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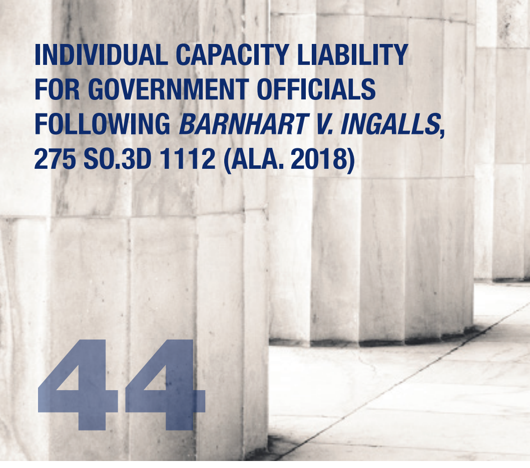

GERALD C. SWANN, JR.
President

As I begin to serve as your president, I am both honored and humbled. It is incredibly gratifying to hold this position as a result of the trust and confidence of my peers. I would be remiss not to acknowledge the exemplary leadership and dedication of our two most recent presidents, **Christina Bolin** and **Andy Rutens**, along with **Jennifer Hayes**, our executive director. Over the past two years, our association has faced many unexpected challenges, to which Christina, Andy, and Jennifer managed with resiliency and flexibility. Through their efforts, our association did not simply survive, but prospered and offered more membership benefits and services. While I certainly hope I am not faced with anything close to what they had to navigate, I am confident in the changes and modifications that have been implemented, and for which I can rely.

Congratulations to **Jennifer Hayes**, Executive Director, **Gaby Reeves**, Journal Editor, and the entire editorial board. The Spring Journal publication received the 2021 APEX Award for publication excellence in magazines, journals, and tabloids print over the 32 pages. The APEX Awards are an annual competition for corporate and nonprofit publishers, editors, writers, and designers. Nearly 1,200 entries were considered for recognition this past year. This is the first time the Journal has received the award.

Although ADLA was formed in 1965, it was not incorporated until 1982. In Article III of the Bylaws, the first two stated purposes of ADLA are:

1. To bring together by association, communication, and organization lawyers of Alabama who devote a substantial amount of their professional time to the handling of litigating cases and whose representation in such cases primarily for the defense.

2. To provide for the exchange among the members of this association of such information, ideas, techniques of procedure, and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers.

The stated purpose of ADLA is to serve its members. In order for ADLA to fulfill its purpose, it requires the engagement and involvement of its entire membership. In addition to taking advantage of the services ADLA offers, this includes participating in ADLA's various programs, serving on committees, and contributing to publications. I encourage you to take on the challenge of seeking opportunities to volunteer and serve, while also accepting any requests to serve.

FOCUS ON MENTORING

Proverbs 5:26:6 reads, "Train a child up in the way he should go and he will not depart from it." This instruction is certainly good advice for parenting. By the same token, it is also applicable to the training and nurturing of young lawyers so as they mature, they will have the skills, knowledge, and temperament to be successful. When training young lawyers, it is imperative to exercise creativity and availability, encourage mentorship beyond individual firms, and to revitalize ADLA's role in mentorship.

As I began practicing law in the summer of 1986, I was immediately introduced to a unique process of mentoring and training by veteran lawyers. A notorious research project assigned by John Matthews comes to mind. Initially this in depth project seemed nonsensical and irrelevant to the case I was working on. I would later discover his complex assignment acted as preparation to better handle issues that might arise in the future. Tabor Novak allowed me to participate in the preparation for an upcoming trial, only to learn that the testimony would be unnecessary. On a regular basis, Richard Ball came to my office to go over the cases he assigned me, offering his insight to additional work that needed to be done. Winston Sheehan consistently reviewed numerous drafts and rewrites of pleadings, motions, and discovery responses to ensure the writings were refined and concise. Each of these lawyers were innovative in their teaching and took time from their own practice to not only listen to questions, but to provide guidance and perspective on how one should be a lawyer. The advice was instructional and positive. Consequently, there was also constructive correction to show how mistakes and errors should be avoided. At times the instruction and correction could be somewhat hard to take. However, the sole purpose of the interaction, correction, and instruction was to assist my growth as a lawyer. The goal and intent was to prepare me to properly and effectively represent my clients.

A discussion with a fellow lawyer and friend left with me a lasting impression and realization; we must do a better job of implementing a mentorship plan (program/or procedure) that resembles the one we were the beneficiaries of.

A discussion with a fellow lawyer and friend left with me a lasting impression and realization; we must do a better job of implementing a mentorship plan (program/or procedure) that resembles the one we were the beneficiaries of. As I have interacted with lawyers of my generation, we frequently share stories of the attorneys who shaped, molded, and taught us the meaning of being a litigator. Now it is our turn, myself included, to continue the tradition of mentoring, and to meet and exceed the standards which we were fortunate enough to enjoy. When assigning an associate a project, take the time to review any unsatisfactory work. The easiest way to fix an incomplete and lacking work

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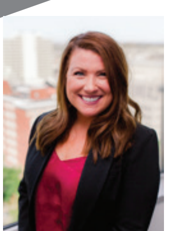

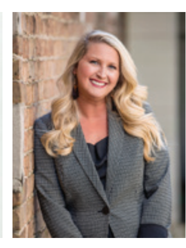

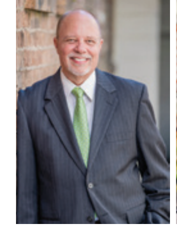

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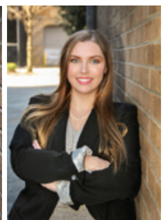
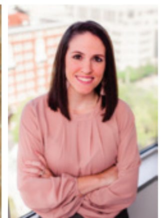

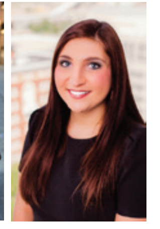

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product is to do the work ourselves, but there is no training or learning in that scenario. In order to successfully mentor young lawyers, utilize the same constructive instruction we once received. In guiding and training associates it is necessary to engage in conversations about deficiencies in work product, and to use our experiences and knowledge in sharing recommendations on how to approach similar assignments in the future.

In coordination with an established training program within individual firms, it is advantageous for young lawyers to learn and interact with seasoned lawyers belonging to other firms. Shortly after I began my practice at Ball, Ball, an application for membership to ADLA was placed on my desk. Although I had opportunities to work with two seasoned lawyers in Montgomery, Bob Bradford and Charlie Stakely, an ADLA Membership created the opportunity for my legal education and training to extend throughout the State of Alabama. With that membership, a door with access to vast resources and opportunities was opened.

While individual firms are the primary source of mentoring younger lawyers, the Alabama Defense Lawyers Association has always, and continues to play a vital role in that process.

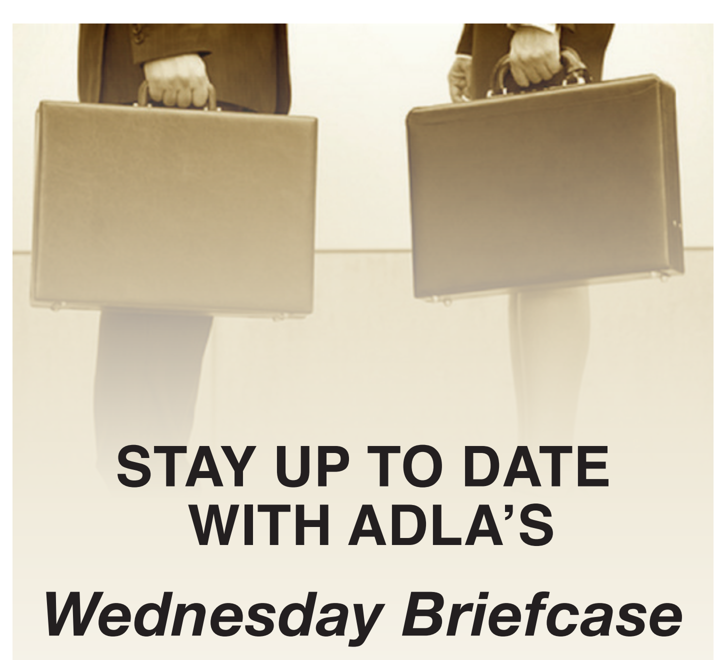
The first annual meeting I attended was in the Fall of 1987 at the Wynfrey Hotel in Birmingham. The speakers and attendees were a who's who of Alabama Defense Lawyers. The meeting provided me the ability to interact with Bibb Allen, Sam Franklin, and Walter Cook from Birmingham and Mobile. However, the interactions were not limited to the large defense firms but extended to those in rural areas. Membership in ADLA afforded me the opportunity to connect and gain instruction from numerous lawyers like: Curtis Wright from Gadsden, Bill Lee from Dothan, and Clark Summerford from Tuscaloosa to name just three. In thinking about the process of how to best advise young lawyers, highlighting the importance of ADLA should be an integral part of our approach.

While individual firms are the primary source of mentoring younger lawyers, the Alabama Defense Lawyers Association has always, and continues to play a vital role in that process. As ADLA grew, it recognized the demands on older lawyers and began holding Deposition Bootcamp. Continuing its purpose, our association expanded the training program to include the Trial Academy. In an effort to strengthen our association and continue the process of training our next generation of lawyers, we continue to offer webinars, Lunch and Learns, peer-to-peer conferences, and social events.

In coordination with an established training program within individual firms, it is advantageous for young lawyers to learn and interact with seasoned lawyers belonging to other firms.

I want the focus of 2021-2022 to be mentoring that goes beyond individual lawyers and law firms. I want ADLA to play an active role in mentoring today's young lawyers. I want to challenge each lawyer at his or her own firm to make a commitment to mentoring our next generation. Excuses of clients and insurance companies not paying for two lawyers, or not paying for certain tasks is a convenient way of neglecting our responsibilities to our young lawyers. Let's be creative. Let's be committed. I welcome any and all suggestions on how our association can implement programs to assist our members in this endeavor. Our legacy will not be defined by hours billed or honors received. Our lasting legacy will be found in how we mentored and trained the next generation of lawyers to adequately, professionally, and skillfully represent long-standing clients, new clients they will develop, and to honor those that mentored us.

Gerald Swann



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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.**

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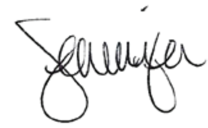
JENNIFER HAYES
Executive Director

It's been a busy and productive year for the Alabama Defense Lawyers Association, with meetings and events resuming mid-year. Although in-person events were delayed until May, members have remained connected and took advantage of exclusive membership resources. New online CLE webinars hosted by various industry sponsors were offered to members for free and are now available in the CLE Library. Deposition Boot Camp, held in May at Faulkner Jones School of Law in Montgomery drew the largest attendance to date with thirty-six young lawyers. The 2021 Annual Meeting kicked off in June at the Sandestin Golf and Beach Resort. Lawyers from Alabama and Tennessee brought their families to the beach, along with honored guest judges and speakers from around the state. ADLA also hosted a successful Trial Academy and social for young lawyer attendees in August at Cumberland School of Law in Birmingham. Check out the website's event page for upcoming CLE and networking events.

In case you haven't heard, ADLA's website login process has changed. Wild Apricot is now integrated with the ADLA website, allowing members to perform self-service functions such as profile updates, paying invoices, membership renewal, viewing member-only content, signing up for events, and interact with other members through the member directory and discussion forums. Members must reset their passwords to access the new membership system. Feel free to contact the ADLA office for website login assistance.

We have additional good news to share this fall. Mark your calendar for ADLA's statewide community service project week on October 11th – 22nd. Community service projects are unique to each district and will focus on an outreach effort to benefit local communities. Representatives of the Board of Directors and Young Lawyers Board of Directors will lead each district service project. Final details on the event will be posted to the website and included in the *Wednesday Briefcase*. Stay tuned!

Thank you again to our members and company sponsors for continuing to partner with ADLA, especially during the pandemic. We are truly grateful for all you do and look forward to reconnecting with everyone through the various statewide events this fall and spring. ADLA remains committed to providing excellent member services and valuable resources that keep members connected. If there is anything ADLA can do for you, please call 334-395-4455 or email me at jhayes@adla.org.



ALABAMA DEFENSE LAWYERS ASSOCIATION

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DISTRICT COMMUNITY SERVICE OUTREACH PROJECT WEEK

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more details coming soon

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COURTROOM TECHNOLOGY & TRIAL PRESENTATION SOFTWARE:

A PRIMER FOR DEFENSE LAWYERS AND A CALL TO ACTION

FOAM BOARD BLOWUPS ARE OBSOLETE. NOW, MORE THAN EVER, IT IS CRITICALLY IMPORTANT FOR DEFENSE LAWYERS TO FAMILIARIZE THEMSELVES WITH COURTROOM TECHNOLOGY AND TRIAL PRESENTATION SOFTWARE, AND LEARN HOW TO USE THEM EFFECTIVELY.

By: Carter R. Hale, Scott Sullivan Streetman & Fox, PC | Mobile, AL

It's Sunday evening and your jury trial begins tomorrow morning. While reviewing your *voir dire* questions, your phone pings with a text from one of the co-defendant's attorneys: *"Wanted to let you know we just settled with the plaintiffs."* Perhaps you have had a similar experience. Hopefully you anticipated this possibility and were prepared to try the case with or without a co-defendant. But then your stomach drops to the floor: The co-defendant's attorneys had tasked themselves with utilizing and running trial presentation software for both defendants. Your entire case – your PowerPoint for your opening statement, all of your trial exhibits, as well as annotated demonstrative aids you prepared and organized to be queued up for direct- and cross-examinations – now resides in a program that may no longer be available to you, and even if it is, you have absolutely no idea how to operate it or any of the equipment necessary to use it.

While the above is merely an anecdotal scenario that underscores the need for technology-challenged litigators to familiarize themselves with courtroom technology and trial presentation software, there are a number of significant reasons why it is crucial that defense attorneys promptly jump aboard the legal technology train.

To be clear, the roots of this call to action did not sprout from COVID-19. Sure, the pandemic forced lawyers to learn (or attempt to learn) how to use Zoom. Most of you have attended Zoom hearings. You may have taken remote depositions and even uploaded exhibits for use at those depositions. Beyond these narrow, limited-used environments, however, far too many defense lawyers have distanced themselves from courtroom technology and trial presentation software for far too long. For some, intimidation or fear is the culprit. Some argue they don't have the time, while others simply dismiss the notion that courtroom technology is a "necessity," claiming their foam board blowups and flip charts are just as effective and serve them just fine.

> *Go through all electronic exhibits of the respective parties just as you would check paper exhibits to ensure any applicable or necessary redactions have been made (e.g., evidence the court has excluded pursuant to a motion in limine; evidence that is inadmissible under the Alabama Rules of Evidence, or evidence that is otherwise objectionable on other grounds).*

Whether you have used one or more of these excuses (all of which this article will debunk), it's time for every ADLA member to acknowledge and accept that courtroom technology is, in fact, a necessity; that its prevalence is growing exponentially and will only continue to do so; and that now – not tomorrow, next week, or over the next holiday, but now – is the time to become familiar with courtroom technology and trial presentation software, and how to use them effectively. This is equally true for seasoned litigators with decades of experience and new lawyers who just received their bar admission certificates.

Put simply, the extent to which your experience and skill pay off in the courtroom is and will be determined in significant part by your familiarity with courtroom technology and trial presentation software and your ability to use it effectively.[1]

Along with our professional obligations, we are doing ourselves – and, more importantly, our clients – a grave disservice if we are unfamiliar with courtroom technology and trial presentation software, and how to use effectively use them.[2,3] Further, juries expect it, and we should anticipate that the other side is going to use it. Finally, some judges not only require it, but prohibit the use of other demonstrative aids such as blowups.[4]

You do not need to pursue an IT degree. Instead, you need a general, foundational understanding of and familiarity with the following:

- The technology equipment already in place in the particular courtroom in which you will try your case;
- Trial presentation software and/or other technology tools available for purchase and use, and their respective pros and cons as it relates to, among other things, cost, ease of use, and suitability for the particular cases you typically litigate; and
- The compatibility of these technology tools with the court's equipment (*i.e.*, ensuring they "play well" with the court's equipment), along with how well they are suited for the particular venue where you will use them (*i.e.*, the courtroom's layout, size, etc.).

The underlying goal of this article is two-fold: to serve as a primer to facilitate your efforts in incorporating courtroom technology equipment and trial presentation software in your cases, and to provide you with a skill level sufficient to efficiently and effectively use these technologies. While this article is by no means all-inclusive, my hope is that it will provide you with a painless-as-possible roadmap.

By design, I wrote this article in an intentional manner that would enable me to pitch you this commitment: Give me your time and read this article, and I can (almost) guarantee you will be positioned to use courtroom technology equipment and trial presentation software at your next jury trial. And, to the extent you may a question or two, feel free to reach out to me. I can *unequivocally* guarantee you that if I don't have the answer, I will either put you in touch with someone who can, or get the answer for you myself. So, read on!

Why you need to be Technologically-Competent… NOW.

1. Clients, judges and jurors all expect lawyers to use technology at trial.

As noted at the outset, your clients expect you to be technologically proficient. Judges increasingly continue to conduct and navigate virtual hearings with ease, and, in turn, they expect the same from you. Perhaps most importantly, jurors expect you to use technology at trial. On this front, it is critical to note that this expectation is not limited merely to Millennials. Older jurors such as Baby Boomers are increasingly expecting media presentations in the courtroom.[5] This shift is reinforced by a recent survey which revealed that "56% of potential jurors expect attorneys to use PowerPoint in presenting their case," and "64% said they would expect attorneys to use creative graphics and videos to illustrate their case."[6]

2. Demonstratives are a powerfully effective way to present your case.

We've all heard the saying, *"A picture's worth a thousand words."* This is especially true when presenting evidence to a judge or jury. Countless studies have long established that the overwhelming majority of people

retain information presented visually far better than they remember information presented orally. Likewise, the manner in which information is presented *(i.e.*, visually through presentations) has proven far more persuasive and effective with jurors.

3. New types of evidence necessitate the use of technology at trial.

With the rapid and exponential growth of new types of evidence, and, consequently, new sources of evidence, lawyers must be versed in how to present these various kinds of information at trial. While videos and photographs have long been used at trial, the types of electronic and digital media, along with the sources where they reside or are stored, has changed and expanded astronomically. Videos are no longer limited to closed-captioned videos burned to DVDs, and photos are no longer confined to digital cameras. Today, sources of video recordings and photographic evidence include cellphones; home security cameras; dashboard cameras; drones; social media applications; GoPros; in-vehicle infotainment systems (IVIs); internet of things (IoT) devices such as Amazon Alexa and Apple HomePod mini, and wearable devices such as Apple Watches and Fitbits, to name just a view examples.

Similarly, social media evidence has infiltrated the litigation arena, from photos, videos, and location information to posts which can be used to demonstrate a person's emotional state (or lack thereof). Juries don't want you to tell them what the plaintiff posted; they want to see the post itself, and it is far more effective and persuasive to show them in the same manner in which they themselves are familiar seeing them (*i.e.*, on a screen).

Presenting other evidence such as Google Earth images or Google Street View images electronically is likewise far more effective than simply holding up an enlarged photograph of an intersection. Using the Google Maps platform, for example, enables you to pan out, zoom in, and navigate a particular area – giving jurors a far better understanding of the location at issue.

HOW and WHERE to Start.

1. The courts' technology equipment.

In lieu of undertaking exhausting research or embarking on an unnecessary spending spree, first find out what technology is already in place in the courtroom where you will be trying your case. This is the first and easiest step.

Make a list of the equipment that is present, confirm that it is works, and identify the adaptors and cable connections each supports *(i.e.*, see what inputs and outputs the equipment has). This will likely include document cameras (think overhead projectors); a "technology cart"; TV monitors, and projectors. You will want to note where these items are located in relation to your counsel table. Also identify nearby power outlets that you will use.

Of importance particularly during these current times is to confirm with the judge or his or her judicial assistant the arrangement of the courtroom for trial. Do not assume that the courtroom will be set up at trial exactly as it is on a day you are there prior to trial. Because of the pandemic, you must take into account that the traditional layouts may give way to alternative setups. One commonly-used courtroom layout for jury trials during COVID-19 is having the jury seated in the gallery (meaning you will sit on the opposite side of the table with your back to the bench). The judge may sit off to the side, with witnesses testifying from the jury box.

