

# JOURNAL

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**CHRISTINA MAY BOLIN**  
President

**W**e had your typical American family vacations when I was a child. We loaded up the station wagon and drove upstate to spend some time on the lake and in the woods. For a city kid like me, it was something to look forward to all year. My parents worked really hard to be able to get us out of the city and give us some freedom to roam, or in my case, get lost. They worked not to give us things, but

a bike for inner city kids in Chicago. I have travelled from one end of this country to the other; from East and West and top to bottom. Every summer, my family and I get to spend a few days at the beach. My children are now at the age that they want to bring their friends along in hopes that no one will know they have parents, but still call it our “family tradition.” It is with absolute certainty that I tell you that none of these things would have happened absent my involvement in the Alabama Defense Lawyers Association. My active involvement here has led to my participation and leadership in not only in ADLA, but in other national and international legal organizations.

It did not happen overnight. It started with me as a new associate being “voluntold” to assist in the preparation of ADLA’s first Deposition Boot Camp. I attended Trial Academy as a student. I bugged the right people long enough that I was on the faculty of the Boot Camp, then Trial Academy. I took over as Journal Editor and did that job for years. I was appointed as a board director, then ultimately got to be your ADLA President. I both earned and was given that privilege for a few reasons. I asked for it. I worked for it. Lastly, I was fortunate to have mentors who guided me

opportunities that they did not have.

I was sixteen the first time I got to fly in an airplane. My sisters and I divided up legs of our flights to and from LaGuardia to Orlando so that we could each have a turn looking out the window. I was in my early twenties the next time I flew. If someone had told sixteen year old me that getting on an airplane would be a regular event, I would never have believed you. I couldn’t have because I did not really understand that I lived in that world. My career has lead me to a life that this city kid never could have dreamed.

I have met interesting, important, funny and kind people. I have made business connections and met new or potential clients. I sat in a room in San Francisco and listened to Condoleezza Rice speak. I met Jack Hanna and Frank Abignale in Orlando. I was awed and humbled by Ruby Bridges in New Orleans. I helped build

and pushed me along the way. I got to make my mark on this organization and am proud of the things we have accomplished together during all my time with ADLA.

So in this my last column as ADLA President, I challenge all of you. Ask. Get involved. Work. Realize how fortunate you are and look around you for someone who needs or wants the same opportunity. Bring them along. Stuff the backpack. Build the bike. Come to the meetings. Be present and look ahead. The opportunities are right here. Come get them. 

*So in this my last column as ADLA President, I challenge all of you. Ask. Get involved. Work. Realize how fortunate you are and look around you for someone who needs or wants the same opportunity. The opportunities are right here. Come get them.*



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**JENNIFER HAYES**  
Executive Director

**A**DLA is off to a great start this year, thanks to the support and commitment of the membership. I'm pleased to report that ADLA has welcomed over 60 new members since August 1st. Our goal is to double that number by June 30th. The 2020-2021 membership campaign recently kicked off on February 15th. ADLA membership is 950 members strong, of which 270 are young lawyers. The Women in the Law Committee has

worked hard over the past year to recruit new members and provide networking and CLE events to focus on their interests. Currently, there are 205 female members, representing just over 20% of the overall membership.

Membership dues continue to provide quality CLE opportunities and other various events throughout the year.

Free webinars, statewide networking mixers, Lunch & Learns, and philanthropy events are just a sample of what the members can expect from their dues investment. I encourage each member to help recruit at least one new member during our membership campaign. Also, let's work hard to make sure we include each incoming young associate.

Many of our seasoned members who served in an ADLA leadership role will tell you they initially joined because a leader in their firm signed them

up for membership as a young associate.

Unfortunately, March delivered a big surprise to everyone- the coronavirus pandemic. ADLA is only a few months away from the Annual Meeting at the Sandestin Golf and Beach Resort in Destin, Florida. We remain optimistic and are proceeding on schedule at this time. ADLA leadership continues to monitor the coronavirus situation and will notify members of any program changes. Join us on June 18th-21st for another excellent conference at the beach, and please bring the entire family. The conference will be at the Baytowne Conference Center. The family-friendly nightly receptions are always a hit with our members and sponsors. We have exciting activities planned for the kids again this year; they will not leave disappointed! The meeting agenda, online registration, and hotel reservation information are on ADLA's website at <https://adla.org/event/2020-annual-meeting/>. Make your reservation early; the resort is expected to sell out. Support ADLA's contracted room block and receive discounted room rates. The room block cut off date is May 18th, based upon availability.

Please take the time to visit the website often and look for ADLA's electronic newsletter, the *Wednesday Briefcase*. It's our goal to make sure you stay informed of all association news and events. Don't forget to follow ADLA on Twitter, LinkedIn, and Instagram. In this issue of the *Journal*, catch up on recent ADLA events, news, and member highlights.

As always, if there is anything ADLA can do for you, please reach out to me directly at [jhayes@adla.org](mailto:jhayes@adla.org) or call the office at 334-395-4455. 

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

It's important to us to keep our members informed. Each week members receive timely information on association events, legislative updates, important news bites and more. Please contact us at [adla@adla.org](mailto:adla@adla.org) if you are not receiving the e-newsletter.

# PRIMAL SOLUTIONS: A BRIEF EXPLORATION OF THE UNEXPECTED AND UNDERAPPRECIATED ROLE OF EMOTION IN NEGOTIATIONS



“In a negotiation, particularly in a bitter dispute, feelings may be more important than talk.”  
Roger Fisher,  
*Getting to Yes*

By: Stephen D. Palmer, Carr Allison | Birmingham, AL



## I. Introduction

At the risk of stating the obvious, the role that emotions play in negotiation is not generally well understood or valued. Perhaps this is rooted in our dualistic philosophical inheritance that created a troubling dichotomy between “elevated” reason and “primal” emotion,<sup>1</sup> perhaps Freud has simply made Westerners squeamish about and suspect of emotions, or perhaps lawyers simply operate in a pervasive legal culture that denigrates the importance of emotion.<sup>2</sup> For whatever reasons, emotions are often marginalized in the negotiation process, and the disputants are not treated first and foremost as humans but rather as abstract positions.<sup>3</sup> However, given the potentially enormous time and expense associated with protracted litigation, disputants are increasingly seeking negotiated resolutions, so the lawyer who wishes to maximize her client’s opportunity for an efficient and beneficial outcome does well to understand the various forces at play in a negotiation—including the potential role of emotion.

## II. The Evolution of Emotions

Before we can examine what role emotions might play in negotiations, we must first take a moment to look at what emotions are, why they are important, and how they connect us socially. There are numerous ways to describe and account for emotions - social, neurobiological, psychologi-

cal, clinical, philosophical, and spiritual - but one particularly productive approach, for our purposes, is to view emotions through the lens of evolutionary neuropsychology.

According to evolutionary neuropsychology, emotions, and the human brain that produces them, were forged through the process of natural selection that operated over thousands of generations to favor organisms with adaptations and mutations, including psychological ones that were advantageous

to survival and reproduction.<sup>4</sup> Thus, one key to understanding why the brain functions the way it does today, (specifically, why we have emotions), is to examine how various cognitive developments, (such as emotions), might have helped our distant ancestors solve certain environmental, social, and reproductive pressures given finite cognitive resources<sup>5</sup>.

One theory is that emotions created an evolutionary advantage over the competition by allowing a person to react quickly, automatically, appropriately, and instinctively given any number of situations. Thus, in computational terms, “emotions can be conceptualized as software programs that orchestrate the mind’s many tools into the configuration best suited to complete a particular task.”<sup>6</sup> For example, when danger approaches, the brain triggers the corresponding emotional preset program of fear, prioritizing the goal of survival over other goals (such as sleeping, eating, or mating) and judiciously allocates mental and physical resources (such as adrenaline for running) that best serve this purpose. Emotions are like

*The role that emotions play in negotiation is not generally well understood or valued.*

computer dashboard shortcuts to prepackaged cognitive applications in the brain that provide efficient ways to solve particular objectives.

In addition to being a highly efficient way of pre-bundling and prioritizing computational cognitive modules, emotions are, to an extent, invisibly communicable and they bind us together socially in profound ways. In contrast to “closed-loop” systems, such as the circulatory system, where others’ systems do not impact our own, our emotions are on the “open-loop” of the limbic system “whereby one person transmits signals that can alter hormone levels, cardiovascular function, sleep rhythms, and even immune function inside the body of another.”<sup>7</sup> Through this open loop (or “limbic resonance”), “our physiologies intermingle, our emotions automatically shifting into the register of the person we’re with”<sup>8</sup> creating a “symphony of mutual exchange.”<sup>9</sup> This communicative property of emotions, (also called “emotional contagion”), has been recreated and artificially manipulated in clinical studies showing that an individual can successfully influence the positive emotions of a group, thereby eliciting “improved cooperation, decreased conflict, and increased perceived task performance.”<sup>10</sup>

Emotions are a powerful part of our primal selves and are an unavoidable aspect of all human subjective experience - including negotiation - where they can effect individuals, the group, the process, and the result.

