JOURNAL

ALABAMA DEFENSE LAWYERS ASSOCIATION | VOL. 35 | NO. 1

Strengthening the Foundation *for* Civil Defense Lawyers

ADLA's own Rodney Cate shares his memoir of overcoming a devastating life-changing event and how he was determined to live an extraordinary life

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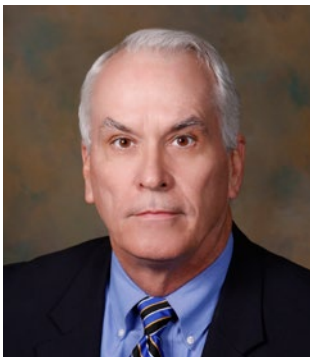
in this issue

Rod Cate, a partner at Hand Arendall Harrison Sale, LLC in Mobile, has been a practicing lawyer for 26 years. Rod graciously sat down with *Journal* Editor, Gaby Reeves, and shared his personal story of surviving a life-changing event, overcoming adversity, practicing law, raising a family and living his extraordinary life.

On the Cover: Strengthening the Foundation for Civil Defense Lawyers Membership Campaign Kicks Off



DENNIS R. BAILEY
President

I hope all of you had a rewarding 2018 and that this message finds you off to a good start in 2019. I also hope you agree that, thanks to the hard work of our Executive Director **Jennifer Hayes** and members of your leadership, this venerable organization is providing you more value now than it has in the past. Permit me to remind you of the benefits the ADLA currently offers to its membership and suggest some additional benefits we may be able to add in the future if you see a value to them.

You probably already know about our expert witness database, deposition boot camp, trial academy and CLE on the beach in a family-friendly environment. Our President-Elect—**Christina Bolin**—has already lined up excellent speakers for our summer meeting over the Father's Day Weekend June 13-15 when we return to Sandestin, Florida. There we will again share the beach and convention center with the plaintiff's bar and hundreds of our best friends yearning for a place in the sun. Fostering civility between the plaintiff's and defense bar, as well as getting to informally meet many judges, is a hidden value of your ADLA membership. This year we will also invite circuit judges to join us at the beach along with our appellate jurists. Thanks to the hard work of Secretary-Treasurer **Andy Rutens** and ADLA Board member **Gerald Swann**, as an added new networking benefit, the Alabama Property & Casualty Adjusters Association Board of Directors will be meeting in the same area at the same time. It was your ADLA which helped form the APCAA this year. We have also opened membership to in-house insurance company counsel.

We also have your back in the legislature. We have opened up communications with the State Bar on how best to address embarrassing and misleading lawyer advertising from a "truth in advertising" standpoint and how we can help each other monitor legislation as well. Bar Executive Director **Phillip McCallum** wants a closer relationship between our organizations and with the assistance of their governmental relations staff, we will be on the lookout for issues that affect you—as opposed to your clients or the bar in general—and we will call on our members to help provide expertise on the effects of proposed legislation that will either harm the civil justice system or bills which will make it fairer to the litigants and their counsel. I, for one, believe we should encourage legislation that will encourage more trials which, unfortunately, are becoming so rare our young members are not able to obtain needed trial experience. So, realizing we are not a lobbying organization and have no PAC, we have beefed up our legislative committee—led by **Stephen Still**—to be ready to support legislators who want the opinions, expertise and viewpoint of our membership on civil legal matters.

Fostering civility between the plaintiff's and defense bar, as well as getting to informally meet many judges, is a hidden value of your ADLA membership. This year we will also invite circuit judges to join us at the beach along with our appellate jurists.

Due to our terrific relationship with DRI and **Allen Estes,** our former president and current DRI liaison, we will also monitor DRI's Task Force on auditing legal bills and their position on proposed amendments to Rule 30(b)(6) procedures at the federal level.

Even long-term members sometimes forget about ADLA amicus briefing support or the availability of our searchable brief bank and database of our past online articles. Our new Amicus Committee chairman—**Craig Alexander**—now has our policies online. The policies outline how to get an issue you believe the ADLA should weigh in on before the amicus committee members. The DRI has now created a database of all their CLE and "For the Defense" publications. Our CLE materials are something we will consider adding to our searchable database.

We also have new services for our members. We have started offering free online CLE programs for those in a pinch at the end of the year. We have started a Women in the Law Committee for our members which is currently led by **Meade Hartfield**.

Even long-term members sometimes forget about ADLA amicus briefing support or the availability of our searchable brief bank and database of our past online articles.

Finally, we are seeking input on new programs. I have recently polled our young lawyer's section leadership—headed by **Bains Fleming**—to find out whether an ADLA list-serv email exchange would be of benefit for our younger members who are familiar with the protocols of how to use list-servs efficiently. Other initiatives to consider would be a "Put the Civil Back in Civility" initiative with the plaintiff's bar with some joint event designed to foster more collegiality with our worthy and right honorable opposition.

I have also noticed the DRI does a good job of including philanthropic actions into their events and would like to see the ADLA do the same as a way of giving back to the communities where we practice. Perhaps, one day, we may even consider "rebranding" ourselves—as the plaintiff's bar has already done—with a name that better describes who we are and lessens the confusion created among members of the public about our being criminal defense lawyers. Perhaps a name like: "Alabama Lawyers for Civil Justice" would catch on someday. After all, justice is what we strive for…right?

I guess the point of all of this is to demonstrate to you, and maybe prospective members, that the ADLA is willing to change as the practice of law changes to remain relevant and valuable. I hope you agree we have made tangible steps in the right direction.

See you in June!

Dennis R. Bailey
Rushton Stakely, Montgomery

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I choose to be a member of ADLA because I think it gives the defense bar a way to connect. The plaintiff's bar is very good about exchanging information within its membership. ADLA gives defense bar a similar opportunity. Until this point, I would say this is the best ROI I've seen. The free CLE may be my answer from now on!

Ben Robinson

Wallace Jordan Ratliff & Brandt | Birmingham

Deposition Boot Camp was great training for me and a great introduction to some of the best defense attorneys in Alabama.

Christie Estes

Quality Correctional Healthcare, Inc. | Birmingham

I cannot say enough wonderful things about Deposition Boot Camp. I attended when I was a young lawyer and I have served on the faculty for several years now. The importance and benefit of hands-on, practical CLE cannot be overstated. I encourage all young lawyers to attend and recommend seasoned lawyers consider serving on the faculty.

SHARE YOUR GOOD NEWS WITH US

adla@adla.org

GABY REEVES
Editor

As I write this column, we are three weeks into 2019. It has rained at least two days of each of those three weeks and the temperature has ranged from unseasonably cold to unseasonably warm, frequently within the same 24-hour period. Spring is 56 days away; a sunny day at the beach is a remote mirage. However, when this edition of the *Alabama Defense Lawyers Journal* arrives in the mail, Spring will be little over two weeks away and it will be time to make reservations for the ADLA Annual Meeting to be held June 13, 2019 through June 16, 2019 at the Sandestin Golf & Beach Resort-Baytowne Conference Center – the perfect time and place to enjoy the beach and the program that President-Elect Christina May Bolin has arranged for this year. Please make plans to attend this year's Annual Meeting; you do not want to miss it.

Congratulations to **Meade Hartfield** on her appointment as the inaugural chair of the ADLA's Women in the Law Committee. The Committee's goal is to encourage and assist ADLA female members in developing their careers by promoting networking events, expanding educational opportunities, coordinating philanthropic outreach efforts and supporting female members as they assume leadership roles the legal field and in their communities. If you are interested in participating in this Committee, please contact Meade at *mhartfield@bradley.com*.

Robert B. Thornhill, Director of the Alabama Lawyers Assistance Program ("ALAP"), has submitted an article addressing the issue of cognitive impairment in the legal field. As the average age of practicing lawyers has increased, so have concerns and issues regarding cognitive decline/impairment in the legal field. It is axiomatic that a lawyer practicing with a cognitive impairment risks disciplinary consequences, but his or her continued practice can also negatively affect that lawyer's partners both professionally and financially. If you suspect a colleague may be experiencing cognitive decline, contact the ALAP for assistance; all requests for assistance are completely confidential.

I am pleased to announce that this issue of the *Journal* includes the first article co-authored by a law student, **Hayes Ellett**, a third-year student at the Thomas Goode Jones School of Law and a clerk at Ball, Ball, Matthews & Novak in Montgomery. **Gerald Swann** and **Miland Simpler** sponsored Hayes as a contributing student author and, together, the three have written an excellent article on the American Law Institute's *Restatement of the Law, Liability Insurance*, which was released in May of 2018. As many of you know, the ALI's *Restatement* has met with staunch opposition because many of its provisions are contrary to the common law of insurance. This article addresses the ways in which critical provisions of the *Restatement* conflict with established insurance liability law in Alabama, as well as in the rest of the country. Please read this article closely; the so-called "*Restatement*" stands to have an impact on our practice.

In late 2017, the President of the Alabama State Bar Association appointed a special Task Force to construct a balanced reformation of the Workers' Compensation Act in response to the Jefferson County Circuit Court Judge Pat Ballard's finding the provisions of the Act capping injured employee weekly benefits and Plaintiff's attorney's fees unconstitutional. A member of that Task Force, **Jeannie Bugg Walston**, has submitted an article reporting on the extensive work of the Task Force and its recommendations to the State Legislature for amendments to the Act. Recently, the Alabama Council of Workers' Compensation Self Insurers Funds issued a Statement in Opposition to the recommended legislative reform, which could threaten its success;

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UPDATE ON THE PROPOSED REFORM TO ALABAMA'S WORKERS' COMPENSATION ACT

By: Jeannie Bugg Walston

On May 8, 2017, Jefferson County Circuit Court Judge, Pat Ballard, found two provisions of the Alabama's Workers' Compensation Act ("the Act") unconstitutional: 1.) The $220 per week cap on workers' compensation benefits paid to any injured employee;[1] and, 2.) The 15% cap on Plaintiff's attorney's fees.[2] [3] Given the non-severability of the Act, if any one section is found unconstitutional, the entire Act is deemed unconstitutional and nullified.[4] Needless to say, this decision had a tremendous ripple effect across the State of Alabama and beyond. Judge Ballard stayed his Order for 120 days to allow Alabama's Legislature to correct these two provisions. The employee's (Clower's) attorney, Larry King, Esq., stated, "[Ballard] turned the lights onto a horrible inequity that has penalized and injured members of Alabama's labor force for decades, and I really am encouraged that his clarion call for change will finally be heard." Change was called to the Act, which was last amended in 1992.

Nora Clower filed suit against CVS Caremark after injuring her back on the job in November 2013 while earning an average wage of approximately $335 per week. Pursuant to the Act, Clower was only entitled to $220 per week in compensation for her disability once it stabilized.[5] Clower argued that this weekly amount dated back to 1987 and was only slightly above the current minimum wage and poverty level. Clower asserted that living costs and employee wages today far exceeded $220 per week and that it was time to raise this cap in Alabama. The Court agreed and noted the inequity of grouping all Alabama employees together under the $220 per week cap, stating, "There is little credibility in telling two injured workers, both of whom are 99% disabled due to work injuries, that they both get $220 per week … when one earns $8.50 per hour for a 40-hour work week, and the other earns an annual salary of $125,000."[6] Judge Ballard further stated that the 15% cap on attorney's fees failed to afford due process to employees and their counsel.[7]

Following *Clower*, some Alabama trial courts stayed workers' compensation cases pending a ruling in *Clower*, while others questioned their ability to rule when the constitutionality of Alabama's Workers' Compensation Act had been called into question. Confusion and panic flew through all areas of Alabama's workers' compensation system from employers and insurers to medical care providers and pharmacies. Accordingly, in late 2017, the President of the Alabama State Bar appointed a Task Force of only Alabama lawyers to address, study, analyze, and craft a balanced work reform to the Act. The Task Force consisted of both defense and plaintiffs' lawyers and lawyers representing particular interest groups such as self-insured group funds, insurance companies, self-insured employers, the Department of Labor, municipalities, hospitals, and medical facilities. All of the members agreed that the Act was obsolete and unfair and that interests on both sides needed reform.

The Task Force initially met and focused its discussions on the "obvious issues" with the Act, including the $220 cap and lifetime medical and indemnity benefits paid to employees in Alabama. Attempts to amend the Act in the past were unsuccessful, so all members of the Task Force unanimously agreed to work diligently together to reach recommendations for Alabama's Legislature. Sub-committees were formed and charged with gathering information to better understand Alabama's Workers' Compensation system relative to that of other states, the cause and effect of raising the $220 cap, costs to employers of changes, impacts on insurance premiums, *etc*. Research revealed that Alabama has some of the highest medical costs in workers' compensation systems in the country with some of the lowest benefits paid to employees. Alabama is also one of the few states that still allows lifetime medical benefits for employees. Actuarial studies further showed that employers, insurers, and third party administrators (TPAs) bear the high cost of maintaining reserves and maintaining "open files" for the lifetime of workers' compensation employees, many of whom do not seek medical treatment after the first few years following an accident. Needless to say, everyone on the Task Force was educated.

The Task Force created an "Issues Sub-Committee," led by long-time defense lawyer Clay Clark. This Sub-Committee fully examined all workers' compensation costs in Alabama (both medical and indemnity) and compared them to other states. Large Alabama employers and workers' compensation insurance carriers provided actuary studies that examined lifelong costs of workers' compensation employees. These studies also illustrated how long employees actually treated after an injury, what permanently and totally disabled ("PTD") employees' costs were at 5, 10, 15, and 20 years after an injury, etc. The Issues Sub-Committee, (and, ultimately, the Task Force), concluded that, in the long run, the overall costs and benefits of the Task Force's proposed amendments to the Act would produce *almost no additional costs to the employers* and will allow cost savings, (oftentimes significant savings), for them.

Ultimately, the members of the Task Force *unanimously* agreed to recommend that the Alabama Legislature amend the Act as follows:

1. End the payment of lifetime medical benefits for every injured employee to a maximum of 300 weeks UNLESS there is a finding, (proven by clear and convincing evidence), that medical treatment is likely to be needed beyond 300 weeks. The Task Force learned that never-ending medical benefits causes significant problems for actuary departments of insurers, self-insurers, employers,

and group funds. As life expectancies increase each year, files must remain open longer and until the death of injured employees. Moreover, with advancements in the medical field, setting reserves for a claim becomes more challenging each year. For example, no employer reserved or planned twenty years ago for an employee to get a costly pain stimulator today. This reform will provide significant cost savings for employers which offset costs of the increased PPD cap, reduce reserve expenses, and provide file closure. Another benefit is elimination of Medicare Set-Asides ("MSA"), which fund medical care beyond 300 weeks.

2. Limit the length of time permanent total disability ("PTD") benefits are paid to an injured employee to the latter of age 70, social security retirement age plus two (2) years, or 500 weeks. Currently, PTD benefits are paid for the lifetime of the employee. This reform not only offsets the costs of the increased PPD cap, but it also provides closure for files, stops all administrative fees, and reduces costs of setting reserves on claims.

3. Increase the PPD rate paid to injured employees who are up to 99% disabled from $220 per week to a figure that adjusts annually and represents 50% of the state's average weekly wage. Currently, this figure is $432.58. When the $220 cap was established more than 30 years ago, it was $66^{2/3}$ percent of the state's average weekly wage. The Act, however, makes no allowance for this rate to change and does not account for cost of living adjustments. Today, the cap is a fraction of minimum wage and far below poverty level for a family of four. (The cap in Georgia is $575 per week.) Immediate benefits of this change include a reduction in PTD awards and a lower value in settlements. With the current $220 cap, judges often face the scenario of awarding very low PPD benefits, a maximum of $66,000, or a very high PTD award, oftentimes upwards of $500,000.00.

4. Require a presumption that, if medical treatment is not sought for any three-year period, the treatment is deemed unrelated to the workers' compensation injury. This reform will also provide additional cost-savings for employers.

5. Require a *conclusive* presumption that if medical treatment is not sought for any five-year period, the treatment is deemed unrelated to the workers' compensation injury. The benefits to this recommendation are obvious.

6. Give employers the right to designate the pharmacy that will provide medications to the employee for workers' compensation injuries. This proposed reform is contrary to the Alabama Court of Civil Appeals decision in *Davis Plumbing Company, Inc. v. Burns*,[8] but provides additional relief to employers and offsets the costs of the increased PPD cap. In some cases, these savings will be significant for employers.

In late 2017, the President of the Alabama State Bar appointed a Task Force of only Alabama lawyers to address, study, analyze, and craft a balanced work reform to the Act. The Task Force consisted of both defense and plaintiffs' lawyers and lawyers representing particular interest groups such as self-insured group funds, insurance companies, self-insured employers, the Department of Labor, municipalities, hospitals, and medical facilities. All of the members agreed that the Act was obsolete and unfair and that interests on both sides needed reform.

7. A physician can no longer be *both* the prescriber and dispenser of medications. In other words, a physician cannot prescribe medicine that he then compounds and/or sells. Again, this reform will provide great cost-savings for employers.

8. Place limitations on opioid prescriptions. Written and signed agreements will now be required between employees and pain managing physicians regarding prescription opioid medications. This reform should benefit employers and employees alike.

9. Settlements with employees represented by attorneys are presumed to be in the best interest of the employee. Judges occasionally refuse to approve a workers' compensation settlement that has been thoroughly negotiated between the parties and their attorneys and agreed to by the employee and his/her attorney. Judges are not always aware of the events and communications preceding a settlement hearing. As such, the Task Force believes the employee's attorney has his/her client's best interests in mind. This reform benefits both employers and employees.

10. Trial judges must rule on workers' compensation hearings within 90 days of the trial or hearing. Oftentimes, many months, (sometimes years), pass between the date of the workers' compensation hearing and the final ruling by the court. This reform will benefit all parties.

11. Plaintiffs' attorneys' fees will increase from a maximum of 15% to 20% of a workers' compensation award. This additional fee has no impact on employers because the fee is deducted from the employee's workers' compensation award/settlement. This current fee has not changed since the inception of the Act many, many years ago.

Although there are other minor revisions recommended by the Task Force, the above reflects the major recommendations. While these are significant changes to the Act, all members of the Task Force believe costs to the employers will ultimately be minimal. Earlier this month, the Alabama Council of Association of Worker's Compensation Self Insurers Funds ("Council") stated its opposition to the Task Force's proposed Reform. A copy of the Statement of Opposition is attached to this article. Opposition may jeopardize the future of the Task Force's work and proposed Reform. As summarized by the Task Force, *"Flipping through merely to see 'what numbers changed' for any one employer or party would be a serious mistake*." Neither side gets the fulfillment of a "wish-list" in this

Reform. The efforts of the Task Force were directed at a fair *quid pro quo*. Based on the data presented, the Task Force concluded with a *high degree of confidence that the numbers work*. The Task Force encourages anyone opposed to the reform, to first re-check their own "numbers," and provide additional input with actual data to the contrary. The Task Force recognizes that some changes will have an immediate and measurable impact, while others will result in certain savings that defy precise actuarial measure.

Reform through recommendations from the Task Force is far preferable than facing an onslaught of *Clower v. CVS* decisions in courts across Alabama that ultimately will land in the appellate courts. The plaintiffs' bar has openly advised the Task Force and all levels of the workers' compensation system that "*Clower* was only the first case of many to come" if reform is not seen in 2019. It only takes one case to declare Alabama's Workers' Compensation Act unconstitutional. For this reason, all members of the Task Force spent countless hours in 2018 working with all sectors in the workers' compensation system to draft proposed reform to the Act and, most importantly, unanimously approved and fully support the recommended reform.

Jeannie B. Walston is a partner at Starnes Davis Florie LLP whose practice is devoted to civil defense litigation, including

defending Federal Black Lung claims, workers' compensation litigation and defending mass toxic torts and general civil matters at both trial and appellate levels. She has wide experience in representing mining and mineral companies with various issues, including mineral rights, contractual issues and environmental and toxic tort issues. Jeannie also has significant experience in handling Federal Black Lung claims at all levels. She graduated from the University of Alabama School of Law in 1992.

Endnotes

[1] Ala. Code § 25-5-68(a).
[2] Ala. Code § 25-5-90(a).
[3] *Clower v. CVS Caremark Corp.*, CV-2013-904687 (Cir. Ct. Jeff. Co., Birmingham Div. filed Nov. 20, 2018) (Order, May 8, 2017).
[4] Ala. Code § 25-5-17.
[5] *See* note 1, *supra*.
[6] *See* note 3, *supra*. at p. 8.
[7] *See* note 3, *supra*. at p. 18.
[8] *Davis Plumbing Company, Inc. v. Burns*, 967 So. 2d 94 (Ala. Civ. App. 2017).

Statement of Opposition to Alabama State Bar Association's Workers' Compensation Legislation Alabama Council of Association Workers' Compensation Self Insurers Funds

The Alabama Council of Association Workers' Compensation Self Insurance Funds (Council) voted to oppose a draft bill prepared recently by a committee of the Alabama State Bar Association. The Council made its decision at a recent meeting in Montgomery.

Neither the council nor any of its members were included on the committee or were allowed to participate in the deliberations. For this reason, the council believes it would be unfair and counterproductive to use the content of the committee report as the basis for reform discussions in the coming legislative session.

While the Council continues studying the impact of the complex proposal on the cost of workers' compensation coverage to the Alabama business community, the following are some of the organization's more significant concerns:

- the draft does not attempt to address the current cost of hospital, doctor, and other medical fees, making it unacceptable, particularly since those fees make up the majority of workers' compensation expenses;
- increasing legal fees for plaintiffs' attorneys by one-third will only serve to encourage the filing of additional lawsuits and their related costs, a significant factor in workers' compensation expenses for businesses;
- while the Council agrees that an increase in the Permanent Partial Disability (PPD) cap is warranted, it believes the approach taken in the committee report fails to address comprehensive issues important to the business community, while simply more than doubling the cap and providing for future inflation adjustments
- Considered together, the increase in attorneys' fees, more than doubling of the PPD cap and the inclusion of an automatic inflationary adjustment will have a direct, immediate and negative impact on business in Alabama and the employers represented by the council

While the Council is always willing to work with any group to make meaningful and fair improvements to Alabama's workers' compensation law, any such negotiation must include all parties. A proposal developed without the involvement of the business and medical-care community is not a document that can lead to meaningful and productive reform.

Russell Davis, CAE
Chairman

The Alabama Council of Association Workers' Compensation Self Insurers Funds is made up of the following:
Alabama Home Builders Self Insurers Fund
Association of County Commissions of Alabama Self Insurers Fund
Alabama Self-Insured Worker's Compensation Fund
Automotive Aftermarket Fund
DealerComp ADAA
Alabama Rural Electric Cooperatives Self Insured Pool
Alabama Retail Comp
Alabama Truckers Association Comp Fund
ForestFund
WorkersFirst Comp Fund
Alabama Associated General Contractors Self Insurer's Fund

These entities represent 16,200 firms and more than 375,000 employees across the state of Alabama.

THE EMERGING ISSUE OF COGNITIVE IMPAIRMENT AMONG ATTORNEYS

By: Robert Thornhill, MS, LPC, Director | Alabama Lawyer Assistance Program

The Alabama Lawyer Assistance Program is committed to providing confidential services and support to attorneys, judges and law students who may be struggling with alcohol or drug abuse, or mental health issues such as anxiety disorder, depression, or bipolar disorder. However, with the aging of our society and the tendency for many in the legal profession to delay retirement, the issue of cognitive impairment is becoming a major concern. While much effort continues to be made to educate those in the legal profession regarding the inevitably worsening negative consequences of undiagnosed and untreated addiction or mental health issues, little has been done thus far to address the increasingly prevalent issue of cognitive decline and cognitive impairment.

Age-based changes in cognition and cognitive abilities are normal for all of us as we get older. Declines in reaction time and processing speed can become evident as early as the late 20's, while other cognitive functions show decline in later decades. As we age, it is normal for information to be processed more slowly, retrieval of information to be less accurate and efficient, and learning of new information to be more challenging. In addition, the ability to multi-task and to perform complex problem-solving declines. On the positive side, our store of knowledge, emotional functioning, vocabulary, and acquired wisdom can remain stable or even show improvement over time! These are all examples of normal cognitive aging.[1]

Abnormal cognitive changes that are not age-appropriate are biologically based and are referred to as dementia, cognitive disorder, or cognitive impairment. This kind of impairment manifests as problems with thinking abilities that represent a change or decline from a previous level of functioning, or cognitive deficits that cause significant impairment in occupational and/or social function. Examples include Alzheimer's disease, vascular dementia (pour blood flow to the brain due to multiple small strokes, diabetes, hypertension, etc.), Parkinson's disease dementia, Traumatic Brain Injury (impact to the head or other mechanism of rapid-movement displacement of the brain within the skull), Huntington's disease and so on. Other behaviors and disorders that can negatively impact the brain and lead to cognitive impairment include Multiple Sclerosis, tobacco use, hypertension, heart disease, diabetes, brain tumor, elevated cholesterol, vitamin B 12 deficiency, and alcohol/drug abuse.[2]

The most common cognitive disorders are neurodegenerative diseases that involve progressive deterioration of the brain over time. They generally have an insidious onset and progress gradually. The most commonly recognized is Alzheimer disease, but Frontotemporal dementia, Diffuse Lewy Body disease, and Parkinson's disease are also fairly common. It is known that neurodegenerative brain changes can begin years before symptoms become obvious or debilitating. Dementia is a term that is used to describe a decline in cognitive and behavioral skills that is severe enough to interfere with daily functioning and the ability to live independently. It is a significant clinical finding that strongly implies that an individual is disabled in key aspects of everyday life and may no longer be able to function in the workplace.[3]

Lawyer Assistance Programs around the country have become increasingly aware of the issue of cognitive impairment and the need to assist those attorneys and the families and colleagues who may be affected. Here in Alabama we are seeing an increase in calls from law partners, judges, family members, spouses and clients. Some fundamental questions and concerns need to be addressed. Lawyer Assistance Programs are accustomed to dealing with attorneys who may have a substance use disorder (alcoholism or addition) or a mental health problem, and the treatment processes are well known. However, as Robert "Kim" Lusk, a Portland attorney who chairs their State Lawyer Assistance Committee states, "dementia is a progressive, debilitating condition there's not a lot you can do to unravel". He adds, "You can't develop a remedial program and get the lawyer to follow through. It's effectively an irreversible process. What exactly do we do with those cases? As an institution, how does the bar deal with the process"?[4]

Here in Alabama, as far as possible, we hope to provide

assistance to these attorneys and their colleagues and loved ones to first identify the presence of a possible problem, assist with intervention, provide appropriate referrals for neurological and neuropsychological evaluation, and then assist with an appropriate and non-disciplinary avenue to discontinue the practice of law when indicated. When colleagues or loved ones begin to recognize that an attorney may be experiencing cognitive impairment the best place to seek assistance is the Alabama Lawyer Assistance Program. We recognize that calling attention to an attorney or judge who may be cognitively impaired may be very difficult, but assistance from the Alabama Layer Assistance Program is confidential. Cognitive Impairment that goes unaddressed will inevitably result in violations of the Rules of Professional Misconduct. It is our hope that we can provide this kind of confidential assistance before the impaired attorney's behaviors result in harm to clients and law firms, and before formal complaints are received at the Alabama State Bar that may lead to disciplinary actions.