With these preliminary matters in mind, we will now turn to the courtroom technology equipment available in the federal district courts in Alabama, and the varying (to non-existent) courtroom technology equipment in Alabama's circuit court courtrooms.

Federal Courts

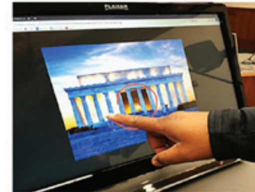
For federal cases, the district courts' respective websites provide especially informative details about the technology they have, complete with pictures and specifications. The Southern District's courtrooms include the following features:[7]

Technology Lectern

The lectern (shown) is the contains the document camera, several laptop inputs, and a touch screen. It is height adjustable for ADA compliance. There is also an Apple TV available in the lectern for wireless streaming of evidence, be that video or documents.

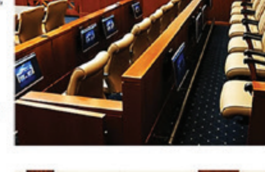
Courtroom Techonology - Touch-Screens

Touch-screens are available at the witness box and the lectern. They can be used to call attention to certain areas of a document, image, computer output or video. The touch screen function is available as a layover for any video input received by the system.



Evidence Monitors

There are monitors throughout our courtrooms which receive HD digital video. The monitors display items placed on the document camera, laptops connected to the audio/video cables, someone appearing via Video Conference, and they mirror the annotation input from the touch-screens. You will find two monitors on each counsel table, one monitor per two jurors in the jury box (shown), at the lectern, the witness stand, the courtroom deputy station, and on the judge's bench. The lectern and witness stand both have touchscreen monitors which allow annotation.



There is also a confidence monitor outside the jury box (shown) which reflects what is being seen by the jurors. If evidence has not yet been admitted, the Courtroom Deputy will mute what the jury can see and this monitor will be blank.

The courtrooms in the Middle District of Alabama feature similar technology equipment as those in the Southern District, and its website provides additional, informative guidance and policies for attorneys.[8]

Unlike the Southern and Middle Districts, the Northern District's website does not currently include information about the specific courtroom technologies available in its courtrooms. A number of you may have been in one or more of the Northern District's courtrooms in the recent past and know what equipment they do and do not have available. Regardless, best practices include (1) contacting the court staff for your particular district court or magistrate judge, and (2) carefully reading the court's pre-trial orders, as well as any applicable standard orders specific to the judge presiding over your case.[9]

One factor should always be kept forefront with respect to the use of courtroom technology and trial presentation software in any federal court courtroom: the particular court and its rules and orders ultimately dictate what technology you can and cannot use, and the extent or limit to which you can use it.

U.S. District Court for the Middle District of Alabama

Evidence Presentation in the District & Magistrate Courtrooms

Bench:
- 10-inch Crestron tablet, controls all components at Judge and Deputy benches
- Judge Override System

Attorney Tables:
- 24-inch widescreen LCD Monitors
- VGA & HDMI connections for laptops
- 2 microphones on each table
- Remote interpreter headsets at table

Evidence Presentation Lectern:
- 18-inch gooseneck microphone
- Digital Document Camera
- Blu-ray player
- 21-inch annotation monitor
- Desktop PC
VGA and HDMI inputs

Additional Presentation System features
- Screen capture with annotation
- Video conferencing
- Video streaming to overflow crowds

Jury:
- 4x 24-inch monitors and 1x 65-inch monitor

Witness:
- 21-inch monitor with annotation
- 18-inch microphone

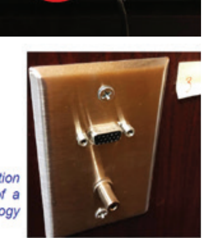
- Wifi available for attorneys
2x 65-inch spectator monitors

Audio System:
- Wireless Microphone System
- Teleconference ready
- Interpreter headset and boom microphone
- Assisted Listening Headsets for both hearing impaired and second language
- Bench Conference with white noise

State Courts

1. Courtroom technology equipment.

Not surprisingly, the types of courtroom technology available in state circuit courts vary not only from county to county, but often among the courtrooms within the same courthouse. As with cases in federal court, before making a decision as to (1) the technology you plan to use at trial and (2) how you will use it, you first need to find out what equipment the state circuit or district court already has in place (and, equally important, what it does not). Perhaps most commonly found in circuit courtrooms are document cameras with a display surface and control features similar to the one below.



An adapter connection port on the side of a courtroom technology cart

Second, be sure to inquire as to the court's policies regarding usage of the court's equipment at trial (*i.e.*, whether you must use the court's equipment exclusively, or, whether you can utilize the court's equipment in connection with your own equipment and/or presentation software).

Third, make note of the location of the court's equipment within the courtroom and their proximity to your counsel table – in particular, outlets, adapters, technology carts and TVs. However, as emphasized earlier, be sure to confirm with the judge or his or her judicial assistant exactly how the courtroom will be arranged for trial – including the locations of the court's technology equipment, counsel tables, the judge, witnesses, and the jury.

For convenience, below is a non-exhaustive list of factors you should consider when preparing to use the court's technology equipment and/or your own equipment and trial presentation software.

Pre-Trial Technology To-Do List

To Do	Comments
Orient yourself with the courtroom	Note your counsel table in relation to the location of: - the judge - the *venire* (for *voir dire*) - the empaneled jury - witnesses, including both those attending in person and those who may be attending remotely - outlets - the court's technology cart - monitors / screens / TVs
Confirm that the court's technology is operating properly	Just because there's a TV or projector in the courtroom, or a connection port for a laptop, doesn't necessarily mean it works properly or at all.
Identify the cables and adaptors you'll need to bring with you to court	If the court's technology cart has a port to connect your laptop or other device, it's useless if a VGA adaptor is required, and all you have with you is an HDMI cable (more on these terms later).
Ensure your equipment is compatible with the court's	While I advocate below for a trial setup that doesn't require a DVD player, if you intend to play a DVD at trial and the court has a DVD player, test it to make sure it reads (plays) your DVDs.

2. AlaFile: Electronic Exhibits.

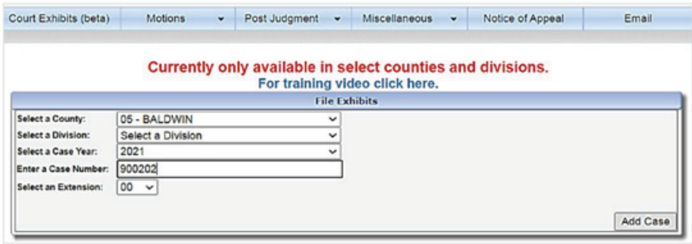
Before transitioning to trial presentation software, it merits mentioning here that exhibits and other documents (*e.g.*, case law) can be uploaded to AlaFile for use at hearings and other proceedings, including trial.[10] At this time, the feature is in beta testing, but is currently available for use in

the following counties: Baldwin; Cherokee; Jefferson – Bessemer; Mobile; Morgan; Russell, and Shelby.[11]

For cases you have in these counties, you can upload exhibits or other documents you want to discuss or reference, for example, a summary judgment hearing, as well as exhibits you seek to have admitted into evidence at trial.

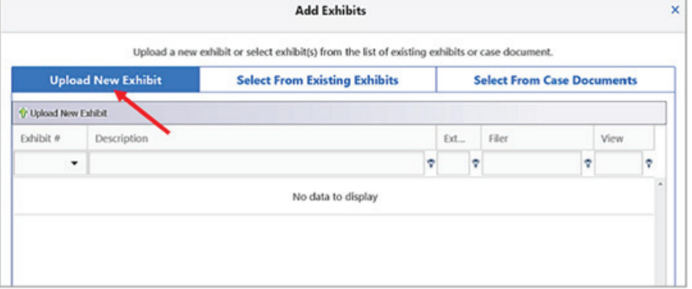
When you log into AlaFile, simply click the "Court Exhibits (beta)" tab at the top:

This will direct you to this familiar screen you see when you e-file other documents:

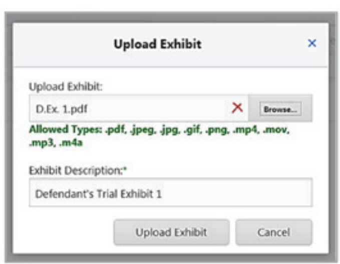


Note there is also a link to an informative training video.[12] After you have selected the county, division, case year, and entered your case number, click "Add Case" and then "Continue". You will be directed to the following page, which lists the future hearing dates in your case:

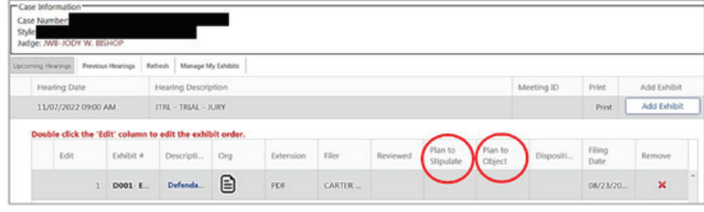
Locate the hearing, trial or other setting for which you want to upload exhibits, and click the "Add Exhibit" button. The following pop-up window will appear, where you will then click on the "Upload New Exhibit" button:



Click the "Browse..." button to select the exhibit that you want to upload from your computer. Once you've uploaded and named it, click "Upload Exhibit". From here, you will be directed to the screen below, where your exhibit is shown.



Parties have the option to select those exhibits of their opponents to which they plan to agree or stipulate to their admissibility, or to which they plan to object. However, you will not be bound by selecting either of these options for any exhibit. Rather, stipulations and objections will be made and/or confirmed on the record and through formally filed pleadings and court orders.



Trial Presentation Software.

Now that you have a working knowledge of the technology equipment most commonly available in our federal and state circuit court courtrooms; the key factors to address with respect to that equipment (*i.e.*, its operability, its location in the courtroom, and the adaptors and cables necessary to connect to and use it), along with an overview of uploading exhibits to AlaFile, you're ready for the fun part: trial presentation software.

First, as a combined introduction and double *caveat*, I have focused on one specific trial presentation software. While word and space limitations are part of the reason, I do not want you to feel overwhelmed by a litany of options, all with different features, functions, and pros and cons. Moreover, I believe you will find the trial presentation software discussed below to be extremely easy to understand and operate (regardless of your technology skill level), cost-efficient, and at the same time feature-rich.

The second *caveat* is that throughout this article, I use the term "trial presentation software." As you will see below, the software discussed works very well in many other matters aside of trial. Indeed, these tools were designed and developed for use in many other litigation phases over the life of a case, including document and deposition review, analysis and organization; the ongoing development of the defense of your case; written discovery; depositions, and summary judgment hearings.

LIT SUITE

You may have heard of **TrialPad** – the first iPad app specifically designed for lawyers. It debuted in 2010, the same year as the first iPad was released. Over the past decade, while consistently improving TrialPad and adding new features (many requested by lawyers), Lit Software developed other apps, including **TranscriptPad** and **DocReviewPad**. Most recently, on May 8, 2021, Lit Software introduced its latest app, **Exhib-**

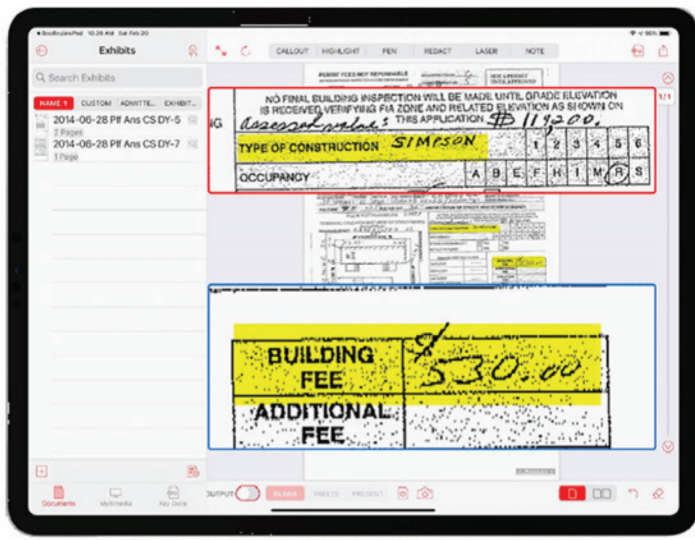
itsPad.[13] With LIT SUITE, you get all 4 of these apps and all updates to them. Below is an overview of each app, their key functions and features, along with some how-to's.

1. TrialPad.

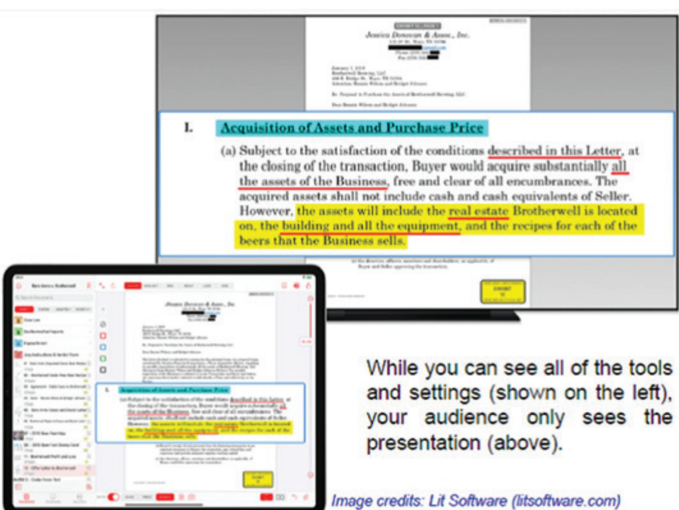
With the TrialPad app, you can easily present evidence to a judge or jury, and use exhibits during your direct- and cross-examinations of witnesses at trial or in depositions (whether remote or in person). TrialPad has feature-rich tools that are easy and quick to create – whether in advance or in real-time, and equally as easy and efficient to use.

Annotation Tools

With TrialPad, you can highlight parts of a document, as well as mark on it as you go using your finger or Apple Pencil. The Redact tool allows to you place a black or white box over portions of a document. A "virtual laser pointer" enables you to point to a particular part of a document when you are discussing it with a witness or the jury. The Callout tool is especially powerful. Simply select the portion you want to enlarge, then use Callout to zoom in on that area. The process is seamless and impressive. An added bonus is the Snapshots tool, which enables you to generate a PDF of a document you annotated should you want to use it again later.



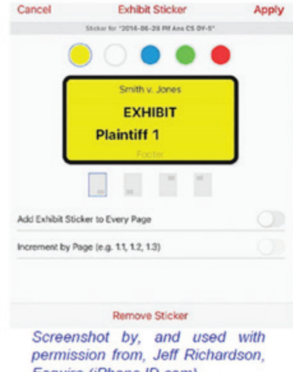
Screenshot by, and used with permission from, Jeff Richardson, Esq. (iPhoneJD.com)



While you can see all of the tools and settings (shown on the left), your audience only sees the presentation (above).

Image credits: Lit Software (litsoftware.com)

Exhibits



Screenshot by, and used with permission from, Jeff Richardson, Esquire (iPhoneJD.com)

TrialPad enables you to apply exhibit stickers to documents – whether one at a time, or to a group of documents, and you can customize the fields in the sticker to your liking, as well as the color of the sticker. Moreover, you can keep track of which exhibits are admitted into evidence.

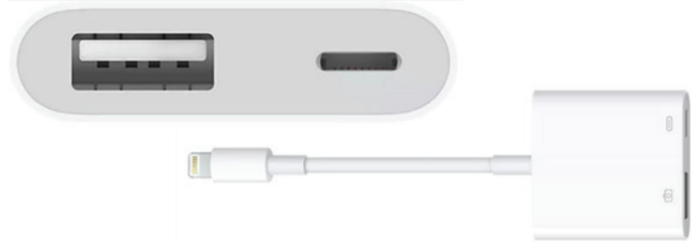
Multimedia

By now, you're probably not surprised to learn that you can present videos and audio using TrialPad, along with documents.

Document Upload

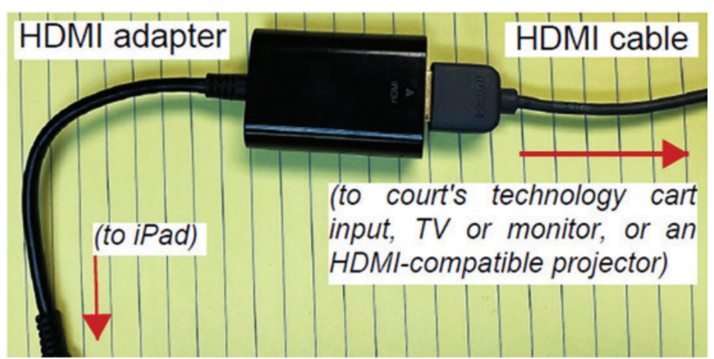
You can upload your documents, media and exhibits into TrialPad via most any cloud service that integrates with Apple's Files app (*e.g.*, Dropbox; Box; Microsoft OneDrive; Citrix Files; Google Drive, and iCloud). Alternatively, you can put them on a USB (thumb drive) and upload them to your iPad via a USB connector in rapid time.[14,15]

You can import individual files, a set of files, or "import a .zip file (up to 1GB), which lets you create folders and subfolders on your computer, and then maintain those folders when you import [them] into TrialPad.[16]

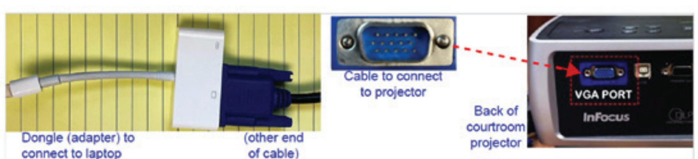


Equipment and set up to present wirelessly or with a wired connection

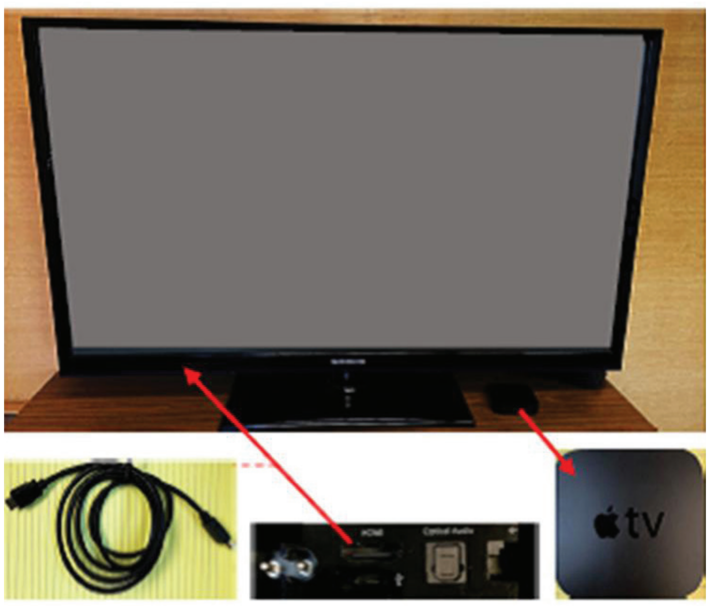
If you do not have an iPad, that is obviously the first thing you will need to purchase. TrialPad offers the flexibility of presenting with or without a wireless connection. To present with a wired connection, you will need either an HDMI adaptor to connect your iPad to the court's technology port or to connect to a TV (provided they have an HDMI input).



If you are using a projector that does not have an HDMI input, it most likely has a VGA or DVI input. In such case, simply use a VGA or DVI adapter as illustrated in this diagram:



You can present wirelessly – **without a WiFi connection** – via Peer-to-Peer Apple AirPlay using an Apple TV (it's a box, not an actual television).[17] You will need an Apple TV if you do not have one, as well as an HDMI cable. Your set up will be similar to this:



Cost Options

I created the table below to present the approximate costs for purchasing LIT SUITE and using its apps at trial. Simply view the costs in the column that applies to you, and you will see the items you will need to purchase. For items you already own, simply reduce the total cost by the amount of that item. Items in italics are optional but recommended.

	I want to present with TrialPad wirelessly	I want to present with TrialPad using a wired setup
LIT SUITE	$399 annual subscription	$399 annual subscription
Apple iPad	from $350 - $1,300	from $350 - $1,300
Apple TV	$150	N/A
HDMI cable	$20 - $60	$20 - $60
HDMI adapter	$40	$40
USB Adapter to upload docs to TrialPad	$40 - $60	$40 - $60
One-time, initial total	$999 - $1,949	$849 - $1,799
Annual cost thereafter	$399	$399

Why it's worth every penny

To the extent the cost gives you any heartburn, the price tags associated with other options are significantly greater. Additionally, TrialPad can easily be used by *you* while you are trying your case. This means you do not have to rely on someone else to have the correct exhibit or other document ready to go, or pay for a trial technician with specialized skills.[18] It also eliminates the constant, "Next slide, please", interruptions you otherwise make when using a program that requires another person to operate it.

