensifiers

Words that simply qualify and intensify are usually unnecessary, and serve only to clog up your writing. For instance, if something is necessary, you don't need to say that it's absolutely necessary. Look for these types of words and eliminate whenever possible.

Some commonly used qualifiers and intensifiers are: absolutely, actually, apparently, barely, basically, certainly, completely, definitely, essentially, extremely, generally, hardly, kind of, literally, particularly, practically, probably, quite, rather, really, severely, somehow, somewhat, totally, utterly, very, and virtually.

## 10. Common clunky phrases

There are lots of phrases we all commonly use that can usually be replaced by one word. For instance, "in order to" can be replaced with "to," "due to the fact that" can be replaced with "because," "a sufficient number of" can be replaced with "enough," "had an effect upon" can be replaced with "affected," and "by means of" can be replaced with "by."

Lawyers are famous for using such phrases, but they clog up your writing and should be reduced to their shorter form whenever possible. Once you start looking for these phrases when editing, you'll begin to avoid using them in the first place.

I'm sure you can think of more, but here's a representative collection of additional clunky phrases to avoid:

on the ground thatthe reason for/is

concerning the matter ofbecause of

due to the fact thatby virtue of

given the fact thatin light of the fact that

considering the fact thatthe reason... was

for all intents and purposeson a daily/monthly/yearly basis

with regard towith the possible exception of

at the same time as to whether appear to beat this point in time for the purpose of it is important/necessary that until such time as all things considered as a matter of fact at the present time it is possible that the possibility exists for for all intents and purposes for the most part in reference to in the case of in the final analysis in the nature of in the course of in the event that as regards it is important to note that it seems that the type of in terms of needless to say all of them the process of there is a chance that there is a need for in a very real sense in his/her opinion whether or not in actual fact in excess of is able to has the capacity for has the ability to

Take the time to reread your motion or brief multiple times to implement each of these strategies for tightening up your writing. If you can, put the document aside for a while before doing a final read-through. When you've been fully consumed with the writing process, it can become difficult to catch typos and other minor errors. It's always a good idea to have

someone else with "fresh eyes" read through the document, maybe even a nonlawyer. Plus, the other reader can indicate where you might need to do a better job of explaining.

Editing is an important part of the writing process. Your goal isn't simply compliance with the word count limitation; it's also to represent your client well by crafting a document in which each word counts.

### Endnotes

<sup>1</sup> William Strunk, Jr. and E.B. White, *The Elements of Style* 23 (Allyn & Bacon, 3rd ed. 1979).  
<sup>2</sup> *Id.*



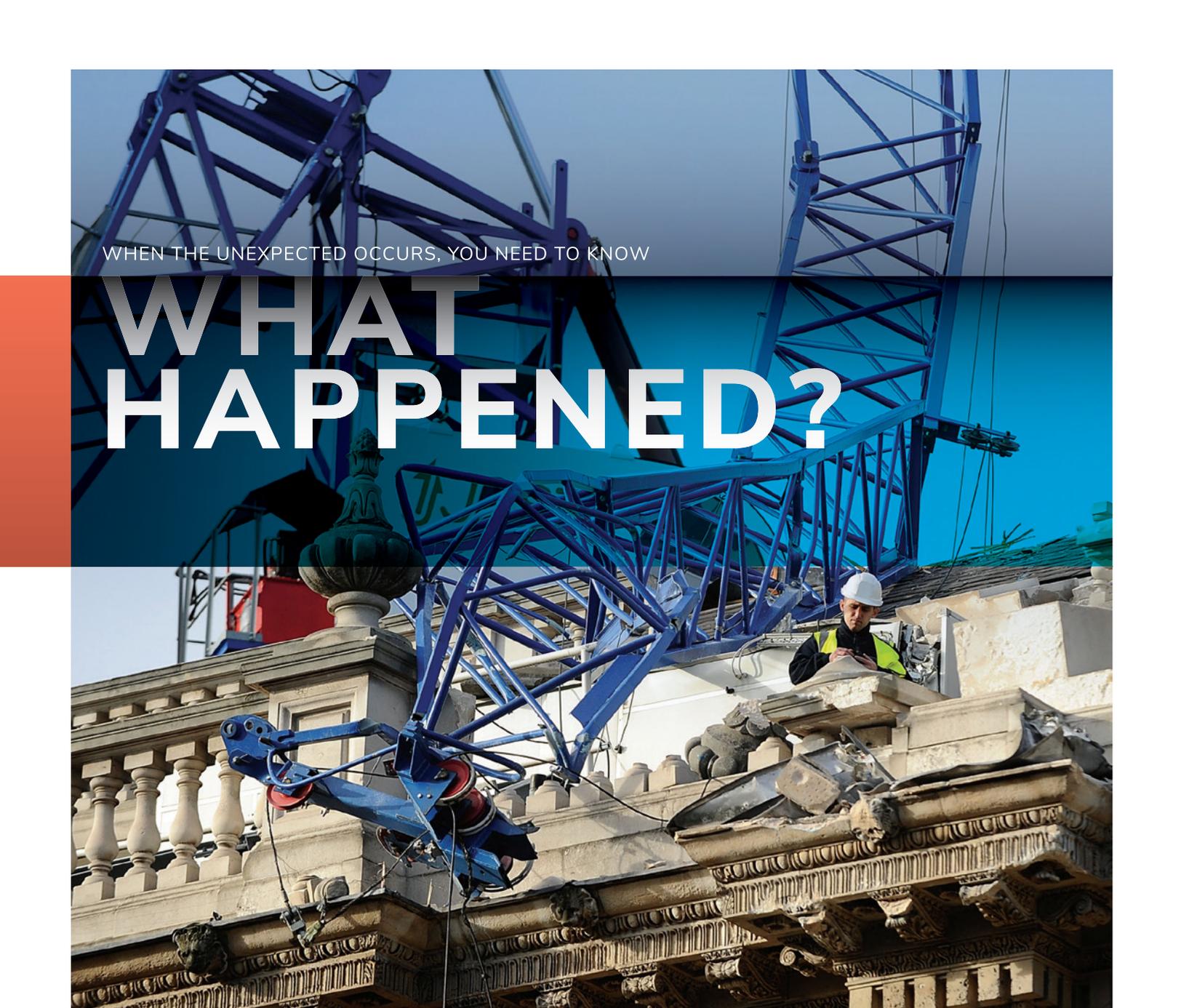
**Mary Margaret Bailey** is involved in civil litigation, primarily in the areas of medical malpractice and commercial disputes. Her practice is focused on the drafting of motions and briefs, both at the trial and appellate stages of litigation. Mary Margaret is a member of the Alabama Supreme Court's Standing Committee on the Alabama Rules of Appellate Procedure and has been included since 2012 in *The Best Lawyers in America, Appellate Practice*. She is a graduate of Rhodes College and Cumberland School of Law.

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**CHRISTINA MAY BOLIN**  
Alabama DRI Representative

**T**hank you all for allowing me to serve as the Alabama State Representative for DRI. DRI is back with live, in-person programming spanning just about every conceivable area of civil defense practice. You may not realize that DRI has additional resources available as well. DRI stands ready to assist ADLA and its members in areas that might require a national voice. If you would like DRI to weigh in on a legislative issue or even possibly provide amicus help, please let me know.

I look forward to seeing you all in June at the beach. 🌊



## LIGHTFOOT PARTNER LANA OLSON NAMED PRESIDENT-ELECT OF DRI

**A**DLA member and Lightfoot, Franklin & White LLC partner **Lana A. Olson** has assumed the role of president-elect of DRI, the leading organization of defense attorneys and in-house counsel. She was confirmed in October at DRI's annual meeting in Boston.

With more than 16,000 members, DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. Olson will become president of the organization in October 2022 and will be its fifth female president and the first female president from Alabama.

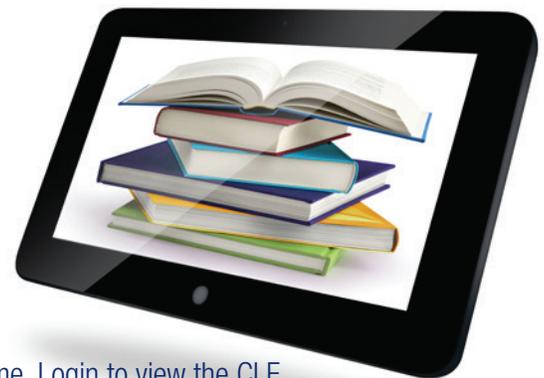
Olson most recently served as first vice president of DRI from 2020-21,

following her first year on the organization's presidential track as second vice president from 2019-20. Prior to that, Olson was DRI's secretary-treasurer from 2018-19 and served on its board of directors for three years, where she was the chair of the organization's Philanthropic Activities Committee (2016-18) and vice-chair (2015-16). She was also a founding member of DRI's Women in the Law Committee and served as its chair from 2013-15.