The following is a partial list of Signs and Symptoms of Cognitive Impairment:

- Deteriorating performance at work
- Making mistake on files or cases
- Difficulty functioning without help
- Committing obvious ethical violations
- Failing to remain current on changes in law; over-relying on experience
- Exhibiting confusion about timelines, deadlines, conflicts, trust accounting
- Inappropriate dress, poor grooming or hygiene
- Sexually inappropriate statements or behavior that is uncharacteristic
- Denial of any problem or highly defensive or paranoid
- Forgetting conversations, events, details of cases
- Frequently repeating questions or making requests for information
- Trouble staying on task or topics
- Difficulty adjusting to changes
- Problems with verbal expression, digression, distraction
- Confusion, lapses in attention, concentration
- Emotional distress, rapid mood shifts

It is very important to remember that some degree of cognitive decline is a normal process for most of us that happens very slowly over decades, not years. Rapid cognitive decline should not be viewed as a normal, expected consequence of aging.[5] These signs and symptoms should be taken seriously. If you observe any of these signs or symptoms in a colleague or loved one, that person may be struggling with one or more undiagnosed maladies such as a substance use disorder (alcoholism, drug addiction), a mental health issue such as anxiety or depression, or a biologically-based cognitive disorder. It is also possible that one or more of these problems could be "co-occurring disorders". For example, undiagnosed and untreated alcoholism/addiction can also lead to symptoms of depression, anxiety, and even cognitive impairment. There are often cases in which undiagnosed and untreated alcoholism/addiction have directly caused cognitive impairment. In such cases most people are able to demonstrate significantly improved cognition over time as they maintain abstinence from mood-altering substances and participate in a genuine recovery program. For a smaller but significant minority, the cognitive impairment is biologically based and will persist despite abstinence and recovery. It is also common to see symptoms of anxiety and depression improve over time with abstinence and recovery. Each person's challenge is unique and requires proper evaluation and treatment. The Alabama Lawyer Assistance Program can provide assistance with this process.

The following is a partial list of suggestions regarding the sensitive subject of approaching the Impaired/Declining Lawyer:

- Partner with those who have first-hand observations of the behaviors that are causing concern about that lawyer's competence to practice law, and who are trusted by that lawyer.
- Contact the Alabama lawyer Assistance Program for assistance
- Arrange for a non-confrontational meeting with the lawyer and concerned individuals.
- Provide objective and supportive statements such as:
  a. I am concerned about you because ……
  b. We have worked together a long time so I hope you won't think I'm interfering when I tell you I am worried about you …..
  c. I've noticed you haven't been yourself lately, and I am concerned …..
- Get the lawyer to talk; listen, do not lecture.
- While listening, add responsive and reflective comments.
- Express concern with gentleness and respect.
- Share first-hand observations of the lawyer's objective behavior that is raising questions or causing concern.
- Review the lawyer's good qualities, achievements and positive memories.
- Approach as a respectful and concerned colleague, not an authority figure.
- Act with kindness, dignity, and privacy; not in crisis mode.
- If the lawyer is not persuaded that his/her level of professional functioning has declined or is impaired, suggest an evaluation by a specific professional (in most instances, a neuropsychologist) and have contact information ready.
- When appropriate, offer assistance and make recommendations for a plan providing oversight (such as a buddy system or part-time practice with co-counsel).
- When appropriate, propose a voluntary transfer of licensure status to an available non-practicing option such as Inactive status.
- Remember that this is often a process and not just a onetime event.[6]

It is important to never ignore the situation or do nothing when confronted with the issue of cognitive impairment. These symptoms and behaviors are a strong signal that assistance and appropriate intervention are needed. The Alabama Lawyer Assistance Program can provide guidance, support, and assistance through the process of intervention, referral for evaluation, diagnosis and treatment, interpretation of clinical findings and recommendations regarding fitness to practice. We are here to help with this difficult challenge! (Reprinted with permission from The Alabama Lawyer, Sept. 2015).

Robert B. Thornhill, MS, LPC is the director of the Alabama Lawyer Assistance Program of the Alabama State Bar. He is also a Certified Alcohol and Drug Counselor. Mr. Thornhill has worked in the field of mental health and substance abuse for the past 20 years, and currently oversees program operations including coordinating evaluations, assessments and monitoring services.

Endnotes

[1] ABA CoLAP Senior Lawyer Assistance Program, Working Paper on Cognitive Impairment and Cognitive Decline, Apr. 11, 2014.
[2] Presentation by Dr. Delisa West, Neuropsychologist, 15 April, 2015.
[3] ABA CoLAP Senior Lawyer Assistance Program, *supra* note 5.
[4] Cliff Collins, *Ready or Not, When Colleagues Experience Cognitive Decline*, Oregon State Bar Bulletin, Nov. 2014.
[5] "Age and Ageing", Oxford Journals, November 2011, 40 (6), 684-689.
[6] ABA CoLAP Senior Lawyer Assistance Program, *supra* note 5.

Now that 2018 is in the books, I'm pleased to report that membership is up 10% and thriving. ALDA's membership has been steadily declining over the past several years, falling short just like other membership organizations across all professions. We have also seen this same trend in our Annual Meeting attendance and other membership activities. In 2017, the Board of Directors made some tough financial decisions in order to identify ways to slow the decline in membership, redefine the association's services to its members and create opportunities to attract new and young civil defense attorneys.

Members' dues were invested into the redesign of the association's branding, re-launch of a new website, free quality CLE opportunities, new and redesigned electronic and print publications, member legislative calls to action alerts, the formation of the Women in the Law and more. The 2018 Annual Meeting offered new family activities, superior CLE content and enhanced exhibitor and sponsor support. Although last year's Annual Meeting was held in a new location and attendance was down slightly, we can assure you that the 2019 Annual Meeting keynote speaker, CLE content and family events we have planned for you will make you think twice about missing future summer conferences. We promise it will be BIG. We are very excited to return to Sandestin Golf and Beach Resort June 13-15, so please make sure to note this event on your calendar and bring your family to the beach. Registration is already open.

Additionally, the board spent quality time during the September board retreat in Montgomery with an incredible strategic planner, Frank Ramos of Clarke Silvergate, P.A. from Miami, Florida. Frank challenged everyone in advance of the planning session by asking the board and staff to identify the association's strengths, weaknesses, membership challenges and future goals we envisioned for ADLA, all of which were discussed at great length at the retreat. Since it's pretty common to leave any kind of strategic planning meeting with endless ideas and enthusiasm, it's also very easy to lose sight of those ideas as we get back to our work and families. However, in this situation we all committed to focus on three specific goals. The board was charged with identifying potential members who separated from large firms to join smaller firms and organize an outreach effort, identify new and innovative technology driven benefits that appeal to younger lawyers, and offer opportunities that encourage member engagement through events, speaking opportunities and committees.

JENNIFER HAYES
Executive Director

Each goal is a tall order to accomplish, but we are already seeing positive results since the retreat. I challenge you to reach out to colleagues in your office and encourage them to join ADLA this year. The days of joining your professional society because "it's what you're supposed to do" are long gone and it's up to everyone to pull the ranks together in order for this association to remain relevant, effective and to grow.

Please take time to visit the website often and look for ADLA's electronic newsletter, the *Wednesday Briefcase*. It's our goal to make sure you stay informed of all association news and events. In this issue of the *Journal*, read up on the website reveal and learn what ADLA has to offer you. As always, if there is anything ADLA can do for you, please reach out to me directly at jhayes@adla.org.

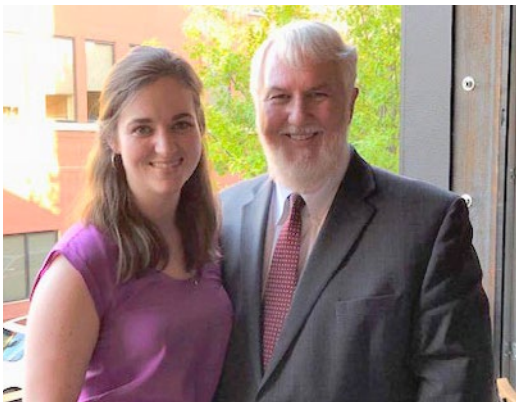
ONE WARM COAT DRIVE

During the month of December, ADLA proudly partnered with DRI to collect winter coats for those in need. DRI SLDO's held a nationwide competition to collect the most new and gently used coats. All collected coats were donated to organizations in local communities. Thank you to all of our ADLA members who graciously collected and donated coats.

ADLA members **Lana Olson** and **Bridget Harris** of Lightfoot, Franklin & White in Birmingham, spearheaded their firm's coat collection and donated 41 coats to the Greater Birmingham Ministries.

Bridget Harris and Lana Olson of Lightfoot and Franklin, along with Maggie Olson, daughter of Lana Olson

ADLA AFTER HOURS



Harold Stephens and daughter Jordan Henning

District One members gathered together for their first networking mixer at The Martin Bar and Bistro in Huntsville. Everyone who joined us after work were treated to great drinks and appetizers in the open aired bar this past fall.

We welcomed some long time members, as well as several new young lawyers to the event. Check the website and the *Wednesday Briefcase* for upcoming mixers this year.

Hal Mooty, Stacy Moon, Bree Wilbourn, Travis Jackson, Sarah Henson & Bob Wood

David Canupp and Lauren Smith

March 21-22

register online at www.adla. org

Thomas Goode Jones School of Law Montgomery

Deposition Boot Camp combines lectures from experienced ADLA faculty with challenging breakout exercises to sharpen members skills to effectively take and defend depositions.

August 8-9

online registration coming soon

Cumberland School of Law Birmingham

The Bibb Allen Memorial Trial Academy is the perfect follow up for learning and sharpening trial skills. It's a hands-on experience that pairs young attorneys with experienced lawyers and judges to practice trial exercises.

STEPHEN W. STILL JR.
Chair

I hope everyone is having a fabulous spring. When **Dennis Bailey** asked me to Chair ADLA's Legislative Committee, I immediately responded that I was happy to help however I was needed. When I accepted, however, I did not fully appreciate the added benefit that ADLA provides to its membership through the Legislative Committee. In fact, a few seconds after I committed to Chair the Committee, I had the same thought that I suspect many of you may have – "What is the Legislative Committee and what does it do?"

For those of you who (like me) do not understand the Legislative Committee's purpose or what the Legislative Committee does, here is a brief explanation of what ADLA does through the Legislative Committee. First, ADLA receives and reviews proposed legislation that may impact (positively or negatively) the practice of law, the ADLA membership, and/or clients of the ADLA membership. ADLA and the Legislative Committee will, from time to time, circulate new or proposed legislation to the membership to keep all members abreast of current legislative issues and developments. I trust you have received such emails from ADLA in the past. Second, depending on the impact that proposed legislation may have on the practice of law, the ADLA membership, or clients of the ADLA membership, the Legislative Committee will involve the ADLA Board of Directors, membership, other lawyers, and/or other interested individuals and entities to work with legislators to promote or oppose certain legislation. In looking into the Committee's past work, I am pleased to report that the Committee and ADLA as a whole has a strong track record on this front.

This year's Committee is made up of **Allen Estes** of Balch & Bingham LLP, **Ed Howard** of Ford Howard & Cornett, P.C., **Keith Miller** of Alfa Insurance Companies, **Mary Margaret Carroll** of Fine Geddie & Associates, **Andy Rutens** of Galloway Wettermark Everest & Reutens LLP, and me. We look forward to working with you during this coming year. Please do not hesitate to contact us if we can be of any assistance.

Thank you to everyone for your participation in ADLA.

MENTAL HEALTH RECORDS: CURRENT ISSUES CONFRONTING THE PRACTITIONER

By: Jansen Voss

In Alabama, the scope of discovery is relatively broad. Discovery may be conducted on relevant matters, not otherwise privileged, which are relevant to the subject matter involved in the pending action.1 However, there are significant limitations on the disclosure of mental health records in the discovery process. The objective of this article is to provide the practitioner with a) a brief review of the evidentiary privileges protecting mental health records, b) a discussion of several important appellate decisions concerning mental health record privileges, and c) a suggested best practices for protecting mental health records from discovery.

Ala. R. Evid. 503(b) sets out the general rule of privilege with respect to "confidential communications, made for the purposes of diagnosis or treatment of the patient's mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family."[2] Rule 503(b) applies to persons licensed to practice medicine and licensed psychologists who are regularly engaged in the diagnosis or treatment of mental or emotional conditions, including alcohol or drug addiction.[3]

> "While the Act specifically excludes companies regulated by federal laws that require data breach notification, such as banks and health care entities, the Act will have a profound effect on Alabama businesses throughout most industries, including law firms."
>
> – JANSEN VOSS

Rule 503A of the Alabama Rules of Evidence, sets out the general rule of privilege with respect to "confidential communication made for the purpose of facilitating the rendition of counseling services to the client."[4] Rule 503A applies to persons who are assisting another person, "through the counseling relationship, to develop understanding of personal problems, to define goals, and to plan action reflecting the person's interests, abilities, aptitudes, and needs as these are related to personal-social concerns, education progress, and occupations and careers."[5]

For purposes of this article, Rule 503 and Rule 503A will sometimes collectively be referred to as "mental health privileges." At the risk of oversimplification, confidential communications made to mental health professionals for the purposes of obtaining help for a mental health issue are privileged. It will not come as a surprise that there are exceptions to the general rule. An exhaustive analysis of those exceptions requires a book length treatment. However, the practitioner seeking to protect mental health records from disclosure to opposing parties must establish that: 1) the subject records contain confidential communications by, between, or among, a patient and his/her mental health professionals; 2) no exceptions to the privilege apply; and, 3) the patient has not waived the privilege.

The Courts have analyzed many of the exceptions to the mental health privileges. Of some note, the Alabama Court of Civil Appeals has held that a child is not a party to child custody matter and that the exception to the psychotherapist-patient privilege (Rule 503) relating to custody matters was intended to apply when the mental state of the person seeking custody is at issue.[6]

Alabama Appellate Courts Have Declined to Broaden Exceptions to the Privilege.

Alabama Appellate Courts have declined to broaden the exceptions specifically set out in Rules 503 and Rule 503A. In *Ex parte Pepper,* the Petitioner asked the Court to recognize an exception to the privilege where privileged information may be relevant to the element of proximate cause.[7] The Court, citing principles of statutory construction, and public policy supporting protection of mental health records, declined to recognize an exception to the privilege. In *Ex parte Northwest Alabama Mental Health Center,* the Court refused to create "an exception to the privilege…making the privilege inapplicable when a plaintiff establishes that privileged information is 'necessary' to proving a cause of action."[8]

Confidential communications.

Both 503 and 503A protect "confidential communications." Rule 503(a)(3) states "[a] communication is 'confidential' if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family." Similarly, Rule 503A(a)(3) states "[a] communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure

is made in furtherance of the rendition of professional counseling services to the client or those to whom disclosure is reasonably necessary for the transmission of the communication."

In *Ex parte Altapointe*, the trial court, and the Alabama Supreme Court, examined the term "confidential communications" as it is used in Rule 503.[9] Hunter Avnet was a resident at an Altapointe group home for persons with mental health needs. Hunter alleged he was assaulted by Crenshaw, another group home resident. Hunter alleged Crenshaw attacked him with a blunt object and stabbed him numerous times in the head with a knife. Hunter's father filed suit on behalf of Hunter against Altapointe alleging negligence and wantonness.

Hunter served discovery requests to Altapointe requesting, among other things: "Prior to the incident made the basis of this lawsuit, were the Defendants aware of any prior aggressive acts of K[e]rdeus Crenshaw based on any reports, incarcerations, arrests, convictions, treatments, or other similar incidences at any location?"[10] Altapointe objected to the Plaintiff's discovery request arguing that a response to the request violated the psychotherapist-patient privilege. The trial judge entered an Order compelling Altapointe to produce responsive documents. Altapointe filed a Petition for Writ of Mandamus seeking an order prohibiting discovery of information concerning Crenshaw's prior aggressive acts.

The Alabama Supreme Court denied Altapointe's Petition requesting an order prohibiting the disclosure of information concerning Crenshaw's prior aggressive acts. The Court stated that Altapointe's "argument … is based on an overbroad definition of the privilege. The psychotherapist-patient privilege is intended to protect confidential relations and communications between a patient and his or her psychotherapist."[11] The Court noted Altapointe could have obtained knowledge of Crenshaw's prior aggressive acts outside of a confidential communication with Crenshaw. The Court further noted, "[B]y definition, a patient's interactions with a third party (other than those described by the rule) are not a 'confidential communications' with a psychotherapist. Thus, it follows that a mental health provider's independent knowledge of a patient's assault on a third party cannot be considered as resulting from a confidential communication protected by the psychotherapist-patient privilege."[12]

Until the Alabama Supreme Court's decision in *Ex parte Altapointe*, practitioners and the courts seem to have given little thought to whether records maintained by a mental health provider were "confidential communications" protected by the psychotherapist-patient privilege and the counselor-client privilege. The assumption that a mental health provider's patient records were privileged (unless an exception or waiver applied) pervades many reported opinions, in part because the parties did not raise the issue on appeal. Most of the appellate decisions relating to the mental health privileges focus on the enumerated exceptions, or waiver. In representing mental health providers in this state over the past decade, it is this author's experience that trial courts broadly protect a patient's mental health records where 1) testimony from the mental health provider establishes the subject records are records prepared and/or maintained by the mental health provider, 2) none of the exceptions set out in 503 or 503A apply, and 3) there has been no waiver of the privilege. The trial courts' collective wisdom on that issue is supported by the public policy of this state and should be commended:

> Statutes such as § 34–26–2 are intended to inspire confidence in the patient and encourage

> "Discovery may be conducted on relevant matters, not otherwise privileged, which are relevant to the subject matter involved in the pending action. However there are significant limitations on the disclosure of mental health records in the discovery process."

him in making a full disclosure to the physician as to his symptoms and condition, by preventing the physician from making public information that would result in humiliation, embarrassment, or disgrace to the patient, and are thus designed to promote the efficacy of the physician's advice or treatment. The exclusion of the evidence rests in the public policy and is for the general interest of the community. See 81 Am.Jur.2d *Witnesses* § 231 at 262 (1976); *Annot.,* 44 A.L.R.3d 24 *Privilege, in Judicial or Quasi-judicial Proceedings, Arising from Relationship Between Psychiatrist or Psychologist and Patient* (1972).

"[A] psychiatrist must have his patient's confidence or he cannot help him. 'The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. * * * It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.' "

Taylor v. United States, 222 F.2d 398, 401 (D.C.Cir.1955), quoting Guttmacher and Weihofen, *Psychiatry and The Law* (1952), p. 272.[13]

However, *Ex parte Altapointe* signals a turning point in the application of mental health privileges, and a more rigorous application of the privileges. For parties seeking to protect mental health records from disclosure, it will no longer be enough to simply assert the privilege and present an affidavit from the mental health provider stating the subject records were prepared in the course of providing mental health care to the patient.

Using the discovery request at issue in *Ex parte Altapointe* as an example, consider if Altapointe learned of the patient's violent tendencies by receiving notice from a criminal court concerning criminal proceedings against the patient. That information may then be recorded in the patient's file, but would not have been obtained through confidential communications with the patient. Likewise, if the patient assaulted another patient in the waiting room of at an out-patient mental health clinic run by Altapointe, that information may be noted in the patient's file, but would not have been obtained through confidential communications with the patient.

The aforementioned examples, and the example set out in *Ex parte Altapointe*, are clear. However, applying the term "confidential communication" to communications by, and actions of, profoundly intellectually disabled persons and persons with severe mental illness is a much more difficult task. Persons for whom the privileges are designed to protect, may not comprehend the technical concept of confidentiality described in *Ex parte Altapointe*. Such persons may not have the appropriate insight to determine when, or when not, to communicate concerning his/her mental health condition. Questions concerning whether the person intended the communication to be confidential (or not), or whether the person knowingly, or unknowingly, made a communication in the presence of a third person are made all the more difficult to analyze in connection with persons who have profound intellectual disabilities or serious mental illnesses.

Additionally, depending upon the mental health care provider, and whether the care is provided in-patient, out-patient, or residential care, a mental health care provider's "file" on a particular patient may contain general demographic information, financial information, or medical records relating to the treatment of purely medical conditions, dietary and nutrition records, and records concerning what the patient likes to watch on television. All of the aforementioned records may be intertwined with, and inextricable from, what the Court in *Ex parte Altapointe* considers confidential communications protected by the privilege. So, applying a narrow interpretation of "confidential communication" would require extensive testimony from the mental health provider—going line by line in the mental health record in some cases—parsing out what is, and is not, a confidential communication. Getting further into the weeds, the mental health professional would need to answer questions such as: 1) Did you establish at the outset of the psychotherapist-patient relationship that all communications by, between, and among you and the patient would be confidential and would be used in connection with providing mental health services, or is there some ambiguity in that respect? 2) What, if any, of your records represent verbatim statements made by the patient, in confidence?, 3) What records, if any, contain your confidential communications and

clinical assessments of the patient, and 4) What records contain publically available information, or information you obtained outside of your relationship with the patient? Arguably, the mental health professional would have no need for "outside" information about the patient, nor would the mental health professional receive such information, but for the psychotherapist-patient relationship. But, even the above-suggested process may not completely satisfy *Ex parte Altapointe* without testimony from the patient concerning the patient's intent to convey confidential information.

In camera inspections.

On occasion, parties seeking privileged mental health records request, in the alternative, that the trial court conduct an *in camera* inspection of the mental health records. This seemingly magnanimous tactic presents itself as an easy and reasonable choice to the trial judge (*i.e.*, "Judge we don't want you to give it to us outright, take a look at the records, keep the opposing party honest…and then you decide if we ought to get the records").

Ex parte University of South Alabama offers some guidance on the propriety of *in camera* inspections.[14] In that case, a former university employee sued the university, and a university student, arising out of the university's failure to reappoint the employee to her position. During discovery, the employee issued a subpoena seeking the student's mental health records. The student objected to the subpoena, and both the student and her mental health provider filed motions to quash and motions for protective orders. The trial court denied the motions and entered an order denying the motion to quash, and requiring the mental health provider to submit of the records to the trial court for in camera review. The student filed a Petition for Writ of Mandamus seeking an order directing the trial court to quash the subpoena for her mental health records.

The Alabama Supreme Court held the trial court exceeded the scope of its discretion in ordering the production of the student's mental-health records for *in camera* review because: 1) the student demonstrated her mental-health records were privileged, 2) the employee failed to demonstrate the records fell within an exception to the privilege, 3) the employee failed demonstrate the student waived the privilege, and 4) the employee failed to establish the subject records may contain information not protected by the privilege.[15]

The former employee did not argue that the mental health records were privileged; however, she simply argued that production of the records for *in camera* review was consistent with the Court's decision in *Ex parte Etherton*, 773 So.2d 431 (Ala. 2000). In *Ex parte Etherton*, the Court held that production of mental health records for *in camera* review was appropriate because the mental health records were perhaps the plaintiff's "only source of relevant evidence, or information that [would] lead to admissible evidence, in support of her claims."[16]

The Court in *Ex parte University of South Alabama* soundly rejected the former employee's reliance on *Ex parte Etherton* in support of her argument. The Court noted that neither the main opinion nor

the special writing in *Ex parte Etherton* was by majority. The Court also observed that even if *Ex parte Etherton* had precedential value, the former employee had not demonstrated the production of the student's mental-health records for *in camera* review was necessary. The Court noted the former employee had not established the student's mental health records contain information outside of the materials protected by the psychotherapist-patient privilege. Finally, the Court also cites *Ex parte Northwest Alabama Mental Health Center,* wherein the Court specifically refused to create an exception to the psychotherapist-privilege where privileged information is 'necessary' to prove a cause of action.[17]

Conclusion.

The practitioner seeking to protect confidential mental health records from disclosure should establish the following:

1) Establish through testimony from the mental health provider that the subject records reflect confidential communications made by, between, and among, the patient and the patient's mental health providers for the purpose of providing mental health care;
2) Establish that no exceptions to the privilege apply to the subject records;
3) Establish that the patient has not waived the privilege; and,
4) Establish through testimony from the mental health provider that the subject records do not contain any information not obtained through confidential communications.

In contrast, assuming that no exceptions apply and waiver is not applicable, the practitioner seeking disclosure of mental health records would be advised to narrowly tailor the discovery requests seeking only information the mental health provider learned outside of the confidential communications by, between or among provider and patient. Additionally, depositions of the patient's mental health professionals would be helpful. Establishing that the patient's mental health records contain information not solely obtained through "confidential communications" would support production of said records or, at minimum, a motion for *in camera* inspection.

M. Jansen Voss is a partner at Christian & Small LLP. Through his diverse defense litigation and appellate practice, M. Jansen Voss represents a wide range of businesses and individuals involved in complex personal injury and wrongful death lawsuits, as well as business disputes and breach of contract matters. Jansen helps small businesses with business formation and transaction matters, as well as contract drafting and risk management, in addition to his representation of businesses facing EEOC complaints, employee discrimination lawsuits, and Americans with Disabilities (ADA) complaints. He regularly represents mental health facilities, psychiatrists and psychologists with business matters, regulatory issues, risk management and lawsuits. His representation also includes doctors, nurses, and other health care professionals in medical malpractice lawsuits, handling matters before professional licensing boards. Additionally, Jansen advises social service providers and nonprofits, and represents insurance agents, brokers and carriers involved in lawsuits related to negligent failure to procure insurance, bad faith and coverage issues.

Endnotes

[1] Ala. R. Civ. P. 26(b).
[2] Ala. R. Evid. 503(b).
[3] *Id. See also* Ala. Code § 34-26-2.
[4] Ala. R. Evid. 503A(b).
[5] Ala. R. Evid. 503A(a)(6)(A). *See also* Ala. Code. § 34-8A-21.
[6] *Ex parte Johnson*, 219 So. 3d. 655 (Ala. Civ. App. 2016).
[7] 794 So. 2d 340 (2001).
[8] 68 So. 3d 792, 799 (Ala. 2011).
[9] 249 So. 3d 1108.
[10] *Id.* at 1103.
[11] Id. (emphasis in original).
[12] Id. at 1115.
[13] *Ex parte Rudder*, 507 So. 2d 411, 413 (Ala. 1987).
[14] 183 So. 3d 915 (Ala. 2015).
[15] *Id.*
[16] 773 So.2d at 436.
[17] 68 So.3d at 799.

BAINS FLEMING
Young Lawyers Section President

From elementary school to law school I used acronyms. Whether it was ROYGBIV to remember the colors of the rainbow or MY LEGS to remember the statute of frauds, acronyms all had their place. So, when thinking about how to give an update on the Young Lawyers Section ("YLS") of the ADLA – ACTIVE – came to mind.

The YLS is:

A – Accessible – First and foremost the YLS is accessible. All you have to do is be an ADLA member and 40 years of age or less, or who have been practicing law for ten years or less, regardless of age.

C – Collaborative – The YLS is collaborative. Sixteen officers and directors regularly meet to discuss the direction of the section and plan for future events. In the spirit of collaboration, be on the lookout for a YLS listserv that we will be launching in 2019. We hope that this will be a way for the entire section to share ideas and find resource to help us all become better lawyers.