As we all well know, the time and expense associated with having large, foam board blowups made is costly. (And, I suspect I am not the only ADLA member who has called their legal copy vendor late on a Sunday evening because I thought of another document or deposition excerpt I wanted enlarged at the last minute.)

Moreover, LIT SUITE comes free of the non-monetary expenses that accompany other trial presentation software, such as time, inefficiency, staffing, and uncertainty, to name a few.

TrialPad also affords you the freedom to move around the courtroom, allowing for better engagement with the jury and witnesses. Even a laptop placed on a podium creates a barrier between you and the jury, a witness, or both. iPads are small and flat, providing an unobstructed visual connection between you and your audience.

In addition to all of the benefits highlighted above, you can also use TrialPad and the other Lit Software apps comprising the LIT SUITE bundle in a host of other litigation settings besides trial, such as depositions, dispositive motion hearings and mediations.

2. TranscriptPad.

I've never been a big fan of deposition summaries. I know some lawyers heavily rely on them. My micro-managing, over-meticulous nature may be the reason. Whatever the case, and regardless of your position on deposition summaries, all litigators can benefit tremendously from Lit Software's TranscriptPad app, which comes with the LIT SUITE app bundle.

First, TranscriptPad is the go-to app for reading, reviewing, navigating, and annotating deposition transcripts. With the app, you can assign Issue Codes relative to your case, and within a matter of seconds, it will go through the 15 or 20 depositions that have been taken in that case and generate a report. This feature is especially intuitive: it doesn't just grab a page and line number where a particular word was used, but will capture the question preceding it (if the word was in an answer) and capture the answer (where the word was in a question). This way you have the context in which the particular word was used.

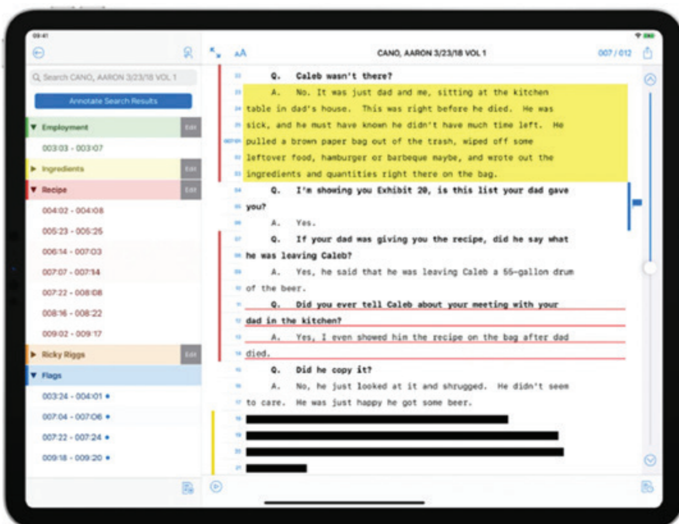


Image credit: Lit Software (litsoftware.com)

Further, because a line of testimony may be relevant to more than one issue in your case, you can assign multiple Issue Codes to the same text. The reports that TranscriptPad generates are fully customizable and searchable as well.

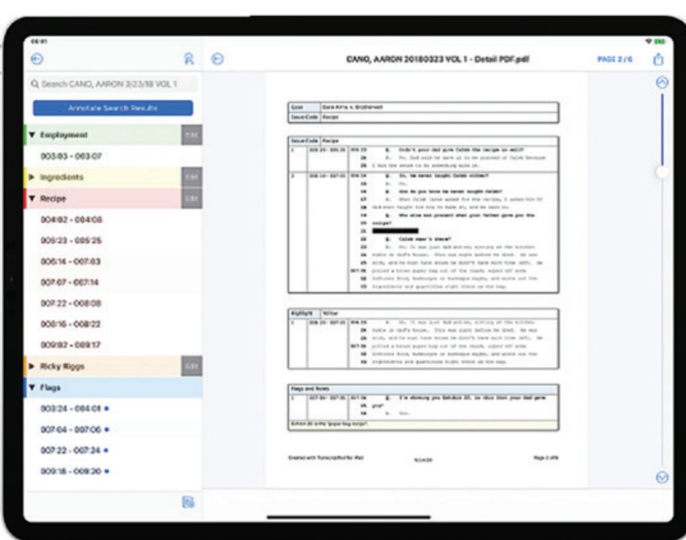


Image credit: Lit Software (litsoftware.com)

The result is an organized and searchable narrative capsule. You can print, export or email the reports in PDF. You can also export a report as a Microsoft Excel file, which, when opened, will have tabs for each issue code.[19] The Excel document has different tabs for each Issue Code.[20] To the extent *this* is considered a "summary," I love it.

Associated deposition exhibits are also organized in TranscriptPad. You can open them up, view them, and when you close them out, you are automatically returned to the page and line where you were reading.

Speaking of reading, the latest update release of TranscriptPad has a new feature called "Speak Transcript."[21] Yes, you guessed correctly; TranscriptPad will speak the deposition testimony to you. This means you can listen to a deposition while driving to a hearing out of town, or writing a summary judgment brief on your computer.

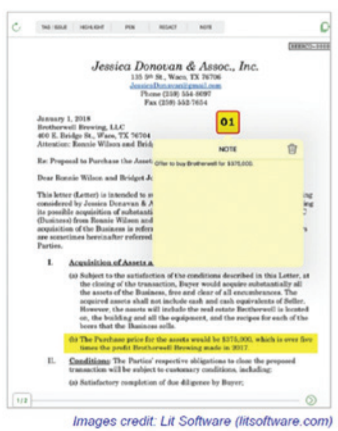
One *caveat* should be noted regarding TranscriptPad: it does not work with PDF versions of transcripts. You have to upload the ASCII file versions, instead. Most court reporters typically email these to you, anyway, but if they don't, just simply ask for it. That said, in TranscriptPad, deposition transcripts look like the PDF copies to which most of us are accustomed to reading.

3. DocReviewPad

Mega tech enthusiast and New Orleans attorney, Jeff Richardson, best describes DocReviewPad: it is "sort of like TranscriptPad for Documents."[22] You can upload your case documents to DocReviewPad and have them all in one place, and with you everywhere you go.

Image credit: Lit Software (litsoftware.com)

Store your documents in separate case folders and customize how they're organized to suit your preferences. Search functionality is DocReviewPad is powerful – allowing you to search across every document you have uploaded filter your searches, to view the document or documents you sought to retrieve. You can annotate documents, assign them color-coded Issue Codes or Flags. Better yet, DocReviewPad will bates number your documents for you.



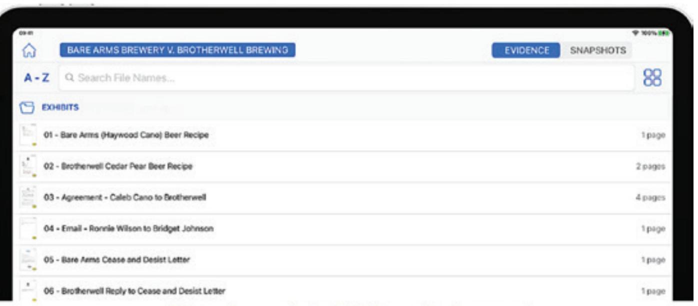
Images credit: Lit Software (litsoftware.com)

DocReviewPad also provides piece of mind when it comes to ensuring your documents don't somehow disappear into the abyss. The app's archiving feature backs up your cases, including all Issue Codes, Flags, and annotations, which also enables you to share them with other DocReviewPad users.

4. ExhibitsPad.

Lit Software's newest app is ExhibitsPad, which was released just a few months ago. I have only briefly played around with this iPad app (which is free on the App Store), but its use purpose is exciting. ExhibitsPad works as a replacement for those thick, heavy exhibit binders that are an annoyance to create (or have created for you). What this means, of course, is that each juror will need an iPad.

Now, before you file this away in a "never-gonna-happen" folder, think of the time and expense involved with exhibit binders. With compatible iPads starting at around $330, your investment of $4,950 (12 jurors, the judge, his or her judicial assistant, and opposing counsel) will pay for itself over time. You will eliminate future printing and copying costs –paper and ink, as well as assembly into binders (which aren't free, either). Further, it is much faster to load the exhibits admitted into evidence onto iPads is much faster than printing and organizing binders.[23]



Mockup of screenshot by Lit Software (litsoftware.com)

Attorney Jeff Richardson in New Orleans, who I mentioned earlier in this article, wrote an early review of ExhibitsPad.[24] What is particularly informative is the detailed response in the comments by the head of Lit Software,

just as you would make and preserve the record for appeal in "traditional" trials with respect to exhibits, testimony, or any other matter, you must be on guard to do the same when these things are presented using technology equipment.

Ian O'Flaherty, who highlighted some of the key features and capabilities of ExhibitsPad, which include:

- A court employee (or counsel) can load evidence into the app easily and quickly via a USB drive.
- The Home Screen of ExhibitsPad has a document, page, and multimedia count to ensure that every iPad has the exact same set of exhibits.
- Every import of exhibits will completely replace the exhibits of any previous import, eliminating any possibility that exhibits from a previous matter could get left in the app and get with the current case being deliberated.
- The app is very intuitive with a minimum learning curve, making it easy for non-technically proficient users to navigate and review the evidence. (Everything is on one screen with a flat hierarchy so that users with different technology comfort levels won't get lost within the app.)
- Robust and easy search capabilities make finding exhibits a breeze among hundreds of exhibits that may be admitted into evidence. (A large search field is always at the top of the screen.) Exhibits are searchable by file names or types, exhibit numbers, or parts of names. OCR data is not searchable, preventing a juror from using the power of an iPad to mine the data. (As a user types in the search field, the files are filtered to only show documents or multimedia files that contain those characters.)
- Jurors cannot exit the app, e.g., to access the internet. This is accomplished using Apple's Guided Access.[25] Additionally, a password is required to get to the Home Screen.
- Jurors can take screenshots (called "Snapshots") of a particular page of a document for later reference. The Snapshot tool stores any Snapshots in a dedicated Snapshots area in the app. Jurors can also annotate a snapshot of an exhibit using Apple's familiar markup tools without altering the original exhibit.[26]

Bonus Tips

1. Practice, Practice, Practice…

Just as the saying goes with washing hair – "rinse and repeat", you, too, should practice, practice again, and then practice another time. This includes ensuring (1) that all equipment is operating properly; (2) that all documents are visible and easy to read when projected or viewed on large screens; (3) that images appear clear and not grainy or pixelated when displayed on large screens; (4) that videos play seamlessly; and (5) that audio is easily discernable and volume levels are appropriate. Monday morning is not the time to make sure everything is operating correctly.

2. Triple-check your exhibits and those of the other parties.

Go through all electronic exhibits of the respective parties just as you would check paper exhibits to ensure any applicable or necessary redactions have been made (*e.g.*, evidence the court has excluded pursuant to a motion *in limine*; evidence that is inadmissible under the *Alabama Rules of Evidence*, or evidence that is otherwise objectionable on other grounds). Indeed, unlike with paper exhibits, where the risk that jurors might unintentionally see inadmissible and excluded evidence is rather slim, the same does not hold true with electronic exhibits. When paper exhibits are used, there are opportunities to check and re-check exhibits before they are published to the jury. With electronic exhibits, there may be fewer opportunities (if any) to conduct a last minute check of an exhibit before it is presented on a screen for the jury to see (particularly by the other side). As you well know, once they are displayed on large screens for the jury to see, it may very well be too late to un-ring the error bell.[27]

Of course, mistakes can and will happen. But this should in no way deter you from using technology to present your case at trial. Mistakes are made using archaic demonstratives, as well, like flipcharts. Indeed, in late 2019, I tried a week-long jury case in Mobile County Circuit Court. In his closing argument, the plaintiffs' attorney used a flipchart to add up medical bills and expenses, lost wages, and other monetary damages which his clients wanted the jury to award. During the course of this exercise, his easel fell over twice, and worse – he miscalculated his addition, shortchanging his clients to the tune of several hundred thousand dollars. The resulting product, red marker scribbles through numbers with arrows pointing to other numbers, was not an impressive display for the jury.

The point is, just as you would make and preserve the record for appeal in "traditional" trials with respect to exhibits, testimony, or any other matter, you must be on guard to do the same when these things are presented using technology equipment.[28]

Conclusion.

I hope through reading this article that you have developed a serious interest in using courtroom technology and presentation software at trial and elsewhere in your practice. Moreover, I hope you have an increased comfort level, and will act now to get the technology wheels in motion. There are a variety of options available, and a hybrid may be the avenue you choose. I intentionally avoided presenting you with an overwhelming smorgasbord of options because the market is crowded, and attempting to jump head-first into the legal technology ocean with blinders on can be a daunting and intimidating undertaking, whether you're a tech luddite or you're tech savvy.

Regardless of your choice, I wish you the best of luck. I know your fellow ADLA members will be proud of your performance at your next trial.

Endnotes

[1] As discussed in this article, the pandemic has forced courts to employ new means of conducting proceedings, including complex and document-intensive summary judgment hearings and bench and jury trials. The research conducted on courts' adoption and implementation of different technologies in order to carry out proceedings are not likely to fully return to the former, traditional ways they've been undertaken whenever the pandemic ends. This reality is, in large part, attributable to courts' first-hand realization of the efficiencies inherent in these technologies and their effectiveness in accomplishing their intended objectives. To this end, we, as lawyers, would be remiss to assume courts will return completely to the former, traditional methods of conducting proceedings. *See, e.g.*, Jennifer Bottomly, Bufford, K., and Strokes, H., "Practicing Law at a Distance: The Circuit Bench Offers Guidance for Lawyers Navigating the Courtroom during the COVID Pandemic", ADLA Journal, Vol. 36, No. 2 (Fall 2020), pp. 46-57 (comprising interviews with several Alabama circuit court judges who majorly shared positive experiences using Zoom and other technologies).

[2] The Alabama Rules of Professional Conduct do not contain language specifically requiring lawyers to be technologically competent. Ala. R. Prof. C. 1.1 states that a lawyer shall provide "competent representation", which it defines as "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." The Comments to Rule 1.1 provide that "[t]o maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education." *Id.* Still, attorneys should not disregard technology competence in their compliance with this admittedly broad language. See Ambrogi, Robert, "Tech Competence", LawSites, https://www.lawsitesblog.com/tech-competence. ABA Model Rule 1.1 specifies that lawyers should be technologically competent, including knowledge of "the benefits and risks associated with relevant technology". While Alabama has not adopted the ABA's Model Rule, to-date, 39 other states have amended their rules to specifically require technology competence. Given this wide-sweeping adoption, it is foreseeable – if not inevitable – that Alabama will ultimately amend its current rule to impose a specific obligation of technology competence on the part of lawyers admitted to practice in this State. *See* "Lawyers' Duty of Technology Competence by State in 2021", Percipient Blog (March 21, 2021), https://percipient.co/lawyers-duty-of-technology-competence-by-state-infographic.

[3] In *Hartman v. State*, for example, the defendant appealed the trial court's denial of his motion for a new trial following his conviction for the crimes for which he had been charged. As grounds for his ineffective-assistance-of-counsel argument, the defendant asserted that his counsel should have been more familiar with the courtroom technology and should have used that technology. 858 S.E. 2d 39 (Ga. App. March 3, 2021). The defendant maintained that in failing to do so, his attorney did not adequately cross-examine the victim. *Id.*, at 48. The Georgia Court of Appeals affirmed the conviction, citing defense counsel's extensive cross-examination of the victim and his impeachment of her on several fronts. *Id.* Notwithstanding, this case is just one of many (including civil actions) which evidences an increased level of awareness of courtroom technology and a corresponding increase in expectations that attorneys know how to use it, and use it at trial.

[4] By way of example, scheduling orders in civil cases issued by Baldwin County Circuit Court Judge Jody Bishop include the following provision which he enforces: "AUDIOVISUAL EQUIPMENT IS AVAILABLE IN THE COURTROOM AND SHALL BE USED IN LIEU OF BLOW-UPS AND CHARTS." (Bold, all-caps emphasis in original).

[5] *See* Cook, Katrina, Ph.D., and Keith Pounds, Ph.D., "Adapting Advocacy for the Post-Pandemic World", Litigation Insights Blog (July 29, 2021), https://litigationinsights.com/adapting-advocacy-post-pandemic.

[6] *Id.*

[7] The U.S. District Court for the Southern District of Alabama's website contains detailed information about the technology available in all 6 courtrooms, including computer audio/video inputs; document cameras; evidence monitors; technology lecterns; touch-screens; portable technology carts; video-conferencing equipment, and more. *See* https://www.alsd.uscourts.gov/courtroom-technology.

[8] The Middle District offers attorneys training on its evidence presentation equipment. Training sessions can be scheduled with the Court's IT department here: https://www.almd.uscourts.gov/about/technology-and-training. Additionally, the Middle District has published a "Courtroom Technology Reference guide", a PDF of which you can download here: https://www.almd.uscourts.gov/files/courtroom-technology-reference-guidepdf.

[9] For the procedural requirements mandating the submission of exhibits electronically or via digital media applicable to all civil cases in the Northern District, *see Administrative Procedures for Filing, Signing, and Verifying Pleadings and Documents in the District Court under the Case Management/Electronic Case Files System in Civil Cases* (May 18, 2021), § IV.C.1 - 6, at pp. 17-18, a copy of which you can view and download at: https://www.alnd.uscourts.gov/sites/alnd/files/AL-N%20Civil%20Administrative%20Procedures%20Manual.Revision.05-18-2021.pdf. For an example standard order which sets forth the requirements for attorneys who want to present exhibits via a projector onto a screen or monitor, *see* Honorable District Court Judge Abdul K. Kallon's "Standard Pretrial Procedures – Exhibit A", ¶ 3(g), available to view and download at: https://www.alnd.uscourts.gov/sites/alnd/files/forms/AKK%20Standard%20Pretrial%20Procedures%20-%20Exhibit%20A.pdf ("[c]ounsel are responsible for providing whatever technology may be necessary for such projection").

[10] https://alafile.alacourt.gov/frmLogin.aspx.

[11] *Id.*

[12] https://www.youtube.com/embed/ylHkLelBB2Y?autoplay=1&rel=0

[13] *See* "Announcing ExhibitsPad – An Exciting New App From LIT SOFTWARE!" (May 8, 2021), https://www.litsoftware.com/blog/2021/5/5/announcing-exhibitspad-an-exciting-new-app-from-lit software.

[14] Upload files to TrialPad on your iPad using a Lightning to USB Camera Adaptor ($39.00 on the Apple Store, https://www.apple.com/shop/product/MK0W2AM/A/lightning-to-usb-3-camera-adapter?fnode=f3d1988b-3d12849e9bcd963a085a58ce6cd577bc8e16cdbb35a2d1df7a61ed10e6cf-b0e395a774d9b9d5a6ae3fab5312600edacccb65f169b4a79a0b2471a31db3730af8c-96381587cc7b1efb484addc628fd77efa1913912ef5460f9d0fe2d1).

[15] Tara Cheever of Lit Software noted in a recent video podcast interview that the company tested its newest app, ExhibitsPad (discussed later in this article), in a jury trial in Miami, where each juror was provided an iPad with all exhibits uploaded to them for use during deliberations. Tara said it took her less than 10 minutes to upload the exhibits in this document- and media-intensive case to all 11 iPads via USB! See Brett Burney, "AiL040-Tara Cheever from LIT SOFTWARE Discusses Effective Presentations, App Updates, Brand New ExhibitsPad App, and Why Subscriptions Produce Better Apps! [Developer's Edition]" (July 8, 2021), https://appsinlaw.com/ail040-tara-cheever-from-lit-software-discusses-effective-presentations-app-updates-brand-new-exhibitspad-app-and-why-subscriptions-produce-better-apps-developers-edition.