In 2018, the DRI Foundation established a tribute in Olson's name in recognition of her years of dedication to DRI and her commitment to philanthropy and public service on behalf of the organization. She also received the Davis Carr Outstanding Committee Chair Award in 2015 for her work on the Women in the Law Committee.

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# 2022 DEPOSITION BOOT CAMP WRAP-UP

**A**DLA faculty once again organized a successful event for young lawyer members in March at Faulkner Law Thomas Goode Jones School of Law in Montgomery. This year's class consisted of 26 young lawyers who were all eager to get back to learning and networking with colleagues in person.

Faculty members, guest speakers, and young lawyers enjoyed challenging demonstrations and small breakout sessions over the two-day program. President & CEO **Lori Warren** of **Alabama Court Reporters Videographers Litigation Support** sponsored and led a very informative CLE session about best practice tips and techniques when working with court reporters. Attendees earned 15 CLE credit hours, including 1 hour of ethics- more than enough for the year.

A special thank you to the **Honorable James Anderson, 15<sup>th</sup> Judicial Circuit**, for serving as the honored guest speaker again this year. Judge Anderson led an interactive session and candidly answered questions from the bench's perspective. Judge Anderson's time with the young lawyers is always an interesting learning experience. Young lawyers were encouraged to ask the judge anything-literally!

Deposition Boot Camp had generous support from sponsors this year. Thank you to our friends at **Alabama Court Reporters Videographers Litigation Support** for hosting the faculty dinner at Taste Montgomery in Hampstead. Additionally, we recognize our friends at **Veritext Legal Solutions** for the swag bags and hosting a fabulous BBQ luncheon, and **Huseby Global Litigation** for sponsoring a breakfast buffet.

This year's program would not have been successful without the faculty members and speakers who volunteered their time and talents to lead this young group of lawyers. Faculty and speakers included **Christie Estes, Jeremy Gaddy, Jonathan Hooks, Megan McCarthy, Stephen Still, Hal Mooty, Jeremy Dotson, J. Evans Bailey, Bill Lancaster, Hope Hicks, and Jeremy McIntire** of the Alabama State Bar. **Ben Heinz** served as Deposition Boot Camp's Program Chair.

## Highlights from Deposition Boot Camp



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**Caitlin Cobb** of Capell & Howard, PC took home one of several Amazon gift card prizes



Congratulations to **Karmen Gaines** of Clark May Price Lawley Duncan & Paul, LLC. Karmen took home a Yeti Camino Waterproof Beach Tote and a set of Yeti Ramblers



## TOP TAKEAWAYS FROM YOUNG LAWYER ATTENDEES

*General deposition strategy and how to properly take an expert's deposition*

**Andrew Edge**, Huie

*Be inquisitive, don't assume answer to anything, and use an outline as checklist*

**Hunter Pearce**, Bradley

*Very helpful and informative- I would recommend to all new defense attorneys*

**R. Brook Meadows III**, Carr Allison

*Prepare-prepare-prepare; but also listen to your witness- don't stay too glued to your outline*

**Liz Harrison**, Lightfoot Franklin & White

*Importance of 30(b)(6) notice scope and the importance of creating/protecting a record*

**Ian Burt**, Alabama Department of Transportation



# WHAT I WISH I KNEW THEN



By: **Ashley C. Scarpetta**, Watkins & Eager PLLC | Birmingham, AL



**B**eing a young lawyer is hard. Every lawyer will remember experiences they had as a young lawyer and think back on “what they wish they knew then.” These lawyers came through those early years of practice wiser from their experiences, good and bad, and learned lessons they then honed over years of practice.

In effort to shed some light at the end of the tunnel for ADLA’s young lawyers, **J.S. “Chris” Christie**, **Angel A. Croes**, and **Allen Estes** touch on “what they wish they knew then.”

## 1. What are some of the important things an associate should know about managing and living up to partner expectations?

**J.S. “Chris” Christie:** Law firm expectations for associates have changed for the better from decades ago. For example, on my first day as an associate, the partner giving me my firm orientation half-jokingly told me the firm’s flexible holiday and vacation policy for associates: Every year, associates had off the Fourth of July and Christmas; in addition, associates had 15 vacation or holiday days off and could take those 15

days any Saturdays or Sundays they wanted.

Being successful as an associate depends on meeting expectations. One of my best lawyer friends left our firm without making partner despite his being talented, well liked, and one of the hardest working associates. His problem: he never told any partner no. He had so much work, and from different partners, he too often could not provide the work product in the time he was expected to do so. He failed to manage and thus meet expectations; it cost him.

Associates should recognize that most partners, even the best lawyers,

are usually not ideal bosses and may not provide associates adequate expectations and feedback. Most partners spend years learning to be a lawyer, not how to manage people.

For the partners with whom you work, find out the partner's expectations for you. Hopefully, that can be done by talking with the partner. Ask the partner for feedback. But don't ask the partner so often you become a pest. Use your judgment, just as you would for any other relationship.

And talk with others who work or worked with the partner. If you still don't know enough after these steps, guess what the expectations should be, do your best, and then learn through trial and error.

Expectations should be a two-way street. An associate manages partners' expectations by letting the partners know the associate's expectations. Manage expectations early and diplomatically. Try not to wait until a problem arises.

As examples, associates should let partners know when they need time off, whether they understand how to do what they have been asked to do, and whether the work they have is what they want to do. Whatever expectations are a priority to you, let those you work with know.

Part of being happy in life, as well as an associate, is learning what other people want from you and then how best to give or not give them what they want. You are a lawyer with great potential. Use the same skills that have taken you to where you are to plan and become the lawyer you want to be.

**Angel A. Croes:** Above all, partners want an associate that will be proactive in handling files and driving defense strategies.

There is certainly a sweet spot that lies somewhere between being self-sufficient and proactive in the sense of taking ownership of the case, while also recognizing when to seek the partner's advice, input and/or approval.

Having played both the associate and partner role, I can tell you that the most desired and mutually beneficial dynamic is one where both lawyers are actively contributing to the defense and working together. The most valued type of associate is one that is not afraid to offer defense strategy recommendations, that looks beyond task-based assignments to the case overall and aims to develop an end-game, and that works the case as if he or she is ultimately responsible for the outcome.

**Allen Estes:** The Partner is your client. Find out what the expectations are and exceed them when possible. To figure out what the expectations are, you must ask (and ask again, if needed).

## 2. What should associates avoid doing?

**J.S. "Chris" Christie:** Associates should avoid doing mediocre work. Not doing your best would likely make your firm unhappy with you and you unhappy with your job and with yourself.

Your work might be mediocre because the work is not what you want to do, because you do not have enough work, or because you have too much work. Regardless, do the work well, at least for a while, and if not satisfied, at the same time plan to shift to work you want to do, or to have more work, or to have less work – preferably at the same firm, but possibly elsewhere.

Plan and use the skills you have learned to solve other problems, so you have the type and amount of work you want to have.

**Angel A. Croes:** Hurrying.

There seems to be such an overwhelming and self-imposed sense of urgency that is prevalent amongst associates these days. I realize that there is a lot of pressure in our industry to be both thorough and efficient, but when we focus too much on output, quality suffers.

I would rather receive a solid, well-written and well-thought-out work product that takes a significant amount of time to prepare, than a stack of reports that were prepared in haste. There is nothing worse than a partner having to waste time proofreading a product as opposed to focusing on substance.

A poorly proofread product, no matter how solid its contents or substance, causes clients to quickly lose confidence and we lose credibility. It's akin to reading a typo in the New York Times. It may be small and insignificant to the entire piece of work, but it's glaring to the reader.

**Allen Estes:** a. Don't assume you know how a partner or client wants things done; ask them.

b. Don't send an email when a phone call is better for the question. Or better yet, ask in person.



**June 16, 1989: Judge Seybourn H. Lynne with Chris and Sturgeon Christie.**

*Judge Lynne was appointed to the Northern District of Alabama bench in January 1946 as President Truman's first United States District Court appointment. I clerked for Judge Lynne for a year, beginning in July 1987, after graduating from law school and then teaching for two years as a Peace Corps Volunteer at the University of Yaoundé School of Law in Cameroon. Sturgeon is ten months old in the photo. He is 33 years old today.*



Doing pro bono work helps you focus on serving your clients – paying and pro bono. As to pro bono service, the Alabama Rules of Professional Conduct, Rule 6.1, “Pro Bono Public Service,” provide that a “lawyer should render public interest legal service.”

**Angel A. Croes:** Communication is key.

While associates often don’t communicate directly with clients, they should stay apprised of how often we are reporting and remind the partner when an update is in order.

The ideal situation is one where the associate is proactive and prepares updates regularly, without being prompted, even if it’s nothing more than to say that nothing significant has happened over the past thirty (30) days.