### III. The Unexpected Role of Emotion in Negotiation

Modern day legal negotiations are a far cry from the circumstances of our ancient hunter-gatherer ancestors, but given that our primal emotive systems have not turned off in the modern era, we should not be surprised that emotions continue to inform the way we experience and respond to the world and those around us - including at the negotiation table.

In terms of positive effects on negotiation, emotions have a “consistently dramatic”<sup>11</sup> effect on mutual, but not on individual gains.<sup>12</sup> Social scientists have shown that it does not take much manipulation of mood to produce effects on a negotiated outcome. For example, students induced to have even mildly better emotional states, *e.g.*, by smelling a pleasant scent, viewing a funny short video, receiving a small gift, or reading a funny comic, achieved more joint gains than those in control groups.<sup>13</sup>

Scholars have hypothesized several possible reasons for this phenomena and have variously credited the decreased use of aggressive behaviors,<sup>14</sup> more “flexible, creative, integrative, and efficient” thinking,<sup>15</sup> and the fact that positive emotions trigger the release of the neurochemical dopamine with improving in cognitive functionality.<sup>16</sup> A more straight forward explanation is that, by expressing and being open about your emotions, you provide the other party with important information about your interests and the way you want to be treated, which, in turn, makes it more likely that a mutually beneficial solution will be found.<sup>17</sup> Whatever the specific cause, the jury is in - negotiators who are in a good mood

generate more joint interests-based gains and increase their problem solving abilities, creativity, and empathy.<sup>18</sup> Said another way, the cultivation of positive emotion may be one the most “effective lubricants” to move a “stuck” negotiation into one that produces joint gains.<sup>19</sup>

In contrast to the clear research demonstrating the benefits of positive mood on joint gains in a negotiation, the findings on individual gains are far less consistent, and most studies showing that “positive moods do not have any significant effect on individual gains.”<sup>20</sup> Negative emotions, however, do seem to produce positive individual gains in distributive negotiations where an expression of anger is likely to garner a negotiator a larger portion of the proverbial pie.<sup>21</sup> This makes sense from an evolutionary

stand point, since displays of anger could have functioned as a way to fend off competition or persuade others to acquiesce rather than becoming victim of violence.

Paradoxically, in addition to positive emotions’ positive effects on joint gains, positive emotions also can have negative effects on an individual party’s negotiated outcome. For example, sympathy can be exploited, optimism can lead one to think that he is getting a better deal than he actually is, and “overly happy negotiators may

be more susceptible to certain cognitive biases that lead them to form suboptimal agreements that insufficiently satisfy their interests.”<sup>22</sup>

Nonetheless, negative emotions deserve the lion’s share of blame for emotionally induced negative effects in negotiations. Perhaps this is because “the human propensity for defensive and reactive behavior” leads many negotiations to fail when agreement would otherwise make sense.<sup>23</sup> Whatever the cause, negotiators in negative moods are less likely to explore value-creating options, and, once a resolution is reached, the negative “emotional residue” may become the “seeds of future conflict.”<sup>24</sup> Likewise, higher rates of anger, combined with lower concern for the interests of other parties (no surprise) leads to negotiators identifying fewer opportunities for tradeoffs and reaching agreements with fewer joint gains.<sup>25</sup> Negative emotions also are associated with poor judgment, less concern about others, distraction from a party’s real interests,<sup>26</sup> and parties in negative moods use more threats, make fewer deals, and tend to break the deals they do make.<sup>27</sup>

In sum, the research shows, generally speaking, that positive moods lead to greater joint gains and can lead to suboptimal individual outcomes and, while negative moods can lead to more individual gains in certain situations, they also carry with them the likelihood of deleterious effects on current and future negotiations.

### IV. Typology of Approaches to Using Emotions in Negotiation

Now that we have established how emotions can influence negotiations, we can explore how a negotiator might best capitalize on these insights in practice. Given the clinical research on the beneficial effects of mild positive

*Emotions are like computer dashboard shortcuts to prepackaged cognitive applications in the brain.*

*Legal negotiators owe it to their clients, themselves, and society at large to understand and use emotions for “getting to yes.”*



mood inducers on negotiations, one might be tempted to simply play calming music or spray a pleasant scent in the room, but putting such wooden appropriations of the underlying scientific research into practice likely would be interpreted as bizarre behavior, unacceptable emotional manipulation, and, most importantly, would be unlikely to work, as mild positive mood inducers typically do not last long enough to influence a negotiation.<sup>28</sup>

Nonetheless, in theory, parties who understand the role of emotion in negotiation should be “empowered with a fuller panoply of resources” in deliberative problem-solving. However, determining exactly how to translate this general theory into specific best practices is not straight forward and has led to a wide spectrum of advice ranging from unabashedly self-serving tactics, to a focus on anticipating the emotional landscape in the room, to good faith attempts to clear the air and understand each other better.

#### **The Machiavellian Approach**

Some advice focuses on using emotion as a Machiavellian - like tactic that can be exploited when it best suits the user’s advantage. For example, it may be a tactical prophylactic at times to conceal one’s genuine feelings to prevent an opposing party from gaining an advantage, *e.g.*, when an opposing party makes a really good offer during informal negotiations, it would be to the receiving party’s advantage to hide its elation to prevent the opposition from rescinding it and offering a lower price during formal mediation.<sup>29</sup> In other situations, it may be advantageous to display an artificial emotion in order to mislead your counterpart, *e.g.*, feigning disgust at an acceptable offer to motivate an opposing party to raise their price.<sup>30</sup> A well-timed display of genuine emotion that “lets your humanity

show” might elicit sympathy and prompt the opposition to take a more conciliatory position as “a genuine display of emotion carries great power” and “people respond to emotional displays instinctively.”<sup>31</sup> Common sense suggests that a client’s tears may move an opposing party in ways that mere argument cannot.

While these types of unabashedly self-serving tactics might strike some as immoral and contrary to the spirit of good faith, one can hardly blame a party for trying to exploit every advantage available to her. However, getting caught using these types of tactics can seriously damage counsel’s credibility, the long-term relationships of the parties, and, in turn, the client’s best interest, as well as counsel’s.

#### **The Reconnaissance Approach**

The Reconnaissance Approach to negotiation involves counsel’s preparing for the emotional landscape of the negotiations through self-knowledge and knowledge of the opposition. For example, if counsel notices that he or she does better in negotiations when in a more positive mood, then he or she should find ways to trigger positive moods before negotiation, such as listening to certain music, wearing lucky Superman socks, or eating a favorite breakfast.<sup>32</sup> “Know thyself” has been a wise axiom for thousands of years, and the negotiation context is no different. Knowing one’s own hot buttons, how to decompress, and how to put one’s self in the right mindset for a successful negotiation is common sense not only for negotiation, but also for general mental health (which, of course, can affect counsel’s affect during negotiations).

In terms of knowing a counterpart’s emotional bent, one author actually

suggests building psychological profiles on everyone involved in the negotiation much as like a memo analyzing the legal issues.<sup>33</sup> Advice to anticipate the emotions that are going to be in the room is helpful practical guidance for a more comprehensive preparation; a negotiating attorney who is prepared to meet the emotions in the room might be able to anticipate topics that could trigger destabilizing emotional responses enabling him to craft his presentation or steer the conversation to avoid disaster.

However, creating in-depth psychological profiles for everyone involved in a negotiation is impractical where emotions are likely to have a minimal impact on the negotiations, as the cost of expending the financial and employee resources necessary to create such profiles will far exceed their value.<sup>34</sup>

### The Non-Confrontational Direct Approach

In contrast to Machiavellian - like tactics and to building in-depth psychological profiles in order to spot a party's emotional weak spots, the advice Fisher and Ury offer in *Getting to Yes* "separate the people from the problem"<sup>35</sup> and promotes considering the emotions of all of the people in the negotiation room and confronting them directly:

Make emotions explicit and acknowledge them as legitimate. Talk with the people on the other side about their emotions and talk about your own. Making your feelings or theirs an explicit focus of discussion will not only underscore the seriousness of the problem, it will also make the negotiations less reactive and more "pro-active."<sup>36</sup>

Fisher and Ury urge open and honest communication that treats the substance of a negotiation separately from the relationship of the parties in order to "clear the air" of toxic emotions, get to the heart of each party's interest, create value, enlarge the proverbial pie, and realize joint gains. Moreover, honest communication allows negotiating counsel to see where there might be opportunities for joint gains and value creation. Active listening and empathy are free tools that can reap tremendous rewards, to wit, "a note of sympathy, a statement of regret, a visit to a cemetery, delivering a small present for a grandchild, shaking hands or embracing, eating together—all may be priceless opportunities to improve a hostile emotional situation at small cost."<sup>37</sup>

The sage advice of Fisher and Ury seems more likely to disentangle an emotionally laced dispute from the common trap of trying to solve relational problems with substantive concessions than either the Machiavellian or the Reconnaissance approach.<sup>38</sup> Another advantage of encouraging each side to talk openly about its feelings is that it may discourage an unsavory party from faking its emotions for strategic gain; a sustained fiction will crumble under the close scrutiny of open conversation.