[16] Jeff Richardson, "Review: TrialPad – present evidence from your iPad", iPhoneJD (May 16, 2019) (https://www.iphonejd.com/iphone_jd/2016/05/review-trialpad.html); *see also*, Jeff Richardson, "Review: LIT SUITE – powerful iPad litigation apps", iPhoneJD (Feb. 24, 2021), https://www.iphonejd.com/iphone_jd/2021/02/review-lit-suite.html (for Richardson's updated review of TrialPad),

[17] Apple's Peer-to-Peer AirPlay feature enables you to present wireless from an iPad without a WiFi connection. For a short, simple explainer on setting up and using Peer-to-Peer AirPlay, visit https://support.apple.com/en-us/HT204289.

[18] *See* n. 16, *supra*.

[19] Jeff Richardson, "Review: LIT SUITE – powerful iPad litigation apps", iPhoneJD (Feb. 24, 2021), https://www.iphonejd.com/iphone_jd/2021/02/review-lit-suite.html.

[20] *Id.*

[21] "Double Your Productivity in TranscriptPad!", Lit Software Blog (Aug. 12, 2021), https://www.litsoftware.com/blog/2021/8/2/we-just-doubled-your-productivity-in-transcriptpad.

[22] Jeff Richardson, "Review: DocReviewPad – review and annotate documents on the iPad" iPhoneJD (July 7, 2015), https://www.iphonejd.com/iphone_jd/2015/07/review-docreviewpad.html.

[23] *See* n. 15, *supra.*

[24] Jeff Richardson, "Review: ExhibitsPad – an electronic exhibit binder for factfinders", iPhoneJD (May 11, 2021), https://www.iphonejd.com/iphone_jd/2021/05/review-exhibitspad.html.

[25] Guided Access limits the iPad to a single app (here, ExhibitsPad). To turn on Guided Access, simply go to Settings > Accessibility, and turn on Guided Access. Next, tap Passcode Settings and then Set Guided Access Passcode. Enter a passcode and confirm it. See "Use Guided Access with iPhone, iPad and iPod touch", Apple Support, https://support.apple.com/en-us/HT202612 (accessed on Sept. 2, 2021).

[26] *See* Jeff Richardson, "Review: ExhibitsPad – an electronic exhibit binder for factfinders", iPhoneJD (May 11, 2021), https://www.iphonejd.com/iphone_jd/2021/05/review-exhibitspad.html.

[27] For example, in *Sherrer v. Bos. Scientific Corp.*, the plaintiff appealed a defense verdict following a nearly four-month jury trial. 609 S.W. 3d 697 (Mo. 2020). Of the four grounds comprising the plaintiff's appeal, the appellate court devoted particular attention to the plaintiff's argument that the trial court erred in not granting her motion for a mistrial after information was presented to the jury regarding her pre-trial settlements with two dismissed defendants. *Id.* At trial, while cross-examining the plaintiff, defense counsel displayed a PowerPoint slide on a 20-by-20 foot screen and multiple monitors that was not admitted into evidence, and was used solely as an aid to the jury. 609 S.W. 3d at 715, 720 (Mo. 2020). After a few brief questions, the trial court judge directed defense counsel to take down the slide. *Id.* It was during the sidebar that followed that defense counsel first realized that the slide included a text box in the lower right corner describing a settlement with the two dismissed defendants. *Id.* The plaintiff moved for a mistrial on the grounds that the reference to settlements in the PowerPoint slide violated the trial court's rulings excluding any reference to prior settlements. *Id.* After a discussion with counsel, the trial court judge ultimately denied the plaintiff's motion for a mistrial. *Id.*, at 715-716. In a *per curium* opinion, the Supreme Court of Missouri ultimately affirmed the judgment, but the risk of reversal, coupled with the time and expense of the appeal and of potentially re-trying a four-month long case, serve as a strong reminder of the importance of reviewing each of party's respective trial exhibits, including your owner, multiple times before trial. *Id.*, at 716.

[28] *See, e.g.*, the recent case of *United States v. Barrow*, Criminal 20-127 (CKK) (D.D.C. Aug. 13, 2021). In *Barrow*, the defendant appealed unanimous verdicts convicting him of wire fraud crimes following an eight-day trial which took place in June 2021 during the COVID-19 pandemic. Id. Specifically, the defendant sought a new trial based on numerous grounds, all of which related to "alleged shortcomings in the Court's technology – *none* of which Defendant's counsel or Defendant alerted the Court of or objected to before or during trial..." *Id.* (Italicized emphasis in original). (The Court noted one glitch that occurred when "one of the jurors seated on the back row of the gallery indicated that he could not clearly see the text of an exhibit... on the monitor in the front of the gallery." *Id.* However, the courtroom technology specialist remedied this issue by setting up an additional monitor closer to that juror. *Id.*)

Carter R. Hale *is a partner with Scott, Sullivan, Streetman & Fox, in the firm's Mobile Office. His civil defense practice is concentrated primarily on products liability; complex construction defect cases; catastrophic injury and death actions; professional liability, and employment matters. He's a frequent CLE speaker on litigation and trial topics, with a particular focus on electronic discovery, digital evidence and emerging technologies.*

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GABY REEVES
Editor

I started my legal career as a litigation paralegal in the late 80's and early 90's; I am of the foam core board era. I like things I can touch. Things that are dependable, that operate in a consistent manner. Things like legal pads (and not that trash with a flimsy back, white paper and only a one-inch margin) Sharpies, and Mirado Black Warrior No. 2 pencils. Things I know how to make and use – such as foam board exhibits. I am less than IT savvy and, frankly, am intimidated by Courtroom Technology. However, I have finally faced the fact that I need to install an update to my internal program or be left behind.

If you are a member of the foam core board club, you are in luck; **Carter H. Hale**, has submitted a primer on the effective use of Courtroom Technology. In his article, he explains the importance of learning to use trial technology well, provides useful tips on how to learn this skill, the benefits of doing so, and introduces us to his preferred programs. If you are not proficient in trial tech, you will come away with the knowledge of where to start. If you are proficient in trial tech, you will learn something new.

The matter of third-party billing services is a persistent issue for insurance defense lawyers. We are fortunate to have a submission from **Roman A. Shaul**, General Counsel of the Alabama State Bar, and **John E. "Tripp" Vickers, III**, Ethics Counsel of the Alabama State Bar, advising us of the expansion of third-party litigation services from billing auditors to include attorney tasks, *e.g.*, document review, responding to and propounding discovery requests, etc., the risk of assisting non-lawyers in the unauthorized practice of law where the attorney does not directly supervise, or in some cases, does not personally perform these tasks. This is a must read. I very much appreciate Roman and Tripp taking the time to prepare this article for us.

In *Individual Capacity Liability for Government Officials Following* *Barnhart v. Ingalls, 275 So.3d 1112 (Ala. 2018)*, **George W. Royer, Jr.** and **David J. Canupp** provide an in depth analysis of the decision in *Barnhart* overruling precedent regarding individual capacity claims against government officials and the effect that ruling may have on claims brought against Alabama county and municipal officers in their individual capacities and on statutory caps on damages. George and David identify issues warranting consideration that may not be obvious to counsel when representing counties and municipalities.

This edition of the *Journal* also features an article from **Allison B. Chandler** and **David J. Canupp** alerting the membership to the fact that the United States Supreme Court has granted *certiorari* in a case that will determine the level of scrutiny to be applied to government actions that regulate speech based solely on content; *Reagan National Advertising v. City of Austin*, 972 F.3d 696 (5th Cir. 2020) will be heard in November of this year. Yes, it's is a First Amendment case. And, yes, the decision will affect the practice of the defense bar. Allison and David succinctly analyze the *Reed* opinion and the current application of that law and give a well-reasoned explanation as to how a change in the law could affect representation of various clients. The decision could affect more than just government restrictions on the display of signs.

All of these submissions are well-written, thoroughly researched, and pertinent. It requires a great deal of effort, time (non-billable, no less), and skill to write a professional article; thanks to all of you.

As always, I close by encouraging members to submit articles for publication and to contact me with constructive criticism.

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ADLA JOURNAL RECOGNIZED WITH APEX AWARDS FOR PUBLICATION EXCELLENCE

The 2020 Spring *Journal* publication received the 2021 Apex Award for Publication Excellence in the Magazines, Journals & Tabloids- Print category- over 32 pages. The APEX Awards are based on excellence in graphic design, editorial content, and the ability to achieve overall communications excellence.

The APEX Awards are an annual competition for corporate and nonprofit publishers, editors, writers and designers who create print, Web, electronic and social media. Nearly 1,200 entries were considered for recognition this year. 100 Grand Awards were presented to honor outstanding work in 13 major categories, with 471 Awards of Excellence recognizing exceptional entries in 100 sub-categories.

The *Journal* is published twice a year, spring and fall, and has a statewide circulation of over 1,500 individuals. This is the first year the *Journal* has received an award for its publication. Congratulations to *Journal* Editor **Gaby Reeves**, ADLA Executive Director **Jennifer Hayes**, and the Editorial Board for their leadership and contribution to the award-winning publication.

"I am proud to announce that ADLA's 2020 Spring Journal received the 2021 Apex Award for Publication Excellence in the Magazines, Journals & Tabloids Print Category for publications of over 32 pages. Our Journal received this honor because of Jennifer Hayes's graphic design skills and because of the quality of the articles submitted by Stephen Palmer, Jeremy Richter, and Mary Margaret Bailey. We also received this award because of the hard work of previous editors and quality submissions to the Journal over the years; success does not happen overnight. I hope that the entire membership is as proud as I am that our Journal received this distinction." Reeves said.

ADLA
ALABAMA DEFENSE LAWYERS ASSOCIATION

2021 ANNUAL MEETING

ADLA CELEBRATES 56TH ANNUAL MEETING AT SANDESTIN GOLF AND BEACH RESORT

After taking a year off due to the pandemic, ADLA's 56th Annual Meeting returned to the Sandestin Golf and Beach Resort in Destin, Florida, on June 17th-20th. This year's conference included a judicial welcome reception, informative CLE speakers, fun-filled nightly family events, and opportunities to network with our wonderful sponsors and exhibitors. Just as conference activities began to kickoff, Hurricane Sally made her unexpected arrival on the gulf coast. The resort staff worked hard behind the scenes to make minor adjustments to the conference logistics due to the weather. Thankfully, all conference activities, including the golf tournament, went on as planned. Members and exhibitors enjoyed catching up with one another and were treated to fun receptions and family activities, all compliments of our conference sponsors. Keynote speaker **Brittany Wagner** from the Netflix documentary series *Last Chance U* gave an uplifting testimony on her experience as a respective athletic academic counselor and mentor. At the conclusion of the conference on Saturday, the membership installed new officers and directors during its annual membership business meeting.

The CLE offerings this year included a message from Alabama Supreme Court **Chief Justice Tom Parker**, a new case law update from ADLA's own **Alex L. Holtsford, Jr.**, and a panel discussion led by the Young Lawyers Section on mentoring. Other topics included diversity and mentoring, enabling in the legal profession, and ethical rules relating to frivolous litigation. ADLA would like to thank the guest judges who attended the conference, visited with members, and answered questions during the CLE session. Alabama Supreme Court: **Chief Justice Tom Parker, Justice Mike Bolin, Justice Tommy Bryan, Justice Brad Mendheim, Justice Will Sellers, Justice Sarah Stewart, and Justice Kelli Wise.** The **Hon. Glenn Murdock,** 2006-2018 Supreme Court Justice, was also in attendance. Alabama Court of Civil Appeals: **Presiding Judge Bill Thompson, Judge Christy O. Edwards, Judge Matt Fridy**, and **Judge Chad Hanson**. Alabama Circuit Court: **Judge John H. England, Jr.**, Retired Circuit Judge Tuscaloosa County, **Presiding Judge Bill Filmore**, 33rd Judicial Circuit, **Presiding Judge Elisabeth French**, 10th Judicial Circuit, and **Judge Debra Jones**, 7th Judicial Circuit.

During the annual membership business meeting, awards were presented to 2020-2021 ADLA President **Andy Rutens** and the first Women in the Law Section President **C. Meade Hartfield**, who served from 2018-2021. A special presentation followed with **Alex L. Holtsford, Jr.** receiving the 2021 Livingston Award for his unselfish devotion and outstanding service to the Alabama Defense Lawyers Association. The Livingston Award was created in 2010 in honor of **Louise and Ed Livingston**. As a special surprise for Alex, Louise and Ed Livingston were in attendance for the award presentation. This prestigious award has only been awarded once, with the first recipient being Helen J. Alford in 2010. Outgoing District Directors recognized were **J. Mark Debro** (District 1), **Christie J. Estes** (District 2), **Megan K. McCarthy** (District 3), and **William J. Gamble, Jr.** (District 4). ADLA's 2020-2021 Young Lawyers Section President **Jay Robinson** was also recognized for his service on the Board of Directors.

Attendees and their families enjoyed games, inflatables, arts and crafts, snow cones, cotton candy, jumbo lawn games, and much more. ADLA's annual golf tournament on Friday offered a fun, competitive environment amongst all golf teams. This year's winning team members were: **Chris Bishop**, **Steve Dix** of Dix & Massey, and **Gary Johnson** of VEAR. Saturday night entertainment included the famous Deano and special signature cocktails were served in honor of **Andy Rutens** and **Meade Hartfield**. If you missed out on all the fun, be sure to make plans early to attend the **2022 Annual Meeting in our new location The Lodge at Gulf State Park in Gulf Shores, Alabama**. Registration and hotel room block will open in early February 2022!

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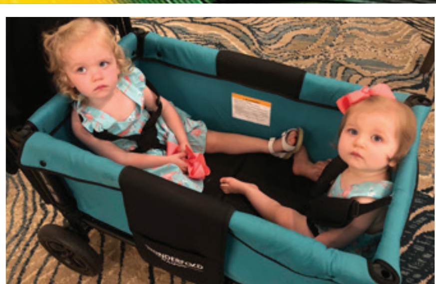
2021 ANNUAL MEETING HIGHLIGHTS



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Meeting details coming soon at www.adla.org

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2021 ANNUAL MEETING HIGHLIGHTS

ADLA MEMBERSHIP DISCUSSION FORUM

Ask. Find. Connect.

ADLA created and offers the discussion forum as a free benefit to members. The purpose of the forum is to foster useful discussion of civil defense litigation topics only among ADLA members. When posting a question or comment, be sure to sign up for reply notifications.

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Join the discussion at www.adla.org/member-forum

JAY WATKINS
Membership Chair

Greetings fellow ADLA members! **“Improvise, Adapt and Overcome”** is the unofficial slogan of the Marine Corps. It became famous after Clint Eastwood used it in the 1986 movie “Heartbreak Ridge.” In it, Eastwood stars as aging Gunnery Sargent Tom Highway, who on the verge of retirement, is sent to his old unit to prepare a group of slackers for the invasion of Grenada. Highway is tough on the group. As he gets the misfits into fighting shape, he continually reminds the group to “improvise, adapt and overcome.” Like the movie, the last eighteen months, have provided many challenges, with COVID-19, racism, shutdowns, governmental chaos, scientific discord, and riots. At some point jury trials were on hold and depositions too risky. Last January, ADLA leadership chose to “Improvise, Adapt, Overcome” and plow forward into the unknown. It has paid off and ADLA is more nimble, informative and in touch with its members than ever. ADLA membership offerings:

ADLA Journal. Our journal is a great way to read about current legal issues, trends and cases that affect your defense practice. Did I mention that our 2020 Spring Journal publication received the 2021 Apex Award for Publication Excellence in the Magazines, Journals & Tabloids - Print category - over 32 pages? The APEX Awards are based on excellence in graphic design, editorial content, and the ability to achieve overall communications excellence. This is the first year the Journal has received an award for its publication.

Deposition Boot Camp is back and was a huge success! Deposition Boot Camp is for every attorney who is serious about improving his or her deposition skills. This seminar combines presentations by experienced ADLA members with mock exercises to learn and apply critical skills to effectively take and defend depositions. Have you already completed the boot camp? Have you taken so many depositions that you don’t even make an outline anymore? Good. Please consider serving as faculty for the boot camp.

Annual Meeting at Sandestin Golf and Beach Resort returned to a full house! As always, this is the CLE to attend. Where else can you join fellow members and judges from across the state for networking, receptions, dinners, golf and beach/pool relaxing? All while you receive 7.5 CLE hours, including an ethics hour. As always, this is a family friendly event for everyone!

2021 Bibb Allen Trial Academy is back! The Trial Academy is for attorneys who seek to develop and/or polish basic trial skills. Trial Academy participants focus on voir dire, opening statements, direct and cross examination, impeachment tactics, introduction of exhibits, objections, closing arguments, and ethics. Participants receive detailed, constructive feedback from experienced trial lawyers, whose goal is to provide critical insights to help improve trial advocacy skills. Send your firm’s young lawyers and ADLA will send them back to you ready to fight! Have you tried some cases? Then please consider serving on this year’s faculty.

CLE Library and Webinars. As a member benefit, members have exclusive access to free CLE webinars throughout the year. Whether members join the webinars live or they need to obtain last minute CLE, take advantage of ADLA’s online resources. Many past CLE programs can be accessed for a small fee; some are free! CLE Webinar are the way to go for great topics and CLE credit from your home or office.

New Membership Forum is up and running. ADLA created the discussion forum as a free benefit to members to foster useful discussion of civil defense litigation topics only among ADLA members. Have a question about a particular judge’s “secret” pretrial order? Have questions about tolling or personal jurisdiction? Need to remove a case by tomorrow? Have a question about excluding an expert? Then this is the site for you. Currently, the topics are Attorneys, Business Torts, Courts, Pleadings, and Trials. Leave a question on the Forum and let one of ADLA’s 936 members provide learned and informative insight!

Find an Expert Witness. Search ADLA’s database for expert witnesses from prior and active cases.

Amicus Brief Bank. ADLA’s Amicus Curiae Committee is highly involved in submitting briefs, writing on issues and participating in oral arguments before the Alabama Supreme Court. This exclusive benefit gives members’ a credible and respected voice in the appellate courts. All previous briefs are searchable and only available to ADLA members.

ADLA Journal Archive. Members can search the last 10 years of the ADLA Journal for prior articles.

Wednesday Briefcase. Stay up to date about the professional law field and regional happenings with our members-only e-newsletter, the Wednesday Briefcase. Find out about local meetups, legislative updates, important news bites and more. The e-newsletter is delivered on a biweekly basis.

Our 2020-2021 Membership Campaign kept pace with previous years’ trends and ADLA had 936 members by the fiscal years’ end June 30, 2021. We had 47 new members join during this time and 30 former members rejoined! With our focus on the above-referenced offerings and the return of our Deposition Boot Camp, Trial Academy and Summer Meeting, membership is solid. ADLA continues to look for ways to make your membership more valuable. As lawyers, we know that no amount of preparation can prepare us for when things turn fall apart. In those situations, we need to have the ability to change and ADLA’s leadership has accepted the challenge to continue to make this organization great. Improvise, Adapt and Overcome!

The 2020-2021 Membership Committee:

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Let’s make 2021-2022 another great year!

ADLA WELCOMES 2021-2024 OFFICERS & DISTRICT DIRECTORS

The Alabama Defense Lawyers Association held its 56TH Annual Membership Meeting and Elections on June 19, 2021, confirming a new slate of Officers and Directors at the close of the business meeting. The Annual Meeting was held at the Sandestin Golf and Beach Resort in Destin, FL, June 17-20, 2021.

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2021 DEPOSITION BOOT CAMP WELCOMES LARGEST CLASS OF YOUNG LAWYERS

After a year on hiatus due to the pandemic, ADLA faculty once again organized a successful event for young lawyer members in May at Jones School of Law in Montgomery. This year's class consisted of 36 attendees, the largest since the program began.

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.

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 again this year at La Jolla. Additionally, we recognize our friends at **Veritext Legal Solutions** for providing custom coolers for everyone and **Huseby Global Litigation** for hosting a great luncheon.

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, Harold Stephens, Jeremy Dotson, J. Evans Bailey, Gerald Swann, Dottie Barker, Woody Jones, Bill Lancaster, and Autumn Caudell** of the Alabama State Bar. **Ben Heinz** served as Deposition Boot Camp's Program Chair.

A special thank you also goes to the **Honorable James Anderson 15th Judicial Circuit** for serving as the honored guest speaker again this year. Judge Anderson led an informative discussion and candidly answered questions from the bench's perspective.