T – Transformative – Through the Bibb Allen Memorial Trial Academy (August 8-9), the YLS provides transformative real-world training to ADLA members. Former participants talk for years about the skills learned and crafted at these programs. If you are interested in registering for this year's Trial Academy please visit the ADLA website to register.

I – Informative – Did you know that the YLS puts on CLE webinars multiple times each year? These webinars are presented live by ADLA members on a variety of topics and are then accessible through the ADLA website for FREE CLE credit year-round. Upcoming webinar topics include E-discovery, defending premises liability cases, and ethics. Webinar CLEs are open to all members.

V – Valuable – The real value of the YLS is in creating relationships. The easiest way to create relationships is by meeting other YLS members at the ADLA Annual Meeting (June 13-15). I look forward to seeing everyone at Sandestin.

E – Exciting – It is an exciting time to be a YLS member of the ADLA. The opportunities are everywhere, just ask and we can get you plugged in. It has been a great honor to serve as President of the YLS this year and I hope to see you soon at an ADLA event.

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message from the editor

continued from page 7

Jeannie has attached the Statement to her article. We are fortunate to have Jeannie's insight as a Task Force member regarding this issue.

Jansen Voss has contributed an article addressing the evidentiary privileges protecting mental health records and the exceptions to those privileges. Jansen has dealt with this issue on many occasions. In his article, he analyzes several important appellate decisions regarding mental health privileges and shares the benefit of his experience in applying those decisions in the protection of mental health records from discovery, as well as for obtaining them with the least possible opposition.

The *Journal* also features an update on the Alabama Property & Casualty Adjusters Association from **David Sikes**, APCAA President, as well as a review of *Get Back Up*, a memoir written by fellow ADLA member, **Rod Cate**.

If you are interested in submitting an article to the 2019 Fall ADLA *Journal* or know of someone who is, please contact me at *gereeves@csattorneys.com* or at (251) 415-9264. Also, if you are interested in sponsoring a law student for submission of an article for publication, please contact me for further information. The deadline for submission of articles to the 2019 Fall *Journal* is **July 31, 2019**. Submissions should be in Times New Roman, 12-point font with citations presented as endnotes in Blue Book format.

ADLA Leadership Attends DRI Annual Meeting in San Francisco

ADLA leadership recently attended the Defense Research Institute's Annual Meeting in San Francisco this past October. Many other familiar faces from Alabama also made the trip, which showed a sizable representation of the Southeastern Region. Excellent programming, networking and substantive CLE were just a few of the highlights of the program. ADLA's own **Lana Olson** was elected Secretary-Treasurer of DRI at the Annual Meeting.

*Pictured: **Sharon Stuart**, ADLA Immediate Past President, **Allen Estes**, ADLA DRI State Representative, and **Christina May Bolin**, ADLA President-Elect.*

*Pictured: **Brooke Malcom**, Lightfoot Franklin & White and **Lana Olson**, Lightfoot Franklin & White*

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I am pleased to announce the establishment of the **ADLA Women in the Law Section,** whose mission is to support, encourage and advance women lawyers in the State of Alabama. This section will engage female members of the association by promoting networking events, expanding educational opportunities, coordinating philanthropic outreach efforts, and supporting each other as they take on leadership roles inside and outside of the association. ADLA's Women in the Law Section will focus on providing opportunities to develop and strengthen personal and professional relationships to facilitate business growth and development. This section is also designed to assist in the career advancement of female attorneys through education, training and mentoring.

ADLA's Commitment

ADLA is committed to the overall diversity of the organization and the development of women lawyers. The Women in the Law Section fits squarely into the ADLA core goals of exchanging information and ideas among members, elevating the skills of civil defense lawyers in Alabama, and collaborating with similar associations in other states and across the legal spectrum. At its core, ADLA seeks to foster an increase in the quantity and quality of service contributed by legal professionals at the community, state and national level.

ADLA and Women

- 22% of current ADLA members are women.
- 26% of the ADLA's women members are young lawyers.

What do these numbers tell us? ADLA has and should continue to play a critical role in the recruitment and advancement of women lawyers in Alabama. ADLA has the opportunity to be innovative by creating this section with member input and ideas. ADLA has room to recruit more women members.

The Need for the Women in the Law Section

ADLA asked; you answered. In the fall of 2018, ADLA sent out a survey to its women members. The response was telling. Here is what you said is important to you:

1. "Connecting women with other women who can mentor them and help them develop their skills and develop business"
2. "Mentoring; networking with potential women clients/in-house counsel"
3. "Varying work hours to accommodate duties at home and with children"

4. "Advice on how to [bring in new work] would be helpful"
5. "Client development and learning how to develop clients from industry groups, not just legal groups"
6. "Networking with more experienced female attorneys"
7. "Finding ways to network and develop clients in the 'good ol' boys' network"
8. "Develop[ing] regional [State Defense Legal Organization] women lawyer networks so we can refer to one another and support one another"
9. "Developing [a] book of business"
10. "Deal[ing] with unintentional biases in the work place and in the courtroom"
11. "More networking opportunities with companies and carriers"
12. "Marketing opportunities"
13. "Work/life balance issues"
14. "More flexible work opportunities (especially for those with families)"
15. "An opportunity to interact with female judges, federal and state"
16. "More connection opportunities with female attorneys"
17. "A network of female defense attorneys that can be contacted for advice, suggestions and referrals"

So let us begin here. The Women in the Law Section provides a new and interactive way for you to engage in the issues that matter most to you in the practice of law. Thank you for providing your important feedback. ADLA is committed to providing the skillsets and opportunities you want to advance your career and personal satisfaction in the legal profession. All you have to do is show up and participate. Moreover, if you want to further contribute your time and leadership skills, we want you on our team.

How Will You Help Us?

If you have any interest in helping this section, there is a place for you. Whether through leadership opportunities within the committee, or simply enjoying the benefits of membership, we need you to engage with us and take personal ownership of this section in 2019, and in the years to come. The Women in the Law Section can only be as strong as the time and attention its members give it. Every gesture of support helps.

If you are advanced in your career and professional experience, will you consider sharing what you have learned? If you are new to the practice of law, would you like to meet like-minded people? Would you like more visibility in leadership roles within the Alabama legal community? Would you like to connect with and learn from other women lawyers in your field? If you answered yes to any of these questions, get involved with ADLA's Women in the Law Section.

Committee Structure

Below are the individuals who have committed to leading the inaugural 2019-2020 Women in the Law Committee leadership team:

Role	Attorney	Firm	Location
Chair	C. Meade Hartfield	Bradley Arant Boult Cummings, LLP	Birmingham
Membership Chair	Jennifer Pickett	Smith Spires Peddy Hamilton & Coleman PC	Birmingham
Membership Vice Chair	Open		
Marketing Chair	Regina Cash	Luther, Collier, Hodges, Cash LLP	Mobile
Marketing Vice Chair	Open		
Publications Chair	Diane Maughan	Cabaniss, Johnston, Gardner, Duman & O'Neal LLP	Birmingham
Publications Vice Chair	Kristy Dugan	Frazer Greene	Mobile
Program Chair	Martha Thompson	Balch & Bingham LLP	Birmingham
Program Vice Chair	Jennifer "JD" Segers	Huie, Fernambucq & Stewart, LLP	Birmingham
Corporate Counsel Liaison	Open		
Diversity Liaison	Michal Crowder	Maynard Cooper Gale, LLP	Birmingham
Philanthropy Chair	Lisa McCrary	Barze Taylor Noles Lowther LLC	Birmingham
Philanthropy Vice Chair	Rachelle Sanchez	Lightfoot, Franklin & White LLC	Birmingham
Mentoring Program Chair	Amanda Hines	Rushton Stakely Johnston & Garrett PA	Montgomery
Mentoring Program Vice Chair	Megan McCarthy	Holtsford Gilliland Higgins Hitson & Howard PC	Montgomery
Young Lawyers Liaison	Megan Jones	Clark May Price Lawley Duncan Paul LLC	Birmingham
Young Lawyers Liaison	Ashley Crank	Christian & Small LLP	Birmingham
Young Lawyers Liaison	Mary Lauren Kulovitz	Wooten, Thornton, Carpenter, O'Brien, Lazenby & Lawrence	Talladega
Newsletter Editor	Jessica McDill	Chason & Chason PC	Bay Minette

We are actively seeking vice-chairs for a few remaining roles, as well as subcommittee members. If you would like to serve in either capacity, please email me with a description of your interest: mhartfield@bradley.com. We will find a spot for you, and we thank

you in advance for your meaningful contribution to the process. With your help, we can build strong foundations for this section that will stand the test of time and leadership transitions. Be a part of something special from its inception: Help us create the Women in the Law Section that you have wanted and for which you have waited. The time to involve yourself is now.

What Will We Do?

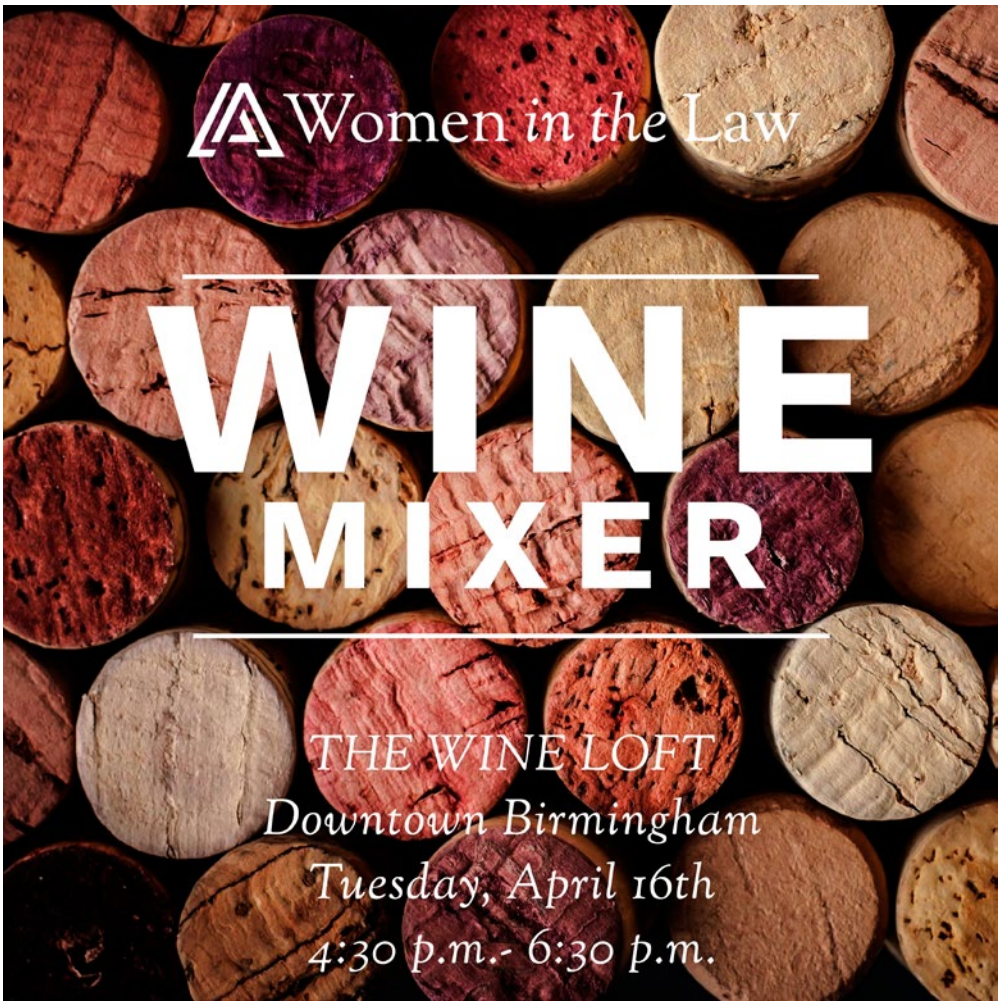
- Recruit new members
- Provide an educational forum for communication between ADLA members (men AND women) to focus on issues related to women and the practice of law
- Offer leadership training and opportunity for advancement
- Educate and train female lawyers
- Focus on retention of women lawyers
- Supply unique networking and business development opportunities
- Promote ADLA
- Provide mentoring for female associates

Kick-Off Events

Join us for one of our first Women in the Law Section networking events: April 16, 2019, from 4:30 p.m. to 6:30 p.m., at the Wine Loft downtown in Birmingham. Be on the lookout for other networking events this spring in your region. Civil defense lawyers who are not yet ADLA members can apply for membership and attend as well. The application to join or renew your membership online is here: https://adla.org/get-connected/join-or-renew/.

Better Together

On a personal note, I am humbled to have been asked to serve as the inaugural Chair of the Women in the Law Committee. I appreciate the opportunity to help build strong foundations for the Section and to lead us into action. We have the ability to create and maintain a committee structure that will engage the women membership of ADLA, and to expand the scope of organizational services provided, based on the identified priorities of women lawyers across this state. What a privilege it is to work with and serve women who inspire me, challenge me, and support me in my professional career. My goal is to extend the same opportunities for engagement to you, and I look forward to working alongside you to achieve our collective mission. Are you ready to get started? Let's do this! Do it for yourself, for our legal community, and for each other. The journey forward will be better together.



ADLA'S Website Relaunched

We've redesigned ADLA's web experience with our members in mind. Log on today and take advantage of what your dues dollars offers you. **www.adla.org**

Member Benefits

In addition to connecting law professionals throughout the state, the Alabama Defense Lawyers Association has a wealth of other benefits for members.

ANNUAL MEETING

Soak up some sun with other civil defense lawyers during our Annual Meeting at Sandestin. This three-day event brings together civil defense lawyers and their families for networking, CLE and family time. Each year ADLA invites members of the Alabama Supreme Court and the Alabama Court of Civil Appeals to speak to attendees and to attend the social events providing a unique opportunity for members to mingle with these prestigious judges outside the courtroom.

DEPOSITION BOOT CAMP & TRIAL ACADEMY

Deposition Boot Camp combines lectures from experienced ADLA faculty with challenging breakout exercises to sharpen members skills to effectively take and defend depositions. The Bibb Allen Memorial Trial Academy is the perfect follow up for learning and sharpening trial skills. It's a hands-on experience that pairs young attorneys with experienced lawyers and judges to practice trial exercises.

GRASSROOTS EFFORTS

ADLA has a strong voice in the Alabama Legislature and has successfully impacted legislation. The Legislative Committee reviews all bills pending before our legislature, and alerts our members when necessary so we can quickly take action against legislation that potentially impacts clients and the defense bar. Additionally, we work with the Defense Research Institute, Alabama State Bar, and other groups in the region to address legislative issues of concern to our members and their clients.

AMICUS CURIAE SUPPORT

The Amicus Curiae Committee is highly involved in submitting briefs, writing on issues and participating in oral arguments before the Alabama Supreme Court. This benefit gives our members a credible andrespected voice in the appellate courts. All previous briefs are searchable and available to ADLA members.

EXPERT WITNESS INQUIRY SERVICE

The Expert Witness Database is a searchable list of inquiries regarding Plaintiffs' experts. This tool can be used for gathering information about various experts who may be sitting on the other side of the deposition table or across the courtroom aisle. Let us connect you with other members who have knowledge about the expert witness you want to know more about.

THE ADLA JOURNAL

The semiannual Journal is a publication filledwith articles on trends and legal updates that are selected by the Editorial Board. Each edition focuses on the issues that affect our practice and clients. Members have access to each current Journal, along with permission to view and search dozens of past articles from previous issues. This is also an excellent publishing opportunity for members who are interested in writing.

WEDNESDAY BRIEFCASE

Stay up to date about the professional law field and regional happenings with ourmembers-only e-newsletter, the Wednesday Briefcase. Find out about local meet-ups, legislative updates, important news bites and more.

CLE LIBRARY

Led by the Young Lawyers Section, members have exclusive access to free CLE that encompasses on demand and live webinars held throughout the year. Providing quality and convenient CLE opportunities allows our members to have unlimited CLE at their fingertips

DISTRICT MIXERS

Don't wait until the Annual Meeting to connect with other civil defense lawyers. Get to know other professionals in your area by taking advantage of ADLA's various mixers and meet-ups that happen throughout the year.

ALLEN M. ESTES
Alabama DRI Representative

Dennis Bailey, **Jennifer Hayes** and I attended the DRI Leadership Conference in Chicago in January. Meeting with representatives from state defense organizations throughout the country reinforced for me how strong of a state defense organization ADLA is, and has been for years. From membership to programming to long term planning, ADLA remains a leader in the defense bar. Being at that DRI meeting also allowed us to share experiences with the many other strong state defense organizations in this country and internationally. DRI meetings of all types give all of us that opportunity to connect with the leading defense lawyers in other states, sharing experiences from both inside and outside the courtroom.

In the Fall of 2018 many ADLA members, myself included, attended the DRI Annual Meeting in San Francisco. As expected, it was a great week of legal programing and socializing. And the striking hotel workers out front were nice enough to keep everyone marching (and trying to sleep) to the beat of their incessant drums. The DRI Annual Meeting comes back closer to home this year, in New Orleans October 16 – 19, 2019.

DRI's full seminar schedule for 2019 has been announced and can be found at https://www.dri.org/education-cle/seminars. As always, DRI provides defense attorney focused legal education on a variety of topics. In addition to in person seminars, DRI provides its members with access to online programming that you can access from your desk, or your bed. Those programs can be previewed at https://digitell.dri.org/dri/. DRI continues to be a great way to stay up to date on national legal issues that impact all of our cases.

As mentioned in past reports, DRI and ADLA keep defense lawyers up-to-date on Twitter – @DRICommunity and @ALDefenseLaw. Please follow each organization so that you can stay informed of the many ways ADLA and DRI continue to work together to represent the interests of defense attorneys. If you have questions about DRI, please contact me at aestes@balch.com or (205) 226-8717.

ADLA Executive Director, Jennifer Hayes, TDLA Executive Director, Mary Gadd, and GDLA Executive Director, Jennifer Davis

DRI State Representative, Allen Estes of Balch and Bingham and Lana Olson of Lightfoot Franklin & White

ADLA President, Dennis Bailey of Rushton Stakely and AL DRI State Representative, Allen Estes of Balch and Bingham

LUNCH & LEARN

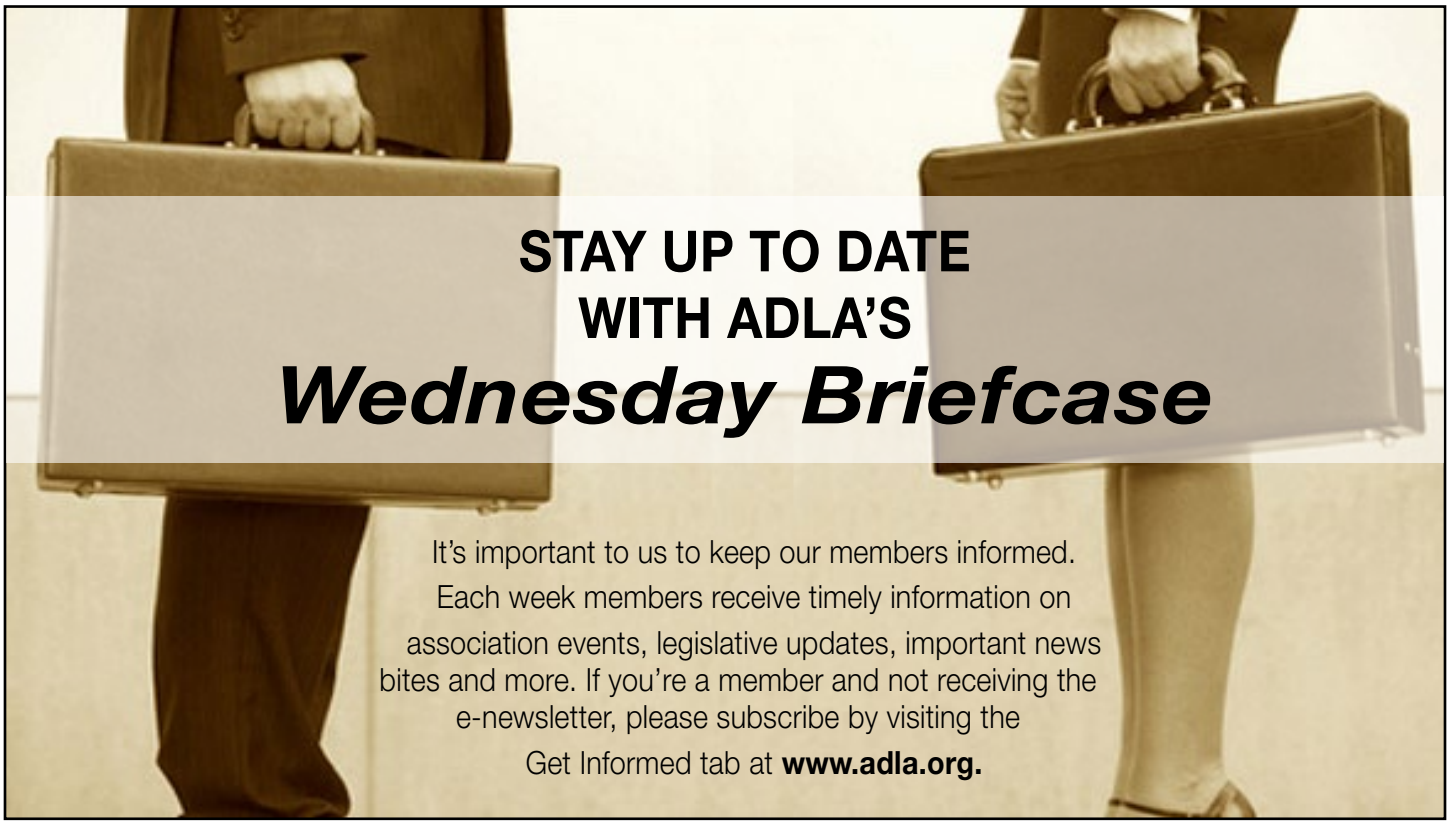
ADLA Welcomed The Honorable Johnny Hardwick, Presiding Judge, Alabama Fifteenth Judicial Circuit to February Lunch and Learn in Montgomery

ADLA members came together for a wonderful lunch and to hear an informative update on the state's judicial circuit from Presiding Judge Johnny Hardwick. Judge Hardwick shared with the members the goals and initiatives he wants to achieve as presiding judge. "I want this circuit court system to be the best. I want other circuit court systems to come see what we do. Additionally, I want others to see excellence in what we do" Judge Hardwick stated. Some of the initiatives that Judge Hardwick shared with the members included bringing the county courthouse up to date on technology and making it more user friendly, renovating areas of the county courthouse, creating sound proof conference rooms with wireless technology so attorneys and their clients can have a comfortable and private space to meet, renovating the law library, and working with the court administrators on waivers that will allow attorneys' clients to bring their cell phones into the courtroom under certain circumstances.

Judge Hardwick also touched on the overall need to improve the judicial process. He further discussed his plans to create a Task Force to study and identify ways to improve the current juror selection process. ADLA members were treated to an informative Q&A and were given the opportunity to share their ideas and experiences with circuit court system. ADLA's first Lunch and Learn of 2019 was hosted at the Alabama State Bar building in Montgomery, watch for upcoming lunch and learn dates around the state.

Judge Hardwick takes Q&A from members

Pictured: Jack Hinton, Judge Hardwick, Brooke Reid, Madeline Lewis and Dennis Bailey



STAY UP TO DATE WITH ADLA'S

Wednesday Briefcase

It's important to us to keep our members informed. Each week members 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 subscribe by visiting the Get Informed tab at **www.adla.org.**

LEARNING TO FALL: A REVIEW OF *GET BACK UP* AND INTERVIEW WITH THE AUTHOR, ROD CATE

By: Gaby Reeves, Editor

"There are two things wrong with almost all legal writing. One is its style. The other is its content." Fred Rodell, *Goodbye to Law Reviews,* 23 Va. L. Rev. 38 (1936).

Lawyers, especially civil defense lawyers, are prolific writers; it is an occupational hazard. The bulk of a trial lawyer's writing is legal writing, whether in the form of a motion or brief filed in a lawsuit or an analytical-legal article published in a professional journal. *Get Back Up*, written by ADLA member Rod Cate, is not legal writing; it is a memoir about a specific event in Rod's life and shows the reader how that event has affected his life. Typically, a lawyer who writes his memoir focuses on a specific event that occurred during his career and its impact on his professional life. This is where *Get Back Up* differs from the memoirs of other lawyers. This is a memoir written by a man with a unique story to tell, who also happens to be a lawyer.

Rod is a partner at Hand Arendall Harrison Sale, LLC and has practiced in Mobile for over 25 years. He has a successful trial and litigation practice, particularly in the area of medical malpractice defense. He and his wife, Tamberly, have been married for 25 years, and have three children: two sons, Cullen and Conner; and, a daughter, Corbit. For the past four years, Rod has been an active Big Brother and regularly spends time with his "Little." He gets up at 4:30 a.m. every day to go to the gym, likes to travel, trout fish, and take frequent vacations with his family. He is a daredevil with a penchant for high-speed roller coasters and those towering waterslides that send me into acrophobic shock. Rod is also an ambulatory quadriplegic.

In 1981, Rod was 15 and about to embark on what was sure to be a "stellar" high school athletic career at South Stokes High School in Walnut Cove, North Carolina. A gifted athlete, "the only question was where [he] was going to play college football."[1] That question received an unexpected and abrupt answer when Rod crushed his fourth and fifth cervical vertebrae breaking up a pass on the first play of an intramural start-of-season scrimmage. His athletic career was over. Rod is one of the few quadriplegics who can walk, but he has some paralysis in every part of his body. In *Get Back Up*, Rod tells the story of his injury, hospitalization, rehabilitation and return to high school as a non-athlete in such vivid detail that it is sometimes painful to read. He shares how his injury affects every aspect of his life with raw honesty and humor; at certain points, I either cringed, got teary, laughed, or did all three at once.

While the central theme of *Get Back Up* is not Rod's legal career, he writes about several of his cases and other experiences that he would not have had were he not a trial lawyer. In fact, the first chapter of *Get Back Up* is entitled, "The Luna Case," which Rod calls "my worse loss ever as a trial lawyer."[2] The *Luna* case is what led Rod to write this book, albeit indirectly.

Rod told me that he never started out to write a book about himself, but that "the *Luna* case really affected me" and he started "jotting down notes" about it and then about some of his other cases in a journal. "I kept doing it and started thinking about a story that might be combined with what happened to me." Rod started putting his story to paper and the result was *Get Back Up*.