However, this approach also has its weaknesses. One problem with encouraging open communication is that the opposing party may be a greedy git who will try to take advantage of a show of emotional cards. A party may be less likely to be taken advantage of in this way by "build[ing] a working relationship independent of agreement or disagreement."<sup>39</sup> A friendly professional relationship independent of any specific dispute makes it less likely that one party will try to take emotional advantage of the other as a larger relationship is at stake.

## V. Summary and Verdict

Practitioners would do well to understand the general role that our "primal" emotions play in negotiations and to appreciate that emotions are a critical aspect of settlement negotiations and to use that knowledge to reach better settlement agreements for their clients. Evolutionary psychology teaches that emotions evolved to help humans respond to their environments and to communicate with each other appropriately and effectively; this knowledge is a useful tool that can assist practitioners in negotiating better agreements for their clients. Given the emotional system's bio-social importance, it is ironic that the current prevailing legal culture advocates for negotiators to ignore or repress this primal system. Such a strategy is likely impossible, may lead to predictably poor results, and, more importantly, may result in leaving the optimal deal on the table. Making the leap from theory to practice is tricky however, and, until the uncertainties in the underlying scientific research are resolved, application likely will remain sporadic.

In *Getting to Yes*, Fisher and Ury emphasize that emotion plays a significant role in negotiation because "you are dealing not with abstract representatives of the 'other side,' but with human beings."<sup>40</sup> While the role of emotion in negotiation, generally speaking, is to either aid or distract negotiators from interest-based negotiation, that the best strategies for using emotions in negotiations focus on getting to the heart of the parties' underlying "core" concerns and interests. Perhaps then the role of emotion in negotiation is really just a sub-species of the well-publicized advantages of interest-based negotiation, or a particular method, or its inner scientific spring, or simply old research repackaged in new jargon? Regardless, emotions play an important role in effecting successful negotiations; given the importance of negotiation to law and the importance of law to society, legal negotiators owe it to their clients, themselves, and society at large to understand and use emotions for "getting to yes." ▲



**Stephen D. Palmer** is an Attorney at Carr Allison in Birmingham, Alabama where his practice focuses on civil defense and workers' compensation litigation. Steve did his undergraduate studies at Birmingham-Southern College, earned his masters at Duke University, and attended law school at the University of

Alabama. In his free time, Steve he enjoys being a father and husband, taking his dog to the park, and watching Alabama football.

## Endnotes

<sup>1</sup> See Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 *Harv. Negot. L. Rev.* 231, 247-48(2005), claiming that Plato's philosophical legacy—that emotions are antithetical to reason, morality, and justice—"saturates the legal culture" and "encourages lawyers to disavow consideration of emotional inputs." See also id. at 251-52 ("a tradition established by millennia of Western thinkers exalts analytical thinking as the very vehicle of justice and denigrates emotionality as a mentally passive,

unruly characteristic that undermines rationality and impinges upon moral responsibility.”)

<sup>2</sup> Clark Freshman et. al., *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 2002 J. Disp. Resol. 1, 66 (2002) [hereinafter *Mood Scientist*] (“in its crudest form, some negotiators simply think it is best to ignore emotion as something that is simply irrational and therefore irrelevant.”). See also Ryan, *supra* note 1, at 249-50 (“Like all human beings, lawyers inevitably rely on emotional sense in interpreting their worlds, but they do so in spite of their training rather than because of it. . . . Lawyers are discouraged from refining (or even acknowledging) their use of emotional knowledge by a professional culture that disdains it.”)

<sup>3</sup> See Roger Fisher, William Ury, and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* 18 (2d ed. 1991) (“A basic fact about negotiation, easy to forget in corporate and international transactions, is that you are dealing not with abstract representatives of the ‘other side,’ but with human beings.”); Michael Schneider-Vocke, *The Human Dimension: A Key to Settlement in Business Mediations and Negotiations*, 42 Les Nouvelles 347, 348 (2007) (“how often we forget that we are first and foremost human beings”).

<sup>4</sup> Carlton J. Patrick, *A New Synthesis for Law and Emotions: Insights from the Behavioral Sciences*, 47 Ariz. St. L.J. 1239, 1251 (2015).

<sup>5</sup> *Id.* at 1255

<sup>6</sup> Patrick, *supra* note 4, at 1257-58. See also, John Tooby & Leda Cosmides, *The Evolutionary Psychology of the Emotions and their Relationship to Internal Regulatory Variables*, in *Handbook of Emotions* 114, 117 (Michael Lewis et al. eds., 3d ed. 2008) describing emotions as a system of “mechanism orchestration” that are “neurocomputational adaptations that have evolved in response to the adaptive problem of matching arrays of mechanism activation to the specific adaptive demands imposed by alternative situations.”

<sup>7</sup> Daniel Goleman, *Primal Leadership: Realizing the Power of Emotional Intelligence* 10 (2002).

<sup>8</sup> *Id.* at 7

<sup>9</sup> *Id.*

<sup>10</sup> Sigal G. Barsade, *The Ripple Effect: Emotional Contagion and Its Influence on Group Behavior*, *Administrative Sci. Quarterly*, Vol. 47, No. 4 (Dec., 2002), at 644, 64.

<sup>11</sup> *Mood Scientist*, *supra* note 2, at 15.

<sup>12</sup> Daniel L. Shapiro, *Emotions in Negotiation: Peril or Promise?*, 87 Marq. L. Rev. 737, 744 (2004) [hereinafter *Peril or Promise?*] “Compared to those in a neutral mood, negotiators in a positive mood achieve more optimally integrative outcomes and use fewer aggressive behaviors.”

<sup>13</sup> *Mood Scientist*, *supra* note 2, at 4.

<sup>14</sup> *Peril or Promise?*, *supra* note 12, at 744.

<sup>15</sup> *Id.* at 745.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 742.

<sup>18</sup> Leonard L. Riskin, *Annual Saltman Lecture: Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 Nev. L.J. 289, 298 (2010).

<sup>19</sup> Ryan, *supra* note 1, at 269.

<sup>20</sup> *Mood Scientist*, *supra* note 2, at 15.

<sup>21</sup> *Peril or Promise?*, *supra* note 12, at 743-44.

<sup>22</sup> Ryan, *supra* note 1, at 272

<sup>23</sup> Fisher, *supra* note 3, at 157.

<sup>24</sup> *Peril or Promise?*, *supra* note 12, at 744.

<sup>25</sup> *Mood Scientist*, *supra* note 2, at 69.

<sup>26</sup> Riskin, *supra* note 18, at 298.

<sup>27</sup> *Mood Scientist*, *supra* note 2, at 19.

<sup>28</sup> *Id.* at 72.

<sup>29</sup> Lee Hugh Goodman, Nichols III. *Civ. Prac. Alternative Disp. Resol. § 5:54* (March 2016 update).

<sup>30</sup> *Id.*

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

<sup>32</sup> *Mood Scientist*, *supra* note 2, at 71.

<sup>33</sup> Schneider-Vocke, *supra* note 3, at 348 (advising to examine the “deeper personal needs and interests of each team member involved”, their “fears and concerns”, their “dreams, expectations and ambitions”, and the “personal stake of each participant.”)

<sup>34</sup> Although, in some cases involving vast sums of money, such profiles might well pay off many times over. However, in those high-stakes circumstances, the parties are likely to be highly sophisticated, and an opponent may therefore easily recognize that you are simply trying to play on their emotions and thus sour the negotiation and damage your reputation

<sup>35</sup> Fisher, *supra* note 3, at 21.

<sup>36</sup> *Id.* at 30.

<sup>37</sup> *Id.* at 32.

<sup>38</sup> *Id.* at 21.

<sup>39</sup> Fisher, *supra* note 3, at 157. See also *id.* at 158, stating that, “a good working relationship tends to make it easier to get good substantive outcomes (for both sides).”

<sup>40</sup> Fisher, *supra* note 3.

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**GABY REEVES**  
Editor

**K**eeping pace with emerging legal trends and modifications to existing law can be overwhelming.

I sometimes feel as though I am playing Whac-A-Mole™ in the fog. Just when I think I am reasonably up to speed — *sproing!* My most recent victim has either procreated or been reincarnated as a different legal theory. “Real-time” analyses and explanations of new legal developments are legion on the internet. In theory, this should help increase the

ratio of whacked to unwhacked moles. Unfortunately, there is no vetting process for launching a web site or creating a social media page, which makes it difficult to separate the wheat from the chaff. Humans cannot digest chaff, but no one has time to winnow the results of even one internet search. Fortunately, the ADLA offers a number of resources to keep its members current on emerging legal trends and new developments in the law — all of them written, organized and/or presented by other ADLA members. ADLA members specialize in all areas of civil law and the collective knowledge of contributing members enables this organization to provide reliable current information in all of those areas. No winnowing required. The Journal is only one of these resources and this edition features well-written articles, as well as messages from the ADLA committee chairs, all of which provide current and important information regarding our practice.