Highlights from Deposition Boot Camp

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Congratulations to ***Kendall Fann*** *of Moore Young Foster & Hazelton, LLP! Kendall took home a nice set of beach chairs.*

YOUNG LAWYERS GATHERED FOR 30TH ANNUAL BIBB ALLEN MEMORIAL TRIAL ACADEMY IN BIRMINGHAM

ADLA's 2021 **Bibb Allen Memorial Trial Academy**, held annually in August at Cumberland School of Law, once again attracted sharp young lawyers who were eager to develop and fine-tune their trial skills in the courtroom. Our experienced faculty members and speakers delivered a stellar program that followed the fact pattern of the Deposition Boot Camp held this past May in Montgomery at Jones School of Law. Trial Academy lawyers received exceptional hands-on-experience by participating in small workgroups led by seasoned ADLA members with significant trial experience and judges to develop and/or polish necessary trial skills. Door prizes were given away throughout the program to keep things exciting.

Offered as a members' only benefit, Trial Academy is tailored to lawyers who practice in civil defense litigation. Young lawyer attendees earned 15 hours of CLE, including 1 hours' ethics. At the close of the Thursday session, attendees and faculty members gathered at Tostadas for a fun time of networking, margaritas and great food co-sponsored by **ESi** and **Quality Forensic Engineering, LLC.** Afterward, faculty members enjoyed a fabulous dinner at Ironwood Kitchen + Cocktails sponsored by **Alabama Court Reporters Videographers Litigation Support.** Additional program event sponsors include Thursday breakfast sponsor **Veritext Legal Solutions**, Thursday luncheon sponsor **Attorneys Insurance Mutual of the South**, Friday breakfast sponsor **Rimkus**, and Friday luncheon sponsor **Birmingham Reporting**.

Trial Academy would not occur without the dedication of the faculty and speakers who are committed to the development of young civil defense lawyers in Alabama. This year's faculty included ADLA members **Bernie Brannan, Mike Edwards, Jennifer Egbe, Megan Jones, Chris King, Gaillard Ladd, Bob MacKenzie, Jessica McDill, Harlan Prater, Kile Turner, Jay Watkins,** and from the University of Alabama School of Law, **Dean Steve Emens. Robby Anderson** served as the Trial Academy's Director**.** Attendees also enjoyed visiting with **U.S. District Court Judge Madeline Haikala.**

Highlights from Trial Academy

Highlights from Networking Social at Tostadas

Congratulations to **Brad Prosch** *of Starnes Davis Florie, LLP! Brad took home this year's grand prize- a Margaritaville Key West Frozen Machine and a set of glasses.*

Trial Academy Faculty Dinner at Ironwood Kitchen + Cocktails

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ATTORNEYS SHOULD NEVER DELEGATE CERTAIN DUTIES TO 3RD PARTIES

By: Roman A. Shaul, General Counsel of the Alabama State Bar | Montgomery, AL
John E. “Tripp” Vickers, III, Ethics Counsel of the Alabama State Bar | Montgomery, AL

The Office of General Counsel (“OGC”) has spent a great deal of time over the last several years advising insurance defense attorneys about their concerns when using third party litigation services. In the beginning, the OGC received calls primarily about 3rd party billing auditors. Now, the list of 3rd party litigation services has grown to include document review, document production, service of subpoenas and even answering and propounding discovery requests. This trend is alarming since the situation appears to be getting worse for attorneys handling these cases. The primary concern for the OGC is whether an attorney is assisting others in the unauthorized practice of law (“UPL”) and whether the attorney is truly able to exercise her independent and professional judgment.

The OGC is not allowed to give legal advice, but routinely counsels attorneys that they have an ethical duty to follow the law. Alabama Code § 34-3-6 defines the practice of law, and requires that certain actions can only be performed by persons regularly licensed to practice law. The unauthorized practice of law is a Class A misdemeanor in Alabama. Ala. Code 34-3-7 (1975). The purpose of §34-3-6 is to ensure that non-attorneys

do not serve others in a representative capacity in areas that require the skill and judgment of a licensed attorney. Many of the 3rd party litigation services we see being requested (or mandated by insurance companies) is essentially the outsourcing of "attorney" work to non-attorneys. Alabama does not license 3rd parties, paralegals, or otherwise allow unsupervised paralegals to engage in actions which constitute the practice of law.

There is no ethical problem when paralegals and other non-attorney staff *assist* in the formulation of discovery requests, preparation of discovery responses, review of documents, interview witnesses, etc. However, these things should be directed and accomplished only under the active supervision of the attorney responsible for the content of these documents. The supervising attorney has broad discretion when deciding what, if any assistance, she may need in the preparation of a case. Sometimes even the simplest of tasks can be deemed "attorney" work and require the exercise of professional judgment. For example, the scheduling of depositions can be done in a strategic manner so as to control the order of the testimony of witnesses and how certain information is revealed. This strategy is not one that should be left to the professional judgment of a non-attorney.

The failure to actively supervise the non-attorney, or simply "rubber stamping" the work, may be construed as assisting in the unauthorized practice of law

Importantly, an attorney cannot abdicate her responsibility to ensure accomplishment of required tasks and rely solely on others to perform **or authorize** certain actions needed for the preparation of a case. A chief complaint from attorneys is that 3rd parties (at the insistence of the insurance company) are attempting to handle important aspects of discovery; to the point where 3rd parties are reviewing document productions before the actual supervising attorney gets a chance. This is problematic when the document production is coming from the other side, but even more so when the production is coming from the client. How can an attorney, as an officer of the court, ever be sure that all relevant materials are being produced? The major ethical and legal problem for attorneys is that the failure to actively supervise the non-attorney, or simply "rubber stamping" the work, may be construed as assisting in the unauthorized practice of law and result in a violation of Rules 5.3 [Responsibilities Regarding Nonlawyer Assistants], 5.5(b) [Unauthorized Practice of Law], and 8.4 [Misconduct], *Alabama Rules of Professional Conduct.*

The OGC is mindful of the pressures civil defense lawyers face when clients start to overreach and attempt to require more involvement in the litigation than ethically allowed. The fear has been expressed that if the individual attorney pushes back on some of the requirements, she will lose business to the attorney down the street. Unfortunately, we cannot advise that attorneys accept an unethical, or illegal, intrusion into their professional judgment. Nor is it a defense to a bar complaint that the attorney was required by the insurer to abdicate decisions that normally require her professional judgment.

When presented with these questionable arrangements, the attorney should strongly consider Rules 1.1 [Competence] and 5.4 [Professional

Independence of a Lawyer], *Alabama Rules of Professional Conduct* and explain your ethical obligations to the insurer. Rule 1.1 requires, in relevant part: "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, … thoroughness [ ] and preparation reasonably necessary for the representation…." Rule 5.4(c) requires "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." See Formal Opinion 98-02 ("It is the opinion of the Disciplinary Commission of the Alabama State Bar that a lawyer should not permit an insurance company, which pays the lawyer to render legal services to its insured, to interfere with the lawyer's independence of professional judgment in rendering such legal services, through the acceptance of litigation management guidelines which have that effect.") If you abdicate your duty to provide a competent representation of the client at the insistence of an insurer or other 3rd party payer you risk violating both of these rules (and perhaps a malpractice claim).

The fact the insurer would not allow you (or not compensate you) for the work you must perform in order to comply with your obligations under the *Alabama Rules of Professional Conduct* (or generally applicable law) is essentially irrelevant for the purposes of determining the proper course of action. Rule 1.16 [Declining or Terminating Representation] requires a lawyer to decline or terminate a representation if "the representation will result in a violation of the Rules of Professional Conduct or other law." The OGC is sympathetic to the dilemma attorneys face in these instances. Although we open and process several UPL cases a year, we have never received a formal complaint allowing us to prosecute these types of abuses. We generally understand why this has been the case.

If any member of ADLA has a suggestion on how we could be of assistance to your membership concerning these issues, we would love to hear them. If you have a problem with an insurer or 3rd party payor similar to what has been described herein, we recommend that you contact Tripp Vickers, Ethics Counsel, at ethics@alabar.org for advice. All calls to the ethics counsel are confidential and will not be turned over to the Disciplinary Division of the Office of General Counsel, pursuant to Rule 18, *Alabama Rules of Disciplinary Procedure*.

Roman Shaul *has been the General Counsel for the Alabama State Bar since 2018. Prior to that he was a circuit court judge in Montgomery County, Alabama. He was in private practice for approximately 19 years and was licensed to practice law in 8 different states, as well as multiple federal district and circuit courts.*

John Ellison Vickers III *"Tripp" was admitted to the Alabama State Bar in 2002, and engaged in general civil practice before joining the Bar as Assistant General Counsel in 2013. He has served as Ethics Counsel to the Alabama State Bar since the creation of that position in 2017.*

Sometimes even the simplest of tasks can be deemed "attorney" work and require the exercise of professional judgment.

HANNAH TORBERT KENNEDY
Young Lawyers Section President

A new year brings a new normal. 2021 is in full swing and, while we continue to deal with the effects of COVID 19 and our new digital ways of working, I remain hopeful that we will soon transition back into a way of life that is not so socially distanced. This year Young Lawyers is actively planning an agenda that will strive to bring us all together once again. Despite the COVID 19 restrictions, Young Lawyers has already seen success with its Deposition Boot Camp and its recent Trial Academy. Both events were well attended and we are looking for ways to build on this success as we move forward into the fall. In addition to adding new CLE programs and presentations, we are also actively working to build networking events in each district that will not only promote camaraderie among our new members but also foster opportunities to meet other ALDA members at large. We are looking forward to a good year and we hope to see everyone soon!

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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 for more information, member login required.

View & register for upcoming events at https://adla.org/events/

September 21, 2021
Associate to Partner CLE Series: Balance in Your Practice and Personal Life
Hosted by Young Lawyers Section
Virtual Zoom Event- Free for ADLA Members

September 28, 2021
CLE Webinar: E-Evidence- What You Need to Know
Guest Speakers: Presiding Judge Johnny Hardwick &
Jason Hodges and Fred Lilly- AOC Technology Department
Virtual Zoom Event- Free for ADLA Members

October 11-22, 2021
District Community Service & Outreach Project Week
Outreach Projects Held Statewide by District

October 21, 2021
CLE Webinar: Diversity & Inclusion Panel Presentation
Hosted by Young Lawyers & Women in the Law Sections
Virtual Zoom Event- Free for ADLA Members

March 23-24, 2022
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June 16-22, 2022
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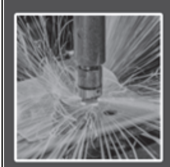
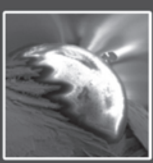
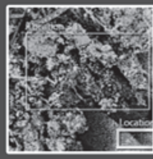

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INDIVIDUAL CAPACITY LIABILITY FOR GOVERNMENT OFFICIALS FOLLOWING *BARNHART v. INGALLS*, 275 So.3d 1112 (Ala. 2018)

By: George W. Royer, Jr. and David J. Canupp,
Lanier Ford Shaver & Payne, P.C. | Huntsville, AL

In its 2018 decision in *Barnhart v. Ingalls*, 275 So.3d 1112 (Ala. 2018), the Alabama Supreme Court corrected an error in its jurisprudence that had incentivized plaintiffs to focus efforts on maintaining individual capacity liability claims against government officials and employees in Alabama for actions undertaken in the course of their official government duties. The Court in Barnhart reiterated the proper test for determining when a government officer or employee can have liability in their individual capacity in such cases. In doing so, the Court overruled prior precedent that had misapplied the test. The Court's decision in *Barnhart* has the potential to have a transformative impact on the manner in which claims are brought against government entities and governmental officers and employees in the State of Alabama. This article will examine the Supreme Court's decision in *Barnhart*, the corrections to the analysis of individual capacity liability made in that case, and potential future effects of the *Barnhart* decision.

Capacity to be Sued Prior to *Barnhart*

The concept of capacity of a public official or employee to be sued is one of the least understood areas of public liability law. Indeed, as the Supreme Court has observed, the concept of the capacity in which a public officer may be sued "continues to confuse lawyers and to confound lower courts." Kentucky v. Graham, 473 U.S. 159, 165 (1985). One thing, however, is clear. It has long been recognized that "official capacity suits generally represent only another way of pleading an action against the entity of which the officer is an agent." Brandon v. Holt, 469 U.S. 464, 472, n. 21 (1985). See also Monell v. Department of Social Services, 436 U.S. 658, 690, n. 55 (1978). Such suits are "in actuality, suits directly against [the governmental entity] that the officer represents." Busby v. City of Orlando, 931 F.2d 764, 776 (11th Cir. 1991), citing Graham, 473 U.S. at 165-66. The same is true under Alabama law. See Smitherman v. Marshall County Commission, 746 So.2d 1001, 1007 (Ala. 1999) ("Claims against county commissioners and employees *in their official capacity* are, as a matter of law, claims against the County.") (emphasis in original); Morrow v. Caldwell, 153 So. 3d 764, 771 (Ala. 2014) ("[C]laims that are brought against municipal employees in their official capacity are . . . as a matter of law, claims against the municipality.")

Following Barnhart, courts must now consider not just how the plaintiff's attorney labels the claim in the complaint, but also whether the defendant purportedly sued in his or her individual capacity actually had an individual duty that is triggered by the allegations of the case.

By contrast, when an action is brought against a governmental officer in that officer's individual capacity, the action is one by the plaintiff to obtain "money damages directly from the individual officer." Busby, 931 F.2d at 772, citing Graham, 473 U.S. at 165. The Supreme Court of the United States has contrasted the difference between individual capacity suits and official capacity suits as follows:

As long as the government entity receives notice and an opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity [citation omitted]. It is *not* a suit against the official personally, for the real party at interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Graham, 473 U.S. at 166. (emphasis in original).

At least as early as 2004, the Alabama Supreme Court developed a rubric for determining whether a suit against an individual government employee should be treated as an individual liability claim or an official capacity claim. In Haley v. Barbour County, 885 So. 2d 783 (Ala. 2004), the Court held that "in determining whether an action against a state officer or employee is, in fact, one against the State, a court will consider such factors as the nature of the action and the relief sought." Id. at 788 (quotations and bracketing omitted). After identifying this test – which focused ostensibly on the "nature of the action" *and* the "relief sought," the Court in Haley then went on to list several factors, including "whether a result favorable to the plaintiff would directly affect a contract or property right of the state . . . whether the defendant is merely a conduit through which the plaintiff seeks recovery of damages from the State . . . and whether a judgment against the officer would directly affect the financial status of the state treasury." Id. at 788 (internal quotations omitted). As the Supreme Court in Barnhart later observed, these listed factors "all . . . related to the issue of damages and whether any damages that might be awarded would flow from the State." Barnhart, 275 So.2d at 1126. The Court in Barnhart noted that "[s]ubsequent cases involving actions against State officials and questions regarding the applicability of State immunity have also focused on the damages being sought, on occasion to the exclusion of other factors." Id. (citing Ex Parte Bronner, 171 So. 3d 614, 622 n. 7 (Ala. 2014)).

Given that the Court in Haley focused so singularly on the source of the damages sought – to the exclusion of other factors in referenced – plaintiffs' attorneys desirous of circumventing the State's immunity from tort liability under § 14 of the Alabama Constitution of 1901 began labeling claims against State officers and employees as "individual capacity" causes of action. This gambit worked exceedingly well. As long as a plaintiff alleged that such was the case, for many years there was no real inquiry by the courts into whether such a designation of the defendant's capacity was proper. See Wright v. Cleburne County Hospital Board, Inc., 255 So.3d 186, 192 (Ala. 2017) ("It is the plaintiff who elects whether to frame his claim as one seeking recovery against a defendant in his official capacity or one seeking a recovery against the defendant in his individual capacity—or both. . . . It is for the court to address the merit of the claim as framed by the plaintiff, not to reframe it.").

The problem was, this "framing" decision often had serious consequences for litigants. Indeed, the issue of capacity impacts more than the State's § 14 immunity. Alabama's statutory caps on damages for other, lesser government entities do not apply to individual capacity claims asserted against local governmental officers who are sued in their individual capacities. Likewise, exhaustion requirements particular to government defendants such as *ante litem* notice of claim requirements do not apply to truly individual capacity claims. For this reason, attorneys representing governmental liability plaintiffs have adopted a practice of suing individual government officers at all levels of government in their individual

capacities, knowing that doing so avoided the State's § 14 immunity from tort liability in suits against State officers, and, as to municipal and county officers, unlocked insurance dollars without triggering the statutory damages caps and other defenses.

The Court's Decision in *Barnhart*

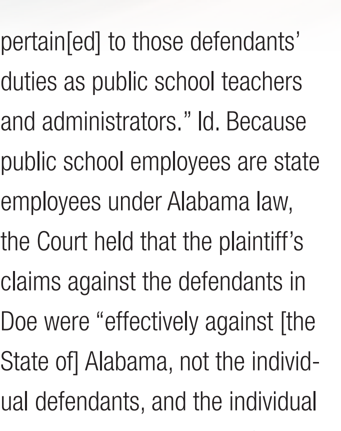
Barnhart re-focused the capacity analysis by returning to the test announced in Haley and clarifying its proper application. In so doing, the Court embraced the test announced in Haley but not how the test had been misapplied in subsequent cases. The Court expressly rejected the idea that the source-of-damages analysis was the exclusive method of determining whether a particular claim is an individual-capacity claim vs. an official-capacity claim. Barnhart, 275 So.3d at 1126-27. Instead, the Court in Barnhart held that the Haley test had always required courts to determine whether claims alleged against a public officer were individual or official capacity claims by consulting "the nature of the action," in *addition* to the source of the damages sought. Id.at 1126. The Court expressly overruled prior precedent which had focused on the source of the damages as the exclusive test for whether a particular claim was an official or an individual capacity claim. See 275 So.3d at 1127 (overruling Ex Parte Bronner to the extent that it held that fact that damages were only sought from the state officer in their individual capacity precluded claim from being considered an official capacity claim.) Although this may at first seem to only represent a subtle analytical shift, it will make a major practical difference, because the "nature of the action" is not something that can be so easily manipulated by plaintiffs' attorneys to foreclose legal defenses. In other words, following Barnhart, courts must now consider not just how the plaintiff's attorney labels the claim in the complaint, but also whether the defendant purportedly sued in his or her individual capacity actually had an individual *duty* that is triggered by the allegations of the case.

Applying this prong of the test, the Court in Barnhart made clear that this lesser-known and now re-animated prong of the Haley analysis can make a dispositive difference in a given case. In fact, it made such a difference in Barnhart. There, the Court held that "regardless of the *damages* being sought, the *nature* of those claims require[d]" a finding that the claim at issue was an official capacity claim and not an individual capacity claim. 275 So. 3d at 1126. (emphasis in original). In Barnhart, employees of the Alabama Space Science Exhibit Commission sued officers of the Commission in their individual capacities alleging that the officers had failed to pay the employees bonuses and holiday compensation as required by law. Id. at 1118. To determine the "nature of the action," the Supreme Court in Barnhart examined whether the duties the officers allegedly breached existed solely because of their official positions. Because the Supreme Court concluded that the answer to this question was yes, it held that the claims asserted against the Commission officers were not individual-capacity claims but were actually official-capacity claims. Id. at 1126. The Court stated: "[T]he . . . officers were, accordingly, acting *only* in their official capacities when they allegedly breached these duties . . . stated another way, the . . . officers had no duties *in their individual capacities* to give effect to the [wage loss]; rather, any duties they had in that regard existed solely because of their official positions in which they acted for the State. Accordingly, the individual-capacity claims are, in effect, claims against the State . . ." Id. (emphasis in original).

Since its decision in Barnhart, the Supreme Court has applied the "nature of the action" test in subsequent cases to determine whether claims alleged against public officers were official-capacity claims or individual-capacity claims. In Anthony v. Datcher, ___ So.3d ___, 2020 WL 5268468 (Ala. Sept. 4, 2020), college instructors sued a state educational official for damages resulting from the official's alleged misclassification of their positions for salary purposes. The instructors' claims were purportedly asserted against the official in her individual capacity. Citing Barnhart, the Supreme Court in Anthony identified "[t]he key issue [as] whether those . . . claims against [the official] were actually individual-capacity claims or were in fact official-capacity claims mislabeled as individual-capacity claims." Id. at * 8. The Court in Anthony noted that under Barnhart, "the nature of a claim is crucial in determining whether it is actually an official-capacity claim or an individual-capacity claim." Id. The Court in Anthony examined the alleged breached duty of the official – the alleged improper classification of the instructors – and determined that the duty "existed only because of her official position in which she acted for the State." Id. at *10. After making this determination, the Court held that the claims against the official in Anthony "were not actually individual-capacity claims" but were in substance official-capacity claims. Id.