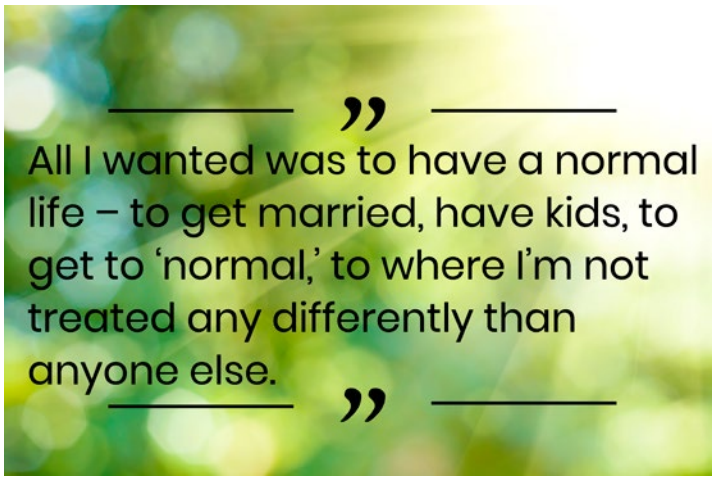
Since the moment of his injury, Rod's life has never been the same. Rod told me that "the physical disability is, at the core, pervasive." He shared the story of another patient he met in rehab who had broken his back in a helicopter crash; the man was also an ambulatory quadriplegic. Rod has always remembered the man telling him that he could not step into a pair of jeans; he had to sit down to put them on. This did not register with him at first, but Rod learned that simple everyday activities, like getting dressed, were never going to be simple for him again. "These are things you don't think about because you don't know, especially when you go from health to handicap." "There is no stepping into a pair of jeans for me."[3]

The damage to his spinal cord also left Rod with an abnormal gait: "Compared to a normal person, each step is a struggle." . . . I'm basically fighting myself with each step. My body is pushing my left foot down while I'm trying to lift it up."[4] Because of his gait, Rod sometimes falls and, because of his paralysis, he goes down fast, hard and face first. Putting his hands out in front of him to break the fall – the body's normal reaction to falling – resulted in quite a few trips to the emergency room due to broken fingers. Over the years, he has "developed a talent for learning to fall the right way."[5] He has also developed a talent for calmly fielding uninvited questions about his condition from total strangers: "These inquiries into my condition happen much more than I would

have every expected." . . . "I have had complete strangers ask me not only if I have MS, but also cerebral palsy, polio or if I've had a stroke."[6]

When I interviewed Rod for this piece, he told me that his goal after his accident, was "not about being extraordinary. All I wanted was to have a normal life – to get married, have kids, to get to 'normal,' to where I'm not treated any differently than anyone else." He does not want special treatment, especially in his career. In *Get Back Up*, he writes

> If you are disabled . . . and choose to compete in the real world, no specialized rules exist for you. There is no special treatment, nor should there be. Juries don't care that I walk with a cane. They are going to decide the case based upon the facts and my effectiveness as a lawyer. My opposing counsel doesn't care that I walk with a cane. They are going to do whatever it takes to win the case for their client.[7]



Rod admits, however, that "[c]ompeting in the real world takes a bit more effort. I always leave early for any deposition, court appearance, meeting, etc." . . . "Regular daily activities that most people don't even think about, require so much more effort." . . . "Getting dressed is a process."[8]

Rod said that "there are a lot of logistical issues" for a lawyer practicing law with a physical disability. "Most lawyers don't have to think about how they are going to get into the courtroom. If I am going to a courthouse I've never been to, like one of the rural courthouses, I have to go the courthouse ahead of time and scope it out. Where is the elevator? Where is it in relationship to the courtroom? What is the best route to the podium and jury box? Most of the rural courtrooms are small, so the distance isn't very far, but, once a trial starts, there are boxes everywhere and I have to make sure I have an unobstructed path. There are fewer power cords in the rural courthouses, but in other

continued on page 46

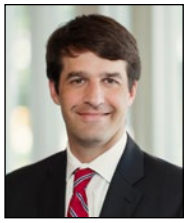
A DLA member, **Tom Coleman** of Smith, Spires, Peddy, Hamilton & Coleman, received a defense verdict for the firm's client, Plant Engineering and Maintenance, from a Jefferson County jury on March 8, 2018, after a 2-week trial. The firm's client had performed certain repairs to a cupola (a type of furnace used to melt rock for the manufacture of insulation) owned by Rockwool Manufacturing in Leeds. Upon restarting the cupola, it exploded injuring the plaintiff, Daniel Ray. Coleman was successful in demonstrating that the cause of the explosion was outside the scope of the client's work. The plaintiff did receive a judgment from several co-employee defendants. Case no. CV-2014-904538 which was tried before Judge Elisabeth French in Birmingham.

Tom Coleman

Lightfoot, Franklin & White LLC litigators have secured the settlement and dismissal of a national class action lawsuit filed in Maine against the firm's client, a boiler manufacturer in June 2018.

Sara Anne Ford

The firm successfully attacked the class warranty and tort claims at the pleading stage using a published opinion that Lightfoot had previously won in Texas — *Rosa v. American Water Heater Co., 177 F. Supp. 3d 1025 (S.D. Tex. 2016).* In that earlier case, the federal court struck a different national class action against another Lightfoot client at the pleading stage.



David A. Rich

The Lightfoot lawyers working on this matter are partner **Sara Anne Ford** and associate **David A. Rich**.

On August 6, 2018, ADLA members **Robert Bailey** and **Lauren Houseknecht**, shareholders with the Huntsville law firm of Lanier Ford Shaver & Payne, won a dental malpractice defense verdict in Marshall County. In this lawsuit, the plaintiff claimed that the defendant general dentist was negligent in extracting tooth numbers 23, 24, 25 and 26 and placing a bridge from 22 to 27. At trial, the plaintiff submitted expert testimony that the defendant breached the applicable standard of care by pulling teeth that could have been saved and by leaving root tips behind after the extractions, which caused the plaintiff to need a new implant supported bridge.

Robert Bailey

Lauren Houseknecht

The defense countered with testimony from the defendant and a similarly situated expert that the subject extractions were indicated and within the standard of care. Additionally, the defense presented testimony from the patient's own subsequent treating dental specialists that root tips were a known complication of extractions, that the root tips in question were not causing the plaintiff any problems and that there was no substantive issue with the bridge installed by the defendant other than the plaintiff's dislike of the aesthetic appearance. After a six day trial, the jury came back with a verdict for the defense after deliberating for just over an hour.

A Calhoun County jury returned a defense verdict in favor of Jacksonville Medical Center on August 31, 2018. Huie partners **Stan Cash** and **Megan Jones** represented the defendant in the medical malpractice case.

Stan Cash

The lawsuit arose from an incident occurring in November 2012 when the 53-year-old plaintiff fell. The plaintiff, who asked for $1.1 million in compensatory damages and punitive damages, alleged that a certified orthopedic technician failed to reapply a splint resulting in multiple Achilles tendon surgeries.

Megan Jones

Throughout the five-day trial, several medical experts were called by plaintiff and defense attorneys, including an orthopedist who testified that wearing the splint would not have prevented this injury. Further evidence established that the standard of care was not violated by the hospital or its employees.

After a two-hour deliberation, a defense verdict was returned by the Calhoun County jury.

Lightfoot, Franklin & White LLC attorneys **JT Thompson** and **Jonathan R. Little** recently secured a significant victory for AL.com, the state's largest online and print media outlet, in a high-profile defamation lawsuit in August 2018.

JT Thompson

The lawsuit, filed in Montgomery County Circuit Court, was brought by a public official who alleged that she was defamed in an online column that criticized statements she made at a public meeting. The public official claimed that her reputation had been damaged and that she had been the subject of a petition to remove her from office as a direct result of the column.

Jonathan R. Little

In response, Thompson and Little moved to dismiss the complaint, arguing that there could be no actionable

defamation claim because the online column was an opinion piece. Further, they argued that the public official failed to sufficiently plead actual malice, which she was required to do in light of the 1964 United States Supreme Court decision, *New York Times Co. v. Sullivan*, a landmark case which originated when a public official filed a defamation lawsuit in Montgomery County, Alabama, during the Civil Rights era.

The court granted Lightfoot's motion and found that the online column was an opinion piece based upon disclosed, non-defamatory facts, and that, as a public official, the plaintiff was subject to such criticisms. Although the case was only at the Rule 12 stage, the court held that there was no defamation claim as a matter of law.

Mike Bell

Lightfoot, Franklin & White LLC attorneys and ADLA members **Mike Bell**, **JT Thompson** and **Reid Carpente**r have obtained a defense verdict on behalf of an Alabama family practice physician after a five-day trial in Cullman County, Alabama in September 2018.

The medical malpractice lawsuit was brought by the family of a patient who developed paraplegia and ultimately died due to an undiagnosed thoracic hematoma. It alleged that Lightfoot's client breached the standard of care by not recognizing signs and symptoms of spinal cord compression in a patient, and not arranging for the appropriate specialist to consult.

JT Thompson

The Lightfoot team vigorously defended the case and showed the jury that the thought process and decision-making by the physician was reasonable and appropriate under the circumstances. The jury returned a unanimous defense verdict after just over one hour of deliberation.

Reid Carpenter

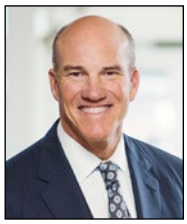
"We worked very hard to make sure the jury understood the full context of the decision-making by our client," said Thompson. "Being a physician is tough. Our client's thought process and decisions, as the events played out in real time, were sound and appropriate under all applicable medical standards. We are very pleased to have secured a jury verdict that confirms the reasonableness of our client's clinical judgment."

Lightfoot, Franklin & White LLC has won a significant defense victory on behalf of client U-Haul in a personal injury trial in Arizona in September 2018. A jury in the Superior Court of Arizona in Maricopa County yesterday found in favor of U-Haul in a case where the plaintiff sought more than $130 million in damages.

The case arose out of a 2014 rollover accident involving a pickup that was using a tow dolly rented from U-Haul to tow another vehicle. The accident left a passenger with permanent paralysis due to a spinal cord injury. The plaintiffs in the case had alleged U-Haul's decision to rent the tow dolly, which did not have brakes, to the plaintiff caused the accident. The plaintiff had sought $30 million in compensatory damages and $100 million in punitive damages.

The jury delivered a verdict in favor of U-Haul on all counts.

"We are grateful to the jury for this verdict and that they saw the case for what it was: a tragic accident," said Lightfoot partner **Banks Sewell**. "We have always contended the rollover was the result of the pickup driver's failure to heed the warnings included with our client's tow dolly, including a stipulation not to drive over 55 miles per hour."

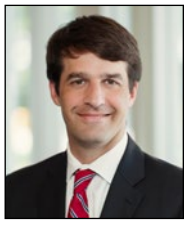


Banks Sewell

During trial, U-Haul presented evidence that the pick-up's driver passed another vehicle on the emergency shoulder at speeds in excess of 80 miles per hour and that this led to the rollover. In addition, U-Haul demonstrated that the plaintiff would not have been seriously injured if he had been wearing a seatbelt — which he was not.

J. Chandler Bailey

"U-Haul's equipment had been extensively tested and was found to be safe without independent brakes when used correctly," added Lightfoot partner **J. Chandler Bailey**, who, along with associate **David A. Rich**, was also part of the U-Haul trial team.



David A. Rich

The case is *Wing et al. v. U-Haul International Inc. et al.*, case number CV2016-050917, in the Superior Court of Arizona in Maricopa County.

The Alabama Supreme Court recently affirmed a summary judgment award in favor of Lightfoot, Franklin & White LLC client Hunter Safety System, Inc. in September 2018.

The product liability case involved the hunting-related death of a minor, whose Hunter Safety System harness strap caught under the wheel of an all-terrain vehicle. During a two-day summary judgment hearing, Lightfoot's team presented considerable evidence demonstrating that the plaintiffs failed to meet the burdens of proof for their design defect and warnings claims. They also presented evidence that the sole proximate cause of the minor's death was the intentional misuse of the product, parental negligence, and/or negligence *per se* for direct violation of Alabama law in allowing a child to hunt alone without supervision.

The trial court entered summary judgment in favor of Hunter Safety System, and the Alabama Supreme Court affirmed the decision, without opinion, on September 13. The matter was handled by Lightfoot attorneys, **Lee M. Hollis**, **Terry W. McCarthy**, **Henry J. Gimenez** and **Liz H. Huntley.**


Lee M. Hollis


Terry W. McCarthy

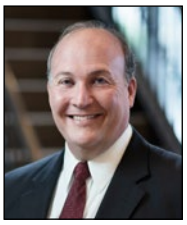

Liz H. Huntley


Henry J. Gimenez

The case is *Jeremy Bradberry and Valerie Nelson v. The Hunter Safety System, Inc.* (Appeal from Chilton Circuit Court: CV-12-900172).

In a unanimous decision, the Alabama Court of Civil Appeals recently affirmed a Madison County circuit court's decision granting summary judgment to Lightfoot, Franklin & White LLC's client, a cemetery property and service provider in September 2018. Lightfoot partner **Terry McCarthy** and of counsel **Ivan Cooper**, along with associate **Jonathan R. Little**, represented the provider at trial and on appeal.


Terry W. McCarthy


Ivan Cooper

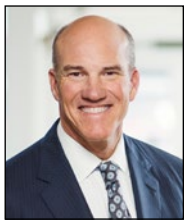

Jonathan R. Little

The plaintiffs had filed suit against the cemetery and a transport company, alleging that their deceased mother's body was damaged during transport from the place of death to the funeral home. They asserted negligence, outrage and fraud claims.

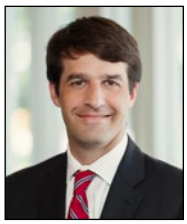
Lightfoot moved for summary judgment and the plaintiffs filed a motion for partial summary judgment, asking the trial court to apply the doctrine of res ipsa loquitur. (The doctrine of res ipsa loquitur presumes negligence if certain factors are met, which lessens a plaintiff's burden at trial.) After briefing and oral argument, the trial court granted Lightfoot's motion for summary judgment and denied the plaintiffs' motion for partial summary judgment.

On appeal, the Alabama Court of Civil Appeals found that the doctrine of res ipsa loquitur did not apply to the claims against Lightfoot's client and that the transport company was not an agent of the client. The appellate court affirmed the trial court's order granting summary judgment on all counts in favor of the cemetery property and service provider.

Lightfoot, Franklin & White LLC partners **Banks Sewell** and **Haley Cox** and associate **David Rich** have secured a defense victory on behalf of client U-Haul International, Inc. in a wrongful death case in Texas.


Banks Sewell


Haley Cox


David A. Rich

After four years of litigation, the court entered a 61-page published opinion granting summary judgment in favor of U-Haul on all claims, which included strict liability for a design defect, failure to warn, negligent design and manufacturing, and gross negligence (for punitive damages).

The case arose out of a 2012 rollover accident involving an SUV towing a U-Haul trailer. The accident claimed the life of the driver and a passenger. Plaintiffs in the case alleged that the trailer was defectively designed and that U-Haul's decision to rent a trailer of that size with an SUV was unsafe.

The court found in favor of U-Haul on all claims, finding that the evidence established no design defects in the trailer, that U-Haul provided adequate and proper warnings, and that U-Haul exercised reasonable care in the design and manufacture of the trailer.

"This is an important victory for our client in a long-standing battle where every fact and issue was litigated over the course of four years," said Cox.

"We always maintained that our client's processes and product were safe and that this accident was the fault of excessive speed and driver error," added Rich.

The case is *Barragan et. al v. U-Haul International, Inc. et al.*, in the U.S. District Court for the Western District of Texas, case no. 5:15-cv-854-DAE.

Huie attorneys **Bryan Paul, Bart Cannon** and **Caroline Sims** recently secured the dismissal of all claims asserted against Huie clients in a personal injury case pending in the United States District Court for the Northern District of Alabama. The Plaintiff alleged he was severely and permanently injured after falling from an elevated platform on which he was working at a facility owned by one of the Defendants, a building materials company.


Bryan Paul

The Plaintiff initially filed suit in the Circuit Court of Jefferson Coun-

ty, Alabama arguing the Defendants breached a duty to provide him with a safe workplace. After removing the case to Federal Court, Huie attorneys immediately filed Motions to Dismiss arguing the Plaintiff's claims failed as a matter of law based on the exclusivity provision of Alabama's Workers' Compensation Act under a general versus special employer analysis from Terry v. Read Steel Products, 430 So.2d 862 (Ala. 1983) and its progeny. The Plaintiff filed a Motion to Remand arguing the Defendants failed to carry their burden regarding the amount in controversy requirement for federal jurisdiction over the case. The Court rejected the Plaintiff's argument, specifically found the Defendants proved the amount in controversy requirement was facially apparent from the Complaint and retained jurisdiction over the case. The Court then adopted the Defendants' argument that the Plaintiff's claims failed as a matter of law and granted the Defendants' Motions to Dismiss fully disposing of all claims and further taxing the costs of the litigation to the Plaintiff.

Bart Cannon

Caroline Sims

Gordon Sproule, Jr. and **Charles J. Fleming, Jr.,** partners at Huie, successfully defended a Mobile, Alabama nursing home facility in an Alabama Medical Liability Act matter that was arbitrated on October 1, 2018.

Gordon Sproule, Jr.

The case was brought on behalf of a nursing home resident who allegedly suffered a spiral fracture of the femur when she rolled out of bed while getting her bed linens changed. Plaintiff claimed the injury occurred because the nursing home breached the standard of care by failing to implement appropriate interventions.

Charles J. Fleming, Jr.

During the arbitration, Sproule and Fleming proved there was no causation between the alleged incident and injury based on witness statements and medical examination results. Thus, the Arbitrator found that the alleged breach in the standard of care did not cause or contribute to plaintiff's fractures and, therefore, returned a defense verdict for the nursing home facility.

Lightfoot, Franklin & White LLC attorneys **Mike Bell, JT Thompson** and **Chris Yearout** have obtained a defense verdict on behalf of an internal medicine physician after a two-week trial in Talladega County, Alabama.

Mike Bell

The medical malpractice lawsuit was brought by the father of a 31-year-old woman who died after complications following childbirth. The woman developed pneumonia after a successful C-section delivery. Lightfoot's client was consulted as the on-call internist, and he entered a series of orders, including transfer to the ICU and a CT scan to rule out a pulmonary embolism.

JT Thompson

Since an ICU bed was not immediately available, they decided to complete the CT scan first. The patient experienced sudden cardiac arrest in the CT scanner and was resuscitated, but ultimately suffered anoxic brain injury and died six days later.

Chris Yearout

The plaintiff alleged that Lightfoot's client breached the standard of care by not insisting that the patient be transferred to the ICU first and that, because he was some distance away from the hospital when he was first consulted, he should have arranged for another physician to evaluate the patient until he could get to the bedside.

"This was a difficult medical case, made even more challenging by the fact that our client was unable to attend trial in person due to having had a stroke," said Thompson. "At the time of the incident, our client was on call, at home, when he received a call from a nurse about a patient he had never seen. He gave a comprehensive set of orders, then went to the hospital to be with the patient. Unfortunately, despite his best efforts, the patient did not survive."

"We focused our defense on telling our story and presenting our themes, and we made sure that we repeatedly conveyed those messages to the jury at every opportunity," Yearout said. "Our doctor's thinking, judgment and decisions were reasonable and appropriate, based on the information available to him at the time. He did what any reasonable physician in this situation would have done. Really, he went above and beyond. In the end, the jury agreed."

Lightfoot, Franklin & White LLC has secured a unanimous ruling from the Alabama Supreme Court dismissing a taxpayer action against the firm's client, CGI Technologies and Solutions, Inc. Alabama State Auditor Jim Zeigler brought the suit to challenge CGI's software contract with the state.

In its ruling in November 2018, the court found that CGI had fully performed its contract to install a new enterprise software system for all state agencies — ren-

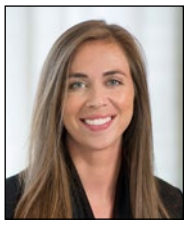
Sam Franklin

Chris King

dering moot Zeigler's effort to either set the contract aside under Alabama's competitive bid law or collect restitution.

The Lightfoot team representing CGI included partners **Sam Franklin**, **Chris King** and **Wes Gilchrist**, along with associate **Amie Vague**.


Wes Gilchrist

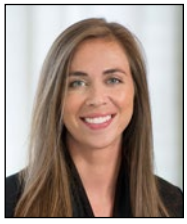

Amie Vague

Lightfoot, Franklin & White LLC has secured a significant appellate victory for client Volkswagen AG. The Lightfoot Volkswagen team included partners **Harlan Prater**, **Sam Franklin** and associate **Amie Vague**. On December 17, the Supreme Court of Alabama upheld a lower court's ruling that dismissed, due federal preemption, a case brought by the state of Alabama against Volkswagen in the wake of allegations the automaker used software to disguise engine emission levels.


Harlan Prater


Sam Franklin

"We are pleased that the Alabama Supreme Court has upheld the trial court's decision in this case," said Lightfoot partner Harlan Prater, who led the firm's team as local counsel for Volkswagen. "The court joined a growing number of courts which have concluded that these claims should not be allowed to proceed as a matter of law."


Amie Vague

In its ruling, the appellate court said that state law did not apply in this case as it involves the federal Clean Air Act (CAA). The state of Alabama had argued the CAA gives states the right to regulate vehicle emissions. The Alabama Supreme Court disagreed, noting that the CAA supersedes applicable state laws and any other interpretation would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Christian & Small is pleased to announce that Partners and ADLA members **Richard E. Smith**, **Jonathan W. Macklem**, and **J. Paul Zimmerman** recently received a summary judgment dismissal in a data breach case.


Richard E. Smith

The case involves the firm's representation of a hospital that was subject to a data breach when a third party broke into a locked office building on the hospital campus. The Plaintiff alleged causes of action including negligence *per se* under HIPAA, breach of contract, and invasion of privacy claims. In November 2018, the Circuit Court of Jefferson County granted summary judgment dismissing all claims against the hospital client.


Jonathan W. Macklem


J. Paul Zimmerman

There were two significant findings by the trial judge that are applicable to data breach cases in Alabama. First: the judge determined that there is no special relationship between a hospital and its patients in terms of protecting a patient's personal identification information. The Court determined that while a special relationship exists between a hospital and its patients in the provision of medical care, that special relationship did not extend to protecting someone's identification information. In the absence of a special relationship, the Court dismissed the claims based on Alabama's general rule that companies are not liable for the criminal conduct of third parties.

Secondly, the Court's decision was significant because it dismissed the claims based on the plaintiff's failure to have expert testimony as to the Standard of Care under HIPAA for a health care provider to protect a patient's information. The only evidence regarding the Standard of Care as provided under HIPAA was provided through the defendant's expert, who testified that the hospital complied with applicable federal regulations. The Court held that the plaintiff was required to present expert testimony about what the HIPAA regulations required, as well as expert testimony as to how the defendant violated or breached those applicable federal standards.

The firm of Starnes Davis Florie LLP is pleased to make the following Wins for the Defense announcements:


Reed Bates


Will Davis

Reed Bates and **Will Davis** obtained a defense verdict in favor of a nursing home in a wrongful death case arising from allegations that a patient died from gastrointestinal bleeding, infection, and hemorrhage at a dialysis access site. The defense presented expert testimony and other evidence that the death was caused by an acute and unavoidable ruptured pseudo aneurysm at the dialysis access site. After a four-day arbitration hearing involving testimony from numerous experts and other witnesses, the arbitrator ruled in favor of the nursing home.

Chris Vinson and **Alfred Perkins** obtained a defense verdict in a jury trial in federal court for a municipality in an employment case. An employee sued her employer alleging that she was denied a

promotion to a supervisor position because of her gender. The employer asserted that the male employee who was promoted was more qualified. After a 3-day trial, the jury returned a verdict in favor of the employer, finding that gender was not a motivating factor in the employer's promotion decision.


Chris Vinson


Alfred Perkins

Mike Wright and **George Newton**, with significant assistance from **Allen King**, obtained a defense verdict in favor of a neurosurgeon in a wrong level spinal surgery case. The plaintiff proffered expert testimony in support of her theory that the defendant breached the standard of care by operating at the T8-9 level instead of the intended T9-10 level. The defense presented expert testimony that the failure to localize the correct level was due to artifact and anatomic variance, and not a breach of the standard of care. The jury returned a defense verdict after brief deliberation.


Mike Wright


George Newton


Allen King

Joe Miller and **Will Axon** obtained a defense verdict for an obstetrician in a case claiming negligence in failing to remove a sponge from the patient's body after vaginal delivery, resulting in alleged permanent pelvic floor injury. After a five day trial, the jury returned a verdict in favor of the defense.


Joe Miller


Will Axon

Bennett White and **Billy Bates** obtained a defense verdict for a family practice physician in a case involving paralysis and wrongful death. The case, which included testimony from five physicians and a medical bill lien of over $700,000, tried for five days in Cullman County.


Bennett White


Billy Bates

Mike Wright, **George Newton**, and **Allen King** obtained a defense verdict in favor of two OB/GYNs in a maternal death case alleging negligent management of gestational hypertension and negligence in failing to administer diuretics in the postpartum period. The plaintiff presented expert witnesses in the fields of maternal-fetal medicine, internal medicine, and critical care. The defense called experts in the fields of obstetrics, internal medicine, and cardiology. The jury returned a verdict for the defendants following a two week trial.


Mike Wright


George Newton


Allen King

Joe Miller and **Bob MacKenzie** obtained a defense verdict for an obstetrician in a five day trial in Morgan County involving an allegation of improper handling of shoulder dystocia during delivery, resulting in permanent brachial plexus injury.


Joe Miller


Bob MacKenzie

Submit your Wins for the Defense to adla@adla.org by July 31st to be included in the Fall *Journal*

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Visit our Member Resources section at www.adla.org to view our new **legal DOWNLOAD** video series.

Members can access quick 1 minute video demo clips, presented by ADLA's own **Hal Mooty** of Bradley in Huntsville. Watch for new releases in the *Wednesday Briefcase.*


ADLA
ALABAMA DEFENSE LAWYERS ASSOCIATION
2019 Annual Meeting
June 13-15
Sandestin Golf
& Beach Resort
Destin, Florida

Annual Meeting Conference Highlights

- Lawyer Marketing
- Mediation Trends
- Case Law Update
- Reptile Theory
- Insurance Co. Panel
- Judicial Panel

Join your ADLA friends & colleagues for **NETWORKING**, nightly **RECEPTIONS**, visit with **GUEST JUDGES**, play **GOLF** & relax on the **BEACH.** We'll have tons of **FUN GAMES** and **EVENTS** for the **ENTIRE FAMILY!**

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Group ID 23O221
Block Closes May 11th
Visit https://adla.org/events/

Register Online

https://tinyurl.com/ADLAAM19

Alabama Defense Lawyers Association

2019 ANNUAL MEETING

June 13-15 | Sandestin Golf and Beach Resort

Christina May Bolin, Program Chair

THURSDAY, JUNE 13

2:30-5:30 **Registration Desk Open**
Azalea Foyer, 2nd Floor

5:30-7:30 **Welcome Reception**
Magnolia Foyer, 1st Floor
Joint Reception with ALAJ

FRIDAY, JUNE 14

ADLA & TDLA Joint CLE Session, Azalea I & II, 2nd Floor

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

7:50-8:00 **Welcome**
Dennis Bailey – ADLA President
Lynn Vo Lawyer – TDLA President

8:00-9:00 **Sean Carter | Mesa, AZ**
Humorist at Law, Keynote Speaker
Join Sean for his unique perspective on the practice of law and legal ethics.