Data security is — and should be — a primary concern for civil defense lawyers. The question is not whether, but when a client will experience a data breach. **Hal Mooty’s** *Cybersecurity 101: What Every Defense Lawyer Should Know* lists the actions that should be taken upon first discovering a breach, provides a straightforward explanation of current applicable law and addresses what the future holds for data protection law. His article is a first-rate primer for civil defense lawyers faced with assuring that their clients are in compliance with existing data breach laws, as well as proposed and developing data breach regulatory legislation, i.e., all of us.

**Amanda R. Coolidge’s** article, *The Basics: Medicare’s Interests in Claims and Settlements*, addresses the complexities of Medicare reporting requirements, Conditional Payments and Set-Asides. Amanda explains how Section 111, Medicare Conditional Payments, and Medicare Set-Asides protect Medicare’s interests and why it is important to comply with the requirements of each in several different situations. Amanda clearly describes how each operates independently and how each overlaps the other, providing valuable insight as to how these three intertwined topics affect our clients and how we should advise them.

The *Journal* also features **Stephen Palmer’s** article, *Primal Solutions: A Brief Exploration of the Unexpected and Underappreciated Role of Emotion in Negotiations*. Stephen’s article recognizes that lawyers know all too well how a client’s feelings can affect an entire litigation, but points out that, despite this awareness, lawyers seem predisposed to take a client’s feelings — and those

of the opposing party — out of the equation during settlement negotiations. The article underscores the value of considering and understanding the emotional climate of a case before, as well as during, negotiations and explains the various ways counsel can use that knowledge to a client’s advantage.

I want to thank **David Sikes**, President of the Alabama Property & Casualty Adjusters Association (APCAA), for his message reporting on APCAA’s continued success in strengthening its profession through education. We are glad that the APCAA will be joining ADLA again for its Annual Meeting in June 2020. We look forward to this opportunity to learn with and from you again.

Please join me in welcoming **Rod Cate** as the inaugural chair of ADLA’s Diversity Task Force. Most law firms recognize the value of increasing diversity, but recruiting and retaining talented and diverse attorneys remains a challenge for law firms throughout the country. Recognizing this, the Executive Committee has established a Diversity Task Force to determine how ADLA can increase the diversity of its membership, which, in turn, will aid members in developing programs that attract and retain skilled, diverse lawyers. Consider joining this committee; it exemplifies the positive effect of sharing individual experiences in the practice of law. This is not only an opportunity to enhance the membership, but to contribute to the enrichment of the Alabama civil defense bar as a whole.

I hope that you will share your knowledge and experience with other ADLA members through one of the many resources that ADLA offers its members and I encourage you to take advantage of those resources. You do not have to know everything to be a good lawyer; you just have to learn to practice. “Assiduuus unus rei deditus et ingenium et artem saepe vincit.” *Cicero.* 🚩

## Endnotes

- <sup>1</sup> 2001, Bob’s Space Racer, Inc., Whac-A-Mole.
- <sup>2</sup> “Constant practice devoted to one subject often outdoes both intelligence and skill.”

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**Alabama Defense Lawyers Association**  
**2020 ANNUAL MEETING**  
**June 18-21 | Sandestin Golf and Beach Resort**  
Andy Rutens, Program Chair

**THURSDAY, JUNE 18**

**2:30-5:30** Registration Desk Open  
**5:30-7:30** Welcome Reception

**FRIDAY, JUNE 19**

**ADLA & TDLA Joint CLE General Session**

**7:00-7:30** **Women in the Law Section Meeting**  
**7:30** **Sign-In**  
Strolling Breakfast for CLE Registrants & Exhibitors

**7:50-8:00** **Welcome**  
Christina May Bolin – ADLA President  
Rockforde “Rocky” King – TDLA President

**8:00-9:00** **Bad Faith Law-A Comparison Between AL & TN and Observations Going Forward**  
Henry Morrissette of Hand Arendall Harrison Sale, LLC & Ashley Gold of Insurors of Tennessee

**9:00-10:00** **Bad Faith-Tripartite Concerns, from Insurance Review to Jury Verdict**  
*Moderator:* Stephen Still of Starnes, Davis Florie  
*Panelists:* Mike Lovelady of Alfa Insurance Co.; Christina May Bolin of Christian & Small, LLP; Marci Williams of AMIC; & Mark Debro of Grace Matthews & Debro, LLC

**10:00-10:10** **Introduction of Exhibitors & Sponsors**  
**10:10-10:30** **Break & Visit with Exhibitors**  
**10:30-11:30** **Judicial Panel: A Federal and State Judicial Review of Trials: What a Jury Likes and What They Don't**  
*Moderator:* Michael Upchurch of Frazer, Greene, Upchurch & Baker, LLC  
*Panelists:* Hon. Karon O. Bowdre, U.S. District Court for the Northern District of AL; Justice Sarah H. Stewart, Alabama Supreme Court; and Hon. Scott Taylor, Twenty-Eighth Judicial Circuit Court of AL

**11:30-12:30** **Leveraging AI to Client Benefit: Tools, Teams and Best Practices**  
John Kihlberg, Senior Director, Engagement and Client Management of H5 & Mark Wentworth, Director, Practice Development of H5

**FRIDAY AFTERNOON/EVENING**

Afternoon free for family and beach activities

**1:00-5:00** **ADLA Golf Tournament**  
**6:30-8:30** **Family Reception**

**SATURDAY, JUNE 20**

**Alabama CLE General Session**  
**Tennessee CLE Breakout Session**  
**APCAA Breakout Session**

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

**7:50-8:00** **Welcome**  
Christina May Bolin – ADLA President  
Alabama State Bar President's Update – ALAJ President

**8:00-9:00** **Attorney Wellness**  
Jeremy Rakes, ALAP Director  
Alabama State Bar

**9:00-9:10** **Introduction of Exhibitors & Sponsors**  
**9:10-9:20** **Introduction of Judges**  
**9:20-10:00** **Prize Drawings & Break with Exhibitors**  
**10:00-11:00** **Alabama Case Law Update**  
Alex Holtsford of Holtsford Gilliland Higgins Hitson & Howard PC

**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**

**SATURDAY AFTERNOON/EVENING**

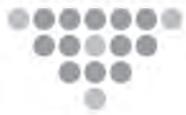
Afternoon free for family and beach activities

**5:45-6:30** **Women in the Law Cocktail Reception**  
Grand Lawn  
**6:30-8:30** **Family Fun Night**  
Grand Lawn

**SUNDAY, JUNE 21**

Depart for home

*\*Agenda subject to change*



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## *Women in the Law Supports Clothed for Success Drive at Annual Meeting*

Do you have clothes you've been meaning to drop off with the Goodwill? Bring them to the Annual Meeting instead, and help benefit ADLA's philanthropic efforts! The Women in the Law section will hold a clothing drive during this year's Annual Meeting, and all donations received will go to a local organization that works with survivors of human trafficking. The aim of the drive is to collect professional and business-style clothing items to provide to women who need appropriate attire for job interviews or who are otherwise trying to break into the workforce. We will be accepting gently used (or new) items such as blazers, skirts, pants, shoes, blouses, belts, etc.

If you are unable to bring physical donations (or cannot make it to the Annual Meeting), the WITL section will also have a monetary donation option available during the Annual Meeting clothing drive. This money will be spent on the clothing items that are most needed, as identified by our partner organization. We know that a lack of professional clothing can be a real hurdle to women trying to start fresh, and we are excited to build a relationship with an organization that can meet these and other needs of trafficking survivors.

Please be on the lookout for more details in the *Wednesday Briefcase* about the clothing drive as we get closer to the Annual Meeting!



**ROD CATE**  
Chairman

I have been asked to chair the ADLA's Diversity Taskforce. In looking at my photograph, you may ask yourself why is a white male chairing the ADLA's Diversity Taskforce? What you can't tell from the picture is that I am physically disabled, handicapped, or whatever descriptive term is appropriate these days. Although I have never felt that my disability has made any difference in my 28 years of the practice of law in Alabama, I assume my disability

qualifies me to chair the Diversity Taskforce. ADLA's website contains a diversity mission statement. This diversity mission statement appears to be similar to diversity mission statements for several organizations. The most important language in the diversity mission statement is the last: "ADLA is committed to creating and maintaining a culture that supports and promotes diversity in its organization." The purpose of this taskforce is to work to put this idealized statement into practice. Making positive changes will take time and effort. Coordination with local diversity groups throughout the state will be an important first step. The goal of this taskforce is to assist in making Alabama a place where civil defense lawyers, regardless of gender, race, sexual orientation or physical disability, can succeed in their law practices, feel comfortable practicing, and desire to remain in Alabama.

I welcome anyone who has a desire to participate on this diversity taskforce to contact me at [rcate@handfirm.com](mailto:rcate@handfirm.com). I hope that within 12 months' time, this taskforce can show progress in meeting its goals. 