Similarly, in Meadows v. Shaver, ___ So.3d ___, 2020 WL 6815066 (Ala. Nov. 20, 2020), the Supreme Court again applied Barnhart's "nature of the action" test *ex mero motu* and determined that the duties of the defendant in that case (who was a circuit court clerk) which were allegedly breached existed solely because of the clerk's official position. Id. at * 3. The claims alleged by the plaintiff in Meadows, who was a prison inmate, involved the alleged mishandling by the circuit clerk's office of the plaintiff's sentence-status transcript. The Court in Meadows held that the facts as alleged by the plaintiff in the complaint made clear that the defendant circuit clerk's alleged duties "arose solely out of [the defendant clerk's] position as circuit clerk." Id. As a consequence, the Court held that "both [the plaintiff's] official-capacity claims and his purported individual-capacity claims against [the clerk] were, in effect against the State; they were, in substance, official capacity claims." Id.

At least one federal court in Alabama has applied Barnhart to dispose of individual capacity claims alleged against public school teachers and administrators. In Doe v. Huntsville City Schools Board of Education, No. 5:21-cv-00110-MHH, 2021 WL 2716117 at * 6 (N.D. Ala. July 1, 2021), the plaintiff alleged state law claims asserting that several teachers and administrators failed to "act in a reasonably prudent manner" to prevent a student from being bullied and assaulted. Id. The Court in Doe determined that the plaintiff's "state law claims against the individual defendants



pertain[ed] to those defendants' duties as public school teachers and administrators." Id. Because public school employees are state employees under Alabama law, the Court held that the plaintiff's claims against the defendants in Doe were "effectively against [the State of] Alabama, not the individual defendants, and the individual defendants are entitled to Section 14 immunity for John Doe's state law claims." Id.

If the Supreme Court does extend the Barnhart analysis to purported individual capacity claims against municipal and county officers, this could have a profound effect upon individual capacity liability in Alabama for county and municipal officers, as well as upon the applicability of the statutory caps on damages in cases.

The courts in the Barnhart line of cases all held that the purported "individual capacity" claims asserted in those cases were in reality official capacity claims by determining that the plaintiffs' claims arose from the performance by the defendant officers of their official job functions. In formulating its new test for determining whether a claim was an individual or official capacity claim, the Court in Barnhart emphasized that the officers had no duty in their individual capacities to perform the duties giving rise to the plaintiffs' claims in those cases because "any duties they had . . . existed solely because of their official positions in which they acted." The Court in Barnhart stated as follows:

It is clear, however, from the named plaintiffs' statement of th[e] claims [alleged in the complaint] that the duties allegedly breached by the Commission officers were owed to the putative class members *only* because of the positions the Commission officers held and that the Commission officers were, accordingly, acting *only* in their official capacities when they allegedly breached those duties by failing to give effect to the benefit statutes. Stated another way, the Commission officers had no duties *in their individual capacities* to give effect to the benefit statutes; rather, any duties they had in that regard existed solely because of their official positions in which they acted for the State.

275 So. 3d at 1126. (emphasis in original)

Potential Ramifications of *Barnhart*

All of the cases that have applied the Barnhart analysis to determine that purported individual capacity claims asserted in those cases were actually official capacity claims have thus far involved State, as opposed to county or municipal officers. However, there does not appear to be any analytical difference between the formulation developed in Barnhart for determining the nature of the claims alleged against the State officers in those cases and any analysis of similar claims alleged against county or municipal officers. At bottom, the question is one of capacity, which has never depended on the identity of the employing entity. If the Supreme Court does extend the Barnhart analysis to purported individual capacity claims against municipal and county officers, this could have a profound effect upon individual capacity liability in Alabama for county and municipal officers, as well as upon the applicability of the statutory caps on damages in cases.

For example, if a local governmental employee is sued in his or her individual capacity in a case in which the local governmental entity is also already a separately named defendant, and the individual capacity claim is determined under the Barnhart analysis to be an official capacity claim, the question arises as to whether the employee should even remain as a defendant in the action. Where a local government entity is already a separately named defendant in an action, official capacity claims asserted against the entity's officers or employees in the same action are superfluous and redundant and are due to be dismissed. See Busby, 931 F.2d at 776 ("Because suits against a municipal officer sued in his official capacity and direct suits against municipalities are functionally equivalent, there no longer exists the need to bring official-capacity actions against local governmental officials, because local governmental units can be sued directly . . ."); Higdon v. Fulton County, 746 Fed. Appx. 796, 799 (11th Cir. 2018) ("Because local government units can be sued directly – and suits against a municipal officer sued in his official capacity and direct suits against municipalities are functionally equivalent – there is no need to bring official capacity actions against local government officials. . . . Thus, official-capacity claims against municipal officers should be dismissed, as keeping the claims against both the municipality and the officers would be redundant.")

Similarly, if the Barnhart analysis is employed to determine whether individual capacity claims alleged against county and municipal employees are, in effect, official capacity claims, there could be significant implications for the imposition of the statutory caps on claims against individual defendants in Alabama. Under Ala. Code § 11-93-2, recovery for damages for personal injury and property is limited to $100,000 in a claim against a county, municipality, or other defined "governmental entity," which includes certain school boards and hospital boards. Section 11-47-190 also provides municipalities with a $100,000 damages cap per injured person, up to a maximum of $300,000 in the case of multiple injuries.

In Suttles v. Roy, 75 So.3d 90 (Ala. 2010), the Supreme Court held that an individual capacity claim alleged against a municipal officer or employee is not subject to the $100,000 statutory cap on damages contained in § 11-93-2, even where the officer or employee is acting within the line and scope of his or her duties at the time of the occurrence of the matters at issue. The Supreme Court in Roy held that the $100,000 damage cap in § 11-93-2 is only applicable to the governmental entity itself and is not applicable to the individual capacity claims against officers or employees. The Supreme Court held in Roy that only caps against public employees in their official capacities, which again, are claims against the entity by which the employee is employed, are subject to the $100,000 cap. In so holding, the Supreme Court stated:

Insofar as Roy's action seeks damages against Suttles in his official capacity, as noted in Smitherman, the cap of § 11-93-2 limits any recovery against Homewood and Suttles to $100,000. Suttles and Homewood thus contend that "it makes no sense at all" for the claims against Suttles in his official capacity "to be governed by the statutory damages cap" without the claims against him in his individual capacity also being subject to the cap. Homewood and Suttles's brief at 20. *This distinction—capping damages for claims against Suttles in his official capacity but not capping damages for claims asserted against him in his individual capacity—however, is clearly provided by the cited authorities.*

75 So. 3d at 97-98 (emphasis added).

It appears likely that the Barnhart analysis is applicable to claims against county and municipal officers and employees of public hospital boards.

The Alabama Supreme Court has reiterated this holding in Roy in a series of cases since Roy was decided. See Wright v. Cleburne County Hospital Board, Inc., 255 So.3d 186, 194-95 (Ala. 2017) ("explaining that, in Suttles, '[t]his Court stated that, although the statutory cap on recovery against 'a governmental entity' set forth in § 11-93-2 applied to a suit against a municipal employee in his individual capacity, it did not apply to a suit against a municipal employee who is sued in his individual capacity.'") (quoting Alabama Mun. Ins. Corp. v. Allen, 164 So.3d 568, 574 (Ala. 2014)). In addition, the Alabama Supreme Court has extended this holding to the statutory damages cap codified at § 11-47-190, finding "no language" in that statute to suggest "that it is intended to apply to claims against municipal employees who are sued in their individual capacities." Morrow v. Caldwell, 153 So.3d 764, 771 (Ala. 2014).

However, in light of the newly developing Alabama Supreme Court precedent beginning with Barnhart, there exists an argument that any individual capacity claim asserted against a county or municipal employee which is determined to be an official capacity claim under the Barnhart analysis is subject to the statutory cap. This is so because the Supreme Court has squarely held that official capacity claims against municipal and county officers are capped at $100,000 under Ala. Code § 11-93-2. See Smitherman, 746 So.2d at 1007 ("Claims against county commissioners and employees in their official capacity are, as a matter of law, claims against the county and are subject to the $100,000 cap contained in § 11-93-2."). See also Alabama Mun. Ins. Corp. v. Allen, 164 So.3d 568, 574 (Ala. 2014) (explaining that, in Suttles, "[t]his court stated that, although the statutory cap on recovery against a governmental entity set forth in § 11-93-2 applied to a suit against a municipal employee in his official capacity, it did not apply to suit against a municipal employee who was sued in his individual capacity.").

Counsel representing governmental liability plaintiffs may resist this conclusion by pointing out that in declining to apply the § 11-93-2 statutory cap to the claims against the individual defendants in Roy, the Supreme Court stated: "[N]o authority is cited or argument advanced demonstrating that this court or the trial court can consider the official capacity claim against [the individual defendant] as, in substance, an official-capacity claim subject to the cap of § 11-93-2; further, nothing in Benson [v. City of Birmingham, 659 So.2d 82 (Ala. 1995)], Smitherman [v. Marshall County Commission, 746 So.2d 1001 (Ala. 1999)], or § 11-93-2 allows such a result." Roy, 75 So.3d at 97-98. Plaintiffs' attorneys will also likely argue that the Court doubled down on this position in Wright where, quoting Roy, the Court stated: "And, we repeat, 'nothing in . . . Smitherman[] or § 11-93-2 allows [the] result' that a court can confer a claim framed by the plaintiff as one against a governmental employee in his individual capacity into 'an official-capacity claim' so as to make it 'subject to the cap of § 11-93-2.'. . . . Again, official-capacity and individual-capacity claims are two distinctly different types of claims, and it is the plaintiff as the 'master of his complaint' that decides whether to pursue one or the other – or both." 255 So.3d at 195. The Court in Wright continued by stating that "[i]f a plaintiff choses to sue an official or employee in his official capacity, such a claim is treated as a claim against the 'governmental entity' because it constitutes an attempt to reach the public coffers. As Suttles clearly states, the purpose of the § 11-93-2 damages cap is to protect the public coffers; therefore, the cap

would apply to that claim." Id.

Critically, Barnhart itself provides guidance as to the continuing vitality of this language from Roy and Wright following the Court's revision of the test first announced in Haley. While not citing Roy or Wright, the Court in Barnhart specifically observed that cases subsequent to Haley "have also focused on the damages being sought, on occasion to the exclusion of other factors." Barnhart, 275 So.2d at 1126. Acknowledging the dispositive weight that the Alabama Supreme Court had previously placed on the source of the damages in deciding questions of capacity, the Court in Barnhart nevertheless made clear that such decisions would no longer control. The Court in Barnhart framed the analysis as follows:

Inasmuch as the named plaintiffs in the present case have made it clear that they are seeking *personal* payment from the Commission officers for the tortious misconduct alleged in the individual-capacities claims — and such a judgment would therefore have no effect on the State treasury — it might seem, based on Ex parte Bronner, that the individual-capacities claims are not claims against the State and, accordingly, are not barred by § 14. However, regardless of the *damages* being sought, the *nature* of those claims requires us to hold otherwise.

Barnhart, 275 So.2d at 1126. (emphasis in original). The Court in Barnhart then went on to specifically overrule any cases "containing language indicating that the State immunity afforded by § 14 cannot apply when monetary damages are being sought from State officers in their individual capacities." Id. at 1127. While Roy and Wright were not § 14 immunity cases, they likewise held that plaintiffs could circumvent damages caps and other defenses through the simple artifice of purporting to seek monetary damages solely from government officials in their individual capacities – that is, their holdings focused solely on the source of the damages sought. The Court's decision in Barnhart makes plain that the test announced in Haley is not to be applied in this manner and cannot support such a result. Instead, post-Barnhart, courts must look beyond the mere source of the damages and must also consider the *nature of the action*. Moreover and critically, where the two factors conflict, the Court in Barnhart made clear that the nature of the action controls. Id. at 1126.

There are at least three additional reasons why Roy and Wright should not control the capacity inquiry post-Barnhart. First, the language of Roy (repeated in Wright) discussing this issue noted that at the time of that decision "no authority or argument" was cited to the Court that an individual-capacity claim may be considered in substance, an official-capacity claim subject to the cap of § 11-93-2. 75 So.2d at 98. Now, because of Barnhart, unlike the situation that existed at the time Roy and Wright were decided, recent authority can now be cited for the conclusion that purported individual capacity claims may be reclassified as official capacity claims making them subject to the statutory cap. Second, the Wright decision noted that Roy was bottomed on then existing law holding that official capacity claims were "treated as a claim against 'the governmental entity' because [they] constitute[d] an attempt to reach the public coffers." 255 So.3d at 195. Post-Barnhart, the "public coffers" source-of-the-damages test for official capacity claims is no longer the law. As the above discussion of Barnhart makes clear, the "nature of the action" analysis has now been re-inserted into the analysis and controls where there is a conflict with the "source-of-the-damages" test. Finally, there appears that there is some sentiment on the Court indicating that, despite language quoted above from the Roy and Wright decisions, this issue is not settled. See Wright, 255 So.3d at 196-98 (Sellers, J., dissenting); see also id. at 198 (noting that "[i]n a special concurrence on the denial of rehearing [in Roy] Justice Shaw noted that the opinion on original submission had acknowledged 'that no authority was cited for the proposition that § 11-93-2 capped any claims against [the officer] in his official capacity at $100,000.' . . . Thus, contrary to *Wright*'s position in present case, it appears that *Suttles* did not settle the issue.").

In summary, it appears likely that the *Barnhart* analysis is applicable to claims against county and municipal officers and employees of public hospital boards. If application of the test announced in Barnhart results in nominal individual capacity claims being transformed into effective official capacity claims, such claims may be subject to dismissal as redundant and superfluous where the local governmental entity is already a separately named defendant. In addition, if the *Barnhart* analysis is held applicable to claims against local governmental officers, any determination of whether an individual capacity claim asserted against such officers is actually an official capacity claim, and thus subject to the statutory caps, will depend upon whether the duties allegedly breached by the defendant officer arose from discharge by the defendant public officer of their official duties and not simply upon allegations regarding capacity made by the plaintiff in their complaint.

George W. Royer, Jr. *is a shareholder in the Huntsville, Alabama law firm of Lanier, Ford, Shaver And Payne. His practice is focused on litigation in the areas of local governmental liability, civil rights, employment and constitutional litigation at both the trial and appellate levels. He has been engaged in the practice of law since 1972.*

David Canupp *focuses his practice on defending defending employment lawsuits and lawsuits against local governmental entities and their employees. He serves as panel counsel for several large insurance carriers, and is often retained to represent cities and individual employees at both the trial and appellate levels, frequently in federal court. He has been recognized byThe Best Lawyers in America since 2019.*

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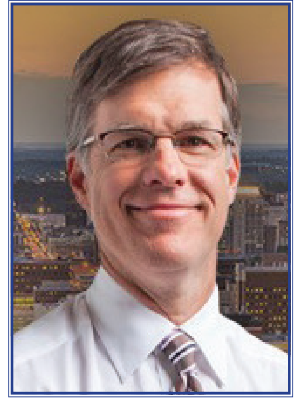

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CHRISTINA MAY BOLIN
Alabama DRI Representative

Well, its déjà vu all over again. Like everyone else, I had hoped that by this time COVID would be an unpleasant memory and we would all be back to a more normal legal practice and travelling and attending ADLA and DRI conferences. Slowly, but surely, we are getting there. Kudos to **Gerald Swann** and **Jennifer Hayes** for organizing a fantastic in-person ADLA meeting in SanDestin. It was great to get to see our defense bar come together live and in person again. Like ADLA, DRI has gone back to in-person meetings and this year's Annual Meeting promises to be an amazing event. The Annual Meeting will take place in Boston from Wednesday, October 13 through Saturday, October 16, 2021 at the Sheridan Boston Hotel. As always, there is something for everybody and the speakers are always entertaining and engaging. You can find more information at www.dri.org.

Please join me in congratulating ADLA and DRI member **Gary Howard, Esq.** of Bradly for receiving DRI's Albert H. Parnell Program Chair Award. This award was bestowed upon Gary for his success in leading, planning, marketing and presenting DRI's 2021 Diversity for Success Seminar and Corporate Expo. Congrats Gary!

If you are not a DRI member and would like to become one, or if you have any questions about the benefits of DRI membership, please call or email me at 251-415-9280 or cmbolin@csattorneys.com. I hope to see you in Boston!

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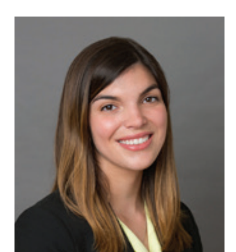
GLOBAL LITIGATION SUPPORT

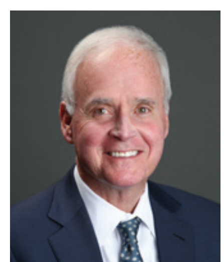
Huie Partner **Phil Collins** and Associate **Hillary Fisher** recently successfully argued summary judgment in favor of a North Central Alabama hospital in a medical negligence case. The case was brought under the Alabama Medical Liability Act and claimed that the hospital staff breached the standard of care in the care and treatment of the plaintiff. The Circuit Judge granted summary judgment and dismissed all medical negligence claims.

Phil Collins



Hillary Fisher

Huie was retained to handle an appeal from the Trial Court's granting of more than $620,000 in punitive sanctions against Allstate Insurance based upon its handling of the underlying auto accident case, including alleged misconduct in connection with a court-ordered mediation. The Trial Court found that Allstate willfully disobeyed the Mediation Order because it did not attend the mediation with settlement authority and defended the case to jury verdict with no "legitimate" defenses to the claim. In reversing the decision, the Alabama Supreme Court found that there was "no evidence" to support a finding that Allstate committed any actionable misconduct in the handling of the case, including the participation in the mediation process. The Supreme Court returned the case to the Trial Court for appropriate Order of Dismissal. The appeal was handled by Firm members **De Martenson** and **Madison Morrison**.



De Martenson

Madison Morrison

Will Thompson, an associate attorney at Huie, recently obtained summary judgment on all claims for a regional heavy equipment dealership in the Bessemer Division of the Circuit Court of Jefferson County, Alabama. The case arose from a workplace accident in which the Plaintiff suffered severe injuries when he attempted to lower the canopy of a piece of heavy equipment. The canopy had been modified prior to the accident to make the machine suitable for underground mining, and Plaintiff testified in his deposition that he knew the modification made the canopy much heavier. To lower the canopy, Plaintiff had to lift it slightly and disengage a safety latch that held the canopy in the raised position. Due to the weight of the canopy, he enlisted the help of a nearby employee of the dealership for the sole purpose of releasing the safety latch. Unfortunately, Plaintiff lost control of the canopy while attempting to lower it, and the canopy struck

Will Thompson

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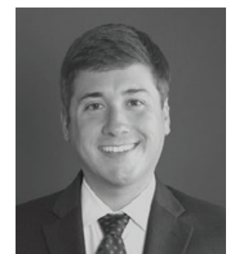
Plaintiff on the head, causing his injuries.

Plaintiff sued the employee and the dealership for negligence and wantonness, and also made a claim against the dealership for negligent hiring, training, and supervision. In granting the motion for summary judgment, the Court held that the Plaintiff knew of the dangers of lowering the modified canopy by himself, and his claims were therefore barred by the doctrines of contributory negligence and assumption of risk. The Court also held that Plaintiff failed to present any evidence that the dealership's employee owed Plaintiff any legal duty, or any evidence to support Plaintiff's negligent hiring, training, or supervision claims.

Huie attorneys **Bart Cannon, Woods Parker** and **Cameron Rentschler** recently obtained summary judgment on behalf of Ford Motor Company ("FMC") and Ford Motor Service Company ("FMSC") in a case involving allegations of fraud and breach of contract. The plaintiff alleged that FMC and/or FMSC misrepresented the terms of an extended service plan ("ESP") thereby inducing her to enter into the agreement when she purchased her vehicle. She further alleged the defendants breached obligations owed to her pursuant to the terms of the ESP and sought to recover compensatory damages, including for physical and mental anguish, as well as attorneys' fees and costs.

Bart Cannon


Woods Parker

Cameron Rentschler

Prior to trial, and before even addressing the merits of the plaintiff's claims, Huie attorneys filed a motion arguing that there were no genuine issues of material fact to decide at trial because the plaintiff did not suffer any damage as a matter of law. The trial court agreed, granted FMC and FMSC's motion and dismissed all fraud and breach of contract claims asserted against them with prejudice prior to trial.