9:00-10:00 **Defending Against Reptile Theory at Trial**
Lessons learned from a trial in which textbook reptile theory tactics were used by the plaintiff. Defense strategies for countering the reptile attack.
Ken Ward | Trammell, Adkins & Ward

10:00-10:10 **Introduction of Exhibitors & Sponsors**

10:10-10:20 **BREAK & VISIT with Exhibitors**

10:20-11:20 **Lawyer Marketing**
A discussion of how lawyers can develop their personal business development plans and execute them. A focused, well conceived plan can help any attorney develop business referral relationships and grow their practices.
Frank Ramos | Clarke Silvergate, Miami, FL

11:20-12:20 **Insurance Company Panel**
What are your clients looking for in a lawyer? How do they evaluate metrics, choose counsel, and evaluate their lawyers? This panel of experienced in-house counsel and adjusters will give us invaluable insight.
Moderator- William R. Lancaster
Panelists- Holly Wolf & Kelly Holmes, GeoVera Insurance Company, Lenox Godfrey, FIGA, David Sikes, AMIC

FRIDAY AFTERNOON/EVENING

Afternoon free for family and beach activities

1:00-5:00 **Golf, The Raven Course**

6:30-8:30 **Family Reception**
Magnolia D-F, 1st Floor

SATURDAY, JUNE 15

Alabama CLE Session, Azalea I-II
Tennessee CLE Session, Azalea III

7:30 Strolling Breakfast for CLE Registrants & Exhibitors

8:00-8:10 **Welcome**
Dennis Bailey – ADLA President
Alabama State Bar President's Update
Sam W. Irby | Irby & Heard, Fairhope

8:10-8:15 **ALAJ President**
Steve Nicholas | Cunningham Bounds, Mobile

8:15-9:15 **Mediation and Case Resolution**
A discussion of trends in mediation, case resolution strategies and what is going on in the plaintiff's room.
Moderator-David Hamby
Panelists- The Honorable Patrick J. Ballard, Brad Wash, Esq., Michael Upchurch, Esq., Reggie Copeland, Esq.

9:15-9:25 **Introduction of Judges**

9:25-9:35 **PRIZE DRAWINGS**

9:35-10:00 **BREAK & VISIT with Exhibitors**

10:00-11:00 **Alabama Case Law Update**
Significant recent civil decisions of the Alabama Supreme Court.
Alex Holtsford | Holtsford Gilliland

11:00-11:30 **State of Judiciary**
The Honorable Tom Parker, Chief Justice, and panel members comprising of the attending members of the Supreme Court and Court of Civil Appeals

11:30-12:00 **ADLA Annual Membership Meeting & Elections,** Azalea I-II

SATURDAY EVENING

6:30-8:30 **Family Fun Night**
Grand Lawn

Agenda subject to change.

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Check out what's currently in ADLA's CLE Library

Alabama Case Law Update: Recent Civil Decisions of the Alabama Supreme Court
Presenter: **Alex Holtsford** of Holtsford Gilliland Higgins Hitson & Howard PC

ESI Discovery and Evidence: Find it, preserve it, and present it
Presenter: **Bains Fleming III** of Norman Wood Kendrick & Turner

Managing Clients and Creating Collaborative Relationships
Presenter: **Jeremy Richter** of Webster Henry Bradwell Cohan Speagle & DeShazo PC

Medicare Secondary Payer Issues: Section 111 Reporting, Conditional Payments, & Medicare Set-Asides
Presenter**: Jennifer Baker** of Carr Allison

Premise Liability- How to Defend Against Slip, Trips and Falls
Presenter: **Hannah Torbert Kennedy** of Wade S. Anderson & Associates- State Farm Mutual

Technology for Law Offices: Ways to Practice Law More Efficiently in the Digital Age
Presenter: **Hal Mooty III** of Bradley

Ten Civil Procedure Answers You Need To Know But Probably Don't
Presenter: **Sharon D. Stuart** of Christian & Small PC

War Stories and the Lawyer's Duty of Confidentiality: The Potential Impact of ABA Formal Opinion 480
Presenter: **Craig Alexander** of Rumberger Kirk & Caldwell **Approved Ethics Credit*

> **I recently started using the ADLA's webinars and found them to be very helpful to my practice. The topics covered in the webinars are relevant and the convenience of earning CLE credits at my desk is very hard to beat. Perhaps best of all, though, is that the webinars are a free benefit to members of the ADLA. I highly recommend the webinars to all ADLA members.**
> Keith Pflaum, Porterfield Harper Mills Motlow & Ireland PA, Birmingham

> **The process was very smooth and did not have any problems or issues with hearing the speaker or obtaining the materials. This was the best webinar process I have experienced.**
> Andrew Knowlton, Hall Booth Smith PC, Birmingham

> **I recently participated in the webinar "Ten Civil Procedure Answers You Need To Know But Probably Don't". The presentation had valuable information and was well presented.**
> Daniel Beasley, Lanier Ford Shaver & Payne PC, Huntsville

> **The ADLA's free on-demand webinars are a great way to stay informed on topics relevant to my practice and gain insight from fellow defense lawyers. They are an invaluable resource, especially for young lawyers.**
> Andrew Townsley, Lanier Ford Shaver & Payne PC, Huntsville

> **I would absolutely recommend others to take advantage of ADLA's CLE Library, the topics are useful to my practice.**
> David Stevens, Holtsford Gilliland Higgins Hitson & Howard PC, Montgomery

> **The webinar was very informative and accessible. The presenter was very prepared and gave a thorough presentation. I appreciate ALDA providing these seminars.**
> Philip Sellers, Rushton Stakely, Johnston & Garrett PA, Montgomery

Learning to Fall: A Review of *Get Back Up* and Interview with the Author, Rod Cate

continued from page 33

courtrooms, I have to accommodate for boxes and power cords. If I have a hearing, I have to cull the documents I want to take with me to the bare minimum. I can't take a bunch of boxes with me like a lot of lawyers do. It forces me to prepare and to focus on what is important in the argument."

In *Get Back Up*, Rod writes candidly about the struggles and concerns he has had in his career, many of which are no different from those of non-disabled lawyers. When Rod started his first year as an associate in 1992, he faced the same pressures all first-year associates at a civil defense firms face – long hours, tracking billable hours, and constant travel on back roads to cover hearings in rural counties. At the same time, he started a family; he and his wife married in 1993, had their first child in 1994, and their second in 1995. His wife was exhausted when he got home and so was he. "Looking back, it is all a blur."[9] In spite of that, Rod told me that his advice to a new associate would be to focus on his or her career.

> At first, your energy needs to be spent on being a defense lawyer. Fortunately, I married someone who understood that and that allowed me to do what I needed to do. It was tough. But, when you are a new defense lawyer, you have got to commit; there is so much to learn if you want to be a good lawyer. But, you can't just ignore everything else. Work won't always have to be your focus; you do yourself a disservice if you stay that way your whole life. Relationships are the most important thing - friends, family. What good is anything if you have no one to share it with?
>
> That translates to being a defense lawyer, too. I am fortunate to work with great people I can bounce things off of and who care about me. As a defense lawyer, you have an opportunity to develop friendships with other lawyers and clients and should; it gives you a professional network, but you've got to genuinely care about people. I know I am doing something right because I have become good friends with lawyers I've worked with who live as far away as Chicago, with clients, and with opposing counsel.

At age 52, Rod is just as concerned about the effect the current fierce competition for clients will have on his career as a defense lawyer as the rest of us are. His concern, however, is colored by his disability. As he has gotten older, he has noticed a deterioration in his condition. "My neurologist explained that as we all age, we have fewer and fewer cells. We all deteriorate. My deterioration will be more pronounced."[10] Given the current legal market combined with his disability, he wonders what the next step will be for him. While Rod has had many successes in his legal career, he knows that "those past successes don't put food on the table or pay college tuitions."[11]

Since publishing *Get Back Up*, Rod has been invited to speak to a variety of different groups and organizations. I asked Rod if any particular questions he had received from his audiences stood out for him. He said the most interesting question came from a student. In December, the Stokes County Arts Council hosted a speaking engagement and book signing for Rod at his alma mater, South Stokes High School. His high school coaches, former teachers, friends, current faculty, students and their parents came. Rod told me that it was an "emotional experience; very humbling." After he finished speaking, the student, a boy, asked him, "If you could go back, would you change anything knowing where you are now?" Rod was not expecting that sort of question and was even more taken aback that it came from someone so young, so he rambled a bit before he answered, "No." I asked why. He said, "Because of the family and life I have now. I wouldn't give up what I have now, just to change things. The experiences I've had, the friends I've made – I wouldn't trade any of that. That's what it's all about at the end of the day."

I am not telling you to read this book; I am not in the business of marketing and neither is the *Journal*. But I wanted to share with you that one of our colleagues had the courage to publish his story in the hope it would inspire others to overcome life altering events with determination and humor. No one has to read *Get Back Up* to learn that everyone, at some point, likely more than once, will fall hard, fast and face first. What I learned from Rod is that the key to overcoming a fall is to develop your talent for falling the right way; do not quit until you have learned to minimize your injuries. If you can do that, you will stay on the track in your quest for a great life, even in the face of adversity.

Endnotes

[1] Rod Cate, Get Back Up 11 (2018).
[2] *Id.* at 7.
[3] *Id.* at 61.
[4] *Id.* at 24.
[5] *Id.* at 62.
[6] *Id.* at 64.
[7] *Id.* at 60.
[8] *Id.* at 61.
[9] *Id.* at 47.
[10] *Id.* at 78.
[11] *Id.* at 73.

THE "RESTATEMENT" OF LIABILITY INSURANCE LAW?

By: Hayes Ellet, Miland Simpler and Gerald C. Swann, Jr.

It is strange and funny how things happen and you find yourself involved in a task you had not really anticipated and certainly were not looking for. As you are sitting at your desk working you suddenly become involved in a group e-mail discussion. It seems an enterprising law school student has inquired as to the possibility of being permitted to submit an article for inclusion in the *Alabama Defense Lawyers Journal*. It so happens this student is a clerk in your firm. Most probably not by chance, he also drops your name in his request. As the e-mail discussion continues, for no good and apparent reason, you agree to become involved in the process. Better yet, your topic is even selected for you.

Reluctantly and honestly, I have to admit that prior to that day I was oblivious to the fact the American Law Institute had for some eight years been working on what it was calling a *Restatement of the Law, Liability Insurance*. I felt slightly better when I polled other lawyers in my office and discovered they too had allowed such an important project, which could significantly impact our clients, to go unnoticed. Regardless, I immediately began to research and immediately not only became interested in the project but committed. As any good Senior Partner would do when faced with such an opportunity and task, I immediately drafted an Associate to the team as well.

Webster's defines a restatement as something that is stated again the same way.[1] *Black's Law Dictionary* defines a restatement as the work of the American Law Institute to collect and, in one publication, state the law.[2] Obviously, the two definitions are not one and the same. In my mind I already possessed a restatement of liability insurance law for the State of Alabama in a publication I regularly refer to in *Allen's Alabama Liability Insurance Handbook* by Bibb Allen.[3]

HISTORY OF THE ALI'S *RESTATEMENT OF THE LAW, LIABILITY INSURANCE*

The American Law Institute began its process in 2010 initially for the purpose of preparing a Principles of Law, rather than a Restatement. Following numerous drafts and revisions with portions adopted under standards applicable to a principles project, the ALI converted the project into a Restatement in 2014. This was an unprecedented act in the ALI's over 90-year history. When the ALI released its final draft *Restatement of the Law, Liability Insurance* in May of 2018, it was clear it had retained the aspirational standards of a Principles project. The draft was not a Restatement of the law; it was a statement of what its drafters wanted the law to be.[4]

The ALI's final draft was widely criticized before its completion had even been announced. On May 16, 2017, DRI, through its President John E. Cuttino, wrote to DRI members opposing ALI's restatement:

> From time to time during my term as DRI President, I have written to you about matters of great importance to our members, our clients and the Defense Bar. The issue I call your attention to today is among the most critical DRI has addressed in recent years. It is an urgent matter of central importance to DRI members and our clients . . . DRI has grave concerns over several portions of this body of work. Many provisions are at odds with the common law of insurance and their adoption would impede the ability of our members to represent policyholders and insurers.[5]

This purpose of this article is to analyze selected portions of the *Restatement of the Law, Liability Insurance* as they relate to current Alabama law, and, to a lesser extent, the prevailing law of the land these sections purport to "restate."

THE "RESTATEMENT" OF LIABILITY INSURANCE LAW? POLICY INTERPRETATION

In attempting to determine whether the American Law Institute's *Restatement of the Law, Liability Insurance* ("*Restatement*") comports with the law of Alabama, one must first compare how those two treat the interpretation of a policy of insurance. My research on this issue began by pulling the *West Alabama Digest*. Yes, I actually went into the library and pulled the actual book. Alabama's law on policy interpretation is consistent with general contract law. If an insurance policy is clear and unambiguous in its terms, then there is no question of interpretation or construction.[6] Ordinarily, the policy contract is a measure of the rights thereunder.[7] The same rules of construction by which all other instruments are construed will be applied to a policy of insurance.[8] Under Alabama law, the mere fact that a word or phrase used in a provision of an insurance policy is not defined in the policy does not mean the word or phrase is inherently ambiguous. If a word or phrase is not defined in the policy, then the Court should construe the word or phrase according to the meaning a person of ordinary intelligence would reasonably give it. In determining whether a policy is ambiguous, a court cannot consider the language in the policy in isolation, but must consider the policy as a whole.[9]

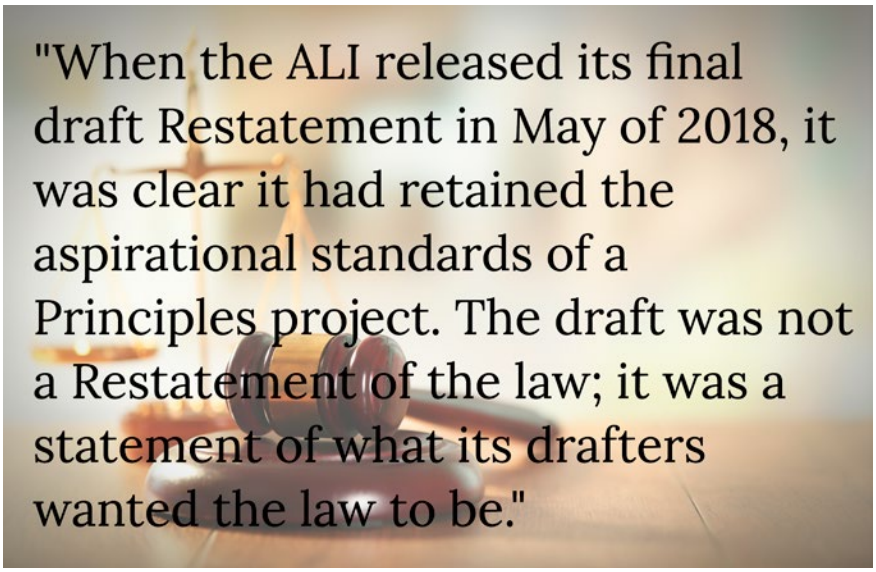
Under Alabama law, insurers have the right to limit their liability by writing policies with narrow coverage. If there is no ambiguity, courts must enforce insurance contracts as written and cannot defeat express provisions in a policy by making a new contract for the parties.[10]

The doctrine of reasonable expectation is limited to ambiguous provisions of an insurance policy.[11] The insured is entitled to the protection one may reasonably expect from the terms of the policy purchased.[12]

In his article, *Breach of Contract Litigation in Alabama, An Over-*

view, Gregory A. Brockwell clearly sets forth the rules of construction as they relates to all contracts in Alabama. "As a bedrock principle, Alabama recognizes the parties' 'freedom of contract.' Alabama's Constitution states: 'There can be no law of this state impairing the obligation of contracts by destroying or impairing the remedy of their enforcement. When a contract is unambiguous, its construction and legal effect is based on what is found within the four corners.'"[13] When examination is limited to the four corners of an agreement, the first of two conflicting provisions prevails over the second provision; irreconcilable inconsistencies between clauses or conditions are to be resolved in favor of the first clause.[14] A court may only consider parol evidence to determine the intent of the parties to a contract where its terms are ambiguous;[15] parol evidence is not admissible to contradict, vary, add to, or subtract from unequivocal contract terms.[16]

In contradiction to established Alabama law, Section 2 of the ALI's *Restatement* regarding policy interpretation allows for courts to look to dictionaries, court decisions, statutes, regulations and secondary legal authorities such as treatises and law review articles encouraging custom practice and usage evidence.[17] In addition, ambiguous terms are to be construed against the party that supplied the term, unless that party persuades the court that a reasonable person in the policyholder's position would not give the term that interpretation.[18] This creates an objective, as opposed to subjective, test, intended to include the observable objective characteristics of the policyholder that identify the policyholder as a member of a relevant class of insurance purchasers; there is no sophisticated policyholder exception for commercial policyholders.[19]



One of the most contentious provisions of the *Restatement*, Section 3, addresses foundational principles of insurance law; that is, how a policy should be interpreted and when courts may refer to outside "**extrinsic**" evidence – such as documents relating to drafting and negotiation of a policy – in order to ascertain whether a term is subject to multiple reasonable interpretations, and therefore, ambiguous.[20] This change is actually different from a prior version of ALI's membership adopting a "strong presumption" in favor of courts applying the plain meaning of policy terms where possible and against courts referring to extrinsic evidence to determine whether terms are ambiguous.[21]

Where a contract of insurance is free from ambiguity, there is no room for construction.[22] The court must enforce it as written.[23] In interpreting the undefined words and provisions of an insurance contract, the language used in the policy should be given the same meaning that a person of ordinary intelligence would reasonably conclude.[24] Only when a provision is reasonably susceptible to more than one meaning is it ambiguous.[25] Ambiguity exists when good arguments can be made for either of two contrary provisions as to the meaning of the term in the document; whether any ambiguity exists is a question of law for the court.[26]

However, the mere fact that adverse parties contend for different constructions does not in and of itself force the conclusion that disputed language is, in fact, ambiguous.[27] More importantly, ambiguities will not be inserted by strained and twisted reasoning into contracts where no such ambiguities exist.[28]

The plain meaning presumption rule and policy interpretation adopted by the ALI significantly affects a fundamental insurance law issue—the interpretation of the policy itself. The *Restatement* first appears to adopt the majority rule that an insurance policy term is interpreted according to its plain meaning, but Section 3 goes further to include a significant exception to the plain meaning rule by allowing extrinsic evidence to establish that a reasonable person in the policyholder's position would give the term a different meaning. As a result, the *Restatement* provides that, even where a policy term is unambiguous on its face, extrinsic evidence may be used to show that, in fact, the term has a different meaning in context and the *Restatement* necessarily expands its view to consider the circumstances, including the policyholder's experience and expertise. The plain meaning presumption rule is significant because it is at odds with the majority rule in most jurisdictions. The adoption of the plain meaning presumption rule by ALI was over several objections by ALI members including several judges.[29]

SECTION 12: LIABILITY OF INSURER FOR CONDUCT OF DEFENSE

In 2015, late Supreme Court Justice Antonin Scalia warned that "modern Restatements…are of questionable value and must be used with caution. Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be."[30] Justice Clarence Thomas, in his own separate opinion in the same case, expressed concern over Restatement provisions that are simply "'novel extensions'" of law that have little or no precedential

support, but have the potential to "'alter the doctrinal landscape'" of an area of law.[31]

Section 12 of the ALI's *Restatement of the Law, Liability Insurance* is one of the clearer illustrations of its authors advocating what is—at best—an extreme minority view that certainly cannot be said to constitute a description, (*i.e.*, a "restatement"), of what the prevailing law of land is. The comments to Section 12 even admit that "there is a dearth of reported cases holding liability insurers directly liable for negligent selection [of defense counsel]."[32]

Section 12 is entitled "Liability of Insurer for Conduct of Defense," and reveals the authors' clear intent to increase insurers' exposure to liability for the negligence or alleged incompetence of counsel appointed to represent their insureds:

> (1) If an insurer undertakes to select counsel to defend a legal action against the insured and fails to take reasonable care in doing so, the insurer is subject to liability for the harm caused by any subsequent negligent act or omission of the selected counsel that is within the scope of the risk that made the selection of counsel unreasonable.
>
> (2) An insurer is subject to liability for the harm caused by the negligent act or omission of counsel provided by the insurer to defend a legal action when the insurer directs the conduct of the counsel with respect to the negligent act or omission in a manner that overrides the duty of the counsel to exercise independent professional judgment.[33]

Admittedly, both subsections of Section 12 appear, at first blush, to serve as a check on insurers' unilateral selection of counsel to represent their insureds. Both provisions seemingly address concerns of an insurer, for example, selecting merely the cheapest attorney it can find, or selecting an attorney who will simply serve as a conduit for the whims and decisions of the insurer instead of exercising his or her own professional judgment. Thus, Section 12 would appear to grant some peace of mind to insureds who find themselves on the wrong side of a lawsuit and are "assigned" a lawyer by an insurer he or she has no choice but to trust.

However, through its proffering of Section 12, the ALI is advocating the creation of a *new* cause of action against an insurer that derives from, or at least does not arise until the commission of negligent acts or omissions by selected counsel during the representation of its insured.

To the extent Section 12 may be interpreted as an avocation for insurers' vicarious liability—or relied upon in support of the creation of such a tort—there is no such cause of action in Alabama. In fact, the Alabama Supreme Court even expressly declined the opportunity to judicially create such a cause of action when presented with the opportunity to do so in 2009.

***Lifestar Response of Ala., Inc. v. Admiral Ins. Co.*, 17 So. 3d 200 (Ala. 2009)**

Facts and Procedural History

On June 2, 2005, Lifestar Response of Alabama, Inc. sued its insurer, Admiral Insurance Company, and the attorneys appointed by Admiral to defend Lifestar in an underlying case involving the alleged breach of the duty to provide emergency medical care in various respects, and that Lifestar (or its predecessor in interest) had failed to employ and dispatch properly qualified personnel during an incident occurring in 2000.[34] Lifestar alleged in its complaint that:

> the [attorney] defendants represented both Lifestar and Admiral in a tripartite relationship and had failed to exercise ordinary diligence in their representation. Lifestar alleged that Admiral breached its contract of insurance with Lifestar by providing a defense that was below the appropriate standard. Additionally, Lifestar alleged that Admiral acted in bad faith in its failure to effectively defend Lifestar. Lifestar also alleged that the [attorney] defendants were Admiral's agents and that as agents of Lifestar the [attorney] defendants' negligence and/or wantonness should be imputed to Admiral. Lifestar sued the [attorney] defendants under the Alabama Legal Services Liability Act, § 6-5-570 *et seq.*, *Ala. Code* 1975.[35]

Admiral filed a motion to dismiss, and ultimately a renewed motion to dismiss, arguing, *inter alia*, that, although no Alabama court had previously addressed the issue of whether an insurance company could be held vicariously liable for malpractice committed by its selected defense counsel, Alabama law compels a finding that no such liability exists because "attorneys in Alabama are prohibited by the Alabama Rules of Professional Conduct from allowing an insurer to interfere with the attorney's independence of professional judgment in representing the insured and because insurance companies are forbidden from practicing law."[36] Additionally, Admiral argued that, in Alabama, "a retained attorney is in essence an independent contractor in relation to the person who retained the attorney."[37]

The trial court granted Admiral's renewed motion to dismiss and Lifestar appealed.

Holding and Rationale

On appeal, the Court considered whether Admiral—or any other insurance company—can be held vicariously liable for the alleged negligence of attorneys the insurer appoints to represent its insureds.[38] The Court answered in the negative, affirming the trial court's grant of Admiral's motion to dismiss.

The Court rationalized that insureds already have other means by which to recover against negligent or incompetent attorneys. Agreeing with and ratifying a decision form the New York Court of Appeals, the Court held:

> Finally, in determining whether a new exception should be recognized, we note that an insured is not otherwise left without a remedy for a law firm's claimed incompetence, and a law firm is not insulated from liability for wrongdoing; indeed, in the case before us, plaintiff has sought full recovery for his damages in a legal malpractice claim against the firm.[39]

"Accordingly," the Court held, "we hold that Admiral [Insurance Company] cannot be held vicariously liable for the [attorney] defendants' alleged negligence or wantonness."[40]

Thus, the Alabama Supreme Court's ratification of Section 12 would not necessarily mean overturning *Lifestar*, since a claim for direct liability against an insurer would be different than a claim of vicarious liability, but it *would* essentially equate to ignoring its well-reasoned conclusion that sufficient checks on attorneys' representation of insureds already exist in the form of legal malpractice claims (Alabama Litigation Services Act[41], Alabama Litigation Accountability Act[42], etc.), and that the creation of a new cause of action against insurers would be superfluous.

It is important to note, however, that Section 12 does not seek to impute liability to insurers for the negligent acts and omissions of defense counsel under a theory of vicarious liability, despite previous efforts by certain ALI contributors advocating for it. Instead, Section 12 seeks to establish a cause of action making insurers *directly* liable through the failure to reasonably select counsel for its insureds. Thus, a cause of action under Section 12 would look more like a negligent entrustment action in which the "entrustment"—*i.e.*, the selection of defense counsel—was the actual negligent act and not the negligent act of the entrustee (here, the lawyer) does not impute to the insurer to create a basis for liability.

The "non-vicarious" nature of a Section 12 cause of action notwithstanding, the Court's rationale in *Lifestar Response* soundly explains why the creation of a new tort is unnecessary.

First, there are already means through which insureds may recover against negligent or incompetent attorneys, such as, again, the ALSLA or the ALAA. The ALI makes no mention of this in the comments to Section 12, nor is there any case law suggesting that the current statutory and common law causes of action adopted by states have failed to hold lawyers accountable in their duty to represent insureds in a competent manner such that this new tort should be created. Simply, there appears to be no justification for creating an additional cause of action for damages that are already recoverable through other means that have proven efficient.

Secondly, binding insurance companies so tightly to the actions of the attorneys they hire to represent insureds may drastically restrict the freedom with which lawyers are entitled to exercise their own unique professional judgment. As it stands, lawyers are not only allowed, but are indeed required and expected to exercise their own professional judgment. Rule 1.1 of the Alabama Rules of Professional Conduct prescribes the duty of lawyers to represent their clients competently, and the ARPC repeatedly defers, unless otherwise expressly limited by the Rules, to the discretion of lawyers to act in their professional judgment.[43] ARPC Rule 5.4(c) even expressly "prohibits a lawyer, employed by a party to represent a third party, from allowing the employer to influence his or her professional judgment."[44] Again, when a lawyer fails to comply with this rule, and it damages the client, the client already has a means to recover those damages through the ALSLA.

Moreover, insurers are not licensed to practice law, and are, therefore, precluded by applicable codes of professional conduct and other statutory law from practicing law or controlling how a lawyer handles a case.[45] Consequently, holding insurers liable for damages caused by a negligent or incompetent attorney, as Section 12 seeks to do, completely disregards 1.) The duty of lawyers to exercise their own professional judgment free of any unreasonable influence, including that of the insurers that hire them; and 2.) The codified prohibition of insurers from practicing law or controlling attorneys in their respective practice. In other words, Section 12 seeks to impose liability on insurers for the actions of attorneys over which insurers have little or no control.

The authors of Section 12 appear to address the latter concern in subsection (2). By imposing liability on insurers for damages caused by insurers "overrid[ing] the duty of the counsel to exercise independent professional judgment." However, again, insurers are already prohibited from overriding attorneys' professional conduct, and causes of action already exist against attorneys who fail to reasonably exercise their professional judgment and succumb to the wishes and interests of the insurer. In short, Section 12 accomplishes nothing new compared to the remedies already available for the compensation of damages by clients who have been harmed by incompetent counsel.