The worst situation is one where a client has to reach out to ask for an update.

**Allen Estes:** A lawyer must know everything you can about a client’s business. Start early, as an associate, keeping up to date on all aspects of a client’s (and potential clients) business operations. Google Alerts are a great way to start this process.

### 3. Describe your philosophy regarding client relationships. Moreover, what are some things an associate can do to help maximize the relationship with a client?

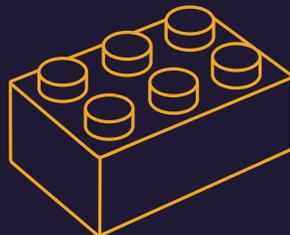
**J.S. “Chris” Christie:** A lawyer has an ethical duty to act in the client’s best interests. That duty should control your relationship with your client.

The State of Alabama gives lawyers, as professionals, a license to help clients solve their legal problems. Remember, you have the state licensed privilege to serve clients.

Without your saying so directly, through what you say and write to the client, the court and others, your clients should know you have been acting, are acting, and will act in their best interests. Usually, timely and prompt communications are as important as what is said or written. Maximize your relationship with the client by building trust; build trust through what you say and write to, for and about the client.

### 4. What are your top tips for developing business?

**J.S. “Chris” Christie:** Of the five questions, this question is the one I might be least qualified to address. As an associate, I developed some business and usually had enough business for myself and at times others. But I have not considered myself a rainmaker.



## BUILDING SUCCESSFUL RESOLUTIONS, PIECE BY PIECE



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Ideally, doing great legal work should result in great client relationships, a solid reputation, and developing business. The best clients often are those who call you because you do great legal work. If the client has confidence in you, the client is likely to call you again and tell others to call you.

Get to know the client, its business, and its legal needs. Let the client know you, or someone else at your firm, can handle the client's needs. Work often comes from existing clients.

Granted, clients at times cannot tell good from poor legal work. So, you probably should do more than good legal work to develop business.

To send you business, potential clients and possible referring lawyers must know who you are and what you can do well. Become active in the community and the bar. Join lawyer organizations, like the ADLA, and be active members.

Develop a subject matter expertise on which you publish and speak. Plan where you speak and publish so potential clients, or lawyers who might refer business to you, hear you or read what you have written.

When speaking or publishing, or when serving on a community organization or bar or other lawyer organization committee, do your best. Your reputation for doing good work will likely be part of what helps you develop business.

**Angel A. Croes:** Remembering that we're all just people.

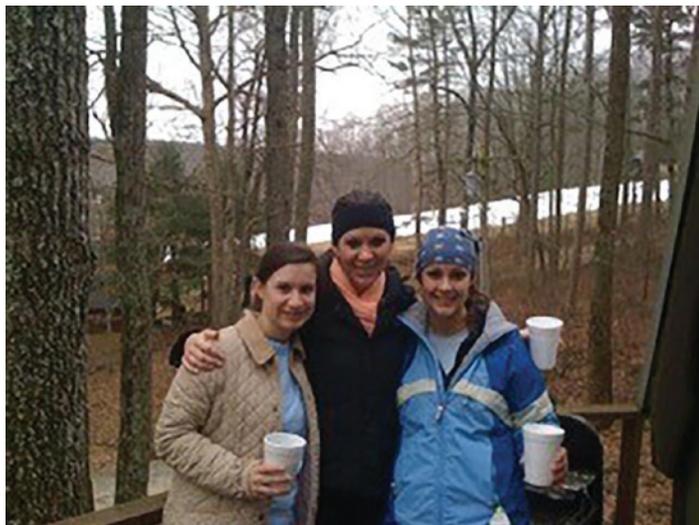
Listening to clients, taking note of what's going in their personal lives when they let you in, remembering to ask about those things, and sometimes letting go of the formalities to just have a regular conversation. Those things go a long way.

Ultimately, we all just want to work with people we like. So do our clients.

**Allen Estes:** a. Be nice; you never know when you are talking to a potential client. b. Ask and listen more than you talk. c. Keep learning about new areas of business and the law.

## 5. If you could give one piece of advice to yourself as a young lawyer, what would it be?

**J.S. "Chris" Christie:** Remember your priorities. Not just what you would like to say are your priorities, but what really is most important to you.



Personally, I think my priorities are, and hope my priorities are, in order: faith, family, friends and firm. By firm, I mean my work as a lawyer.

How might I tell what are my true priorities? By what I spend my scarce resources. For most lawyers, including me, my most scarce resource usually becomes time. After working enough to provide the basics, on what do I spend my time?

**Angel A. Croes:** Find your niche early on. Find something you're good at, or that you enjoy, and hone that.

Become an expert in something. That way, eventually, you will be someone's "go-to". And that's where the real growth begins.

**Allen Estes:** Think like a Partner from day one. To do that, you must ask multiple partners what they think about on a daily basis. I'm always amazed at the different ways seemingly similar attorneys analyze and attack the issues they face.



**J.S. "Chris" Christie** is Of Counsel in Dentons Sirote's litigation practice group in Birmingham. Chris has been an active member of ADLA for many years and assists in teaching young lawyers at ADLA's Annual Trial Academy. Chris can be reached at [chris.christie@dentons.com](mailto:chris.christie@dentons.com).



**Angel A. Croes** is a Shareholder at Carr Allison in Birmingham where she maintains a complex litigation practice. Angel is an active member of ADLA. Angel can be reached at [acroes@carrallison.com](mailto:acroes@carrallison.com).



**Allen Estes** is a Partner at Balch & Bingham LLP in Birmingham where he maintains a litigation practice in the energy litigation practice group. Allen was President of ADLA from 2016 to 2017. Allen can be reached at [aestes@balch.com](mailto:aestes@balch.com).



**Ashley C. Scarpetta** is an Associate at Watkins & Eager PLLC in Birmingham, Alabama where she maintains a complex litigation practice. Ashley currently chairs ADLA's Education Committee, serves as Secretary to ADLA's Young Lawyers Board of Directors, and is actively involved in ADLA's Women's Section. Ashley can be reached at [ascarpetta@watkinseager.com](mailto:ascarpetta@watkinseager.com).



**MARTHA THOMPSON**  
President



This year will mark the third year of the ADLA Women in the Law Committee. The Committee's mission is to support, encourage and advance women lawyers in the State of Alabama. In our first two years, with the guidance of Chairperson Meade Hartfield, the Committee was able to engage female members of the association by promoting networking events, expanding educational opportunities, coordinating philanthropic outreach efforts and supporting each other as they took on leadership roles inside and outside of the association. The Committee has been active in creating network opportunities to assist with career advancement and we are looking forward to continuing with these opportunities.

### ADLA's Commitment

The Women in the Law now have a budget! This new budget will allow us to create more programs, host events, and continue our mission of creating network opportunities to assist with career advancement. In addition, the membership will vote on a bylaw amendment at the annual membership meeting this summer formally recognizing the section.

### Recent & Upcoming Events

After a very trying couple of years, we are looking forward to a number

of events. The Southeastern Women Litigators Conference is finally kicked off in Atlanta on March 23rd-24th. This Event brought together over 140 women litigators from the Southeast to help support, educate and advance women civil litigators. This was a First Time Event and we are looking forward to having a strong showing from our Section next year. We also plan on continuing our philanthropy and outreach programs by working with the other sections.

On March 31st our Section hosted a Judicial Webinar featuring state, appellate and federal judges discussing best practices and the work life balance. We appreciate our female judiciary in participating in this popular program.

I am looking forward to ADLA's Annual Meeting on June 16-19 in Gulf Shores. We have a Section meeting Friday morning. That afternoon we have a Beach day where we can continue our networking efforts. Be sure to register online via the website and bring plan to bring your family with you. We have tons of fun events planned for all ages.

### What Do We Need from You

We were excited to add to our Section, chairs from North and South Alabama. We continue to want to expand and grow this Committee's influence in the state. We want your thoughts and ideas and more importantly your participation. We are better together and with your assistance we have the ability to engage the women membership of the ADLA. 



**Members can view and post job opportunities on ADLA's job board. All job announcements will be promoted to over 900 members for six weeks in the *Wednesday Briefcase* e-newsletter and on the website in the Member Resources section. Visit [www.adla.org](http://www.adla.org) for more information, member login required.**

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# SEWL CONFERENCE HIGHLIGHTS

Over 140 women litigators from Alabama, Georgia, Florida, North Carolina, South Carolina and Tennessee gathered at Zoo Atlanta for the inaugural Southeastern Women Litigators Conference (SEWL) on March 24th. The purpose of the CLE conference was to support, educate and advance women civil defense litigators. The conference kicked-off with a reception at the Georgia State Bar; followed by dine-arounds at local restaurants.