Huie trial lawyers **Greg Schuck** and **Elizabeth Davis McCoy** tried a case for Ford Motor Company to a unanimous defense verdict on August 3, 2021, in the United States District Court for the Northern District of Alabama. The case arose out of a single vehicle rollover crash in Lawrence County, Alabama, in which the Plaintiff's decedent was partially ejected and killed. Plaintiff brought suit against Ford Motor Company alleging that there was additional webbing in the seat belt which proximately caused the partial ejection and fatal injuries. Plaintiff asked the jury for $15 million in damages.

Greg Schuck

Ford trial team proved that the seat belt system functioned properly at the time of the rollover crash, continues to function properly today, and was not the cause of the additional webbing in the system. The team further proved that the partial ejection was due to the unique nature of the crash as well as the occupant's size, and that the proffered alternative designs would not have prevented the fatal injuries. At the close of trial, the jury returned its verdict in favor of Ford.

Elizabeth Davis McCoy

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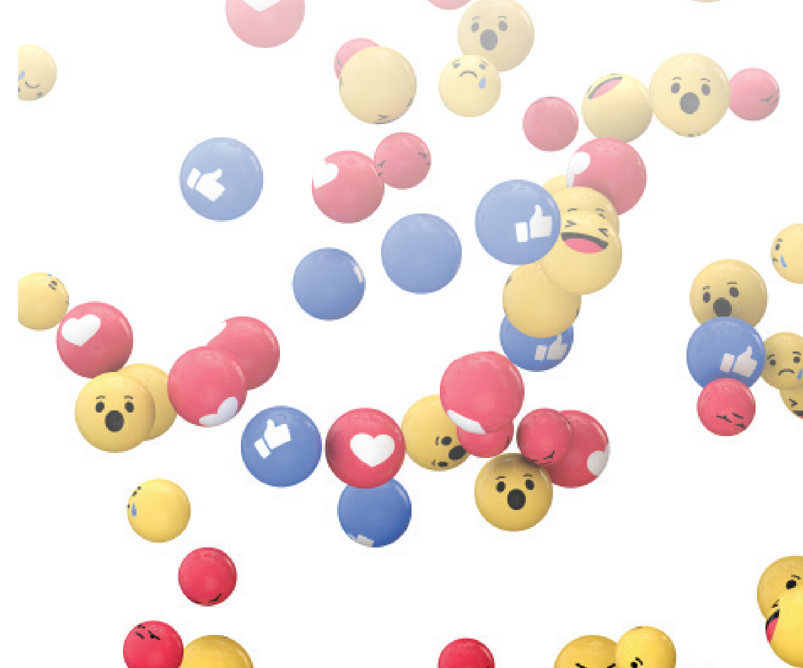

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Bradley Arant Boult Cummings LLP is pleased to make the following announcements:

- **Tripp Haston** (Birmingham) was nationally ranked for Product Liability & Mass Torts by Chambers and Partners in the 2021 edition of the prestigious and independent Chambers USA legal industry referral guide. Chambers USA ranked Bradley as one of only seven firms in the country as "Tier 1 - Highly Regarded" for its Product Liability & Mass Torts practice.

- **Charles Stewart** has been elected as Fellow of the American Bar Foundation (ABF) and inducted into the global honor society.

  The ABF Fellows is a global honorary society that recognizes attorneys, judges, law faculty and legal scholars whose public and private careers have demonstrated outstanding dedication to the highest principles of the legal profession and to the welfare of their communities. Members are nominated by their peers and elected by the ABF board. The Fellows support the research of the ABF and sponsor seminars and events of direct relevance to the legal profession. The independent, nonprofit ABF seeks to advance the understanding and improvement of law through research projects on the most pressing issues facing the legal system in the United States and the world.

Christian & Small LLP is pleased to announce that that the firm, along with several partners, has been recognized in the 2021 edition of Chambers USA. Partner **Richard E. Smith** is recognized in Healthcare (Band 4). **David B. Walston** is recognized in Labor & Employment (Band 3) and **Richard E. Smith** and **Sharon D. Stuart** are recognized in Litigation: General Commercial (Bands 3 and 4 respectively). The firm as a whole was recognized for its Commercial Litigation (Band 4) and Bankruptcy/Restructuring (Band 2) practice areas.

The Chambers Guides have been ranking the best law firms and lawyers for nearly 30 years by more than 200 full-time researchers. Individual lawyers are ranked on the basis of their legal knowledge and experience. Law firm departments are ranked on the qualities of their lawyers and their individual areas of expertise. Researchers interview thousands of lawyers and their clients around the world, and their intensive research identifies the world's leading lawyers and law firms – those who perform best according to the criteria most valued by clients.

Clark May Price Lawley Duncan & Paul LLC is pleased to make the following announcements:

- **Karmen Gaines** and **Nick Brown** joined the firm as associates.

- The firm is pleased to announce that it won on an issue of first impression in the Eleventh Circuit. A plaintiff brought suit against her former employer alleging that her short statute qualified as a disability under the ADA, and that her termination from an assembly line position violated the ADA's antidiscrimination protections. CMP partners **Cannon Lawley** and **Kelly May** were initially successful in moving the District Court to dismiss plaintiff's ADA claims, based upon their argument that short stature, alone, is merely a physical characteristic that does not rise to the level of a disability under the ADA. The plaintiff appealed that dismissal contending that significantly below average height adversely impacted her activities of daily living and was a condition covered by the ADA. On July 21, 2021, the Eleventh Circuit Court of Appeals issued its opinion agreeing with CMP's position and holding, for the first time: "Claiming to be short without alleging any underlying physiological disorder is simply not enough to allege a disability under the ADA."

Fish Nelson & Holden LLC is pleased to make the following announcements:

- **Ashleigh Woodham** has rejoined the firm as an associate attorney after a brief hiatus. Her litigation practice will continue to focus on workers' compensation and employer liability. Most recently, Ashleigh was recognized by Best Lawyers in America as "One to Watch". This is an award that recognizes an attorney for outstanding professional excellence

- Senior partner **Mike Fish** has been selected by his peers as Birmingham Business Journal's "Best of the Bar" in 2021. Out of approximately 3,500 attorneys, only 40 made this prestigious list. Winners were selected based on their status within their practice group, their tangible accomplishments, their impact on their firms and their impact on Birmingham and its legal community.

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

- Partners **Greg Schuck** and **Phil Collins** are among the outstanding legal talent featured in the Birmingham Business Journal's (BBJ) Best of the Bar for 2021.

  The BBJ Best of the Bar Awards honor the best and brightest in the Magic City's legal field across a range of practice areas that help shape their firms, the Birmingham economy and, in many cases, businesses around the nation. Honorees were selected based on their tangible accomplishments, their contributions to the industry and their status in their practice area. This year's honorees, a total of 42, were selected based on their status within their practice group, their tangible accomplishments, their impact on their firms and their impact on Birmingham and its legal community, among other factors.

Greg, who joined Huie in 1994, was recognized for his expertise and contributions in automotive product liability. Phil, who began practicing at Huie in 1997, was recognized for his expertise and contributions in medical malpractice defense.

- In the Chambers USA 2021 guide, Huie received multiple honors. Huie was named a Leading Law Firm in the Litigation: General Commercial practice area, and **Alan Thomas** was included in the Litigation: General Commercial top-ranked attorneys listing.

  The Chambers USA 2021 guide covers practice areas in all 50 states and Washington, DC, covering up to 79 individual practice areas in their legal market coverage.

- We are pleased to announce that **Bret Thompson** has joined Huie as an associate attorney. Thompson, a lateral hire with previous commercial and general litigation experience, joins the firm's product liability, insurance coverage and defense and transportation practice groups.

- In the 28th Edition of The Best Lawyers in America©, Huie attorneys received numerous accolades, including two attorneys named as "Lawyer of the Year", 22 attorneys received 49 placements across 14 practice areas in the 2022 Best Lawyers listings and our group received the "Top-Listed" City Award designation for Litigation – Insurance in Birmingham.

  Best Lawyers is the oldest peer-review publication in the legal profession and each year they recognize individual attorneys in designated metropolitan areas for excellence in specific practice areas. This year, we are excited that two Huie partners received the 2022 "Lawyer of the Year" designation from Best Lawyers. Only a single lawyer in each practice area within a designated metropolitan area is honored as the "Lawyer of the Year". The recognized attorneys are **Jim Shaw**, 2022 Birmingham Professional Malpractice Law – Defendants "Lawyer of the Year" and **Gordon Sproule**, 2022 Birmingham Litigation – Health Care "Lawyer of the Year".

  Altogether, 14 Huie attorneys were recognized as The Best Lawyers in America, including one partner new to the listing: **Stewart McCloud** (Litigation – Insurance).

  Additionally, eight Huie attorneys were included in the second edition of the Best Lawyers: Ones to Watch listing, which highlights attorneys earlier in their careers who provide outstanding professional excellence in private practice in the United States. New to the listing this year was **Woods Parker** (Insurance Law and Personal Injury Litigation – Defendants). Additionally, two associates received honors for excellence in new practice areas: **Brent Almond** (Personal Injury Litigation – Defendants and Worker's Compensation Law – Employers) and **Elizabeth Davis McCoy** (Mass Tort Litigation / Class Actions – Defendants).

Huie attorneys selected by their peers for inclusion in the listings include the following:

The Best Lawyers in America

Tom Bazemore
- Insurance Law
- Litigation – Insurance
- Personal Injury Litigation –Defendants
- Product Liability Litigation – Defendants

Jimmy Brady
- Insurance Law
- Litigation – Insurance

Bart Cannon
- Construction Law

Keith Gann
- Litigation – Insurance

Bob Girardeau
- Litigation – Real Estate
- Professional Malpractice Law –Defendants

John Herndon
- Insurance Law
- Litigation – Insurance

De Martenson
- Personal Injury Litigation – Defendants
- Product Liability Litigation – Defendants
- Professional Malpractice Law –Defendants

Stewart McCloud
- Litigation - Insurance

Greg L. Schuck
- Product Liability Litigation – Defendants

Jennifer Devereaux Segers
- Insurance Law
- Litigation – Insurance
- Medical Malpractice Law - Defendants

Jim Shaw
- Personal Injury Litigation – Defendants
- Product Liability Litigation - Defendants
- Professional Malpractice Law –Defendants
- Transportation Law

Robert Gordon Sproule, Jr.
- Litigation – Health Care
- Medical Malpractice Law - Defendants
- Product Liability Litigation – Defendants

J. Allen Sydnor
- Medical Malpractice Law – Defendants

D. Alan Thomas
- Personal Injury Litigation – Defendants
- Product Liability Litigation – Defendants

The Best Lawyers in America: Ones to Watch

Brent Almond
- Insurance Law
- Litigation – Construction
- Personal Injury Litigation – Defendants
- Workers' Compensation Law -Employers

Elizabeth Davis
- Insurance Law
- Mass Tort Litigation / Class Actions -Defendants
- Product Liability Litigation – Defendants

Hillary Fisher
- Insurance Law
- Litigation – Environmental

Kimberly Jones
- Insurance Law
- Litigation – Labor and Employment
- Product Liability Litigation – Defendants

Madison Morrison
- Insurance Law
- Personal Injury Litigation – Defendants
- Workers' Compensation Law –Employers

Woods Parker
- Insurance Law
- Personal Injury Litigation - Defendants

Will Thompson
- Litigation – Labor and Employment

Alex Parish Underwood
- Insurance Law

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

- For the fifth summer in a row, Lightfoot, Franklin & White LLC has raised thousands of dollars to support pediatric cancer research. This year, the "Lightfoot Lemons" team raised $25,091 to benefit Alex's Lemonade Stand Foundation (ALSF), a national childhood cancer charity. The firm's fundraising efforts culminated on August 5 with attorney **Terry McCarthy** performing 2,000 push-ups, one for each dollar the late, 4-year-old Alex raised in her first lemonade stand.

- Partner **Jack Sharman** will serve as special counsel to the Georgia Secretary of State's Office in an investigation by the Fulton County District Attorney into certain activities in the state by former President Donald Trump during the 2020 election. Sharman's appointment is through an executive order signed April 28 by Governor Brian Kemp. Throughout his decades in practice, Sharman has frequently served as special counsel in sensitive investigations of government officials and agencies.

  The investigation is currently focused on a call between then-President Trump and Georgia Secretary of State Brad Raffensperger in which Mr. Trump urged Raffensperger to investigate alleged fraud that would overturn Georgia's presidential election results.

- Lightfoot has once again received prominent rankings from Chambers and Partners in the Chambers USA Guide for 2021. The firm was ranked as a "Band 1" commercial litigation firm in Alabama. This is the highest ranking given by the prestigious, independent referral directory for the legal industry. The guide also highlighted the firm's work on environmental and medical malpractice defense matters in Alabama, as well as general commercial litigation in Texas.

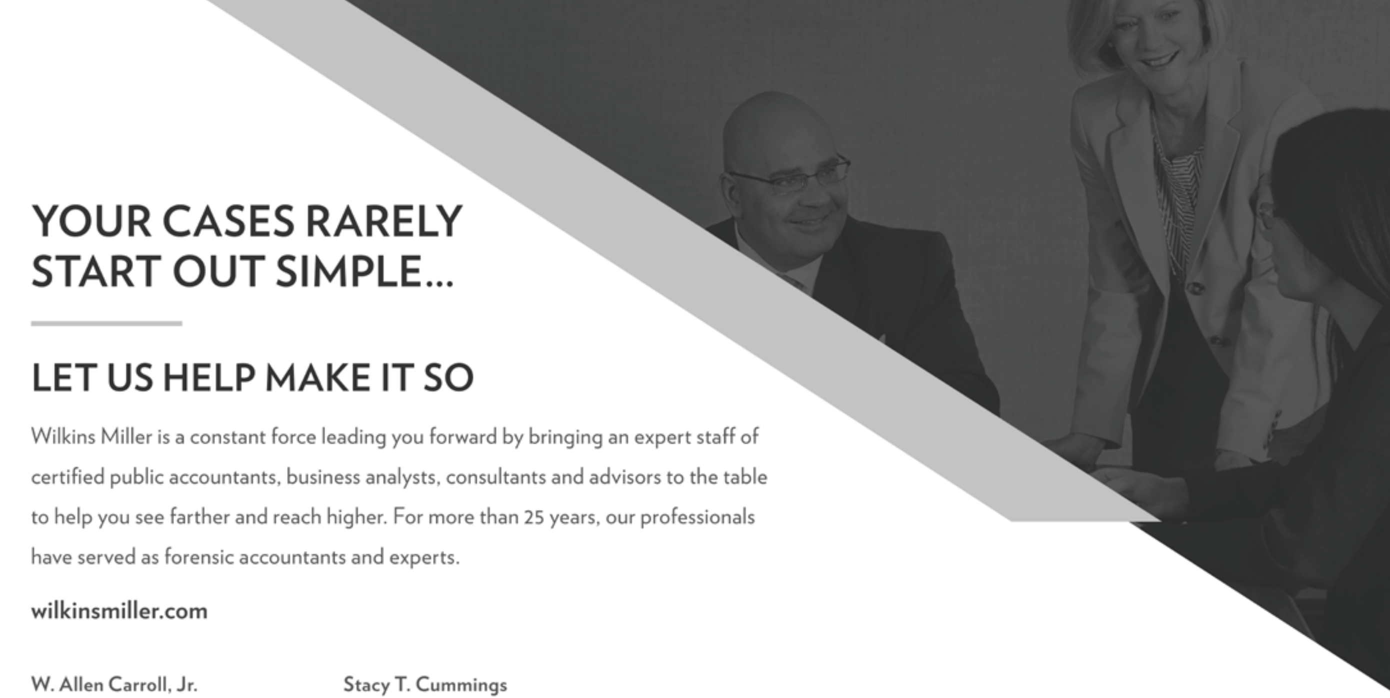
  The new edition of Chambers USA also recognizes several Lightfoot lawyers:
  Mike Bell - Alabama Litigation: Medical Malpractice Defense
  Melody Eagan - Alabama Litigation: General Commercial
  Johnny Johnson - Alabama Environment
  Chris King - Alabama Litigation: Appellate; Litigation: General Commercial
  Adam Peck - Alabama Litigation: General Commercial
  Laura Peck - Alabama Litigation: Medical Malpractice Defense
  Harlan Prater - Alabama Litigation: General Commercial

Samford & Denson, LLP announces that **Houston W. Kessler** has joined the firm as an associate.

Thornton, Carpenter, O'Brien, Lawrence & Sims takes pleasure in announcing that **Mary Lauren Kulovitz** became a partner of the firm on January 14, 2021. The firm has assumed the name Thornton, Carpenter, O'Brien, Lawrence, Sims & Kulovitz.

Weinberg Wheeler Hudgins Gunn & Dial is pleased to make the following announcements:

- The firm welcomes Partner **Jonathan Hooks** to the Birmingham office. This addition complements the firm's growth strategy to strengthen its services in a variety of practice areas in the Birmingham market. Hooks represents an array of clients throughout the Southeast, defending manufacturers and distributors of products such as heavy and light machinery, consumer electronics, chemicals, nutraceuticals, medical devices and pharmaceuticals. In addition, he has represented windstorm insurers, premises owners, transportation companies, energy companies, and professionals such as engineers, home inspectors and real estate agents.
- The firm welcomes Associate **Ethan Wilkinson** to the Birmingham office. Wilkinson regularly advises clients on employment-related issues, including the Fair Labor Standards Act and Family Medical Leave Act compliance. His practice focuses largely on the defense of employment-related cases, including pending litigation and matters before the Equal Employment Opportunity Commission, as well as a number of professional liability matters.



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Fairhope, Alabama
56 South Section Street

CRAIG ALEXANDER
Chair

Greetings from the ADLA *Amicus Curiae* Committee.

Since the committee's last report in the Spring 2021 issue of the ADLA Journal, the Committee has filed an amicus brief in support of a petition for a writ of mandamus in the Eleventh Circuit Court of Appeals, and has filed a pending motion for leave to file an amicus brief in another case in that court.

In Ex parte L. E. Bell Construction Co., Inc., Case No. 21-10719-A, the issue presented to the Court was whether disqualification was mandatory when plaintiffs' counsel obtained work-product information through L. E. Bell's former employee and consultant. The District Court found that the lawyer's conduct violated certain rules of the Alabama Rules of Professional Conduct but concluded that disqualification was not necessary and instead opted to impose lesser sanctions.

ADLA's amicus brief in support of L.E. Bell's petition was authored by ADLA member John Neiman. This brief argued that a bright-line disqualification rule, and not a standard that allows for consideration of the totality of the circumstances, was necessary to adequately enforce the important ethical rules at issue.

By order dated July 26, 2021, an 11th Circuit panel denied L. E. Bell's petition. The court's order did not address the substantive merits of the petition. Instead, the order stated that L. E. Bell had not met its burden of showing that no other adequate remedy was available to justify the issuance of the "drastic and extraordinary" remedy of a writ of mandamus.

In Nelson v. Health Services, Inc., Case No. 21-11319-H, the issue presented to the Court 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 motion for leave, and proposed amicus brief, was authored by ADLA member Marc Ayers. ADLA's brief argues that the "manager rule" constitutes a sound approach that is consistent with Title VII's text and its purpose, and has the benefit of being straight-forward and easy to understand and follow. ADLA's motion for leave was filed July 21, 2021, and no order has been entered on this motion as of the date of the preparation of this Message.

The current policies and procedures for submitting a request for an ADLA amicus brief in an appeal are set forth 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.

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.

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 his 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 email poll of the Board of Directors dated: January 9, 2019

SIGNS, SIGNS, EVERYWHERE A SIGN[1]:

U.S. SUPREME COURT TO RE-EXAMINE THE LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE BILLBOARDS AND OTHER ADVERTISEMENTS

By: David J. Canupp & Allison B. Chandler, Lanier Ford Shaver & Payne, P.C. | Huntsville, AL

Perhaps you noticed the Supreme Court has granted *certiorari* in a Fifth Circuit case, Reagan National Advertising v. City of Austin, 972 F.3d 696 (5th Cir. 2020), cert. granted sub nom. City of Austin v. Reagan National Advertising of Austin, et al., No. 20-1029, 2021 WL 2637836 (June 28, 2021). Or perhaps not. After all, the case has received very little attention among practitioners, and even less in the media, despite the weighty First Amendment issues involved.