Creating a new cause of action against insurers that derives from the conduct of the attorneys they select, (*i.e.*, hire), will likely only make attorneys even more conservative in their representation of insureds—perhaps to a fault. After all, attorneys are already putting themselves and their firms on the line each time they make a bold strategy decision in a case. Through the ratification of Section 12, attorneys would then be also putting the insurers on the line with each strategy, thereby risking their relationship with insurers on whom they rely for business.

Consequently, although Section 12 initially appears to protect lawyers' freedom to "exercise professional judgment," the Section arguably indirectly places *more* restrictions on defense lawyers' autonomy by seeking to impose liability on the insurers who provide business to an attorney if the attorney were to make a mistake. Accordingly, Section 12 may actually *infringe upon* lawyers' freedom to exercise professional legal judgment in the representation of insureds.

Excessive Burden on Insurers to Quality-Check Attorneys

Finally, Section 12 overburdens insurers with a duty to essentially "over-investigate" their attorneys and their law firms prior to hiring them to represent their insureds. The Alabama Supreme Court has noted the following requirements of an insurer when its insured is sued: "First, the company must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries. Second, it must retain competent defense counsel for the insured."[46]

The Reporter's comments to Section 12 show that the ALI clearly seeks to further expand upon this duty by requiring insurers to in-

vestigate whether the firms or lawyers they retain have malpractice insurance, and that their limits are "adequate," thus creating additional grounds for insurer liability stemming from their retention of counsel.[47]

Current Alabama law imposes no such duty upon insurers. Thus, Section 12 is facially at odds with current Alabama law, and its adoption would change the existing law despite a lack of justification for doing so.

It can be presumed that most firms and solo practitioners in Alabama have some degree of professional liability insurance, so requiring insurers to investigate whether a lawyer has malpractice coverage is likely a wholly unnecessary endeavor. Even in the event that an insurer has retained counsel with no malpractice insurance, or a minimal amount thereof, this does nothing to preclude any cause of action an insured may have against *the attorney* for any incompetence or malpractice that causes the insured damage pursuant to the Alabama statutes discussed herein.

Finally, the vagueness of imposing liability against an insurer that retains counsel with "inadequate" malpractice coverage, negates much of the efficacy intended by the ALI.[48] For example, what constitutes an "inadequate" amount of coverage, such that a claim against the insurer is merited?[49] Neither Section 12 nor the Reporter's comments thereto provide any guidance on the issue, and thus, "some sort of *post hoc* standard would be applied that would unreasonably generate malpractice suits against counsel and law suits against insurers more out of sympathy for victims than any rational evaluation of what risks should have been insured against."[50]

Current Lack of Law on the Issue

Although the *Lifestar* Court's reasoning *could* be applied to the issue of creating a new tort against insurers for the negligent *selection* of counsel, the Court has not yet considered the issue, and, consequently, there is no existing case law in Alabama (as of the time this article was submitted for publication) on the issue. This is where the ALI's advocacy of "what the law ought to be" becomes of particular concern. While there is no dispute that restatements of law are not binding on any court in this country, there can be no doubt that, where gaps in the law exist, restatements can be used to fill them, or even create new law.[51]

Thus, because of the ALI's advocacy of the provisions of Section 12, the Alabama Supreme Court may very well be presented in the near future with an opportunity to create a new cause of action finding insurers directly liable for the negligent selection of counsel.

"Within the Scope of the Risk"

To the authors' credit, the limiting language at the end of subsection (1) *does* alleviate some concerns over its impact on lawyers' freedom to exercise their professional judgment. The provision expressly limits an insurer's liability for harm caused by the negligent selection of counsel, as long as counsel's negligence was "within the scope of the risk that made the selection of counsel unreasonable." In other words, an insurer is liable for the negligent acts of its selected defense counsel only if those negligent acts were reasonably foreseeable by the insurer at the time counsel was selected.

A recent opinion from the Federal District Court of Kansas is among the only treatment of this young *Restatement* provision. In

ADLA Supports National Foundation for Judicial Excellence

The Alabama Defense Lawyers Association recently contributed $2,500 to the **National Foundation for Judicial Excellence** (NFJE), which was established in 2004 by leading defense attorneys. The mission of NFJE is to address important legal policy issues that affect law and the civil justice system by providing meaningful education for the judiciary, and engaging in other efforts to enhance judicial excellence and fairness for all engaged in the judicial process. NFJE's premise is that the entire legal system benefits from judicial education because a judge who is acquainted with an issue prior to facing it on the docket will render a more informed, better decision

ADLA's contribution will benefit the **Fifteenth Annual Judicial Symposium** held July 19-20, 2019. This highly regarded symposium seeks donations from the state and local defense organizations. The NFJE is a necessary counterpoint and ADLA strongly supports the attendance of Alabama appellate judges.

Progressive Northwestern Ins. Co. v. Gant[52], the court considered whether Progressive Northwestern Ins. Co. ("Progressive") had acted in bad faith when selecting counsel for its policyholders in an underlying claim involving a vehicular homicide.

The assignee of the policyholders' rights under the Progressive policy alleged that Progressive was negligent in its selection of the policyholders' attorney, Kevin McMaster ("McMaster"), based on McMaster's failure to settle the underlying claim in good faith, after declining to put another insurance provider on notice of the claims against Progressive's policyholders after McMaster had reviewed the policy and determined it did not cover damages resulting from the underlying vehicular accident. The court summarized the assignee's allegations as follows:

> Gant argues that McMaster was incompetent to defend the Birk Defendants in the underlying litigation because Progressive had prior knowledge of McMaster's reputation for "thwarting" settlements. Gant contends that McMaster's reputation as an obstreperous lawyer was well known, both before and during the Birk Lawsuit, and Progressive "knew what it was getting into with Mr. McMaster." Prior to hiring McMaster in this case, Progressive received notice from several lawyers regarding his obstructionist tactics, in particular involving settlement matters. Gant characterizes McMaster's prior conduct as a "history of incompetence with regard to handling cases that required a focus on resolution without protracted, aggressive litigation," and that Progressive was "well aware" of that history. Gant argues that Progressive had extensive notice that McMaster lacked the core competencies needed by the Birk Defendants and that by retaining him with knowledge of these deficiencies, Progressive breached its duty to hire competent counsel for its insureds.[53]

In support of these claims, the assignees relied on the recently published Section 12. However, the court found that McMaster's failure to put the insurer on notice of claims made against Progressive's policyholders was—at most—a "misinterpretation" of the other policy, not an obstruction of settlement. Accordingly, the court held that "any deficiency in McMaster's past performance with respect to his settlement skill or lack thereof is beyond the scope of risk that made the selection of counsel unreasonable."[54] In other words, any negligent act or omission by McMaster during settlement negotiations was not related to his reputation of "thwarting" settlements or being obstreperous, of which Progressive allegedly had knowledge, but was instead involved whether McMaster acted reasonably in determining the additional insurance policy covered the damages at issue. The court accordingly granted summary judgment on the assignee's claim against Progressive for failure to hire competent defense counsel.

The ruling in *Progressive* illustrates the type of strict interpretation of Section 12 needed when the Court imminently considers 1.) Whether to adopt Section 12 (which the *Progressive* court acknowledged it was not doing, but proceeded to discuss in *dicta* what its ruling would be if it did); and 2.) Whether a particular act or omission by appointed defense counsel during the representation of an insured was something the insurer "should have" known was a probability.

Finally, *Progressive* illustrates the "opening of the floodgates" that will likely occur in litigation against insurance providers when insureds are simply unhappy with the outcome of a case. Section 12 arguably paves the way for disgruntled insureds, unhappy with an adverse judgment entered against her, him, or it to simply file suit against the insurer for any excess damages, thus exposing insurers to liability for damages it never agreed to cover. Thus, though Section 12 seemingly purports to protect insureds by adding another (unnecessary) check on the insurers' retention of counsel on the insureds' behalf, insurers will likely absorb this increased exposure

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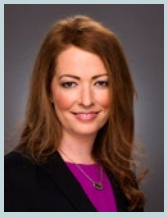

Bree Taylor Wilbourn
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By providing a resource of other attorneys in which to ask questions about the daily practice of law, we received great feedback from members in exploring new billing and time management systems.

to liability through increased premiums, meaning that Section 12, if adopted, may actually trigger a financial backlash on the insureds it purports to protect.

RESERVATION OF RIGHTS

An insurer's reservation of rights is at the core of liability insurance, the insurance industry and the economy. An effective reservation of rights letter can be the difference between preserving defenses and paying damages for which the parties never contracted. The American Law Institute ("ALI") included different aspects of an insurer's reservation of rights in its final draft of the *Restatement of the Law, Liability Insurance*.[55] The final *Restatement* draft was adopted by the ALI on March 28, 2018 and, since then, the focus has been on determining how the *Restatement* might influence courts' future decision-making as a nonbinding document. This section highlights the differences and similarities between Alabama liability insurance law and the *Restatement*, as well as how other jurisdictions have treated the *Restatement*.

The ALI expressed its concerns regarding how insurers reserve the right to contest coverage Section 15 of the *Restatement*.[56] Section 15 states:

> (1) An insurer may reserve the right to contest coverage for an action before undertaking the defense of the action if it gives timely notice to the insured of any ground for contesting coverage of which it knows or should know.
>
> (2) If an insurer already defending a legal action learns of information, which it did not have constructive notice of under subsection (1), that provides a ground for contesting coverage for that action, the insurer must give notice of that ground to the insured within a reasonable time to reserve the right to contest coverage for the action on that ground.
>
> (3) Notice to the insured of a ground for contesting coverage must include a written explanation of the ground, including the specific insurance policy terms and facts upon which the potential ground for contesting coverage is based, in language that is understandable by a reasonable person in the position of the insured.
>
> (4) When an insurer reasonably cannot complete its investigation before undertaking the defense of a legal action, the insurer may temporarily reserve its right to contest coverage for the action by providing to the insured an initial, general notice of reservation of rights, in language that is understandable by a reasonable person in the position of the insured, but to preserve that reservation of rights the insurer must pursue that investigation with reasonable diligence and must provide the detailed notice stated in subsection (3) within a reasonable time.[57]

All four subsections of Section 15 appear to provide a straightforward way to determine whether an insurer has timely and correctly reserved its rights to contest liability insurance coverage. However, potential disputes may arise involving the insurer's obligation to continuously update its reservation of rights and to keep the insured informed by adequately explaining coverage of such rights.

Several insurer advocates have expressed concerns about the possible implementation of Section 15(2) of the *Restatement*. James Friedman from *The National Law Review* stated, "Carriers, who typically provide a coverage position letter at the outset of litigation have argued that this provision would create a significant burden throughout the life of a case as new facts and allegations arise."[58] Gregory LoCasle and John Anooshian from *The Legal Intelligencer* stated, "As a practical matter, this increased burden could distract insurers from focusing on their policyholders' defense by forcing them to spend time scrutinizing each piece of information (pleading, testimony, etc.) they receive to determine whether it contains other potential grounds to disclaim coverage."[59] These insurer advocates emphasize that certain disputes between insurers and insureds will be costly and time-consuming concerning the facts which were known or should have been known by an insurer and when the insurer had constructive notice of them.

Under Alabama liability insurance law, an insurer reserves its right to contest coverage while fulfilling its duty to defend through sending a reservation of rights letter.[60] By sending such notice, an insurer can fulfill its duty to defend without waiving its right to contest coverage.[61] The Alabama Supreme Court has encouraged this procedure in the hallmark case of *L & S Roofing Supply Company v. St. Paul Fire & Marine Insurance*, where the Court held that insurers defending the case under a reservation of rights had an enhanced obligation to insureds and that such a defense provides a valuable service to the insured.[62] The reservation of rights principle protects not only the insured, but also the insurer.

Within Alabama liability insurance law there are several guiding principles that influence a reservation of rights letter. The reservation of rights letter should be sent to an insured as soon as the insurer has knowledge of facts that would affect coverage.[63] In order for notice to the insured that the undertaking of a defense to is not a waiver of any coverage defenses, the notice must be timely.[64] Investigation of the event should be made promptly and failure to investigate promptly may result in a constructive denial of coverage.[65] Where an insurer reserves its rights on specific grounds and other grounds of forfeiture are brought to the insurer's attention through discovery or otherwise, the reservation of rights letter should be promptly amended to include the newly discovered grounds.[66] A reservation of rights letter must be clear and specific.[67] An insurer that specifically disclaims coverage on one ground of forfeiture waives all other grounds which might have been stated, but were not.[68]

An insurer's duty to provide notice through a reservation of rights letter is one of the most important tasks within liability insur-

ance; an insurer's failure to reserve its rights will have a significant impact on both the insured and the insurers. In most jurisdictions, if an insurer conducts an insured's defense without timely reserving its rights to deny coverage, it cannot later disclaim based on any policy defense as to which it was on notice at the time it assumed the insured's defense.[69] The general rule, and the law in Alabama, is that if an insurer assumes the defense of an action, without giving notice that it reserves the right to contest coverage, the insurer is thereafter precluded from setting up defenses of non-coverage.[70]

In the comments of the *Restatement*, the authors state that Section 15 recognizes a practical reality by stating a simple-to-apply, straightforward rule that requires an insurer to inform the insured about the insurer's possible defenses to coverage at the outset of the defense of a claim, or, pursuant to subsection (4), within a reasonable time thereafter.[71] An insurer that undertakes to provide a defense without providing timely notice to the insured of any ground of any kind for contesting coverage of which it knows or should know loses the opportunity to contest coverage on that basis.[72] The rule that insurers must timely reserve their rights to contest coverage or they lose those rights is a recognized principle even within Alabama law.

The *Restatement* addresses information the insurer knows or should know in reserving its rights in the comments of Sections 15. What an insurer knows or reasonably should know is a question of fact and the insurer is presumed to have knowledge of any information contained in its own records and any information obtained by its agents; the insured's defense lawyer is not an agent of the insurer.[73] An insurer should know within a reasonable time of any allegation contained in any pleading and in any other filing or transcript that a reasonable insurer managing the defense of a case would have reviewed.[74] The result of implementing this requirement would be to impose upon insurers the task of reviewing all deposition transcripts and pleadings to try to identify new coverage defenses. The comment adds that, because it is difficult to determine whether the insurer should have known this information earlier, the insured bears the burden of proof, as is appropriate given the harsh consequences for an insurer that has not adequately reserved its rights.[75] Courts considering both Alabama law and the *Restatement* should analyze carefully, and counsel should be prepared to address, binding law as opposed to the non-binding *Restatement*.

The Enhanced Obligation of Good Faith vs. Independent Council

One of the major differences between Alabama liability insurance law and the *Restatement* lies within the duties of an insurer defending a case under its reservation of rights defense. Jurisdictions are divided on whether a reservation of rights creates a *per se* conflict of interest.[76] Some jurisdictions apply a *per se* rule that a reservation of rights creates a conflict of interest between the insured and insurer-appointed counsel.[77] In Alabama, when an insurer is presented with a complaint that contains charges covered by the terms of its policy as well as charges that are not covered, an immediate conflict of interest arises.[78] In *L & S Roofing*, the Alabama Supreme Court set out an enhanced obligation of good faith upon the insurer defending the case under a reservation of rights defense, while the non-binding *Restatement* establishes an obligation to provide independent counsel.[79] Under Section 16 of the *Restatement*, there is a mandatory obligation of the insurer to provide an independent defense for the insured, Section 16 states:

> When an insurer with the duty to defend provides the insured notice of a ground for contesting coverage under § 15 and there are facts at issue that are common to the legal action for which the defense is due and to the coverage dispute, such that the action could be defended in a manner that would benefit the insurer at the expense of the insured, the insurer must provide an independent defense of the action.[80]

When there are facts that are common to the claimant's allegations in the legal action for which a defense is sought and to the insurer's asserted ground for contesting coverage, there is the risk that the defense of the action may be handled in a manner that advantages the insurer in contesting coverage.[81] However, the authors state that leaving the management of this conflict of interest to the professional judgement of the defense lawyer selected by the insurer may in fact be adequate to protect insureds in most situations.[82]

Under Alabama liability insurance law, the Alabama Supreme Court has laid down rigid rules for insurers and their attorneys as to their specific duties where a case is being defended by the insurer under a reservation of it rights to later deny coverage.[83] The enhanced obligation of good faith is met as long as the insurance company complies with certain criteria.[84] Where the criteria are met, the insurer need not pay for an insured's independent attorney, but may use a competent attorney of its own choice.[85]

The Alabama enhanced standard helps the insured retain sufficient representation and also assures that they do not have to go through the process of hiring their own attorney to address difficult issues. The authors of the *Restatement* hope to influence courts in areas where there is no clear precedent on an issue. However, judges and counsel should hesitate to cite the *Restatement* because of its nature. The *Restatement* seeks to incorporate the common law from all states and may differ in many jurisdictions. Not only is the *Restatement* not binding on any court, Section 16 of the *Restatement* is not in alignment with Alabama liability insurance precedent.

Treatment of the Restatement in Other Jurisdictions

Other jurisdictions have considered the *Restatement* and made their opinions known. Ohio was one of the leading states to voice its opinion on the *Restatement*. On July 30, 2018, just two months after the *Restatement* was approved, Governor John Kasich of Ohio

signed into law Senate Bill No. 239, which amended the Ohio Revised Code of Insurance and stated: "The *Restatement of the Law, Liability Insurance* that was approved at the 2018 annual meeting of the American Law Institute does not constitute the public policy of this state and is not an appropriate subject of notice."[86] The bill did not elaborate on what appears to be an unprecedented amendment to preclude courts from applying the *Restatement*, even as persuasive authority, noting only in the comments section that Restatements are "nonbinding treatises" that simply inform the legal community on "general principals of common law."[87] The message was clear: Ohio courts will look to Ohio statutes and Ohio common law in deciding insurance issued, not the *Restatement*.

As a result, some state governments have already felt the influence of the insurance industry's concerns and have even started acting on them. In April 2018, the governors of Iowa, Maine, Nebraska, South Carolina, Texas and Utah sent a letter to the president of the ALI expressing concerns with the then-draft version of the *Restatement*, stating certain rules were "the prerogative of our state legislatures [and/or] at odds with established common law and threatened legislative or executive action if they were approved."[88] The *Restatement* clearly differs from Alabama liability insurance precedent.

Several courts have declined to follow the *Restatement*; one of the first was the Superior Court of Delaware. In *Catlin Specialty Insurance v. CBL & Associates Properties*, the Delaware court applied Tennessee liability insurance law in holding that an insurer may seek reimbursement of costs after a determination that it had no duty to defend.[89] The Delaware Superior Court declined to follow the *Restatement* in its holding.[90] The Defendants argued that decade-old precedent did not reflect the more recent trend away from the then-majority position.[91] The court recognized that the American Law Institute had revised its *Restatement of the Law, Liability Insurance* to reflect such a shift, but just as Tennessee state courts had never before directly spoken on this reimbursement issue, they had also not yet adopted the new *Restatement*.[92] Moreover, the Delaware Superior Court recognized that the Restatements are merely persuasive authority until adopted by a court and the Restatements never, by mere issuance, override controlling case law. The court further noted that the *Restatement* itself acknowledges that "some courts follow the contrary rule."[93] Both parties agreed that no Tennessee court had faced the issue of seeking reimbursement of costs in a decade and that prior case law remained the only authority upon which to divine Tennessee law. Accordingly, the Delaware Superior Court determined that prior case law still took precedence over the *Restatement*.[94]

CONCLUSION

Given that courts and attorneys are citing the *Restatement of the Law, Liability Insurance* as authority, practitioners should make every effort to prevent this from occurring where accepted and known principles of law exist. The most effective way accomplish this is to be prepared to counter attempts by opposing counsel to convince the court to accept the *Restatement* as authority, particularly where it contradicts established Alabama jurisprudence.

Originally from Ashville, Alabama, **Gerald C. Swann, Jr.** is a partner in the Montgomery office who practices in the areas of Construction Litigation, Products Liability, serious personal injury and wrongful death. He has represented both commercial and residential contractors in disputes over construction quality and job site injuries. Additionally, personal injury claims arising out of the use of products in both the private sector and industrial settings have been a large focus of his practice. With over 25 years of litigation experience, he has taken numerous cases to verdict and/or arbitration decision. Mr. Swann is a 1983 graduate of the University of Alabama and 1986 graduate of Samford University Cumberland School of Law.

C. Hayes Ellett is a third-year law student at Thomas Goode Jones School of Law where he is the President of the ADLA chapter at the school. Hayes is also a member of the Board of Advocates program where he has competed in both Moot and Mock trial competitions. This past fall semester, Hayes and his trial partner, Mitch Williams won the 15th Annual J. Greg Allen Mock Trial Competition. Hayes has worked with Ball, Ball, Matthews & Novak, P.A. in the real estate section since the summer of 2017. Prior to law school, Hayes graduated from Auburn University in 2011 and thereafter worked for a community bank, Bank of Lincoln County, in his hometown of Fayetteville, TN for almost five years. Hayes is married to Christal Ellett, a third-grade teacher at Pike Road Elementary.

Miland F. Simpler, III is an associate with Ball, Ball, Matthews & Novak, P.A., in Montgomery, Alabama, with a practice largely dedicated to insurance defense litigation, primarily defending individual and corporate insureds in automotive, trucking, premises liability, and construction actions. Mr. Simpler serves on the Executive Committee for the Young Lawyers Section of the Alabama State Bar, the Board of Directors for the Young Lawyers Section of the Alabama Defense Lawyers Association, and the Board of Directors for the Young Lawyers Section of the Montgomery County Bar Association.

Endnotes

[1] *See Restatement*, Merriam -Webster com , *https://www.merriam-webster.com/restatement* (updated Jan. 17, 2019). *See also id.* at *https://www.merriam-webster.com/restate.*

[2] *Restatement of the Law*, Black's Law Dictionary (9th ed. 2009).

[3] Bibb Allen, Allen's Alabama Liability Insurance Handbook (2d ed. 2008).

[4] Michael L. Resis, *President's Message*, Illinois Association of Defense Trial Counsel IDC Quarterly, Vol. 27, No.

4, 2017 at 1.

[5] John E. Cuttino, *DRI Opposes American Law Institute's Restatement of the Law, Liability Insurance*, http://www.dri.org/home/2017/05/16/dri-opposes-american-law-institute's-restatement-of-the-law-liability-insurance.

[6] *Certain Underwriters at Lloyd's London v. Kirkland*, 69 So. 2d 98 (Ala. 2011).

[7] *Protected Life Ins. Co. v. Moore*, 153 So. 751, 228 Ala. 476 (1934).

[8] *Mobile Marine Dock & Mutual Ins. Co. v. Millen & Son*, 27 Ala. 77 (Ala. 1885).

[9] *St. Paul Fire & Marine Ins. Co. v. ERA Oxford Realty Co. Greystone, LLC*, 572 Fed. 3d 893 (11th Cir. Ala. 2009).

[10] *Id.*

[11] *Safeway Ins. Co. of Alabama, Inc. v Herrera*, 912 So. 2d 1140 (Ala. 2005).

[12] *Aetna Casualty Ins. Co. v. Chapman*, 200 So. 425, 240 Ala. 599 (Ala. 1941).

[13] Gregory A. Brockwell, *Breach of Contract Litigation in Alabama, An Overview*, Brockwell Smith LLC, 34 (2016).

[14] *Id.* at 35.

[15] *Id.*at 36.

[16] *Id.* at 37.

[17] Restatement of the Law, Liability Insurance § 2 (Am. Law Inst. 2018).

[18] *Id.* § 4.

[19] C. Scott Rybny (Rebar, Bernstiel) and Dick Dibella (Dibella, Geer, McAllister, Best), *The Future of Insurance Law? Restatement of Law-Liability Insurance*, Pennsylvania Association of Mutual Insurance Companies (July 26, 2018).

[20] n. 17, *supra*, § 3.

[21] Jeff Sistrunk, *Article V Controversial Rules, ALI Insurance Law Project*, Law 360 Portfolio Media, Inc. (May 18, 2018).

[22] Bibb Allen, *Allen Alabama Liability Insurance Handbook*, § 3-5(a) (1996).

[23] *Id.*

[24] *Id.* § 3-5(b).

[25] *Id.* § 3-6(a).

[26] *Id.* § 3-6(b).

[27] *Upton v. Mississippi Valley Title Ins. Company*, 469 So. 2d 548, 554 (Ala. 1985).

[28] *Alabama Farm Bureau Mutual Casualty Ins. Co. v. Goodman*, 188 So. 2d 268, 270 (Ala. 1966).

[29] David L. Brown, *ALI Restatement Brings Change and Uncertainty for Carriers*, Carrier Management (Sept. 12, 2018).

[30] *Kansas v. Nebraska*, 135 S.Ct. 1042, 1064 (Scalia, J., dissenting)

[31] *See id.* at 1068 – 69 (Thomas, J., concurring in part, dissenting in part) (*quoting* Caprice L. Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages,* 42 Loyola (LA) L. Rev. 131, 134 (2008)).

[32] n. 17, *supra*, § 12, Reporter's Note (b) (2018).

[33] *Id.*

[34] 17 So. 3d at 202.

[35] *Id.*

[36] *Id* at 210.

[37] *Id.*

[38] *Id.* at 213.

[39] *Id.* at 215 (*quoting Feliberty v. Damon*, 72 N.Y.2d 112, 120 (N.Y. 1988)).

[40] *Id.* at 218.

[41] Ala. Code §§ 6-5-570, *et seq.*

[42] Ala. Code §§ 12-19-270, *et seq.*

[43] See, e.g., *Alabama Rules of Professional Conduct*, R. 1.8(f)(2); R. 2.1; R.5.4(c).

[44] *L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298, 1303 (Ala. 1987) (*citing* Rule 5.4(c), *Alabama Rules of Professional Conduct*).

[45] See, e.g., Ala. Code § 34-3-6; Ala. Code § 34-3-7; and *Alabama Rules of Professional Conduct*, R. 5.4(d)(3).

[46] n. 44, *supra,* at 1303 (*quoting Tank v. State Farm Fire & Casualty Co.*, 715 P.2d 1133, 1137 (Wash. 1986)).

[47] n. 17, *supra,* § 12, cmt. c.

[48] *See* 10/6/17 correspondence from John E. Cuttino, President, Defense Research Institute (DRI) to Richard Revesz, Esq., Executive Director, American Law Institute, at http://www.dri.org/docs/default-source/webdocs/ali-restatement-of-the-law-liability-insurance-letter---october-6-2017.pdf?sfvrsn=4

[49] *Id.*

[50] *Id.*

[51] *See*, *e.g.*, *Phillips v. Smalley Maint. Servs.*, 435 So.2d 705 (Ala. 1983) (where the Court had not addressed the issue of whether the tort of invasion-of-privacy extended beyond the intrusion of an actual physical space, such as in regards to "marriage or sexual concerns," the Court adopted the definition of "wrongful intrusion" in the *Restatement (Second) of Torts*, § 652B to broaden the parameters of the tort and increase the amount of conduct falling thereunder); *Keller v. Kiedinger*, 389 So.2d 219 (Ala. 1980) (where no cause of action for negligent entrustment existed for a bailee against a negligent entrustor, the Court considered and adopted Section 390 of *Restatement (Second) of Torts* (1965), creating a cause of action in favor of bailees) ("After careful consideration, we are convinced the Restatement proposes the best view, and we adopt § 390 as the law of this state").