*Rod and Tamberly Cate at Barnes & Noble book signing*



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Carr Allison attorneys **Katy Beth Carr** (Florence, AL) and **Brett Adair** (Birmingham, AL) earned a defense verdict following a jury trial in the employment case of *Spurling v. Total Computer Solutions* in federal court in Decatur, Alabama. The Plaintiff claimed the Defendant owed substantial commission payments allegedly earned during employment that, per an employment agreement, were to be paid for 24 months after employment unless he resigned. During closing arguments, Plaintiff's counsel asked for more than \$200,000 in damages. After deliberating for less than an hour, the jury of eight unanimously determined that the Defendant had not failed to pay any commissions due nor had it breached the employment agreement.



*Katy Beth Carr*



*Brett Adair*

*Murey v. Chickasaw*. Galloway Wettermark & Rutens LLP attorneys, **Andy Rutens** and **Melissa Hunter**, recently obtained summary judgment on behalf of a municipality, its police chief, and jailer/dispatcher in the United States District Court for the Southern District of Alabama. The lawsuit was filed by the estate of the Plaintiff and alleged asserted claims against the defendants under 42 U.S.C. § 1983.

The Plaintiff was arrested on a D.U.I. charge and taken into custody by the police department in the early morning hours of May 27, 2015. Later that morning, the Plaintiff was discovered unresponsive in his cell and pronounced dead at the scene. The Plaintiff alleged that the jailer/dispatcher was deliberately indifferent to the needs of the Plaintiff in that she failed to properly monitor the Plaintiff and failed to perform CPR on the Plaintiff. Plaintiff alleged that the police chief was deliberately indifferent to the needs of the Plaintiff for his alleged failure to adequately staff and equip the jail, failure to train, manage, supervise and discipline department employees, and failure to implement proper policies and procedures. Similarly, the Plaintiff alleged that the City had insufficient policies and procedures in place and failed to train and supervise its employees. In granting summary judgment for the defendants, the Court held that the Plaintiff failed to show that there had been any constitutional violation or that the defendants were deliberately indifferent to the needs of the Plaintiff.

*Young v. Orange Beach*. On December 6, 2019, the Alabama Supreme Court entered an Order reversing and remanding the denial of a Motion for Summary Judgment filed by Mobile attorneys **Andy Rutens** and **Melissa Hunter**. The Plaintiff in the case filed suit against a municipality, its public works director and a private contractor after she tripped and fell on the shoulder of the road. The Plaintiff alleged claims of negligence and wantonness against the defendants. Counsel filed for summary judgment on behalf of the public works director based on state agent immunity. The motion was denied and counsel filed a Petition for Writ of Mandamus.

The Supreme Court determined that, because the job functions of the public works director required the exercise of judgment in the utilization of the City's limited resources, the public works director was entitled to state agent immunity.



*Melissa Hunter*



*Andy Rutens*

Gray & Associates LLC attorneys **Bill Gray** and **Doug Robertson** recently obtained summary judgment and then full dismissal all claims against a homeowner's association and its individual board members in a case filed in Tallapoosa County, Alabama. The plaintiffs claimed that board members had engaged in self-dealing when transferring community property to adjacent homeowners for nominal payment where the transfers were made by majority vote of the board, with interested board members recusing. Recognizing the likelihood of winning the case on legal argument, attorneys William P. Gray, Jr. and Douglas N. Robertson filed an early motion for summary judgment on the issue of statutory immunity afforded to the board members by the non-profit immunity statute, Ala. Code § 10A-20-16.0, and based on the legal interpretation of the association's by-laws and articles of incorporation. The trial court agreed with Gray and Robertson's proposed interpretations of both the non-profit immunity statute and the corporation's governing documents. The trial court denied the plaintiffs' motion to reconsider and dismissed the remaining claims. The plaintiffs appealed the summary judgment ruling, which the Alabama Court of Civil Appeals dismissed.

Attorneys **Bill Gray** and **Doug Robertson** also obtained summary judgment in a lawsuit against a homeowner's association in Autauga County, Alabama. In that matter, the homeowner's association filed lawsuit to collect membership dues from current and former property owners and recorded a lis pendens notice of the lawsuit. The property owners filed counterclaims for negligence, wantonness, and slander of title against the association and its officers. In an early motion for summary judgment, Gray and Robertson again argued the applicability of the non-profit immunity statute, Ala. Code § 10A-20-16.0. The trial court first granted summary judgment in favor of the individual officers only. Gray and Robertson persisted with a renewed motion for summary judgment, obtaining full summary judgment for the homeowner's association on all counterclaims.



*Bill Gray*



*Doug Robertson*

On October 22, 2019, Huie Fernambucq & Stewart LLP attorney **Stewart McCloud** secured a directed verdict for the defendant, a national

insurance provider. The trial took place in the Circuit Court of Limestone County, Alabama.

The case stemmed from a 2013 lawsuit, in which the plaintiff contested the handling of his property damage claim. The 2013 lawsuit settled out of court and the plaintiff executed a full Release and Settlement Agreement, which included a merger clause expressly stated that “there are no understandings or agreements, verbal or otherwise, between the parties except as expressly set forth herein.” Several months after voluntarily dismissing the 2013 lawsuit, the plaintiff claimed that defendant failed to perform certain obligations, which plaintiff admitted, were not included in the final Release and Settlement Agreement that he signed. The plaintiff alleged that the defendant’s attorney made certain “assurances” during settlement discussions, and that he (plaintiff) relied upon those “assurances”, notwithstanding that there was no mention of the alleged assurances in the Settlement Agreement.

The plaintiff filed a second lawsuit in 2015 in the Circuit Court of Limestone County, Alabama. The 2015 lawsuit included 11 causes of action; nine of the claims were dismissed on summary judgment prior to trial. The two remaining claims at trial were “fraudulent misrepresentation” and “fraudulent inducement”. At trial, the jury was presented with testimony from the plaintiff, as well as from the attorney that represented the defendant in the 2013 case. At the close of plaintiff’s case, attorney Stewart McCloud moved for a directed verdict (judgment as a matter of law), arguing that the plaintiff had failed to present substantial evidence in support of either of his claims and that there was no evidentiary basis for a reasonable jury to find in favor of the plaintiff. The trial judge agreed, granting a directed verdict in favor of the defendant.

Huie partners **Stewart McCloud** and **De Martenson** were successful in their petition for writ of mandamus to the Alabama Supreme Court. A summary of the featured case, *Ex parte Allstate Insurance Company*, is provided below.

This case originated from a single-car accident in Perry County, involving a vehicle owned by Thomas Hobson, a resident of Bibb County, and driven by Devin Anthony Harrison. One of the passengers in the vehicle, Dylan Gardner, was killed in the crash. Gardner’s estate brought a wrongful death action against Harrison. This case involves Harrison’s breach of contract and bad faith claims against Allstate for allegedly refusing to defend or indemnify Harrison in the underlying wrongful death case. At the conclusion of trial, the jury returned a verdict against Harrison in the amount of \$2,000,000. Harrison subsequently filed the present lawsuit, alleging that Allstate insured the vehicle involved in the accident, that he was a permissive user covered by the policy, and that Allstate breached its contractual duty to defend and indemnify Harrison in the underlying wrongful death action.

Allstate filed a motion for a change of venue to Shelby County or Bibb County and filed an affidavit in support of that motion testifying that a substantial amount of the investigation, decision-making and handling of the claim occurred at Allstate’s office in Shelby County. Harrison respond-

ed claiming that because the car crash was the event giving rise to the action, venue was proper in Perry County – where the crash happened. The trial court denied the motion to change venue and Allstate filed a petition for writ of mandamus.

Alabama code § 6-3-7 specifies that venue is proper in the county where the events or omissions giving rise to the claim occurred. The Court held that the “events or omissions” referenced in § 6-3-7 are the alleged wrongful acts of a defendant, rather than the injuries suffered as a result of a wrongful act. In this case, the Court found that sworn affidavits filed by Allstate showed that venue was proper in Shelby or Bibb County, but not Perry County, shifting the burden to Harrison to prove that the injury – Allstate’s alleged breach of contract – had occurred in Perry County, which he failed to do.

Huie attorneys **Bart Cannon**, **Phil Collins** and **Alex Parish** received a favorable opinion from the Eleventh Circuit Court of Appeals on behalf of Huie’s telecommunications client. In *Smith v. Comcast Corporation, et al.* (No. 18-13956), the plaintiff initially sued in Alabama Circuit Court seeking \$5,000,000 in damages. The defendants removed the case to federal court based on diversity jurisdiction and filed Rule 12(b)(6) motions to dismiss. The plaintiff moved to remand the case back to state court by arguing, among other things, complete diversity was lacking based on the citizenship of certain fictitious defendants pleaded in the complaint. The plaintiff claimed the description of the fictitious defendants was such that the defendants knew their true identities but improperly concealed the information from him to remain in federal court. The U.S. District Court ultimately found it had jurisdiction over the case and denied the plaintiff’s Motion to Remand.

The District Court dismissed the plaintiff’s initial complaint without prejudice to allow him to attempt to cure certain pleading deficiencies. The plaintiff then filed an amended complaint which the defendants again immediately moved to dismiss. After extensive briefing on the issues, the District Court granted the defendants’ motions and dismissed all claims in the case with prejudice. The plaintiff appealed to the Eleventh Circuit.