The one-day seminar combined speakers and panelists to discuss developing leadership and career building skills. Presentations also explored challenges, risks and rewards on the path to having a fulfilling and productive career for women lawyers. Stay tuned for next year's location!



WITL Past President and SEWL Program Co-Chair Meade Hartfield of Bradley



ADLA Executive Director Jennifer Hayes pictured with WITL President Martha Thompson and Sloane Phillips of Balch.

TDLA Executive Director Mary Gadd, GDLA Executive Director Jennifer Ward and ADLA Executive Director Jennifer Hayes at opening reception hosted by the Georgia State Bar





Program Moderator Sharon Stuart of Christian & Small and Meade Hartford of Bradley





Program Chair Karen Karabinos of Drew Eckl Farnham in Atlanta

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# CELEBRATING WOMEN A CONVERSATION WITH JENNA BEDSOLE



By: **Hannah Stokes**, Carr Allison | Birmingham, AL



**M**arch is an important month for women. March 8<sup>th</sup> is International Women's Day and the entire month is known as Women's History Month. In terms of women lawyers, there have been articles written about the shortage of women in the courtroom in recent years. Following a New York study, an article published in the Birmingham Bar Bulletin found that women lawyers appeared in court 21% of the time compared to men, tracking similarly with the New York data. (1). That number was even lower for substantive motion hearings and trial, versus attendance at status conferences. (2). At the same time, the number of women enrolled in law schools nationwide actually surpassed the number of male law student enrollees in 2016. (3).

Why is this information important to us? Because there are many women and women lawyers who have made tremendous impact on the legal profession and our state. With law student enrollment up, one can only imagine what the future holds for women in the law and how the courtroom data may change and grow. Law firms, including numerous defense firms, are taking the opportunity to help promote and contribute to the progress of women in the law.

In 2021, ADLA was comprised of 237-women lawyers (26% of membership). A new ADLA committee, Women in the Law (WITL), was formed in recent years with Past-President Meade Hartfield (Bradley Arant) at the helm. Currently, Martha Thompson (Balch & Bingham) serves as President of WITL, and the committee is spearheading efforts to gain even more women lawyers in ADLA. ADLA's WITL hopes to encourage and celebrate women lawyers in all areas of defense practice.

To celebrate women lawyers for ADLA's spring journal, I sat down for a conversation with Jenna Bedsole (Baker Donelson). Hopefully, this conversation sparks dialogue amongst and between women and men at ADLA law firms state wide this month as we celebrate women!

**Q. Jenna, you are the Managing Shareholder of Baker Donelson's Birmingham office and were named "Who's-Who in the Law" by the Birmingham Business Journal in 2021, while maintaining a full-practice focused on employment law. How has your practice impacted your outlook on progress of women lawyers?**

A. I love what I do – employment law is a dynamic area of the law. Every Supreme Court term, the justices address an aspect of employment law. Every major piece of legislation that goes through Congress impacts employment: health care, immigration, taxes as examples. It's always changing. I have been fortunate work with brilliant lawyers. The majority of my team is women, so when I think about the progress of women lawyers I think about my team. I am so thankful for them and the great work they do. We have fun, enjoy each other, and the work we do serving our clients in this exciting area of law.

**Q. You are also Programming Co-Chair of the Women's Initiative at your firm. What do you hope to accomplish in that role?**

A. Our goal is to provide programming to our lawyers that helps them achieve their goals, increase their leadership potential, and to network. Most importantly, our programming is typically not gender exclusive. In order for women to advance, we want and need our male attorneys to help.

**Q. In 2020, you wrote, produced and directed a film - *The Fight for the Noblest Democracy: Women's Suffrage in Alabama*. Women**



**obtaining the right to vote in Alabama is something wonderful to celebrate and reflect on. What is one of the most interesting things you learned about the Women's Suffrage Movement in Alabama when making your film?**

A. Frankly, the most interesting thing I learned was there was a women's suffrage movement in Alabama. Alabama was a microcosm for what was happening across the country as women fought for suffrage. There were women like Adella Hunt Logan, Pattie Ruffner Jacobs, Frances Griffin and Bossie Hundley who were fierce advocates for the right for women to vote. They faced a lot of animosity from both men and women who did not want women to vote.





*I love what I do – employment law is a dynamic area of the law. Every Supreme Court term, the justices address an aspect of employment law. Every major piece of legislation that goes through Congress impacts employment: health care, immigration, taxes as examples. It's always changing. I have been fortunate work with brilliant lawyers. The majority of my team is women, so when I think about the progress of women lawyers I think about my team. I am so thankful for them and the great work they do. We have fun, enjoy each other, and the work we do serving our clients in this exciting area of law.*

**Q. What do you hope people take away from the film you made, and what do you think today's legal market in Alabama stands to learn from the state's history?**

A. The movie shows that Alabama women went from community to community to talk about a cause they felt was important. They organized suffrage chapters in almost every county. When the Alabama legislature voted against a state law giving women the right to vote, those same women pivoted to push for ratification of the 19<sup>th</sup> Amendment. Ultimately, Tennessee tipped the scales when it ratified the 19<sup>th</sup> Amendment. Even though the Alabama suffragists weren't successful in getting their state to ratify the 19<sup>th</sup> Amendment, they remained dedicated throughout. It's a great example of believing in something, mobilizing, and fighting for that belief.

**Q. Can you talk about an Alabama female lawyer that you have researched and admire?**

A. My passion for making documentary films started when I volunteered to do a 3-minute video for the Alabama State Bar about an inductee into the Lawyers' Hall of Fame. There were two women – one of whom was Nina Miglionico. I had heard of Miss Nina as the Women's Section of the Birmingham Bar Association has an award named after her: the Paving the Way Award. I'm not from Birmingham so I didn't know much

about her. This is what I learned: She graduated from the University of Alabama School of Law in 1936 – one of four women in her class. She opened a law office as solo practitioner during the Great Depression.



The only job offers she received upon graduation were secretarial. She took whatever case came through the door. In 1964, when Birmingham voted to change its form of government to Mayor/City Council instead of 3 Commissioners, Nina ran for office. She was the only woman elected. That City Council reversed the segregation laws in Birmingham. One year later, Nina ran for re-election and in April of 1964, a bomb was placed on her front porch. Her parents were living with her at the time. When her father went to get the morning paper, he saw the package and heard the ticking. He reached inside, grabbed the timer, and threw it in the yard before it went off. Three bombs went off that morning in other parts of the city. Nina was undeterred. She was re-elected to the City Council and served for 20 years. My three-minute film became a 56-minute documentary feature. It was such an inspiring story that I couldn't keep it to three minutes. Plus, I'm a lawyer – sometimes it's hard for us to be brief.

**Q. Women's History Month gives us all a chance to celebrate women, and women lawyers, in our law firms and practice. You've already mentioned a few women and a women lawyer that are obviously great places to start for reading and research. In addition, do you have any advice for how firms and attorneys can celebrate women this month?**

A. Go see the statue of Nina Miglionico in Lynn Park. Watch *Hidden*

*Figures* or spend money with women-owned businesses. Get together with your women colleagues, share stories and successes. Support a non-profit that empowers girls, like GirlSpring or Girls on the Run. Hug your daughter, and tell her you're proud of her.

**Links:**

Citations: *New judicial study: Birmingham women attorneys trail behind men in courtroom appearances*; Birmingham Bar Bulletin, Fall 2020; [https://issuu.com/280living/docs/issuu\\_bulletin\\_fall\\_2020](https://issuu.com/280living/docs/issuu_bulletin_fall_2020).

<sup>2</sup> *Id.*

<sup>3</sup> Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, The New York Times (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html>.



**Hannah H. Stokes** is an associate in Carr Allison's Birmingham, Alabama office where her practice focuses on construction, premises liability, and products liability defense. Hannah currently serves as secretary on the BBA Women Lawyer's Section Board. In 2019, she was a recipient of the Women Lawyer's Section

Distinguished Service Award. She is also a Board Member for the Alabama Defense Lawyers Association, Young Lawyer's Section.

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**Angel Croes** and **Hannah Stokes** of Carr Allison's Birmingham office represented a well-established roofing and construction company in a bench trial in North Alabama. A customer alleged that roofing work performed by defendant caused water to damage the interior of his home. Defense counsel argued that the customer's alleged damages were precluded due to failure to prove causation; the contractual scope of work between the parties limited the customer's remedies to work already performed; and the customer could not present the required elements to prove the claims asserted. Following trial, the judge entered a decision in complete favor of the defense and the case was dismissed, with prejudice.