[52] 2018 U.S. Dist. LEXIS 163624 (D. Kan. Sept. 24, 2018).

[53] 2018 U.S. Dist. LEXIS 163624, at *13-14.

[54] *Id.* at *18-19.

[55] n. 17, *supra,* § 15.

[56] *Id.*

[57] *Id.*

[58] James A. Friedman, *Seven Key Provisions In The Restatement Of The Law: Liability Insurance*, The National Law Review (Dec. 17, 2018, 10:04 AM), https://www.natlawreview.com/article/seven-key-provisions-restatement-law-liability-insurance-0.

[59] Gregory LoCasale and John Anooshian, *Restatement of the Law-Liability Insurance Debate Now Shifts to Its Impact*, The Legal Intelligencer (Dec. 17, 2018, 12:15 PM), https://www.law.com/thelegalintelligencer/2018/08/22/restatement-of-the-law-liability-insurance-debate-now-shifts-to-its-impact/.

[60] John Johnson II & Richard E. Smith, *Alabama Liability Insurance Handbook* § 4.02(1) (2nd ed. 2018).

[61] *Id.*

[62] n. 44, *supra,* at 1303.

[63] n. 60, *supra*, § 4.02(4).

[64] *Id.* § 4.02(5).

[65] *Id.* § 4.02(6).

[66] *Id* § 4.02(7).

[67] *Id.* § 4.02(8).

[68] *Id.*

[69] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies & Insureds* § 2:7 (6th ed. 2018).

[70] n. 60, *supra*, § 4.02(3).

[71] n. 17, *supra.*§ 15 cmt. (a)

[72] *Id.* § 15, cmt. (b).

[73] *Id.* § 15, cmt. (c).

[74] *Id.*

[75] *Id.*

[76] *State Farm Mut. Auto. Ins. v. Hansen*, 357 P.3d 338, 342 (Nev. 2015).

[77] *Id.*

[78] n. 60, *supra*, § 4.01.

[79] n. 44, *supra,* at 1303.

[80] n. 17, *supra,* § 16.

[81] *Id.* § 16 cmt. (a).

[82] *Id.*

[83] n. 60, *supra,* § 4.03(1).

[84] *Id.*

[85] *Shelby Steel Fabricators, Inc. v. United States Fidelity and Guaranty Ins*, 569 So. 2d 309, 312 (Ala. 1990).

[86] Xandra Bernardo, *The ALI's Restatement of the Law, Liability Insurance Faces Industry and Legislative Opposition*, Pillsbury, Policyholder Pulse (Dec. 18, 2018, 12:35 PM) https://www.policyholderpulse.com/ali-restatement-law-liability-insurance-industry-legislative-opposition/.

[87] *Id.*

[88] *Id.*

[89] *Catlin Specialty Ins. v. CBL & Assocs. Props.*, 2018 WL 3805868, at *6 (Del. Super. Ct. 2018).

[90] *Id.*

[91] *Id.* at *3.

[92] *Id.*

[93] *Id.*

[94] *Id.*

The law firm of Bradley, Arant, Boult and Cummings LLP is pleased to make the following announcements:

- 161 attorneys across the firm's offices in Alabama, Mississippi and Tennessee have been named 2018 Mid-South Super Lawyers or Rising Stars.

  Top 50 Alabama Super Lawyers and Top 50 Birmingham Super Lawyers **Matthew H. Lembke**

  Following are the attorneys in the firm's Birmingham office who have been named Mid-South Super Lawyers for 2018:

  F. Wendell Allen (Business Litigation), **Marc James Ayers** (Appellate)**Philip J. Carroll III** (General Litigation), **William S. "Buddy" Cox III** (Environmental Litigation), **Jeffrey D. Dyess** (Intellectual Property Litigation) **James W. Gewin** (Business Litigation), **John W. Hargrove** (Employment & Labor), **Gary L. Howard** (Insurance Coverage), **David G. Hymer** (Business Litigation), **Matthew H. Lembke** (Appellate), **T. Matthew Miller** (Employment & Labor), **Richard H. Monk III** (Business Litigation), **Michael R. Pennington** (Business Litigation), **Brian Alexander Wahl** (General Litigation), **John D. Watson** (Business Litigation)

  Following are the attorneys in the firm's Huntsville, Ala., office who have been named Mid-South Super Lawyers for 2018: **Scott Burnett Smith** (Appellate) and **H. Harold Stephens** (Civil Litigation: Defense)

  Following are the attorneys in the firm's Montgomery, Ala., office who have been named Mid-South Super Lawyers for 2018:
  George R. Parker (General Litigation) and **Charles Stewart** (Business Litigation)

  Following are the attorneys in the firm's Birmingham office who have been named Mid-South Rising Stars for 2018: **Jason R. Bushby** (Banking) **Ty E. Dedmon** (General Litigation), **Hallman B. Eady** (Business Litigation)**, John Mark Goodman** (General Litigation), **C. Meade Hartfield** (Banking), **J. Riley Key** (Banking), **Ryan P. Robichaux** (Government Relations), **Megan R. Wilson** (Estate & Probate), **James W. Wright Jr.** (Banking)

  Harold D. Mooty III (Business Litigation), in the firm's Huntsville office, has been named Mid-South Rising Stars for 2018.

Christian & Small is pleased to make the following announcements:

- The firm is pleased to announce 12 partners have been selected for inclusion on the list of 2018 Mid-South Super Lawyers, and three more partners were named to the 2018 Mid-South Rising Stars list. Additionally, Managing Partner **Deborah Alley Smith** and Partners **LaBella S. Alvis** and **Sharon D. Stuart** were named to the 2018 Top 50 Women Mid-South Super Lawyers List.

  Christian & Small attorneys recognized are:
  LaBella S. Alvis – Personal Injury Defense - Medical Malpractice, Top 50 Women Mid-South Super Lawyers
  James B. Carlson – Personal Injury Defense - Products
  Thomas W. Christian – Civil Litigation Defense
  Edgar M. Elliott IV – Civil Litigation Defense
  John W Johnson II – Insurance Coverage
  James L. Patillo – Personal Injury Defense - General
  Deborah Alley Smith – Appellate, Top 50 Women Mid-South Super Lawyers
  Richard E. Smith – Business Litigation
  Sharon Donaldson Stuart – Business Litigation, Top 50 Women Mid-South Super Lawyers
  Michael A. Vercher – Civil Litigation Defense

  2018 Mid-South Rising Stars:
  Jonathan W. Macklem – Business Litigation
  M. Jansen Voss – Civil Litigation

- ADLA member **Jordan C. Loper** has joined the firm as an associate focusing her practice on civil litigation, insurance, premises liability and transportation.

- ADLA members **Edgar M. Elliott IV, Richard E. Smith** and **Michael A.Vercher** – who were recognized in the 2019 edition of The Best Lawyers in America as "Lawyer[s] of the Year" for their respective practice areas: Transportation Law, Construction Litigation, Land Use and Zoning Litigation.

- The firm is also pleased to announce that 17 partners have been included in the 2019 edition of The Best Lawyers in America. In addition, the following partners are being recognized for consistently achieving Best Lawyers rankings for the past five to 30 years: **Greer B. Mallette** (five years), **LaBella S. Alvis** (10 years), **James B. Carlson** (10 years), **Edgar M. Elliott IV** (10 years), **Deborah Alley Smith** (10 years), **Richard E. Smith** (10 years), **Sharon D. Stuart** (10 years), **David B. Walston** (10 years), **Clarence M. Small Jr.** (30 years), and **Thomas W. Christian** (30 years).

- Partners and ADLA members **LaBella S. Alvis** (2018 Top 250 Women in Litigation; Civil Litigation – Product Liability, Professional Liability, Medical Malpractice, Health Care), **James B. Carlson** (Civil Litigation – Product Liability) and **Richard E. Smith** (Civil Litigation – Class Action, Health Care, Medical Malpractice, Professional Liability, Top 10 Boutiques) were all recognized in the 2018 Benchmark Litigation guide. They join Benchmark Litigation-recognized Partners **Thomas W. Christian** (General Commercial, Securities), **John W. Johnson II** (Civil Litigation, Insurance), **Jonathan W. Macklem** (Labor &

Employment – South; Labor and Employment), **Deborah Alley Smith** (Appellate, Energy and Natural Resources, General Commercial, Insurance, Product Liability, Professional Liability, Securities), **Sharon D. Stuart** (2018 Top 250 Women in Litigation; Labor & Employment Star – South; General Commercial, Insurance, Labor and Employment, Product Liability), and **M. Jansen Voss** (40 & Under Hot List; Health Care, Insurance, Product Liability, Wrongful Death).

- The attorneys of Christian & Small LLP are pleased to welcome the attorneys of Alford Bolin, LLC – Partner **Christina May Bolin** and Of Counsel Attorneys **Helen J. Alford** and **Gaby Reeves** – and announce that as of Sept. 1, 2018, the firm's Mobile/Baldwin County office began operating under the Christian & Small name.
- Partner and ADLA Immediate Past President **Sharon D. Stuart** was elected to the Birmingham Bar Association Executive Committee, serving Place 3. She also serves on the Board of Directors for the Attorneys Insurance Mutual of the South (AIM), Risk Retention Group, including its Executive, Underwriting and Marketing committees.
- Partner and ADLA President-Elect **Christina May Bolin** was appointed to the Parent Leadership Team at Spanish Fort High School – a new program where parents and school administration partner on the implementation of new school programs and policies.
- Christian & Small earned a **National Tier 3 Ranking for Mass Tort Litigation/Class Actions – Defendants** for the second consecutive year and a **Metropolitan Tier 1 Ranking in 13 practice areas** for the seventh consecutive year in the 2019 edition of *U.S. News & World Report and Best Lawyers'* "Best Law Firms" rankings. Three new practice areas were added to the firm's Metropolitan Tier 1 ranking for 2019: **Family Law Mediation, Real Estate Litigation** and **Construction Litigation**.
- Partner and ADLA member **M. Jansen Voss** was recognized by the Birmingham Business Journal as one of its 2018 Rising Stars of Law.

ADLA members **Clay Clark, Kelly May, Walter Price, Cannon Lawley, Joseph Duncan** and **Bryan Paul** are pleased to announce the formation of Clark, May, Price, Lawley, Duncan & Paul, LLC. Additional partners in the firm are **Charles Fleming, Jeremy Gaddy, Megan Jones**, and **Lauren Tice**. **Melissa Sinor** and **Caroline Sims** have joined the firm as associates. Clark May Price will focus on all aspects of civil defense litigation, including medical malpractice, professional liability, products liability, construction defects, insurance defense, and workers' compensation claims, at both the trial and appellate levels.

Fish, Nelson & Holden is pleased to make the following announcement:

- **Mike Fish**, has been elected as President of the National Workers' Compensation Defense Network. The NWCDN is a nationwide and Canadian network of independent law firms created to provide an organization where reputable law firms of high reputation and expertise could form a comprehensive network to provide employers and insurers access to quality representation in workers' compensation and related employer liability fields.
- **Mike Fish**, recently spoke at the National Workers' Compensation Defense Network's National Conference in Minneapolis. Fish, representing Alabama, participated in a panel discussion titled "What is the Value of a Compensable Claim in Your State." The panel addressed issues of wage calculation, full and final settlement options, future medical and final settlement options from injuries ranging from sprain/strain to surgical cases. Fish concentrates his practice on the representation of employers in workers' compensation defense matters and currently serves as President of the NWCDN.

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

- The law firm announces 17 attorneys have been selected by their peers for inclusion in the 2018 Super Lawyers listing. The list includes the following:
  Mid-South Super Lawyers:

  Tom Bazemore, Stan Cash, Clay Clark, Joe Duncan (new to listing), **John Herndon, De Martenson, Kelly May, Walt Price, Chris Rodgers, Jim Shaw, Gordon Sproule** and **Alan Thomas.**

  Mid-South Rising Stars:
  Jimmy Brady, Jennifer Egbe, Jeremy Gaddy, Megan Jones and **Stewart McCloud**
- ADLA members **Eris Bryan Paul** and **Gordon Jimmy Brady** have been selected for the 2018 edition of the Benchmark Litigation 40 & Under Hot List. This accolade honors the achievements of the nation's most accomplished legal partners of the age of 40 or younger. These emerging leaders have been deemed the most promising talent in their respective litigation communities in the United States by peers and clients.
- The firm welcomes three new attorneys. **Hillary Fisher, Kellianne Campbell** and **Barry Burkett** recently joined the firm as associates and are new members of ADLA.

- This year, several Huie partners received honors in new practice areas. For **Tom Bazemore**,Personal Injury Litigation - Defendants was added to his Best Lawyers listing. Additionally, **Jim Shaw** was honored for excellence in Transportation Law and **G. Jimmy Brady** was recognized in the Insurance Law category.

- Attorneys selected by their peers for inclusion include the following:
  Tom Bazemore- Insurance Law, Litigation – Insurance, Personal Injury Litigation Defendants, Product Liability Litigation – Defendants; **G. Jimmy Brady**- Insurance Law, Litigation – Insurance; **Stan Cash**- Medical Malpractice Law – Defendants, Personal Injury Litigation – Defendants, Product Liability Litigation – Defendants; **Clay H. Clark, Jr.**- Workers' Compensation Law – Employers; **Bob Girardeau**-Litigation – Real Estate, Professional Malpractice Law – Defendants; **H. Cannon Lawley**- Agriculture Law; **De Martenson**- Personal Professional Malpractice Law – Defendants; **T. Kelly May**- Litigation – Real Estate; **Walter Price**- Insurance Law, Litigation – Health Care, Litigation – Insurance, Medical Malpractice Law –Defendants; **Chris Rodgers**- Aviation Law, Transportation Law; **Gregory L. Schuck-** Product Liability Litigation – Defendants; **Jennifer Devereaux Segers**- Insurance Law Litigation – Insurance; **Jim Shaw**- Personal Injury Litigation – Defendants, Professional Malpractice Law – Defendants, Transportation Law; **Robert Gordon Sproule, Jr**.- Product Liability Litigation – Defendants; **J. Allen Sydnor**- Medical Malpractice Law – Defendants; **D. Alan Thomas**- Personal Injury Litigation – Defendants, Product Liability Litigation – Defendants

- ADLA Member **Alex Parish** joins the firm as an associate attorney. Parish, a lateral hire with previous defense litigation experience, joins the firm's medical malpractice, nursing home litigation and insurance coverage and defense practice groups. Parish is a member of the Alabama Defense Lawyers Association and the Birmingham Bar Association.

- ADLA member **Brent Almond** has been named partner in the firm. **Almond** defends clients in the areas of medical malpractice, insurance coverage litigation and bad faith, heavy equipment litigation and workers' compensation. Among other clients, Almond represents hospitals, physicians, heavy equipment companies and suppliers and insurance companies.

- Huie partners **De Martenson** and **Alan Thomas** were named Local Litigation Stars in Benchmark Litigation 2019. New to the publication this year, partners **Clay Clark** and **T. Kelly**

May were also recognized in the Labor & Employment Star – South category.

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

- ADLA member **Melody Eagan** has been selected for Leadership Alabama's Class XXIX. After a rigorous and competitive selection process, Eagan will be among the handful of leaders statewide to participate in the annual program.
- **Melody Eagan** has been named a National Law Journal Elite Boutique Trailblazer for 2018. Each year, the publication recognizes legal industry leaders who have made an impact in the boutique sector through new types of strategies or innovative court cases. After extensive vetting and interviewing, the National Law Journal selected a handful of attorneys out of hundreds of nominations. Eagan is profiled alongside the other honorees in the November issue.
- ADLA member **Lana A. Olson** has been elected Secretary-Treasurer of the Defense Research Institute, the leading organization of defense attorneys and in-house counsel.

  DRI's national elections were held at the organization's annual meeting in San Francisco in October 2018. With more than 22,000 members, DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation.
- ADLA members **Reid C. Carpenter** and **Jeffrey P. Doss** were elected as partners, effective January 1. **Carpenter** joined the firm in 2010 after graduating from law school. He maintains a general litigation practice with a focus on three key areas: natural gas, product liability and healthcare. Carpenter's clients include a natural gas operator, doctors and hospitals, and major manufacturers of industrial, agricultural and forestry equipment. **Doss** focuses his practice on white-collar criminal defense and complex civil litigation, in addition to conducting internal investigations for private and public entities. He has defended businesses and individuals in connection with grand jury investigations, administrative enforcement proceedings, and criminal prosecutions at the trial and appellate levels.

Rushton Stakely is pleased to make the following announcements:

- The firm is pleased to announce that seventeen of our attorneys were chosen for the 2019 edition of *The Best Lawyers in America*©. The selected lawyers are: **Dennis R. Bailey**, Bet-the-Company Litigation, Commercial Litigation, Communications Law, Litigation – Banking & Finance,

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Let ADLA help you find out about the Plaintiff's expert witness in your trial

ADLA's Expert Witness Database is a searchable list of inquiries from ADLA members regarding Plaintiffs' experts. Search our database by expert, specialty and location or request for an email blast inquiry to be sent out to fellow ADLA members. ADLA's email blast system can also be used to request a referral for a Defense expert.

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Mudd Bolvig Luke & Wells LLC
Birmingham

Jennifer Bottomley
Grace Matthews & Debro
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Barry Burkett
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Lauren Houseknecht
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Birmingham

Why APCAA? Because Knowledge is Power.

by David W. Sikes, APCAA President and AMIC Litigation Manager

Early in my career, my wife and I spent a vacation in Colonial Williamsburg. Today that town is one of our favorite places to visit, especially on the first Sunday in December for The Grand Illumination - the opening night of the Colonial Williamsburg Christmas celebrations.

On one of our trips, I acquired a small dish (see picture) which I have in my office.

Knowledge is Power.

Over the past several years, I began to understand a shortcoming in our industry sector as I was charged with interviewing new hire candidates for claims adjuster positions at Alabama Municipal Insurance Corporation (AMIC). Most candidates for these positions do not know what a "claims adjuster" is and once they start in the position, they are overwhelmed by how detailed and complex the job is. I'll have to admit that I remain overwhelmed, but I've learned to accept the stress and manage that in some interesting ways.

Over time, I have spoken with other claims adjusters in the state and my understanding developed to the point where I was able to articulate a simple problem statement: we (the Alabama insurance industry) are not building and promoting the Claims sector to the universe of college seniors in such a way to show that the insurance industry is a good career path, not just a "job."

The first step to solving a problem is to identify the problem. If you ask most claims adjusters who have been working for more than 15 years in the industry, they will likely tell you they "fell into the job." That's not a very good way to develop the future.

Our desire and vision for APCAA is to be an advocate for the education of our industry sector. Knowledge is Power.

By placing education first on everyone's mind, we will empower our claims adjusters to be better employees for our insurance carriers. We will train our membership to be stronger ethically and to exceed the expectations of our policyholders and claimants, as they are our customers as well. A claimant of one carrier is likely to be a policyholder of another. We will promote integrity within the industry as we strive for excellence. In doing all of this, we will strengthen our professional standards and we will make being an insurance claims adjuster a more attractive career.

Knowledge is Power. Nowhere else in the country is there a statewide insurance adjusters association that is working closely with that state's defense attorney association. Alabama has something very special with APCAA working closely with ADLA. The APCAA Board of Directors is committed to success and we would enjoy seeing you join us.

David is enjoying his 29th year as a property and casualty claims adjuster. He has worked as the Litigation Manager for the Alabama Municipal Insurance Corporation (AMIC) since 2011. In August 2018, he became President of the Alabama Property and Casualty Adjusters Association (APCAA). David was born and grew up in Anniston, Alabama.

CRAIG A. ALEXANDER
Chair

Greetings from the ADLA *Amicus Curiae* Committee. The Board of Directors of the ADLA recently approved an update to the policies and procedures that the Committee will follow when a request for an *amicus curiae* brief by the Association is received. One change is that the ADLA President is expressly recognized as having the final authority to approve a recommendation by the Committee to file an amicus brief. Another change is that both the President and the Chair of the Legislative Committee will be notified of any request for an amicus brief, which will provide an opportunity for a better identification of issues that are important to the ADLA, particularly with respect to issues that relate to the work for the Legislative Committee.

The new are set forth below, but please feel free to contact Craig Alexander if you have any questions about the policies or 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.

There have been no new amicus briefs filed, and there have been no decisions released in any appeals in which an amicus brief has been filed, since the Fall 2018 issue of the ADLA Journal was published.

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.

ADLA POLICY RE: REQUESTS FOR *AMICUS CURIAE* BRIEFS IN CASES IN WHICH AN ADLA MEMBER IS COUNSEL FOR AN ADVERSE PARTY

At ADLA's Board of Directors meeting on April 11, 2008, the Board voted to institute the following policy to be adhered to when a request for an *amicus curiae* brief is made in a case in which an ADLA member is counsel for an adverse party: (1) the request for an *amicus curiae* brief by ADLA will be considered solely on the basis of the issue presented, and membership in ADLA by a lawyer whose interest is adverse will not be a factor to be considered by the *Amicus Curiae* Committee in determining whether a brief should be submitted on behalf of ADLA; and, (2) the request submitted to the *Amicus Curiae* Committee and all attachments thereto, the names of the *Amicus Curiae* Committee members considering the request for the brief, the details of the deliberation process, the vote of the Committee members, and the name of the ADLA member who has been asked to write the brief shall remain confidential (with the understanding that the name of the attorney writing the brief will be disclosed when the brief is filed). At ADLA's Board of Directors meeting on June 13, 2013, the Board voted to institute a new ADLA policy precluding opposing counsel from having the opportunity to address the *Amicus Curiae* Committee.

ADLA POLICY RE: $3,000 PAYMENT OF FEE FOR PREPARATION OF *AMICUS CURIAE* BRIEF

ADLA's Board of Directors has approved the payment of up to $3,000 per *amicus curiae* brief to help underwrite the costs. In addition to the $3,000 fee, the Association will reimburse reasonable copying and binding costs associated with the brief. ADLA continues to adhere to the policy that no Association member can accept payment from any party for the preparation of *amicus curiae* briefs.

REQUESTS FOR *AMICUS CURIAE* BRIEFS

Please inform the Committee as soon as possible of issues on appeal that you believe would be of interest to the Association. The following information should be furnished with the request: (1) the name of the case and the appellate court where the case is pending; (2) a summary of the facts of the case and its procedural history; (3) a statement of all the issues of law involved in the appeal, identifying those issues with respect to which ADLA involvement is sought; (4) the date by which an *amicus* brief would have to be filed; and, (5) the consent of the attorney of record for the party in support of whom ADLA involvement is being sought. The request must be in writing to be considered by the *Amicus Curiae* Committee. Please submit the request to the Chair of the *Amicus Curiae* Committee at the following address:

Craig A. Alexander

Rumberger, Kirk & Caldwell, P.C.
2001 Park Place North, Suite 1300
Birmingham, Alabama 35203-2700
Telephone: (205) 572-4920
e-mail: calexander@rumberger.com

ADLA policy regarding *amicus curiae* briefs

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

CUMBERLAND LUNCH AND LEARN

Jonathan M. Hooks, ADLA District II Director

Jonathan M. Hooks and Denzel E. Okinedo, Third Year Cumberland Law Student

ADLA Hosts Samford University, Cumberland School of Law Lunch & Learn

In February, ADLA Board Member Jonathan Hooks, a partner at Christian & Small LLP (Birmingham), addressed students at Cumberland School of Law, speaking on "Rules for Success I Didn't Learn in the Classroom." He touched on the importance of effective networking and billing and the need for lawyers to be courteous, professional, and humble. He also encouraged them to a life of constant learning and effective management of stress in the practice of law.

ADLA is proud to sponsor young professionals in their legal education pursuits by awarding law school scholarships to our Law School Student Section. We're also thrilled to sponsor the University of Alabama School of Law, **Frederick Douglass Moot Court Team** and the Cumberland School of Law, **Thurgood Marshall Moot Court Team.** ADLA also works with the law student section representatives at the Faulkner Thomas Goode Jones School of Law to coordinate educational opportunities and foster leadership growth.

ADLA SPONSORS 14TH ANNUAL DON GARNER CHARITY GOLF TOURNAMENT

Faulkner Jones School of Law students, Hayes Ellett and Nick Key

This past October, ADLA sponsored the Don Garner annual charity golf tournament, held at Arrowhead Country Club in Montgomery. Each year the tournament raises funds that go towards the Faulkner Law Student Disaster Relief Fund. Third year law students Hayes Ellett, ADLA Faulkner Law Chapter President, and Nick Key both celebrated as their team placed 2nd in the tournament.

ADLA now offers a law school student membership category for current law school students in Alabama who have a strong desire to practice civil defense litigation. Membership applications for law school students are available at www.adla.org in the Law Student section of the website. For inquiries, please use the Reach Out tab form on the website or email us at adla@adla.org.

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On ADLA Members the Record

Nobody tells your story better than you do. Our new **ADLA Members On the Record** feature in the *Journal* will spotlight several members in each issue. ADLA members will give us the inside scoop on what makes them tick, their success (and challenges), and what being a member means to them. Chances are you just might learn something about a member that you would have never known.

Jonathan Hooks

Christian & Small, LLP | Birmingham

Where did you grow up and what college did you attend?
I grew up in Cahaba Heights (now Vestavia) in Birmingham. I attended Samford University and stayed there to attend Cumberland School of Law.

Most memorable moment on the job?
Years ago, when I spent some time as a solo practitioner, I took a call from a prospective new client. When I asked where they got my name, he responded that my phone number was written on a handmade cardboard sign, stapled to a utility pole, which read "Good Lawyer."

WHO DO YOU PULL FOR ON FOOTBALL SATURDAY'S?
THE ALABAMA CRIMSON TIDE. I AM IN A HOUSEHOLD OF AUBURN FANS, SO I USUALLY DO SO ALONE.

Unusual job perk?
It isn't unusual for litigators, but being able to travel and dine in so many interesting places is quite a treat.

What is the furthest you have traveled for work?
Newport Beach, California

What is the most rewarding aspect of your career?
Winning a case. It is wonderful to deliver good news to a client.

Most frustrating?
Billing time, of course.

Jonathan and Holly Hooks in Destin during 2017 ADLA Annual Meeting

What is your best advice to young lawyers? Two things:
1) Be courteous. Being adversarial often tends to breed contentiousness. Forcefully maintain your position, argue, and use all of the tools in your toolkit. But do so courteously.
2) This profession is not for the faint of heart. We deal with messy situations, our time is sometimes demanded to excess, and it isn't usually very glamorous. But it is a profession, and at its core, a worthy one. Maintain a healthy work/life balance, but within that healthy balance, give this profession everything you've got.

What was your biggest lesson learned when you started to practice that you didn't already know?
I am perpetually stunned to discover that "I don't know what I don't know." Practicing law is a life of learning new things, and one must be open to learning at all times. You never really know it all.

Why are you a member of ADLA?
I *joined* ADLA because it was what a defense lawyer did back when I started practicing. I have *stayed*, however, because of the value it delivers to my practice daily, from useful and timely information, to CLE programs that help me practice better, to the fellow members who have become close friends.

If you had to choose a different profession, what do you think you would want to do?
I'd probably become a physician. Well, that, or open a barbecue restaurant.