At bottom, Reagan National – which is slated to be heard by the Supreme Court on November 10, 2021 – will decide what level of scrutiny is applied to government actions that regulate speech based upon content, but not viewpoint, when it is also clear that the regulations are not actually intended to suppress the message for what *it* says. In a previous decision, Reed v. Town of Gilbert, 576 U.S. 155 (2015), the Court applied what some have characterized as an absolutist rule, observing that "defining regulated speech by a particular subject matter" would trigger strict scrutiny, even though the precise message is of no consequence to the government. Id. But it is not clear if the Supreme Court's decision in Reed was meant to be taken quite that literally, as evidenced by a slew of concurring opinions that limited, cabined, and even questioned this statement of the rule. The Fifth Circuit in Reagan National applied Reed mechanistically, finding that if a regulation looks to the content of speech at all, it cannot escape strict scrutiny. The fact that the Supreme Court has now granted *certiorari* in Reagan National certainly suggests that the Court intends to tell us if this result is truly required by its precedent.

So why does the anticipated resolution of this admittedly abstract principle of First Amendment law merit the attention of defense lawyers across the State of Alabama? It turns out it matters a great deal to those of us who regularly advise local governments, as well as those who represent regulated entities such as advertising companies, and others who use signs to carry out their business – including real estate agents, political campaigns, churches, and the like.

> *How a city is permitted to regulate signs within its jurisdiction largely flows from restrictions imposed by the First Amendment – and the law in this area is quickly evolving in light of recent and forthcoming Supreme Court decisions.*

Picture this: You are advising a small but growing city in Alabama. The city's mayor wants to manage the growth but maintain its "small town charm," and is concerned about the increasing number of billboards. At the same time, he wants to make sure local businesses can still have their own "on premise" signs on their own property. He asks you whether the city can treat billboards differently than "on premise" signs, since they rarely advertise local businesses anyway, and clutter up the roadways.

Or say you represent one of the several sign and media companies doing business in Alabama. Your client would like to reach a new market through the use of billboards in the same growing city, yet the zoning ordinance prohibits signs advertising products or services that occur *off the premises* where the sign is located. As your client's signs would promote products and services available throughout the state, it won't be possible without the use of these banned off-premises signs. Your client asks if there is any way around the city's zoning ordinance restricting such signs.

These two scenarios represent a conundrum facing many municipalities throughout America. While these cities want to open their doors to businesses that want to operate in their limits, they also have an interest in keeping their community functioning, safe, and attractive for visitors and residents alike. How a city is permitted to regulate signs within its jurisdiction largely flows from restrictions imposed by the First Amendment – and the law in this area is quickly evolving in light of recent and forthcoming Supreme Court decisions.

Where We've Been: *Reed v. Town of Gilbert*

To determine whether a law passes First Amendment muster, the Supreme Court applies one of two levels of review. If a law restricts the "content" of speech, then strict scrutiny is applied, under which the government must overcome the presumption of unconstitutionality and show the law is "necessary to serve a compelling governmental interest." Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987). Laws that are subject to strict scrutiny are highly unlikely to be found constitutional. See Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion) ("it is the rare case in which we have held that a law survives strict scrutiny."). On the other hand, if the law is content-neutral, then the Court applies intermediate scrutiny, under which laws are upheld if they are "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted).

For several years, the Eleventh Circuit's approach to evaluating sign ordinances involved examining the government's reasons for regulating the signage in the first place – if those reasons had nothing to do with content, then the law was content-neutral. Granite State Outdoor Advert., Inc. v. City of St. Petersburg, Fla., 348 F.3d 1278, 1281 (11th Cir. 2003); see also Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir.

1992). As a result, where a municipal ordinance limiting or prohibiting off-premises signs (signs directing the reader to a business *off* the premises) was enacted for reasons of aesthetics, safety, and uniformity, for example, such law was deemed content-neutral. See id. Importantly, such limitations or bans on off-premises signs were also constitutionally permissible because they typically involved regulating off-site advertising or businesses, and thus implicated only commercial speech. See, e.g., Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512 (1981) (upholding the City of San Diego's ban on offsite billboards containing commercial speech); Coral Springs St. Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1343-44 (11th Cir. 2004); Southlake Prop. Assocs., Ltd. v. City of Morrow, Ga., 112 F.3d 1114, 1115-16 (11th Cir. 1997).

Cities and sign companies alike are left with lingering questions regarding their ability to challenge – and to defend – the constitutionality of what were once considered entirely reasonable sign regulations.

However, in Reed v. Town of Gilbert, Ariz., 576 U.S. 155 (2015), the Supreme Court denounced this practice of upholding sign regulations that, although they were perhaps enacted for the well-meaning and non-discriminatory reasons of aesthetics or safety, were content based on their face. In Reed, the Town of Gilbert, Arizona limited "Temporary Directional Signs," or signs that directed individuals to a qualifying event, to 6 square feet in area. Id. at 160-61. Such signs could be displayed from 12 hours before the event until 1 hour afterwards. Id. at 161. By contrast, "Ideological Signs" were to be no greater than 20 square feet in area and could be placed in all zoning districts without time limits. Id. at 159-60. Further, "Political Signs" could be 16 square feet on residentially zoned property and up to 32 square feet on nonresidential use property, undeveloped property, and Town rights-of-way. Id. at 160. Political Signs also had to be removed no later than 15 days following the election. Id.

After receiving citations for the failure to remove Temporary Directional Signs timely, plaintiffs/petitioners Pastor Clyde Reed and Good News Community Church sued the Town for violating their First Amendment rights. 576 U.S. at 161-62. The petitioners argued to the Supreme Court that the Town's Sign Code was content based, and thus subject to strict scrutiny, because enforcement officials had to read a sign and determine what it said to decide what limitations applied. Pet'rs Br., 2014 WL 4631957 at 38-43. In response, the Town reasoned that since the Sign Code provisions did not favor or censor viewpoints or ideas, the intermediate level of scrutiny should apply. Resp't Br., 2014 WL 6466937 at 27-41. The Town also rejected the petitioners' "absolutist" approach, warning the Court that "if a simplistic if-you-have-to-read-it-it-is-content-based test were adopted, virtually all distinctions in sign laws would be subject to strict scrutiny, thereby eviscerating sign regulations that have been repeatedly upheld under the First Amendment as serving important governmental interests such as safety and aesthetics." Id. at 35.

The Supreme Court, in an opinion written by Justice Thomas, ultimately adopted the formulaic approach advocated by the petitioners. The Court held that the Town's Sign Code was content based on its face since its restrictions that would "apply to any given sign thus depend entirely on the communicative content of the sign." Reed, 576 U.S. at 164. Because the Church's signs inviting the public to attend services were "treated differently from signs conveying other types of ideas," the Town's Sign Code was a content-based regulation of speech and subjected to strict scrutiny. Id. The majority opinion found it irrelevant that the Sign Code did not discriminate among various viewpoints on a topic since the regulation was aimed at, and distinguished between, entire topics altogether. Id. at 169, 171. Therefore, "a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed." Id. at 171. And as the Town had no valid governmental interest – much less the requisite *compelling* interest – behind its distinctions, the Sign Code failed strict scrutiny. Id. at 172.

A number of justices authoring concurring opinions took heed of the Town's warning and saw the inherent problems with the majority's rigid approach to determining whether a law is content based. Helpfully, Justice Alito, joined by Justices Kennedy and Sotomayor, provided a list of "rules" regarding signs that would not be content based – among them are "[r]ules distinguishing between on-premises and off-premises signs." Reed, 576 U.S. at 175 (Alito, J., joined by Kennedy & Sotomayor, JJ., concurring). Three additional justices wrote separately to object to any "automatic 'strict scrutiny' trigger" of the type that could result from deeming a law content based. Reed, 576 U.S. at 176 (Breyer, J., concurring); see also id. at 181 (Kagan, Breyer, and Ginsburg, JJ., concurring in the judgment). Justice Kagan specifically recognized the "unenviable bind" that cities

across the nation would face if ordinances that are facially content based are automatically subject to strict scrutiny. Id. at 180. Her concluding remarks actually presaged the granting of *certiorari* in Reagan National, the case that the Supreme Court will take up this fall:

I suspect this Court and others will regret the majority's insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." Ante, at 2231. And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no one—certainly not the majority—has ever explained why the vindication of First Amendment values requires that result.

Reed, 576 U.S. at 185 (Kagan, J., concurring in the judgment).

Reaction to *Reed*

To some extent, Justice Kagan was exactly right about what might happen following Reed. The Reed majority opinion's broad language deeming a law content based due to "the topic discussed or the idea or message expressed," particularly compared with Justice Alito's samples of possibly content-neutral rules in his concurrence, left district courts and the courts of appeals grappling with Reed's application to commercial speech, particularly by way of traditional billboards, and to ordinances distinguishing between on-premises and off-premises signs. Not surprisingly, the courts examining these issues in light of Reed came to vastly different conclusions. Advocates for a hardline reading of Reed contended that, to determine whether a sign regulation applied, one must read the sign and determine its content and the message expressed therein. This reading requirement renders the law content-based since the application of the law necessarily turns on the sign's content. See, e.g., Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 707 (5th Cir. 2020), cert. granted sub nom. Austin, TX v. Reagan Nat. Advert., No. 20-1029, 2021 WL 2637836 (U.S. June 28, 2021) ("To determine whether a sign is 'off-premises' and therefore unable to be digitized, government officials must read it. This is an 'obvious content-based inquiry,' and it 'does not evade strict scrutiny' simply because a location is involved."); Thomas v. Bright, 937 F.3d 721, 730 (6th Cir. 2019), cert. denied, 141 S. Ct. 194, 207 L. Ed. 2d 1119 (2020) ("Therefore, to determine whether the on-premises exception does or does not apply (i.e., whether the sign satisfies or violates the Act), the Tennessee official must read the message written on the sign and determine its meaning, function, or purpose. The Supreme Court has made plain that a purpose component in a scheme such as this is content-based[.]").

In the other camp, governmental entities argued against such a simplistic application of Reed's holding, claiming that neither Reed, nor any other Supreme Court precedent, has held that a mere "cursory examination" of a sign simply to determine what regulation applies to it does not equate to a content-based restriction. See, e.g., Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. D.C., 846 F.3d 391, 404 (D.C. Cir. 2017) ("So, too, the fact that a District of Columbia official might read a date and place on a sign to determine that it relates to a bygone demonstration, school auction, or church fundraiser does not make the District's lamppost regulation content based."). Further, the inclusion of on-premise signs in Justice Alito's list of content-neutral regulations in his concurrence meant Reed did not apply to sign laws distinguishing between on-premise and off-premise signs that implicated commercial speech. See Adams Outdoor Advert. Ltd. P'ship by Adams Outdoor GP, LLC v. Pennsylvania Dep't of Transportation, 930 F.3d 199, 207 n.1 (3d Cir. 2019) (noting Reed "did not establish a legal standard by which to evaluate laws that distinguish between on-premise and off-premise signs"); Contest Promotions, LLC v. City & Cty. of San Francisco, 704 F. App'x 665, 667 (9th Cir. 2017) (finding Reed did not apply to commercial speech regulations). Unhelpfully, the Eleventh Circuit did not have the occasion on weigh in on the issue in the context of the constitutionality of sign regulations.

Amid the backdrop of this circuit split are the players involved. Notably, the litigants in Reed were sympathetic plaintiffs – a pastor and his church that were cited for violating the Town's sign code. Yet far and away, the majority of plaintiffs who bring these kinds of First Amendment sign claims are multimillion dollar sign and media companies seeking to place more billboards throughout cities large and small. Prior to Reed, attorneys for sign companies already engaged in scores of litigation challenging any barrier a city placed in their path that prevented them from putting up more billboards. One judge in the Southern District of Florida aptly described this "ever-increasing trend" of sign litigation as one in which "advertising companies transform the proverbial First Amendment shield, intended to protect noncommercial speech, into a sword that assures their commercial well-being." Nat'l Advert. Co. v. City of Miami, 287 F. Supp. 2d 1349, 1356-57 (S.D. Fla. 2003), rev'd, 402 F.3d 1329 (11th Cir. 2005). Such companies now saw Reed as another tool to attack dated and vulnerable municipal sign ordinances, many of which had not been evaluated in decades.

Where We're Going: *City of Austin v. Reagan National Advertising*

Six years following Reed, the Supreme Court can finally clear up some of the confusion caused by the far-reaching effects of that decision. On June 28, 2021, the Supreme Court granted the City of Austin's petition for a writ of *certiorari* in Reagan National Advertising of Austin, Inc. v. City of Austin, 972 F.3d 696 (5th Cir. 2020), cert. granted sub nom. City of Austin v. Reagan National Advertising of Austin, et al., No. 20-1029, 2021 WL 2637836 (June 28, 2021). In City of Austin, the Supreme Court will specifically confront the question of whether the City of Austin's sign code, which distinguishes between on-premise and off-premise signs, is a content-based regulation subject to strict scrutiny under Reed. Previously, the Fifth Circuit decided it was required to "take Reed at its word"

and held that Austin's distinction between on-premises and off-premises signs was content-based since it required government officials to read a sign to determine whether it was "off-premises." 972 F.3d at 706-07. Austin's petition for *certiorari* pointed out that this literal interpretation was an over-extension of Reed's meaning and led to a complete (and perhaps unnecessary) overhaul of municipal sign codes across the country. Pet'r Br. at 16-17.

It's difficult to say if the Supreme Court will fully embrace the opportunity to provide this much-needed clarity on the effects of Reed. Likely the Court did not intend to back itself into a corner with the draconian effects on city sign regulation the language in that decision posed, particularly given the foresight of Justices Alito, Breyer, and Kagan with their concurrences in Reed that pointed out the potential problems of a hard and fast rule automatically applying strict scrutiny to facially content-based sign regulations. The Court may try to swing the pendulum back to a more classic content-based restriction as opposed to the if-you-have-to-read-it-it's-content based rule that some courts have derived from Reed.

One option could be looking at the purpose of the sign or sign regulation at issue, dovetailing from Reed's language against treating signs differently based *entirely* on subject matter. See 576 U.S. at 164 ("The restrictions in the Sign Code that apply to any given sign thus depend *entirely* on the communicative content of the sign.") (emphasis added). Previously the Supreme Court has rejected the idea that the government's justification for differing treatment of signs alone could avoid strict scrutiny. Currently, that stringent level of review applies if a law is facially content based (regardless of the righteous motives of the government), *or* if the government's purpose, motive, or justification discriminate on the basis of content. See Reed, 576 U.S. at 165-66 ("'[A] content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary.'") (quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642 (1994)). But as Justice Breyer suggested in Reed, that "content discrimination" may be present should lead only to a "rule of thumb" of strict scrutiny review, not the automatic trigger and "certain legal condemnation" that follows if a law may be deemed content based. Reed, 576 U.S. at 176 (Breyer, J., concurring). Indeed, the sensitivity of First Amendment review of whether a law is content based requires a healthy "dose of common sense" and less rigidity so as not to automatically apply strict scrutiny and eradicate entire sign codes that have no intention of skewing the public's debate of ideas or discriminating on the basis of content. Id. at 183 (Kagan, J., concurring). Along with this consideration of purpose is the inherent connection between an on-premise/off-premise sign distinction and the regulation of land use generally by municipalities. The Town of Gilbert pointed out the Court's prior recognition of the unique relationship between zoning and the First Amendment in the respondent's brief in Reed:

As Justice Kennedy has observed, "zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use." City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 449 (2002) (Kennedy, J., concurring) (emphasis added). As he continued, "[t]he zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. *For this reason, we apply intermediate rather than strict scrutiny.*" Id. (emphasis added).

Resp't Br., 2014 WL 6466937 at 21-22 (emphasis in original). This precedent could allow the Court to consider the overarching zoning or land use purpose behind a sign regulation even if such regulation is effectively content based. Consequently, a city could allow on-premise signs showcasing a business operating on the premises, which would necessarily result in limited signage in a particular area, while at the same time prohibiting off-premises signs, which could overtake and unduly clutter a neighborhood.

Conclusion

Although oral argument in City of Austin is quickly approaching in November 2021, the corresponding opinion will likely not be delivered until sometime in 2022. Until then, cities and sign companies alike are left with lingering questions regarding their ability to challenge – and to defend – the constitutionality of what were once considered entirely reasonable sign regulations.

Endnotes

[1] Five Man Electrical Band, *Signs* (Lionel Records 1970).

David Canupp *focuses his practice on defending defending employment lawsuits and lawsuits against local governmental entities and their employees. He serves as panel counsel for several large insurance carriers, and is often retained to represent cities and individual employees at both the trial and appellate levels, frequently in federal court. He has been recognized byThe Best Lawyers in America since 2019.*

Allison Chandler *practices in the areas of governmental liability, civil rights defense, labor and employment law, insurance defense, construction law, and general civil litigation. She has substantial trial and appellate experience in state and federal courts involving complex civil rights claims, employment matters, and personal injury defense.*

NEW MEMBERSHIP MANAGEMENT SOFTWARE LIVE ON WEBSITE

This past August, ADLA launched its new membership management software, Wild Apricot. The new software will streamline ADLA's administrative time and resources, as well as provide members an improved user friendly website experience.

If you are a current member, please visit https://tinyurl.com/ADLAPWReset to create a new password. Use your email address as it is associated with your membership. A link will be emailed to you to reset your password. After your password is setup, login and review your membership profile to make sure it is up to date and save any changes.

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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

At this past Annual Meeting, the Women in the Law Committee was in the forefront. There is much excitement about this coming year and the opportunities we have in front of us. ADLA is committed to the overall diversity of the organization and the development of women lawyers. The ADLA's goal is to exchange information and ideas among members, elevating the skills of civil defense lawyers in Alabama and fostering a community where we can increase the quality of service contributed by our legal professionals.

What We Will Do

After a very trying year, we are looking forward to having in person events once again. We are planning on continuing our CLE Lunch and Learns throughout the state. Our female judiciary has graciously offered to continue to participate in these successful programs. We will have networking events where we can gather to socialize and network among our peers. We also plan on continuing our philanthropy and outreach programs that have been started.

What Do We Need from You

First, we need you. 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 and to expand and grow this Committee's influence in the state. Second, we want to diversify our efforts throughout the state. We have incredible female lawyers from North Alabama to South Alabama and we want to engage all no matter your geographic location.

Below is the list of individuals that have committed to the Women in the Law Leadership Team. See a Committee that you might want to work on? Let us know. We want you. This is a collaborative effort and we are only as strong as the time and attention its members give it.

Finally, Thank you. It is an honor to continue to serve on this Committee. Meade will be a hard act to follow as Chairperson. I appreciate the time and effort that she has given over the last years and look forward to continuing in growing this Committee and its outreach.

WITL LEADERSHIP ROLE

WITL Committee President	Martha	Thompson	Birmingham
Corporate Counsel Liaison	Sharon	Stuart	Birmingham
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Program Chair	Melissa	Hunter	Mobile
Program Vice Chair + YL Liaison	Sloane	Phillips	Birmingham
WITL Committee Past-President	Meade	Hartfield	Birmingham

ASHLEY SCARPETTA
Chair

On behalf of the Education Committee, I am thrilled to share several upcoming programs ADLA is offering its members. On September 21, 2021, the Young Lawyers' Section will host its third Associate to Partner Panel—via Zoom—featuring **Lisha Graham** of White Arnold & Dowd, **Jack Gray** of Smith Spires & Peddy, **Marcus Maples** of Baker Donelson, and **Katie Powell** of Butler Snow. Our panelists will discuss how to find and maintain "balance" both in and out of the office along with other hot topics related to attorney wellness. The Women's Section and Young Lawyers' Section is co-hosting ADLA's first Diversity, Equity, and Inclusion Panel on October 21, 2021 via Zoom. We are so excited to hear from our panelists—**Jenna Bedsole** of Baker Donelson, **Bridget Harris** of Lightfoot Franklin & White, **Denzel Okinedo** of Burr Forman, and **Brandi Russell** of Balch & Bingham—and know it will be an exceptional program. The Associate to Partner Panel will pick back up after the new year with a new Panel who will discuss law firm culture and lawyer transitions.

As the Committee is continuing to plan programming for 2022, we would love your input. In addition, if you would like to get involved with the Education Committee, please reach out to me directly (ascarpetta@watkinseager.com).

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