*Angel Croes*



*Hannah Stokes*

**Karl Baldwin, et al v. City of Gulf Shores** – On September 24, 2021, Galloway Wettermark & Rutens, LLP Mobile attorneys **Andy Rutens** and **Melissa Hunter** obtained a defense verdict following a jury trial in the Circuit Court of Baldwin County. The Plaintiffs alleged that changes made to the City's drainage system in 2012 redirected storm water toward their properties, which caused the properties to flood in April of 2014. Plaintiffs sought damages for the before and after value of their properties, damage to the contents of their homes, and mental anguish. It was the City's position that it was the magnitude of the storm event, rather than the changes made to the drainage system, which caused the flooding and that the City could not have foreseen or guarded against the flood event. After deliberating, the jury ruled in favor of the City.



*Andy Rutens*



*Melissa Hunter*

Huie attorneys **John Isaac Southerland** and **Woods Parker** successfully obtained a verdict for \$100,000 plus reasonable attorney fees and costs on behalf of their client, Ford Motor Credit Company LLC, for breach of promissory note and guaranty by a former dealership principal in a commercial litigation matter. In 2009, a former Mazda dealership in Trussville, Alabama, ceased doing business, and its principal defaulted on loans made by Ford Motor Credit. The loan balance due was secured by a promissory note and personal guaranty executed by the dealer principal. The commercial matter was tried over two days before a jury in Madison County Alabama Circuit Court. The jury deliberated for approximately two and a half hours before



*John Isaac Southerland*

returning a verdict in favor of Ford Motor Credit Company finding that the dealer principal was individually liable for breach of the underlying contractual agreements. Mr. Southerland and Mr. Parker were counsel at trial and were assisted in the case by Craig Leslie and Jacob Sonner of Phillips, Lytle LLP from Rochester, New York.



*Woods Parker*

Huie attorneys **Madison Morrison, Paul Malek, and John Isaac Southerland** successfully represented their client, a disabled military veteran, in obtaining the reversal and remand of a divorce decree that improperly considered their client's military disability income as disposable retired pay in an alimony award. Huie represented the client pro bono through Cumberland School of Law's Veterans Legal Assistance Clinic. As a firm founded by three military veterans, Huie is very pleased to have provided its services to this veteran.



*Madison Morrison*



*Paul Malek*

Huie attorneys **Gordon Sproule, Jennifer Egbe, and Alex Underwood** successfully defended a long-term care facility in a medical malpractice case that was arbitrated in June of 2021.

The wrongful death action was brought by the estate of a nursing home resident who claimed that the nursing home failed to properly inspect, assess, diagnose, and treat the resident's decubiti ulcers, which were present prior to the resident's admission to the nursing home.

During the three-day arbitration, defense counsel proved that the resident had multiple pervasive and chronic conditions upon admission to the nursing home and, as a result, the development and progression of the wounds was clinically unavoidable. Defense counsel further proved that the facility provided proper wound care and treatment. Thus, the Arbitrator returned a final award in favor of the Defendant long-term care facility on August 23, 2021.



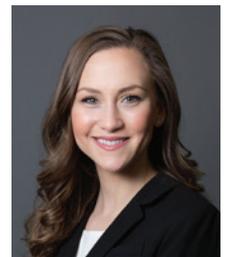
*Gordon Sproule*



*Jennifer Egbe*

Huie attorneys **Gordon Sproule, Jennifer Egbe, and Alex Underwood** secured a defense verdict for a long-term care facility in a medical malpractice case on September 10, 2021. The case was tried before an arbitrator in July of 2021.

The wrongful death action was brought by the



*Alex Underwood*

family of a nursing home resident who died following a choking event in the nursing home. Plaintiff claimed the choking event occurred because the Defendant failed to adequately evaluate the resident's swallowing ability, failed to provide supervision while the resident was eating, and failed to provide proper emergency intervention. However, during the three-day arbitration, defense counsel proved that the decedent's choking and subsequent death were not caused by a breach in the standard of care. Therefore, the Arbitrator determined that Plaintiff's claims were unsubstantiated and returned a verdict for the Defendant.

Huie partner **Bart Cannon** recently received a defense verdict in favor of Ford Motor Company following a trial involving allegations related to a F-250 Super Duty pickup truck. The plaintiff testified at trial that he was driving the truck through an intersection when the truck's engine suddenly stopped and would not crank. Plaintiff alleged that he had the truck towed to an independently owned Ford dealership within the warranty period requesting that the engine be replaced, but that Ford wrongfully refused to make the repairs at no cost to him. Plaintiff sued Ford alleging the truck's engine was "defective" and that Ford further breached express and implied warranties related to the truck. Plaintiff sought to recover from Ford the cost of the repairs, other incidental and consequential damages, mental anguish, attorneys' fees and costs.

Ford defended the warranty case by proving that the truck was not "defective," that it did not breach any warranties relative to the truck, and otherwise breached no duty owed to the plaintiff. Specifically, through cross examination of the plaintiff's witnesses and through expert testimony in own case in chief, Ford was able to prove that the damage to the engine that caused the failure was a direct result of the plaintiff introducing contaminated fuel into the truck's fuel system. The Court entered a



*Bart Cannon*

judgment in favor of Ford, and the plaintiff did not appeal.

Stockham, Cooper & Potts attorney **James A. Potts, II** recently obtained a defense verdict for his client, Mart's Trucking, LLC at a jury trial in the Circuit Court of Autauga County, Alabama. The case arose from a motor vehicle accident in which the plaintiff was involved in an accident with an escort vehicle that was assisting Mart's Trucking, LLC in transporting a mobile home. The attorneys for Mart's Trucking, LLC argued that the escort driver was an independent contractor and therefore, Mart's Trucking, LLC could not be held liable for the escort driver's conduct. Although the plaintiff obtained a verdict against the escort driver, the jury found that the escort driver was an independent contractor. The Court entered a consistent judgment in favor of Mart's Trucking, LLC on all claims.



*James A. Potts, II*

Webster Henry lawyer **Kim DeShazo** tried a wrongful death case for Adams Beverages to a unanimous defense verdict on August 27, 2021 in the Circuit Court of Marengo County. The case arose out of a three car accident in which the Plaintiff's decedent was killed. Plaintiff brought suit against the tortfeasor and Adams Beverages and sought recovery of \$10 million.



*Kim DeShazo*

**Submit your Wins for the Defense and Among the Members News to [adla@adla.org](mailto:adla@adla.org) by July 31, 2022 to be included in the Fall Journal**

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Bradley Arant Boult Cummings LLP is pleased to make the following announcements:

- Birmingham partner **Gary L. Howard** received the Defense Research Institute's (DRI) Albert H. Parnell Outstanding Program Chair Award at the organization's annual meeting in October. The DRI's Albert H. Parnell Outstanding Program Chair Award is an annual award honoring an individual who has created a dynamic educational program which has enhanced the DRI's image.
- Montgomery partner **Charles A. 'Chuck' Stewart** has been inducted as a Fellow of the American College of Trial Lawyers. The induction ceremony was held at the Annual Meeting of the College in Chicago.

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Christian & Small, is pleased to announce that **Neal D. Moore** joined the firm as partner and **Kendall L. Fann** joined the firm as an associate.

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Gaines Gault Hendrix is pleased to make the following announcements:

- The law firm is pleased to announce the association of Wilson Law, P.C. and to welcome **David M. Wilson** as a Partner in the firm.
- **Devona J. Segrest** has joined the firm as Of Counsel.
- **Amanda Graham** made partner after six years of practice.

---

Gordon Rees Scully Mansukhani, LLP is pleased to announce that **Stacy L. Moon** has been promoted to partner in the Birmingham office. Stacy is a member of the Commercial Litigation practice group, as well as Employment Law, Construction Law, Government Regulatory & Administrative Law, Professional Liability and Cannabis, Hemp & CBD practice groups.

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Holtsford Gilliland Higgins Hitson & Howard, PC is pleased to announce that **Alex L. Holtsford, III** and **Jason R. Herbert** are now partners practicing in the firm's Central Alabama Office, and that **Robert C. Alexander, II** and **Aaron M. Wiley** are now partners practicing in the Gulf Coast Office.

The firm is also pleased to announce that **Mark D. Toppen** is an associate in the Central Alabama Office, and that **Leigh Margaret Bostic, S. Grey Alidor, Frederick "Will" Killion, IV,** and **Russell D. Johnson** are associates in the Gulf Coast Office.

---

Huie Fernambucq & Stewart LLP is pleased to make the following announcements:

- **Woods Parker** is among the 2021 Rising Stars of Law featured in the *Birmingham Business Journal*. The BBJ NextGen: Law Awards is a

special feature that highlights up-and-coming lawyers in the Birmingham metro area. Honorees were chosen based on their contributions to their firms and their potential to shape the industry, and the Magic City's legal world, moving forward.

- Mayor Randall L. Woodfin appointed firm partner **Jennifer Egbe** to the Birmingham Airport Authority Board of Directors. Egbe's appointment is immediate. She will complete the term of previous board member Robert Earl Kelly. The six-year term began July 29, 2020 and expires July 29, 2026.