Who was/is your role model/mentor in the profession?
There are far too many to name, but chief among them would be Justice Bernard Harwood and my former partner Jim Carlson, both of whom have taught me the value of hard work combined with humility and sincerity.

Who do you pull for on football Saturday's?
The Alabama Crimson Tide. I am in a household of Auburn fans, so I usually do so alone.

What do you like to do in your spare time when you are not focused on work?
I enjoy travel, cooking, and general handyman work around the house.

What is the last book you read?
Wise Blood, by Flannery O'Connor

Favorite movie?
North by Northwest

Biggest Pet Peeves?
E-mails that answer "yes" to a question presenting alternative "this or this" choices.

This profession is *not for the faint of heart.* We deal with messy situations, our time is sometimes demanded to excess, and it isn't usually very glamorous. But it is a profession, and at its core, **A WORTHY ONE**. Maintain a healthy work/life balance, but within that healthy balance, give this profession everything you've got.

Favorite concert you've attended?
As a proud dad, the concerts of my youth pale in comparison to hearing my kids sing, especially with the very talented Birmingham Boys Choir. That said, Billy Joel put on quite the show back in the early 90s.

What is one of your most embarrassing moments?
As a very young law clerk, still during law school, I was asked to research a fairly simple bankruptcy question. I knew nothing about bankruptcy, and consequently I spent about 3 full days digging through old legal dictionaries and 100+ year old cases absolutely *convinced* that the answer lay in the meaning of one word. I don't remember the exact word, but it was a generic one like "contract" or "the". Not a great start to my career.

Hooks family- Jonathan, Holly, Jonathan Jr., Spencer, Mary Claire, and Andrew

If you could choose one ADLA member who has had a special impact on you, please tell us who and what you want us to know.
I can't name just one. But I will put special emphasis on my "core group" of fellow Deposition Boot Camp colleagues. Once a year, I am privileged to join Ben Heinz, Christie Estes, Stephen Still, Megan McCarthy, and (until recently) Christina Bolin and Bill Lancaster for a few days in March to teach new lawyers. The comradery is unmatched and I consider each of them an irreplaceable part of my ADLA experience.

Is there anything you want us to know about your family?
As I'm typing this, I'm waiting on my fifth child to be born. I don't deserve all I've been blessed with.

Jay Minus, Jr.
Phelps Dunbar LLP | Mobile

Where did you grow up and what college did you attend?
I grew up in Sumpter County, Alabama in the small town of Epes. I graduated from the University of Alabama in 1981 and obtained a business degree in finance. I graduated from Cumberland School of Law in 1985.

Most memorable moment on the job?
Defense verdict in a personal injury case against a commercial bus line and my client, the bus driver. My client had been terminated from the bus company for defending himself from an assault by an aggressive passenger who was attempting to board the bus. The trial was a very difficult week-long case in federal court which ended on the Friday before Hurricane Katrina made landfall on the Gulf Coast. My client had lost his job and benefits at the bus company as a result of the incident so he was very anxious about being sued for the same conduct. The Plaintiff was not visibly injured in the altercation but sued all defendants after he returned three days later from an out of state trip with a severe head injury requiring over $200,000 in medical bills. I was fortunate to try the case with two other talented ADLA lawyers who represented the bus line which made the case enjoyable. With Hurricane Katrina approaching the judge charged the jury at five minutes before 5:00 on Friday afternoon. The jury elected to proceed with deliberations despite the fact the City of Mobile was being evacuated. The verdict was returned in favor of my client as well as the bus line within five minutes of receipt of the case then we all headed home to begin storm preparations.

Unusual job perk?
My law office for 30 years was on Mobile's Mardi Gras Parade Route.

The Minus family enjoying time together at ADLA's 2013 Annual Meeting in Sandestin

The Luther and Minus families visiting at ADLA's 2017 Annual Meeting

With a gated fence and second story balcony it provided the best place in Mobile to bring my kids to almost every parade downtown.

What is the furthest you have traveled for work?
Portland, Oregon was the furthest but certainly not the most enjoyable. When I left Mobile for a deposition in Portland, I was excited about the opportunity to see Oregon after taking the deposition and I planned to stay an extra day to see the City and surrounding area. I flew out of Mobile to Atlanta, then direct to Portland and learned that moderate snow was expected in Portland at the time of our arrival. Unbeknownst to me, Portland rarely ever receives snow and I quickly learned that the city was as inept at dealing with snow as we are in Alabama. Weather conditions forced us to take the deposition at the airport hotel as well as stay there overnight. The entire city was essentially shut down as a result of the snow. Weather forecast indicated the show would not melt for several days so I rearranged my schedule to return to Mobile the next day. Without ever leaving the airport I returned the following morning to Mobile without seeing the City of Portland or any of the sights in that beautiful part of the country.

I was fortunate to be a member of a firm that saw the value of ADLA and encouraged me to become involved with the organization. My involvement quickly revealed that ADLA was not merely a professional organization that provided a platform to develop my practice, but it is an organization that provided an avenue to me as well as my family to develop lifelong friendships and contacts with other attorneys and families throughout the state.

What is the most rewarding aspect of your career?
Helping people in a time of difficulty, work through the problems that face them and being able to provide assistance with finding solutions.

Most frustrating?
Dealing with overbearing lawyers and/or clients particularly if the case involved is difficult on its own merit.

What is your best advice to young lawyers? Two things:

1. Pace yourself and try to find balance between your career and family life. The practice of law is said to be a "jealous mistress" which if allowed, can consume your all of your time. Make sure all of the things important to a balanced life are given the appropriate time they deserve.
2. Always take the high side in dealing with a difficult opposing attorney and never take unfair advantage of another colleague's mistake. Showing respect and professional courtesy when needed always yields the best results and more importantly, gives you personal job satisfaction.

What was your biggest lesson learned when you started to practice that you didn't already know?
Clients never forget and are forever grateful when they see you have "gone over and above" the requirements of the job for which you were retained.

Why are you a member of ADLA?
I joined ADLA early in my practice at the request of one of my senior partners. I was fortunate to be a member of a firm that saw the value of ADLA and encouraged me to become involved with the organization. My involvement quickly revealed that ADLA was not merely a professional organization that provided a platform to develop my practice, but it is an organization that provided an avenue to me as well as my family to develop lifelong friendships and contacts with other attorneys and families throughout the state. Participating in the ADLA Annual Meeting became one of the events my wife and children looked forward to each year because of these relationships and is something we looked forward to each summer. I have always treasured the relationships developed through the organization and look forward to more to come.

Laura, Jay, Leigh and Nancy Minus at Mardi Gras Ball in Mobile

If you had to choose a different profession, what do you think you would want to do?
I think I found the profession that was best for me but at times I thought I would have liked to be a physician.

ADLA member who has had a special impact on you – Pat Sefton served as President at ADLA during the same time I was an officer and also served as DRI State Representative before I served my term. Pat and I became friends and he always provided sound advice and leadership when I was President of ADLA and as DRI State Representative. Pat is liked by all who know him and is an example of what a leader should be.

If you could choose one ADLA member who has had a special impact on you, please tell us who and what you want us to know.
Pat Sefton served as President at ADLA during the same time I was an officer and also served as DRI State Representative before I served my term. Pat and I became friends and he always provided sound advice and leadership when I was President of ADLA and as DRI State Representative. Pat is liked by all who know him and is an example of what a leader should be.

Who was/is your role model/mentor in the profession?
Wes Pipes and Cooper Thurber taught me how to be a lawyer and made it a fun journey along the way.

Who do you pull for on football Saturday's?
University of Alabama

What do you like to do in your spare time when you are not focused on work?
I enjoy outdoor activities of all types. Hunting, fishing, boating and horseback riding are my favorites.

What is the last book you read?
Alabama Moon

Favorite movie?
My Cousin Vinny. It is a very entertain movie about the practice of Law in a small town. It reminded me of where I grew up.

Biggest Pet Peeves?
People who read their text and phone messages while they are trying to talk to you.

Favorite concert you've attended?
Linda Ronstadt in 1978 at University of Alabama.

Is there anything you want us to know about your family?
Nancy and I have been married for over 30 years and have four children, two boys and two girls. All of my children attended the University of Alabama. Not surprisingly, none of them accepted my advice to go into the practice of law, but all are successful in the professions they have chosen to follow.

Joseph, Laura, Matthew and Leigh Minus

Jeremy W. Richter

Webster Henry Bradwell Cohan Speagle & DeShazo PC
Birmingham, AL

Where did you grow up and what college did you attend?
I grew up in Lewisville, Texas. I went to undergrad at Tennessee Temple University in Chattanooga and got an M.A. from UAB.

Most memorable moment on the job?
When I had to pull my client out of a deposition three different times to tell him to stop giving sarcastic answers and smarting off to opposing counsel. I apologized to the other lawyer after the deposition. He told me not to worry about it, then winked and said, "The jury's going to love him."

What is your best advice to young lawyers? Two things: Be coachable – be willing to listen to feedback, then apply it. Develop the ability and mindfulness to perform self-assessments.

Unusual job perk?
My firm has always let me be ambition with marketing efforts as long as I could explain why I wanted to do a particular thing and/or could show some return on investment.

What is the furthest you have traveled for work?
I once took a deposition in a casino near Wichita, Kansas.

What is the most rewarding aspect of your career?
Working with clients.

Most frustrating?
Working with clients.

What is your best advice to young lawyers? Two things:
Be coachable – be willing to listen to feedback, then apply it. Develop the ability and mindfulness to perform self-assessments.

What was your biggest lesson learned when you started to practice that you didn't already know?
I'm pretty calm under pressure and it takes more than I would have thought to get me stressed out.

Why are you a member of ADLA?
I'm always trying to learn from like-minded people who have more experience than me.

If you had to choose a different profession, what do you think you would want to do?
A historian or a medical doctor. And yes, I realize those are two very different things.

Who was/is your role model/ mentor in the profession?
Kim DeShazo

Who do you pull for on football Saturday's?
Texas Longhorns – it's been a rough decade.

What do you like to do in your spare time when you are not focused on work?
Hang out with my wife and kids. Go fly fishing (rarely). And work on writing my next book.

Pictured are Jeremy, Anna, Jack and Caroline

WHO DO YOU PULL FOR ON FOOTBALL SATURDAY'S?
TEXAS LONGHORNS – IT'S BEEN A ROUGH DECADE.

What is the last book you read?
Blink by Malcolm Gladwell

Favorite movie?
Apollo 13

Biggest Pet Peeves?
Working on someone else's Microsoft Word document when the formatting is haphazard and illogical.

Favorite concert you've attended?
Needtobreathe at the Alabama Theatre.

What is one of your most embarrassing moments?
There are so many to choose from – when I was teaching myself to ride a motorcycle (after buying one), I turned to widely and drove through a brush pile, while my friends were in a car behind me watching the scene unfold.

If you could choose one ADLA member who has had a special impact on you, please tell us who and what you want us to know.
Stacy Moon has been very supportive and helpful to me over the last couple of years that I've known her.

Is there anything you want us to know about your family?
If everyone had a family like I've been blessed with, the world would be a better place. Also raising children is much scarier, more tiring, and far more rewarding that I could have imagined.

Lana Olson
Lightfoot Franklin & White LLC | Birmingham, AL

Where did you grow up and what college did you attend?
I grew up in a college town, Gainesville, Florida, home to the Florida Gators. When it came time for me to go to college though, I attended the rival university, Florida State. My dad took me to college in an orange and blue former Gator basketball team van in protest. My brother went to FSU also, and our Thanksgivings were always interesting with half the family cheering for UF and half cheering for FSU!

Most memorable moment on the job?
If by "memorable" you mean frightening, then that's an easy question. As a young lawyer, I went with an environmental expert to conduct stream sampling and investigation in Texas. I was wearing waders that were too big for me because I could only find men's sizes and they were not snake proof (which, as it turns out, was an important feature). While making our way down the stream, I turned and saw a huge water moccasin swimming towards me in full attack mode (or so it seemed to someone who detests snakes). To say that I freaked out is an understatement. Because we were

Maggie collects art supplies at ADLA Top Golf event

videotaping some of the stream features it just so happens that this episode was caught on film. I did not end up getting attacked by the snake, but my expert team had a giant laugh and still remind me about it every time I see them to this day!

Unusual job perk?
This is going to sound crazy, but a few years ago we added freshly brewed (and delicious) sweet tea to our drink assortment in our kitchen. As a sweet tea lover, I rejoiced at the new addition! I don't drink coffee, so you can find me every morning near the sweet tea dispenser getting my caffeine fill.

What is the furthest you have traveled for work?
I've been very fortunate over the years to have had the opportunity to travel to lots of great places for work, including a number of cities in Europe. I'm not sure which one is the farthest away, but my favorite place so far has been the Amalfi Coast in Italy.

I've been very fortunate over the years to have had the opportunity to travel to lots of great places for work, including a number of cities in Europe. I'm not sure which one is the farthest away, but my favorite place so far has been the Amalfi Coast in Italy.

Lana recently visited Zurich for a DRI International Seminar-Women in the Law meeting

What is the most rewarding aspect of your career?
I have such a wonderfully fulfilling legal career. I work for a firm where I really like the folks I work with and find the work incredibly interesting. I learn something new every day. I also have really enjoyed my involvement in DRI, which has provided me with a tremendous network of friends and colleagues outside of my firm. I am thankful to work at firm a who has supported me through the years, both inside and outside our law firm.

Most frustrating?
Airline delays/cancellations and lost luggage!

What is your best advice to young lawyers? Two things:

1. Ask for feedback, not just from partners, but from other associates and friends. Always try and figure out how to do things better. If you identify things that need work, execute a plan for how you can improve. And don't stop doing it once you become a partner. For example, every time I speak, whether to a jury or to a room full of other lawyers, I always ask for feedback on what I could have done better.
2. Don't wait to think about business development until you are a partner, but don't stress about it either. There are easy things you can do starting with day one that can make a difference for your career later. Keep up with law school friends and start building your network. Find opportunities to get out of the office and volunteer to write, speak, help with bar associations and industry groups. As someone told me once, making partner is not just a reward for being a great associate, it's a vote of confidence that you can do great things in the future.

What was your biggest lesson learned when you started to practice that you didn't already know?
How much lawsuits cost. I really had no idea. I'm fortunate that I had a great mentor who worked with me early on and taught me about budgeting, billing, requests for proposals, etc.

Why are you a member of ADLA?
I have been a member of ADLA since my first year as a lawyer because I knew that being successful required more than just sitting behind a desk and billing hours. I knew that professional relationships are important and that I needed to be aware of issues affecting the defense bar in Alabama. ADLA provides all of that for me and so much more.

If you had to choose a different profession, what do you think you would want to do?
I'd be an executive for a non-profit corporation. I've really enjoyed the opportunity to give back and would love to be able to use my experience as a lawyer to make the world a better place.

Who was/is your role model/mentor in the profession?
I'm lucky to have had many role models and mentors in my legal career, both inside and outside of my firm.

Lana Olson and daughter Maggie

Who do you pull for on football Saturdays?
Roll Tide!

What do you like to do in your spare time when you are not focused on work?
I really value the time I'm not focused on work and enjoy spending as much time as I can with my daughter Maggie. She is at such a fun age, so I try and find as much time as I can to be with her. I know I only have a few more years before I have a teen in the house so I'm trying to make the most of it!

What is the last book you read?
I just read (for the second time) a great historical fiction book called The Nightingale. It's fantastic.

Favorite movie?
Still love Shawshank Redemption. I like a lot of movies, but that one has stood the test of time as one of my favorites.

Biggest Pet Peeves?
People at the airport who stand right in front of the luggage carousels so that no one can see when their luggage comes around or get to it. Drives me crazy.

Favorite concert you've attended?
I took my 8 year old daughter Maggie to the Taylor Swift concert a few months ago. I told everyone I was going for her, but I have to admit I think I enjoyed it as much or more than she did! It was a fabulous show and I'd go see it again in a heartbeat!

What is one of your most embarrassing moments?
I could write a book on this topic! Perhaps the most embarrassing was spilling a full glass of red wine on a client as a very young lawyer during one of my first work dinners. He was very gracious, thankfully, but it took me a while to live that one down. I have learned over the years that you can't take yourself too seriously in this job and that a good laugh can go a long way!

I have such a wonderfully fulfilling legal career.

If you could choose one ADLA member who has had a special impact on you, please tell us who and what you want us to know.
I'm really proud of our managing partner, Melody Eagan, who served as the President of ADLA several years ago. She has always been a role model, so it was really great to watch her get to serve in that capacity.

Find opportunities to get out of the office and volunteer to write, speak, help with bar associations and industry groups. As someone told me once, making partner is not just a reward for being a great associate, it's a vote of confidence that you can do great things in the future.

Is there anything you want us to know about your family?
I have an 8 year old daughter, Maggie. I'm not sure what I did right to deserve her, but I'm so thankful every day that I get to be her mom. She has really enjoyed getting to go with me on a number of my work trips and has made friends all over the country. She also loves helping with public service projects that we've participated in, both for ADLA and for DRI. She's even been featured in the ADLA magazine! She is in second grade and attends Highlands School, where her favorite subjects are art, music, drama and recess. When her class did a project about what you want to be when you grow up, Maggie came home with the project collage for her class. Unlike the other kids, who held signs saying they wanted to be a doctor, lawyer or astronaut, Maggie's sign proudly declared: "Pop Star." Oh boy…..

Michael Upchurch

Frazer Greene Upchurch & Baker LLC | Mobile, AL

Where did you grow up and what college did you attend?
My father was a pilot in the Marine Corps and we moved a lot. I went to four different high schools in four years, so my prom dates had to have a fondness for strays as well as below average eyesight. I went to James Madison University for college. I worked in a hardware store my senior year in high school and didn't want to go to college but my parents insisted. Robbie, my assistant manager at Handyman Home Center, had gone to school at Madison College, so I applied there – late. (Madison College became James Madison University my sophomore year). It was the only school I applied to and the first time I saw the campus was the day I moved in. Attending James Madison University was the most dysfunctional big decision I have made, but also one of the best.

Even nicer than Montgomery

Most memorable moment on the job?
My first trial, which I lost. I was worse than terrible, and I learned that I had to work hard to get better. I was surprised that I could survive losing, but I never wanted to go through that pain again if I could avoid it. (As it turned out, I could not avoid it.)

I got in ADLA because I thought I shouldn't turn down any organization willing to let me be a member. I stayed in because of the many, many friends I made in ADLA and how much I learned from them.

Unusual job perk?
Developing friendships with opposing lawyers. Funny how that happens.

What is the furthest you have traveled for work?
I had to tough out depositions in the Bahamas once. India (several years ago) would have been, but I declined to go and we participated in the depositions by phone. I understand that one of the lawyers who did travel to India never made his connection back to the United States. He reportedly is still sitting glassy-eyed in some smoky Amsterdam café, eating brownie after brownie wondering how the case turned out.

What is the most rewarding aspect of your career?
I would say winning, but somehow the wins do not bring as much satisfaction as the losses leave scar tissue. Actually, the best part has been the friends I have made along the way and all the interesting people I have met.

Most frustrating?
Not doing as good a job as I should have for my client. That, more than anything else, is what has kept me wide awake some nights tossing and turning.

What is your best advice to young lawyers? Two things:
1. Do not take yourself too seriously.
2. Do not let the fear of failure hold you back – take risks and put yourself on the line when you need to. #2.5 Find the best in your opponents and in our profession – don't be a hater.

What was your biggest lesson learned when you started to practice that you didn't already know?
All these other lawyers I was encountering had self-doubt too, they just hid it. (Except my friend Buddy Brown, who had his self-doubt removed surgically.)

Why are you a member of ADLA?
I got in ADLA because I thought I shouldn't turn down any organization willing to let me be a member. I stayed in because of the many, many friends I made in ADLA and how much I learned from them.

If you had chosen a different profession, what do you think you would want to do?
College professor: tweed sports coats, smoking a pipe, a captive audience and no judge or opposing lawyer to bother me. Sweet.

Who was/is your role model/ mentor in the profession?
Danner Frazer: the best lawyer I know.

Who do you pull for on football Saturdays?
Michigan Wolverines. I lived in Detroit until I was in second grade and then moved south, but my sports loyalties were permanently forged in Michigan. (I have been allowed to stay in Alabama because I was able to prove that there was a signed photograph of Bear Bryant in my Sigma Nu fraternity house.)

What do you like to do in your spare time when you are not focused on work?
Hunt without shooting anything, play golf at levels rarely reached by sentient beings (and not in a good way) and attempt to repair things around the house right before making a frantic call to the plumber, electrician or contractor.

Mary, Carolyn and Richard

What is the last book you read?
High Noon: The Hollywood Blacklist and the Making of an American Classic by Glenn Frankel. (So as not to give a false impression of my intellect or maturity, I enjoyed the movie *Ace Venture Pet Detective* – a lot.)

Favorite movie?

When I was very young, *Mary Poppins.* After I saw it I jumped off our roof holding an umbrella because I thought maybe I could fly too. Fortunately, we lived in a low one story house with a spongy backyard. My favorite lawyer movie is *Anatomy of a Murder* with Jimmy Stewart, George C. Scott, and Joseph Welch as the trial judge. Before turning to acting, Welch famously stood up to Senator Joseph McCarthy in a televised hearing when McCarthy accused Fred Fisher, a young lawyer in Welch's law firm, of being a Communist: *"Fred Fisher is a young man who is starting what looks to be a brilliant career with us … Little did I dream that you could be so reckless, and so cruel, as to do an injury to that lad … Have you no sense of decadency, sir; at long last, have you no sense of decency?"* The date was June 9, 1954. Welch was Chief Counsel for the U.S. Army, which McCarthy's Senate Permanent Subcommittee on Investigations claimed was harboring Communists. McCarthy made the mistake of attacking Fisher to undermine Welch. Welch, credited with turning public opinion against McCarthy and his bullying, died a little more than a year after *Anatomy of a Murder* was released.

Biggest Pet Peeves?

I don't have any peeves. I have a dog, and had a gerbil once. Peeves are too much trouble and they are impossible to teach tricks to.

Favorite concert you've attended?

John Prine when I was in college, in a very small theatre. He sang like was wounded and had a simple, honest way of telling stories in his music. He had a raspy voice, looked rough and might not have been sober, but I was used to that from living in my fraternity house.

What is one of your most embarrassing moments?

Most occur in my dreams leading up to trial and are too awful to reveal in public. While awake, I defended a police officer in an excessive force case once. During voir dire I asked who was familiar with handcuffs. A sweet young lady raised her hand timidly. I asked a series of questions trying to understand the circumstances of her experience. I was very focused. Too focused. I was the last person in the courtroom to figure out that her familiarity with handcuffs was through recreational use with her boyfriend.

I don't have any peeves. I have a dog, and had a gerbil once. Peeves are too much trouble and they are impossible to teach tricks to.

If you could choose on ADLA member who has had a special impact on you, please tell us who and what you want us to know.

Bill Gamble is fearless, blunt, intensely competitive and a lot of fun. He is a lawyer's lawyer. Bill got me involved in ADLA when he was President and encouraged me to write the articles for young lawyers that ran in the Journal for a number of years. Former Executive Director Ed Livingston also was a good friend who agreed to be my partner at ADLA golf outings, and was every bit my equal as a player (Sorry, Ed).

Is there anything you want us to know about your family?

My wife Knight retired prematurely from a successful career as a lawyer to raise our three children. She is by far the most accomplished of the two of us. My children Mary, Richard and Carolyn, now adults, are kind, smart and loyal. (My wife, again.) Each also has a wonderful sense of humor, which on occasion they use at my expense.

No skeeters!

I wrote opinions short, all while standing tall.
One freely spoke of fire;
Another, of interstate baseball.

WHO AM I? (Provide name and position)
WHAT ARE THE TWO REFERENCED OPINIONS? (Provide the two case names)

The first ADLA member to respond with the correct answers to adla@adla.org will win a $100 Amazon gift card. Good luck!

among the members

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Litigation – Intellectual Property, Litigation – Labor & Employment, Litigation – Real Estate, and Product Liability Litigation – Defendants; L. **Peyton Chapman**, Medical Malpractice Law – Defendants; **Alan T. Hargrove**, Insurance Law, and Litigation – Insurance; **William S. Haynes**, Medical Malpractice Law – Defendants, and Personal Injury Litigation – Defendants; **R. Austin Huffaker, Jr.,** Appellate Practice; **Paul M. James, Jr**., Personal Injury Litigation – Defendants; **Thomas H. Keene**, Medical Malpractice Law – Defendants, and Personal Injury Litigation – Defendants; **Patrick M. Shegon**, Medical Malpractice Law – Defendants; **Frank J. Stakely**, Medical Malpractice Law – Defendants, and Personal Injury Litigation – Defendants; **Fred W. Tyson**, Medical Malpractice Law – Defendants, and Personal Injury Litigation – Defendants; **Benjamin C. Wilson**, Litigation – Healthcare, and Litigation – Labor & Employment.

- **Dennis R. Bailey** has become a Fellow of the American College of Trial Lawyers, one of the premier legal associations in North America. Fellowship in the College is extended by invitation only and only after careful investigation, to those experienced trial lawyers of diverse backgrounds, who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of fifteen years trial experience before they can be considered for Fellowship. **Bailey is also currently serving as ADLA's 2018-2019 president.**

ADLA member **Craig Alexander** of Rumberger, Kirk and Caldwell, moderated a panel discussion during the annual meeting of the Association of Professional Responsibility Lawyers in Las Vegas January 24-26, 2019. The subject of the panel discussion was the ethical implications of the use of artificial intelligence in the practice of law. The panel consisted of Andrew Arruda, the CEO and founder of Ross Intelligence, and attorneys Fred Ury (Fairfield, CT), John Browning (Dallas, Tx) and Allison Wood (Chicago, IL).

Webster, Henry, Bradwell, Cohan, Speagle & DeShazo, PC is pleased to make the following announcements:

- ADLA member **Jeremy W. Richter** has been named a Shareholder at its firm. Richter is based in the firm's Birmingham office.
- ADLA member **Tamera K. Erskine** has been named a Shareholder at its firm. Ms. Erskine is based in the firm's Birmingham office.

SAVE THE DATE
for ADLA's 2020 & 2021 Annual Meeting

June 18-20, 2020
June 17-19, 2021
Sandestin Golf & Beach Resort

Mark your calendars and make plans to join us!

Visit our website often at www.adla.org

ADLA
ALABAMA DEFENSE LAWYERS ASSOCIATION

ESI Discovery and Evidence: Find it, preserve it, and present it
March 7
Webinar

Deposition Boot Camp
March 21-22
Faulkner Thomas Goode Jones School of Law | *Montgomery*

Women in the Law Margarita Mixer
April 9
Jalapenos in the Alley | *Montgomery*

Premise Liability- How to Defend Against Slip, Trips & Falls
April 11
Webinar

Women in the Law Wine Mixer
April 16
The Wine Loft | *Birmingham*

Women in the Law From the Courthouse To the Capitol
April 17
Montgomery

2019 Annual Meeting
June 13-15
Sandestin Golf and Beach Resort | *Destin, FL*

Bibb Allen Memorial Trial Academy
August 8-9
Samford University Cumberland School of Law | *Birmingham*

Visit https://adla.org/events/

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