On appeal, the plaintiff argued the District Court lacked subject matter jurisdiction to dismiss the claims because the removal was improper. Specifically, he argued: (1) the defendants knew or should have known that the fictitiously named defendants were citizens of Alabama and therefore there was not complete diversity; (2) discovery on the citizenship issue would reveal the parties’ true identities; and (3) the District Court erred in denying him leave to conduct the discovery. The appellate court rejected each of the plaintiff’s arguments and affirmed the district court. Central to its holding was the removal statute at issue, 28 U.S.C. § 1441 where it expressly states: “In determining whether a civil action is removable on the basis of [diversity jurisdiction], the citizenship of defendants sued under fictitious names shall be disregarded.” Because “diversity jurisdiction is determined . . . at the time of removal” the Court found that “the District Court rightly ‘disregarded’ the citizenship of the fictitiously named defendants when it assessed jurisdiction . . . .”

Huie attorneys **Gordon Sproule**, **Bart Cannon** and **Alex Parish** recently obtained summary judgment as to all claims against a Huie client in the Circuit Court of Cullman County. The case was brought by a customer of the retail store client who sustained facial injuries when she fell while at a step down while shopping in the store. The Plaintiff claimed the store failed to maintain a safe environment and to warn her of the alleged danger. She asserted claims of negligence and wantonness against the store related to the fall.

After taking the Plaintiff's deposition, Huie attorneys filed a Motion for Summary Judgment establishing the alleged condition was open and obvious as a matter of law because, among other reasons, the area included conspicuous handrails, caution tape and warning signs. Huie attorneys were able to further establish through her deposition that the Plaintiff immediately fixed her gaze on a wall in the store upon entry and through the time of her fall. In response, Plaintiff argued there was a question of fact as to whether the condition was open and obvious. The Court rejected the Plaintiff's arguments and granted Summary Judgment in the store's favor as to all claims.

Huie partner **Phil Collins** was successful in his appeal to the Alabama Supreme Court in a premises liability matter, *Eyer v. Crestwood*. *Eyer* involved a typical premises liability "slip-and-fall" case but for the fact that, while visiting her husband's parent at the premises owner hospital, Plaintiff Jo Eyer was present in the room when the floor was mopped 10-15 minutes prior to her falling. The Trial Court granted *Crestwood's* Motion for Summary Judgment, holding that the wet floor was "open and obvious," and that the hospital / premises owner did not have superior knowledge to the Plaintiff of the alleged hazard.

Plaintiff's theory in opposition to summary judgment and in support of its appeal to the Alabama Supreme Court suggested that the fact that *Crestwood's* housekeeping staff used a product called "Virex" to mop the floor and that the Virex labeling that stated "for disinfection, all surfaces must remain wet for 10 minutes" meant that the Virex was "designed to keep the floor wet" for at least 10 minutes. Plaintiff suggested that the hospital / premises owner had a duty to notify the



*Bart Cannon*



*Phil Collins*



*De Martensen*



*Stewart McCloud*



*Alex Parish*



*Gordon Sproule*

Plaintiff that the mop mixture contained the Virex product. However, Plaintiff offered no evidence that the evaporation rate of a mop mixture that contained the Virex product was any different from any other mixture that did not contain the Virex. The Alabama Supreme Court affirmed without opinion the Trial Court's summary judgment order and denial of Plaintiff's Motion for Reconsideration.

In a case of gender discrimination and retaliation brought by a female police officer, U.S. District Judge Liles Burke granted a motion for summary judgment sought by

**Lauren Smith** and **Greg Burgess** of Lanier Ford Shaver & Payne P.C. in Huntsville. *Gentry v. City of Russellville*, No. 3:16-cv-1466, (N.D. Ala., August 29, 2019).



*Lauren Smith*



*Greg Burgess*

*GLENDIA MICHELLE POWELL v. H.O. WEAVER & SONS, INC. ET AL 16-CV-2015-900164.00*. Luther Collier Hodges & Cash LLP attorney **Jeff Luther** won a defense verdict from a Clarke County jury after a four-day trial on September 26, 2019. The firm's client, H.O. Weaver & Sons, Inc., was operating a tri-axle dump truck loaded with asphalt in route to a paving job in Wilcox County. The H.O. Weaver & Sons dump truck was traveling northbound at 64 mph as it approached the Fulton Junction when the plaintiff's vehicle attempted to cross the northbound lane in an effort to turn south onto U.S. Hwy 43. The defendant slammed on its brakes, sounded its horn and steered left in an attempt to avoid a collision. How-

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ever, the plaintiff chose to accelerate, causing the two vehicles to collide in the median. The plaintiff suffered multiple rib fractures, a collapsed lung and lower back injuries resulting in lumbar laminectomy and fusion. The entire incident was captured on dash cam video. The plaintiff's theory was that defective brakes caused the dump truck to steer left and that had the defendant not been holding a Southern Linc radio in his hand, talking at the time of the accident, that he could have controlled his vehicle and stayed in the right lane and missed her. Mr. Luther argued that any alleged deficiencies in the braking system, or talking on the cell phone, had no causal relation to the accident and that the plaintiff's failure to yield the right of way was the sole cause of the accident.



*Regina Cash*

Attorneys **Danny Collier** and **Regina Cash** won a defense verdict from a Mobile County jury after a three-day trial on October 9, 2019. On August 30, 2016, the firm's client, Mobile Asphalt Company, LLC, had a nighttime paving project on I-10 East with dump trucks coming and going from its asphalt plant in Saraland. Plaintiff Bradley Carden was driving a dump truck for Baldwin County Construction when he drove off the edge of the ramp after having his dump truck weighed. The dump truck rolled over onto its side, and the plaintiff suffered personal injuries that led to suit against Mobile Asphalt.



*Danny Collier*

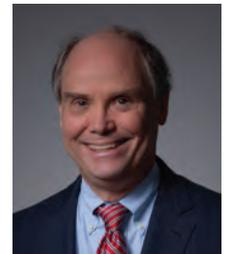
The plaintiff's theory was that the premises was unsafe. The ramp had unguarded edges of at least 18 inches, and it lacked bollards, curbs or other visual cues. Also, Mr. Carden complained about insufficient lighting on the site. Mobile Asphalt defended on the ground that the premises was reasonably safe, as proven by thousands of dump truck drivers over many years. Mr. Carden complained that another dump truck had been blocking his path and he was under implicit obligation to move his truck off the ramp. Mobile Asphalt countered that the unguarded edge was an open and obvious condition, and the site was well-lit. If Mr. Carden had only waited in line like other dump truck drivers there would have been no accident.



*Jeff Luther*

The plaintiff asked the jury for just over \$400,000 in compensatory damages and \$600,000 in punitive damages. After about one hour, the jury returned a verdict in favor of Mobile Asphalt and against the plaintiff.

Parsons, Lee & Juliano attorneys and ADLA members **Paul J. DeMarco** and **John M. Bergquist** recently secured a defense verdict on behalf of an aircraft tool manufacturer in a wrongful death products liability case that was tried before Judge Annemarie Axon in the United States District Court for the Northern District of Alabama. The wrongful death action was brought by the Estate of an FAA licensed aircraft mechanic who sustained a fatal head injury when he was struck by the propeller of a single engine airplane while he was performing maintenance on the engine. The Plaintiff alleged that the Differential Pressure Tester was negligently and/or wantonly designed and that its instructions were defective such that the tool manufacturer was liable to the deceased under the Alabama Extended Manufacturers Liability Doctrine and under common law product liability based on negligence and/or wantonness and failure to warn. After a five-day trial, the case was submitted to the jury on the AEMLD claim and the common law products liability claims based upon negligence. The defendant pleaded contributory negligence and assumption of the risk as defenses while denying that the Differential Pressure Tester was the proximate cause of the injury. During the course of the trial, defense counsel obtained admissions from multiple witnesses that he made a series of mistakes while performing maintenance on the single engine airplane, including standing in the path of the propeller and failure to follow the Tester's instructions which would have prevented the accident from occurring.



*John Bergquist*



*Paul DeMarco*

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## wins for the defense

Starnes Davis Florie LLP attorneys **Tony Davis, Trey Wells, and Ben Presley** secured a jury verdict in favor of a multinational corporation against one of the three largest railroad companies in the United States in a dispute involving a long-term contract for rail transportation. The case was tried in federal court in Virginia. The railroad company claimed that it was owed over \$40,000,000 under the contract, in addition to the more than \$35,000,000 it had already been paid. After a six day trial, the jury returned a verdict in favor of our client, finding that the railroad had materially breached the contract within six months of its execution, such that our client does not owe anything further, and is entitled to repayment of virtually all of the money already paid. The net value of the judgment to our client exceeds \$75,000,000. 



Tony Davis



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**STEVEN P. SAVARESE, JR.**  
Young Lawyers Section President

concluded my previous article with “moments matter. They leave their impression upon us. They shape how we live our lives, and they impact who we become. They also offer us something of possibly more value: The opportunity to leave a lasting mark on the world around us.”

See, my original article focused on something I thought was important - how to get the most out of the associate experience. However, when I was putting the final touches on it, I received a phone call about an awful tragedy to one of my best friend's family. His daughter unexpectedly passed away.