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Lightfoot Franklin & White LLC is pleased to make the following announcements:

- Firm partner **Lana A. Olson** has assumed the role of president-elect of DRI, the leading organization of defense attorneys and in-house counsel. She was confirmed at DRI's annual meeting in Boston in October. With more than 16,000 members, DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. Olson will become president of the organization in October 2022 and will be its fifth female president and the first female president from Alabama.
- The firm welcomes two new lawyers to the firm's Birmingham office. **Henry "Ben" Brown III** and **Mary "Elizabeth" Harrison** are first-year associates.
- *Super Lawyers* recognizes outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The patented selection process includes independent research, peer nominations and peer evaluations to select lawyers across all 50 states and Washington, D.C.

Lightfoot attorneys selected as 2021 Mid-South Super Lawyers:

- **Chandler Bailey** (Personal Injury - Products: Defense)
- **Mike Bell** (Business Litigation)
- **Melody Eagan** (Personal Injury - Products: Defense)
- **Brandon Essig** (Criminal Defense: White Collar)
- **Wes Gilchrist** (Business Litigation)
- **Lee Hollis** (Personal Injury General: Defense)
- **Sandy Hooper** (Personal Injury - Products: Defense)
- **Johnny Johnson** (Environmental Litigation)
- **Christian King** (Business Litigation)
- **Lana Olson** (Environmental Litigation)
- **Adam Peck** (Personal Injury - Products: Defense)
- **Harlan Prater** (Personal Injury - Products: Defense)
- **David Pruet** (Business Litigation)
- **Banks Sewell** (Personal Injury - Products: Defense)

- **Jack Sharman** (Criminal Defense: White Collar)

Lightfoot attorneys selected as 2021 Mid-South Rising Stars:

- **Reid Carpenter** (Civil Litigation: Defense)
- **Haley Cox** (Civil Litigation: Defense)
- **James Gibson** (Personal Injury - Products: Defense)
- **Charlie Hearn** (Civil Litigation: Defense)
- **Brian Kappel** (Environmental Litigation)
- **Jonathan Little** (Civil Litigation: Defense)
- **Jay Sewell** (Civil Litigation: Defense)
- **Clint Speegle** (Aviation & Aerospace)
- **Amie Vague** (Personal Injury - Products: Defense)
- **Christopher Yearout** (Personal Injury - Products: Defense)

- The firm elected attorney **Clinton T. Speegle** to the firm's partnership, effective January 1. He first joined Lightfoot as an associate in 2013.

Miller Christie & Kinney PC is pleased to announce that **Stephanie A. Marrero** has joined the firm as an Associate.

Lawyers from Phelps Dunbar, LLP's Alabama offices made the 2021 Mid-South Super Lawyers and Rising Stars lists. Those chosen ranked in the top 5% of nominated lawyers in Alabama, Arkansas, Mississippi and Tennessee. Super Lawyers ranks attorneys by weighing them on 12 different factors. Their peers also vote for them based on their professional achievements.

The following lawyers were chosen for the 2021 Mid-South Super Lawyers list:

*Birmingham, Ala.*

- **Crawford S. McGivaren Jr.** – Business Litigation

- **Michael E. Turner** – Employment Litigation: Defense

*Mobile, Ala.*

- **Joseph J. "Jay" Minus Jr.** – Employment & Labor
- **William E. Shreve Jr.** – Appellate

The following lawyers were picked for the 2021 Mid-South Rising Stars list: *Birmingham, Ala.*

- **Jason W. Bobo** – General Litigation

*Mobile, Ala.*

- **Breanne Stanley Zorzour** – Civil Litigation: Defense

To qualify for the Mid-South Rising Stars honor, lawyers go through the same selection process as Super Lawyers. They must also have 10 years or less in practice or be 40 years old or younger.

Starnes Davis Florie LLP welcomes attorney **Kirby Howard** to the firm's Mobile office. Kirby is a partner with the firm and has been practicing law for over 15 years in Mobile, Alabama. His practice is devoted to civil litigation, including premises liability, products liability, wrongful death, and construction defect cases. Kirby has experience with state-agent immunity and qualified immunity issues through representation of counties, municipalities, and state agents such as educators. He has tried several cases including, jury and bench trials. In addition, Kirby has participated in an oral argument before the Alabama Supreme Court.

Weinberg Wheeler Hudgins Gunn & Dial is pleased to announce the addition of **William C. "Will" Hoffman, Jr.** to the firm's Birmingham office. Will's practice primarily concentrates on commercial litigation, products liability, construction law, and labor and employment matters.

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# LAW SCHOOL STUDENT LUNCH & LEARN

FAULKNER LAW THOMAS GOODE JONES SCHOOL OF LAW | MONTGOMERY

**A**DLA YLS board members **Jordan Jenkins** of Hill Hill Carter Franco Cole & Black, PC and **Chalankis Brown** of Ball Ball Matthews & Novak, PA recently met with 35 Thomas Goode Jones School of Law students during a lunch time hour to talk about what it means to be a defense lawyer. Jordan and Chalankis answered questions about their daily routine as a civil defense lawyer, lessons they learned after law school, and how they ultimately decided to practice civil defense litigation. Learning how to keep track of billing, best practice tips on working with clients and other lawyers, the importance in keeping clients up to date, and other financial tips were discussed. Professionalism and having a good working relationship with other attorneys were also hot topics.

**Melvin Dixon**, 2L law student, was recently elected President of the Jones School of Law student organization. Melvin has been instrumental in boosting law school student membership and is actively planning student socials and other joint events co-sponsored by ADLA. Melvin organized an ADLA student membership drive in late February. Other members of the 2022 Executive Committee includes student members **Justus Armstrong**, **William Raybon** and **Arjen Meter**. Additionally, Justice **John Browning** was appointed as faculty advisor and serves on the Executive Committee. He was a Texas Appellate Court Justice and is currently a partner at Spencer Fane in Texas with over 30 years of civil defense litigation experience under his belt.



*Jordan Jenkins, Melvin Dixon, and Chalankis Brown*



*Justice John Browning, Melvin Dixon-President, Jordan Jenkins, Chalankis Brown, Justus Armstrong- Secretary, and Arjen Meter- Vice President*



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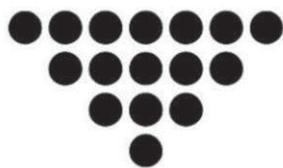
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**CRAIG ALEXANDER**  
Chair

**G**reetings from the ADLA *Amicus Curiae* Committee.

Since the committee's last report in the Fall 2021 issue of the ADLA Journal, the Eleventh Circuit Court of Appeals has granted ADLA's motion for leave to file an amicus brief in *Nelson v. Health Services, Inc.*, Case No. 21-11319-H. This issue in this appeal is whether the District Court Judge erred in relying on the "manager rule" to grant summary judgment on a Title VII retaliation claim brought by a Human Resources Director who investigated and reported "up the ladder" another employee's sexual harassment claim. ADLA's amicus brief, authored by ADLA member Marc Ayers, advocates that the "manager rule" constitutes a sound approach that is consistent with Title VII's text and its purpose, has the benefit of being straight-forward and easy to understand and follow, and consequently that the court should not reverse the district court's order adhering to that rule. This appeal is pending as of the date of the preparation of this report.

Also, a revision to ADLA's policy and procedures was considered and approved by the ADLA Board during its Fall 2021 meeting, specifically with respect to requests for an ADLA amicus brief in support of an application for rehearing.

The current policies and procedures for submitting a request for an ADLA amicus brief are set forth in full below, but please feel free to contact committee chair Craig Alexander if you have any questions about the process of submitting a request for an amicus brief. We continue to look forward to the opportunity for the Association to "weigh in" when an appeal involves significantly important issues to the defense bar or to the fair administration of justice. Also, please remember that as part of a renewed and invigorated effort of the leadership of the ADLA to serve its members, recent *amicus curiae* briefs have been made available for download on the ADLA's website. 



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ADLA@ADLA.ORG FOR WEBSITE ASSISTANCE.**

## I. STATEMENT OF ADLA'S GENERAL POLICY

It is the policy of the Alabama Defense Lawyers Association that it should authorize the filing of *amicus curiae* briefs sparingly and only in appropriate cases. In deciding whether a specific case is appropriate, these primary factors will be considered:

- (1) Whether an *amicus curiae* brief is reasonably likely to make a significant contribution to the determination of the issue(s) to be addressed;
- (2) Whether the issue(s) will be of particular significance to the interests of the defense trial bar or of particular significance to the fair administration of justice;
- (3) Whether the case is on appeal before the highest appellate court where the issue is likely to be determined; and
- (4) Whether the determinative issue(s) in the case will be legal, instead of factual.

With respect to requests for an ADLA amicus brief in support of an application for rehearing, these additional factors will be considered:

(a) whether the application for rehearing is directed to a “no-opinion” affirmance, (b) if not, whether the record clearly shows that the court overlooked or misapprehended a necessary issue that the requesting party adequately preserved and addressed in its principal brief, and (c) whether a compelling argument can be made that as a result, the court reached an incorrect conclusion on the merits of the appeal.

The ADLA ordinarily will not join in *amicus curiae* briefs with other organizations except local defense associations. Authorized *amicus curiae* briefs generally should be filed only in ADLA's name.

## II. SUBMISSION OF REQUESTS FOR *AMICUS CURIAE* BRIEFS

A request by an ADLA member for an *amicus curiae* brief should be submitted to the Chair of the *Amicus Curiae* Committee as soon as reasonably possible. The request must be submitted by letter or electronic mail. The following information and documents should be furnished with the request:

- (1) The name of the case and the identification of the appellate court where the case is pending;
- (2) The order from which the appeal has been taken;
- (3) A summary of the relevant facts and the procedural history of the case;
- (4) A statement of all the issues of law that are expected to be raised in the appeal, specifically identifying each issue for which ADLA involvement is requested;
- (5) The date by which an *amicus curiae* brief would be due to be filed;
- (6) The consent of the attorney of record for the party in support of whom ADLA involvement is being sought, and
- (7) A full disclosure of any personal or professional interest in the matter on the part of the ADLA's member and the member's law firm.

## III. PROCESSING OF REQUESTS FOR *AMICUS CURIAE* BRIEFS

The Chair of the *Amicus Curiae* Committee should promptly notify the ADLA President and the Chair of the ADLA Legislative Committee of the receipt of any request for an *amicus curiae* brief, which notification should

include a summary of the issue(s) presented in the appeal. Any comments about the request by the President and the Chair of the Legislative Committee will be given to the Chair of the *Amicus Curiae* Committee, to be shared by the Chair with the members of the committee.

Once the *Amicus Curiae* Committee has considered and has voted on the request, the committee chair will notify the ADLA President of the result of the vote and will provide a summary of the committee's analysis of the request.

The ADLA President has the authority to overrule a vote by the *Amicus Curiae* Committee in favor of filing an *amicus curiae* brief. The ADLA President does not have the authority to overrule a decision by the committee to decline a request for an *amicus curiae* brief.

## IV. REQUESTS FOR *AMICUS CURIAE* BRIEFS IN CASES IN WHICH AN ADLA MEMBER IS COUNSEL FOR AN ADVERSE PARTY

Whenever a request is made for an *amicus curiae* brief by the ADLA in a case in which an ADLA member is counsel for an adverse party:

- (1) The request will be considered solely on the basis of the issue presented, and membership in ADLA by a lawyer whose client's interests are adverse will not be considered by the *Amicus Curiae* Committee in determining whether an *amicus curiae* brief should be submitted;
- (2) The request submitted to the *Amicus Curiae* Committee (including all attachments) the specifics of the Committee's deliberation process, the votes of the individual Committee members, and the name of the ADLA member who will prepare the brief shall be confidential (with the understanding that the name of the attorney writing the brief will be disclosed when the brief is filed); and
- (3) The *Amicus Curiae* Committee will not solicit and will not accept any comment or other input from any such ADLA member as part of its deliberation on the request for an *amicus curiae* brief.

## V. APPEARANCES

Every ADLA *amicus curiae* brief, and every other court filing in an appeal in which ADLA is participating as an *amicus curiae*, shall identify as counsel for ADLA the author of the brief, the President of ADLA, and the Chair of the *Amicus Curiae* Committee.

## VI. FEES AND COSTS

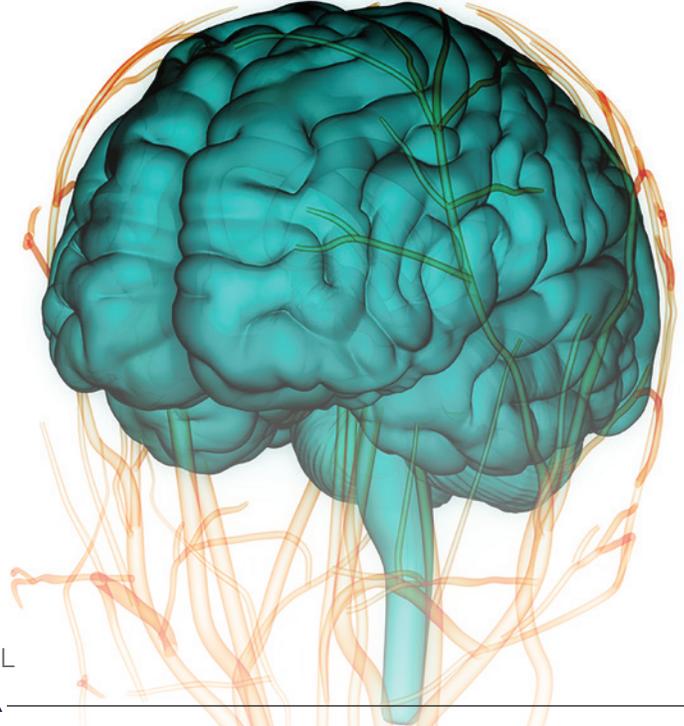
On approval of the Chair of the *Amicus Curiae* Committee, ADLA will pay a fee of up to \$3,000 for the preparation of an *amicus curiae* brief. ADLA also will reimburse reasonable copying and binding costs associated with the brief.

No ADLA member who prepares an *amicus curiae* brief may accept any fee or other payment from any party for the preparation of the brief. ADLA will not accept payment from any source to reimburse the expenses associated with participating in the appeal as an *amicus curiae*.

***Adopted unanimously by the Board of Directors September 2021.***

# DEFENDING TRAUMATIC BRAIN INJURY CLAIMS

By: **M. Jansen Voss**, Christian & Small, LLP. | Birmingham, AL



**T**raumatic brain injury (TBI) cases are complex in nature. Developing and executing a defense strategy for TBI cases requires a team knowledgeable in law and medicine. With thorough preparation and well-planned discovery, TBI cases can be evaluated quickly for trial or settlement.

## What is Traumatic Brain Injury?

There are at least eleven definitions of the term “Traumatic Brain Injury”.<sup>1</sup> However, a TBI is generally defined as a sudden brain injury caused by a blow to the head, a penetrating head injury, blast-induced injury, or when the brain is shaken within the skull.<sup>2</sup>

## How Does a TBI affect the brain?

TBIs can cause bleeding on the brain, injuries to nerve fibers, inflammation, and swelling. The following are common injuries associated with TBIs:

- *Diffuse axonal injury (DAI)*. A DAI is one of the most common injuries associated with TBIs and refers to damage to white matter in the brain. A DAI usually results from twisting of the brain or sudden stopping of the brain occurring during automobile accidents and falls. Brain damage from a DAI can be temporary or permanent.<sup>3</sup>
- *Concussion*. Concussions are generally mild TBIs. Concussions can be caused by blows to the head, automobile accidents, falls, as well as other rapid movement of the brain within the skull. A person may lose consciousness or may experience an altered state of consciousness.<sup>4</sup>
- *Hematomas*. Hematomas describe bleeding in or around the brain from a ruptured blood vessel. Hematomas can occur in the area

between the skull and the dura mater (*epidural hematoma*). Bleeding can occur between dura and the arachnoid mater (*subdural hematoma*). Both epidural and subdural hematomas put pressure on the outside of the brain. Bleeding between the arachnoid mater and the pia mater is a *subarachnoid hemorrhage*. Finally, bleeding into the brain itself is an *intracerebral hematoma*.<sup>5</sup>

- *Contusions*. Contusions describe bruising or swelling of the brain when small blood vessels bleed into the brain. Contusions can occur at the impact site. The injury can also occur on the side of the brain opposite of the impact. For example, when the skull is struck on the left side, this may cause the right side of the brain to slam into the right side of the skull.<sup>6</sup>
- *Fractures*. Fractures are breaks or cracks in the skull.<sup>7</sup>
- *Psychiatric Disorders after TBI*. Research suggests the onset of depression, mania, obsessive-compulsive disorder, PTSD, personality changes, aggression are associated with TBIs.<sup>8</sup>

## Diagnosing a TBI

There are at least ten separate criteria for diagnosing TBIs.<sup>9</sup> Symptoms commonly associated with TBIs include:

- Vomiting or headache
- Lethargy or confusion
- Paralysis, coma, or loss of consciousness
- Dilated pupils or vision changes
- Cerebrospinal fluid (CSF) appearing from the ears or nose
- Droopy eyelid or facial weakness

1 See Table B-1 in *National Academies of Sciences, Engineering, and Medicine, Health and Medicine Division, Board on Health Care Services, Committee on the Review of the Department of Veterans Affairs Examinations for Traumatic Brain Injury, Evaluation of the Disability Determination Process for Traumatic Brain Injury in Veterans*. Washington (DC): National Academies Press (US); 2019 Apr 10.