Anna Kate Wilkerson was a beautiful, smart, and vivacious four year old. Her smile shown bright. Her bubbly personality was infectious. She was kind beyond imagination, even

to her younger brother Fisher. As I watched the outpouring of support to her family, it was clear to me that little Anna Kate left a lasting mark not only my family but everyone who came in contact with her. The stories I heard were abundant. They were filled with river fun, princesses, doll houses, go karts, train rides, and make-up. One thing I can say for certain is the moments my family got to spend with Anna Kate changed our lives. She was and will always be a part of each of my children's lives. There is a void in our hearts because Miss Anna Kate is no longer here with us. Our thoughts and prayers go out to Kevin, Kim, and Fisher Wilkerson.

Unquestionably, this job is hard, time consuming, frustrating, and sometimes no fun. However, perspective is something we all need. While sitting at his house, my perspective instantly changed when Kevin told me he did not want to be an astronaut...all he wanted to be was a dad and take care of his family. He was a fantastic dad to Anna Kate and took care of his family. Anna Kate and Kevin, you both impacted people in more ways than you will ever know. You changed people's lives for the better.

My hope for all of us is that we take a little time out of our busy day to recognize what is important. It is assuredly different for each of us. But hopefully, whether it be through your spouse, children, colleagues, friends, acquiesces, or a random stranger, we can follow in Anna Kate Wilkerson's footsteps and impact this world making it just a little bit of a better place. 

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# ADLA YOUNG LAWYERS MEET IN BIRMINGHAM FOR CLE PROGRAM AND NETWORKING MIXER

**O**n December 5, 2019, District II of the Young Lawyers Section hosted an interactive CLE and mixer at Balch & Bingham LLP—*Associate to Partner: What You Really Want to Know*. At the CLE, ADLA young lawyers learned invaluable advice from **LaBella Alvis** of Christian & Small LLP, **Allen Estes** of Balch & Bingham, **Christie Estes** of Quality Correctional Healthcare, and **Lisha Graham** of White, Arnold & Dowd regarding various topics such as, how to effectively market and mentor and how to successfully master the billable hour. The CLE was followed by a mixer, hosted by Alabama Court Reporting, that was enjoyed by all who attended. District II of the Young Lawyers' Section is excited to present Part II of *Associate to Partner: What You Really Want to Know* this summer. Stay tuned for details!

Thank you to our YLS District 2 Directors and CLE Program Committee: **Theresa Friedman** of Rushton Stakely Johnston & Garrett PA, **Ashley Scarpetta** of Carr Allison, and **Hannah Stokes** of Carr Allison.

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*Program Moderator, Ashley Scarpetta of Carr Allison pictured with panelists LaBella Alvis of Christian and Small LLP, Lisha Graham of White Arnold & Dowd, Christie Estes of Quality Correctional Healthcare, and Allen Estes of Balch & Bingham LLP*



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*CLE Panel Session*

# THE BASICS: MEDICARE'S INTERESTS IN CLAIMS AND SETTLEMENTS

By: **Amanda R. Coolidge**, Lanier Ford Shaver & Payne PC | Huntsville, AL



If most non-attorney Americans were asked to list events which made 1965 an important year in American history, that list would probably include the ongoing Space Race, the Selma to Montgomery marches, passage of the Voting Rights Act, the arrival of the first U.S. combat troops in Vietnam, and maybe even the Beatles' performance at Shea Stadium. Their list would probably not include the exciting day, July 30, 1965, when President Johnson signed Medicare into law and ushered in healthcare for those 65 years and older.<sup>1</sup> So started the regulatory spaghetti which we have all grown to love—and hate—and attempt to understand.

Although not the most exciting of topics, most attorneys have questions related to Medicare's interests in claims and settlements, and how they should protect those interests. This article will only address three topics which are part of that regulatory framework:

- Section 111 Reporting;
- Medicare Conditional Payments and the Recovery Process; and
- Medicare Set-Asides.

Why do we even have to worry about Medicare's interest, you ask? When Medicare was enacted, it was designated as the primary payer in most instances. Effectively, this meant that Medicare paid for medical services even when another health plan or insurer was responsible. Medicare expanded in 1972 to include individuals below

the age of 65 and who were receiving social security disability benefits. With increased coverage, Medicare was at risk of instability in the long-term.<sup>2</sup>

Enter the Medicare Secondary Payer Act (MSPA) which was enacted as part of the Omnibus Reconciliation Act of 1980.<sup>3</sup> The Centers for Medicare and Medicaid Services (CMS) is the federal agency that oversees Medicare and acts to track and enforce MSPA compliance. The MSPA provided protection for Medicare by shifting costs to other sources of payment.<sup>4</sup> Essentially, the MSPA ensures that Medicare does not pay for medical treatment which should be paid by other payers, although it can make payments conditioned on reimbursement from the responsible primary payer.

Medicare utilizes three different mechanisms to regulate proper payment of claims. Working in conjunction of the MSPA, Section 111 of the Medicare, Medicaid and SCHIP Extension Act (Section 111) mandates reporting of Medicare beneficiaries who receive coverage under group health plans, as well as those who receive settlements, judgments, or awards from liability, workers' compensation, no-fault, or other non-group health plans.<sup>5</sup> Section 111 reporting puts Medicare on notice of potential

secondary payer situations and helps to coordinate benefits and organize the secondary payer process from the beginning of a claim, including the tracking of Medicare conditional payments. Medicare set-asides, known as "MSAs" are a mechanism commonly used to protect Medicare's interests when a primary payer seeks to close its

*The MSPA ensures that Medicare does not pay for medical treatment which should be paid by other payers, although it can make payments conditioned on reimbursement from the responsible primary payer.*

obligation to pay future medical benefits.

Section 111, Medicare Conditional Payments, and Medicare Set-Asides are all distinct, but intertwined topics that must be understood to properly protect Medicare's interests.

## Section 111 Reporting

Section 111 is a simple directive that responsible reporting entities (RREs) report the existence of claims that involve a Medicare beneficiary. The RRE, which is the primary payer of a claim, is generally the entity funding any settlement, judgment, or award to a Medicare beneficiary. This includes insurance carriers and self-insured entities. Section 111 requires that all group-health, workers' compensation, liability, no-fault, and other non-group health plans query their claimants to determine the Medicare eligibility of the claimant through the Section 111 process.

Section 111 reporting is only required when the claim involves a Medicare beneficiary. If the claimant is a Medicare beneficiary, data is reported on a quarterly basis and then at time of settlement. The information required by Section 111 reporting, including the diagnosis codes for the covered injury, assists Medicare in identifying conditional payments and estimating any future medical treatment needed for the injury. Having to complete the Section 111 process can also be a practical benefit to the defense attorney because the defense plan, including settlement strategies, change depending on a claimant's Medicare status.

Since the Medicare status of claimants can change throughout the life of a claim, the RRE should check into the claimant's Medicare status on a regular basis. Regularly assessing the claimant's Medicare status can also prevent the RRE from incurring stiff penalties. The MSPA provides for the assessment of civil monetary penalties for noncompliance with Section 111 reporting. Specifically, if a RRE fails to report, it "may be subject to a civil monetary penalty of \$1,000 for each day of noncompliance with respect to each claimant."<sup>6</sup> This equals a potential penalty of \$1,000 per day per claim. Although CMS has not levied a Section 111 penalty to date, proposed rulemaking was expected out in late 2019. Though not released yet, Section 111 rulemaking on civil monetary penalties is inevitable. Because Section 111 penalties can be severe if assessed, RREs should pay attention to the requirements and act accordingly.

## Conditional Payments and the Recovery Process

If a claimant is a Medicare beneficiary (by age or disability), close attention should be paid to determining whether Medicare has made any conditional payments. Of course, if any conditional payments exist, priority should be assigned to resolving those payments in a timely manner. A conditional payment is any payment made by Medicare for medical services for which another payer (insurance carrier or self-insured entity) is responsi-

ble.<sup>7</sup> Medicare is granted the authority to make conditional payments, and to seek reimbursement for those payment via 42 U.S.C. § 1395y(b)(2). An entire administrative recovery process is in place to enforce Medicare's right to reimbursement, including dispute and appeals processes. The most important documents involved in the recovery process include:

- **Rights and Responsibility Letter (RAR):** Once a claim is identified through Section 111 reporting, Medicare will send an RAR that will set forth the recovery process and the applicable deadlines.
- **Conditional Payment Letter (CPL):** When requested, Medicare will issue a CPL which provides an interim list of all conditional payments made to date. Each conditional payment listed on the CPL should

be evaluated to ensure they are accurate, medically necessary, and related to the injury claim. Examining the CPL also provides an opportunity, if applicable, to dispute liability for the conditional payments as a whole—that is, if the primary payer disputes liability for the injury for which the service was rendered.