2 *Id.*; *Diagnosis and Assessment of Traumatic Brain Injury – Evaluation of the Disability Determination Process for Traumatic Brain Injury in Veterans*, <https://www.ncbi.nlm.nih.gov/books/NBK542595/>.

3 <https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Hope-Through-Research>.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2536546/>.

9 See Table B-2 in *National Academies of Sciences, Engineering, and Medicine; Health and Medicine Division; Board on Health Care Services; Committee on the Review of the Department of Veterans Affairs Examinations for Traumatic Brain Injury, Evaluation of the Disability Determination Process for Traumatic Brain Injury in Veterans*. Washington (DC): National Academies Press (US); 2019 Apr 10.

- Loss of bowel control or bladder control
- Difficulty swallowing
- Ringing in the ears, or changes in hearing and balance
- Breathing problems, or slow breathing rate with an increase in blood pressure
- Slow pulse
- Cognitive difficulties, and inappropriate emotional responses
- Speech difficulties
- Body numbness or tingling<sup>10</sup>

## The Glasgow Coma Scale (GCS).

The GCS is a widely recognized initial tool for assessing TBIs in trauma patients.<sup>11</sup> The GCS classifies TBIs as mild, moderate, or severe. The GCS was developed in 1974 by Graham Teasdale and Bryan Jennett to assess the level of consciousness of a TBI patient.<sup>12</sup> The GCS assesses a TBI patient's eye response, verbal response, and body movement response.

SCALE VALUE	MOTOR RESPONSE	VERBAL RESPONSE	EYE OPENING RESPONSE
6	Obeys commands	-	-
5	Localizes stimulus	Oriented	-
4	Withdraws from stimulus	Conversant, but confused	Eyes open spontaneously
3	Flexes arm	States recognizable words or phrases	Eyes open to voice
2	Extends arm	Makes unintelligible sounds	Eyes open to painful stimulus
1	No response	No response	Remain closed

A GCS of 13 to 15 is a mild TBI and is associated with brief loss of consciousness and normal brain imaging results. A GCS of 9 to 12 is a moderate TBI and is associated with loss of consciousness for 1 to 24 hours and abnormal brain imaging results. A GCS score of 3 to 8 is a severe TBI with loss of consciousness for more than 24 hours and abnormal brain imaging results.<sup>13</sup>

## Neuroimaging

Neuroimaging is an important tool for identifying patients with TBIs. Rapid utilization of neuroimaging helps distinguish patients who need emergency neurosurgical intervention from those patients who require only moni-

toring.<sup>14</sup> CT or CAT scan is the standard for radiological assessment of a patient with a suspected TBI. A CT scan can detect blood in and around the brain and fractures. Conventional x-rays may also be helpful in evaluating

patients with mild neurological issues. MRIs are not commonly used for initial assessment of TBIs because it takes longer to perform an MRI than a CT. However, after a patient is stabilized, an MRI may help identify brain lesions undetected by CT scans.<sup>15</sup>

## Blood test

The Banyan Brain Trauma Indicator (BTI) is a blood test focusing on blood proteins that indicate concussion or mild TBI.<sup>16</sup>

## Neuropsychological examination

A neuropsychological examination involves performing cognitive tasks that help assess memory, concentration, information processing, executive functioning, reaction times, and problem solving.<sup>17</sup> Many neuropsychological tests are highly subjective and susceptible to manipulation by both the patient and the test administrator. Factors affecting neuropsychological test results include: test selection, conditions under which the test was administered, the plaintiff's use of medication, the establishment of the plaintiff's baseline, selection of normative data used to compare the plaintiff's test data, and the neuropsychologist's method of interpretation of raw test data. Nevertheless, neuropsychological testing is routinely used to assess scope and extent of TBIs.

## Discovery Plan: Defending TBI Claims

Developing a discovery plan is an important part of the overall strategic plan for any case, including TBI cases. With the help of experts, a defense strategy should focus on the plaintiff's pre-incident condition and post-incident condition.

## Pre-incident condition

Obtain the plaintiff's pre-incident medical/mental health records. Review the plaintiff's criminal background. Obtain the plaintiff's pre-incident education and employment records. Identify witnesses familiar with the plaintiff's pre-incident personality, habits, and function. Consider the following when analyzing the plaintiff's pre-incident condition:

- Was the plaintiff exposed to social stressors like divorce, employment termination, etc. prior to the incident?
- Did the plaintiff have alcohol or substance abuse issues?
- Did the plaintiff have poor pre-incident educational performance?

14 <https://www.ncbi.nlm.nih.gov/books/NBK542595/>.

15 American Association of Neurological Surgeons <https://www.aans.org/Patients/Neurosurgical-Conditions-and-Treatments/Traumatic-Brain-Injury>.

16 <https://my.clevelandclinic.org/health/diseases/8874-traumatic-brain-injury>.

17 <https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Hope-Through-Research/Traumatic-Brain-Injury-Hope-Through>; Lezak M, Howieson D, Loring D. Neuropsychological Assessment. 4th ed. New York: Oxford University Press; 2004.

10 American Association of Neurological Surgeons <https://www.aans.org/Patients/Neurosurgical-Conditions-and-Treatments/Traumatic-Brain-Injury>.

11 [https://www.ncbi.nlm.nih.gov/books/NBK542590/#sec\\_000095](https://www.ncbi.nlm.nih.gov/books/NBK542590/#sec_000095).

12 <https://www.glasgowcomascale.org/what-is-gcs/>.

13 *Id.*

- Did the plaintiff have a poor pre-incident employment history?
- Did the plaintiff have prior head/neck injuries, including workers compensation claims, disability claims, automobile accidents, or sports injuries?
- Did the plaintiff have prior mental health issues or learning disabilities?
- What was the plaintiff's pre-incident social media behavior?

*Many neuropsychological tests are highly subjective and susceptible to manipulation by both the patient and the test administrator.*

## Post-incident condition

Obtain the plaintiff's medical records following the incident paying particular attention to Glasgow Coma Scores, MRIs, CT scans, neuropsychological testing, and medication. Obtain post-incident education and employment records. Obtain post-incident social media posts as well as the plaintiff's post-incident criminal records and traffic violations. Surveillance of the plaintiff's daily activities may be helpful. An independent medical examination of the plaintiff may be helpful, but do so with extreme caution since you'll likely be stuck with the results. Consider the following when analyzing the plaintiff's post-incident condition:

- What was the scope and extent of the plaintiff's physical injuries?
- Did the plaintiff lose consciousness? How long?
- Did the plaintiff report TBI symptoms at or near the time of the incident, or days or weeks later?
- What was the plaintiff's GCS? When was the score obtained?
- Identify all neurological testing performed, when it was performed, and obtain raw data from the tests.
- Are the plaintiff's complaints consistent with the areas of the brain injury?
- Does the plaintiff's reporting of symptoms change, evolve, or conflict?
- Since concussion symptoms are non-specific, did the treating physician rule out other possible causes through differential diagnosis?
- Do any treating physicians suspect malingering or secondary gain issues?<sup>18</sup>
- Compare the plaintiff's pre-incident and post-incident medical and mental health, social media behavior, educational performance, employment history, social stressors, and personality. Are there any significant negative changes from pre-incident to post-incident? Could the plaintiff's current condition be explained by other events or stressors unrelated to the subject incident?

<sup>18</sup> Secondary gain are the advantages a patient derives from their medical condition (or claim). By way of example, secondary gain could occur when the plaintiff files a lawsuit arising from the TBI and is incentivized to remain injured.

## Engage Experts

Engage experts at the earliest opportunity. Consider using one or more of the following experts in a TBI case:

- Neurologists and neurosurgeons can diagnose TBIs and may offer opinions concerning the nature of the injury.
- Neuroradiologists evaluate diagnostic scans and render findings based on the scans.
- Neuropsychologists conduct psychological testing to determine whether the alleged TBI caused cognitive impairment.
- If the plaintiff is claiming mental or emotional issues following the incident, you may consider involving a psychologist or psychiatrist.
- A biomechanics expert may be able to determine the amount of force imparted to the skull from a particular incident.
- Lifecare planners should be engaged with caution by defense counsel, and typically used only to rebut a plaintiff's life care plan.

*With the help of experts, a defense strategy should focus on the plaintiff's pre-incident condition and post-incident condition.*

## Conclusion

TBI cases are complex. Although the diagnosis of TBIs involve subjective reports from plaintiffs and subjective testing, these injuries cannot be taken lightly. Such injuries can significantly and permanently impact a plaintiff's quality of life and may require expensive future medical care. So, defending these claims requires experienced defense counsel, a well-thought-out discovery plan, and a multi-disciplinary expert strategy.



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