- **Conditional Payment Notice (CPN):** When Medicare is notified of an impending settlement, judgment, or award, it will issue a CPN. The CPN should also be examined, and a timely dispute should be completed, if necessary.
- **Recovery Demand Letter (RDL):** After a settlement, judgment, or award is completed, Medicare will issue an RDL. At this point, the recovery demand amount should be paid promptly to avoid interest accrual, which will accrue from the date of the demand letter and is assessed for each 30-day period thereafter. At this stage in the recovery process, the RDL amount can be appealed. If payment is not made within 180 days, the recovery will be referred to the Department of Treasury, unless an appeal is pending.

Although Medicare has an administrative recovery process, Medicare also has a private right of action against primary payers to recover its conditional payments. Medicare's private right of action means it can file suit against a primary payer and seek double damages for failure to reimburse its conditional payments. This private right of action has been extended in recent years to apply not only to Medicare Parts A and B, but also to Medicare Part C (Medicare Advantage Organizations) and Part D providers. However, Medicare's private right of action is subject to a three-year statute of limitation (with the three years beginning on the date the settlement, judgment, or award is made or when notice of a primary payment has been made to CMS).

Importantly, during a Town Hall teleconference in early January 2020, CMS made clear that it does not interpret the statute of limitations as applicable to its administrative recovery process. Based on this interpretation, CMS could potentially seek administrative recovery of conditional payments indefinitely.

The bottom line is that conditional payments should be requested regularly throughout a claim, should be thoroughly evaluated once received, and should be resolved promptly either through the dispute process or by payment.

*Medicare's private right of action means it can file suit against a primary payer and seek double damages for failure to reimburse its conditional payments.*

## Medicare Set-Asides

Medicare is prohibited by 42 USC § 1395y(b) from making payment where a primary payment (settlement, judgment, award, or other payment) has been made. In other words, when a claimant receives a primary payment, Medicare must remain the secondary payer until the proceeds from the primary payment are properly exhausted. Because of this directive, many parties choose to use a Medicare set-aside with the goal of estimating the cost of future medical expenses and setting aside an amount sufficient to meet those future expenses from the proceeds of a primary payment.

Though an MSA is applicable in liability and no-fault claims, it is most commonly used in workers' compensation claims (WCMSAs). If an MSA is used, the parties have the *option* to seek CMS approval of the MSA amount. There is *no* statutory or regulatory requirement that an MSA be used. Likewise, there is no statutory or regulatory requirement that an MSA be CMS approved. However, a CMS-approved MSA is one of the tools used the most to protect Medicare's interests and is currently the only method that CMS has approved for compliance with the MSPA. It follows that CMS-approved MSAs, particularly WCMSAs, provide the most certainty as CMS has stated:

CMS' voluntary, yet recommended, WCMSA amount review process is the only process that offers both Medicare beneficiaries and Workers' Compensation entities finality, with respect to obligations for medical care required after a settlement, judgment, award, or other payment occurs. When CMS reviews and approves a proposed WCMSA amount, CMS stands behind that amount. Without CMS' approval, Medicare may deny related medical claims, or pursue recovery for related medical claims that Medicare paid up to the full amount of the settlement, judgment, award, or other payment.<sup>8</sup>

Although CMS has approved liability MSAs in the past, those reviews and approvals have been sporadic and no formalized process for review of liability MSAs has been issued. Further, CMS has not issued detailed guidance about liability MSAs although CMS has signaled that it will move toward issuing guidance in that area sometime in 2020. CMS has, however, provided rather extensive guidance for WCMSAs.

For WCMSAs, CMS has established the following thresholds for *review* of WCMSAs. Therefore, a prudent approach would be to loosely apply the WCMSA guidance to liability cases when:

- The claimant is a Medicare beneficiary and the total settlement is greater than \$25,000 or
- The claimant has a reasonable expectation<sup>9</sup> of Medicare enrollment within 30 months of the settlement date, and the total settlement is greater than \$250,000.

If the review threshold is met, CMS will review the parties' proposed MSA. The review thresholds are *not* safe harbors for non-compliance with the MSPA. CMS's guidance indicates "[t]hese thresholds are created based on CMS' workload, and are not intended to indicate that claimants may settle below

*CMS has not issued detailed guidance about liability MSAs although CMS has signaled that it will move toward issuing guidance in that area sometime in 2020.*

the threshold with impunity. Claimants must still consider Medicare's interests in all WC cases and ensure that Medicare pays secondary to WC in such cases."<sup>10</sup> Again, funding an MSA is voluntary, as is its submission to CMS for approval.

The most important aspect of every claim involving a Medicare beneficiary is to ensure compliance with the MSPA by being diligent about protecting Medicare's interests. Doing so requires an amalgamation of all of the above topics and continued efforts to understand (and come to love) the regulatory spaghetti more thoroughly.<sup>11</sup> 



**Ms. Coolidge** focuses on civil litigation, including defending employers in workers' compensation and retaliatory discharge claims; experience in personal injury, defense of long-term care and assisted-living facilities, and other healthcare-related, professional-liability cases, as well as general tort litigation; local government and

municipality law, labor and employment issues, regulatory compliance, Medicare Set-Asides (MSAs), and insurance coverage disputes.

As a registered nurse who has performed intensive patient care as well as utilization reviews, Ms. Coolidge has a unique background that assists her in defending against workers' compensation and personal injury claims, as well as healthcare-related professional-liability cases.

## Endnotes

<sup>1</sup> Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395 et seq., commonly known as the Medicare Act, established the Medicare program.

<sup>2</sup> In other words, Congress was afraid that if something did not change soon, Medicare would be pinching pennies, running on empty, be taken to the cleaners, chasing chips, trawling for treasure, or any other idiom which denotes the possibility of going broke.

<sup>3</sup> Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599.

<sup>4</sup> See *Zinman v. Shalala*, 67 F.3d 841, 845 (9th Cir. 1995) ("The transformation of Medicare from the primary payer to the secondary payer with a right of reimbursement reflects the overarching statutory purpose of reducing Medicare costs."); Christopher C. Yearout, *Big Brother Is Not Just Watching, He's Suing: Medicare's Secondary Payer Statute Evolves in Aggressive Pursuit of Fiscal Integrity*, 41 Cumb. L. Rev. 117 (2011).

<sup>5</sup> See 42 USC 1395y(b)(7)-(b)(8).

<sup>6</sup> The Medicare MIG Access and Strengthening Medicare and Repaying Taxpayers (SMART) Act of 2012, signed into law by President Obama in 2013, softened the penalty language and provided Medicare with discretion in whether to assess the civil monetary penalty. After the SMART Act was signed into law, the Centers for Medicare and Medicaid Services (CMS) solicited proposed rulemaking related to the imposition of penalties. However, to date, no structured rulemaking has been completed.

<sup>7</sup> 42 CFR 411.21.

<sup>8</sup> *Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) Reference Guide*, Version 3.0 (October 10, 2019), Section 4.2.

<sup>9</sup> A claimant has a reasonable expectation of Medicare enrollment if he meets any of the below conditions:

- Applied for Social Security Disability (SSD) benefits.
- Anticipates appealing a SSD benefits denial.
- Currently appealing or re-filing for SSD benefits.
- Is 62 years and 6 months old.
- Has End Stage Renal Disease (ESRD).

<sup>10</sup> *WCMSA Reference Guide*, Version 30.2 (Oct. 10, 2019), Section 8.1.

<sup>11</sup> More information is available at <https://www.cms.gov/Medicare>.

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# Women *in the* Law



## WELCOME, YEAR TWO: AN UPDATE ON ADLA'S WOMEN IN THE LAW SECTION



**C. MEADE HARTFIELD**  
Bradley Arant Boult  
Cummins, LLP

**Y**ear two of the Women in the Law (WITL) Section of ADLA has arrived! Building on the progress made last year, WITL continues to expand its reach within and outside of the organization. In addition to replicating the educational, networking, and philanthropic events hosted in 2019, we will further build strong foundations for this committee's future throughout 2020. Here is what you need to know, and how you can help:

First, we will focus this year on building out online content that can serve as a resource for our current and potential members. Do you need a little inspiration in your life and legal practice? Then be on the lookout for our new "Off the Record" newsletter. We will provide you with the latest books, podcasts, and articles of interest for women lawyers. We will give

you more food for thought on how to achieve personal and professional success in a way that brings you fulfillment and joy. We will also be adding more podcasts to our "Real Talk: Women in the Law" series. Plus, this is the one-stop shop of information on upcoming WITL events and how you can serve on the committee and support our collective vision. Let's all connect with one another "off the record"!

Second, we want to meet you at ADLA's Annual Meeting this year! We will host a WITL business meeting, as well as a cocktail reception, so that we can meet and plan and connect in person. You should be a part of this. Make plans now to attend in June.

Finally, having introduced the commitment to addressing human trafficking in Alabama, we will begin to offer opportunities for the men and women in ADLA to tangibly pledge their support. Our kickoff event is at Annual Meeting, where we will collect clothing and donations for recovering trafficked individuals who are moving forward in life and seeking gainful employment. Remember that trafficking is not limited to women, so feel free to bring your gently used professional attire (including menswear), and we will provide that to local organizations who assist trafficked persons in rehabilitation.

Thank you for your involvement, support, and valued feedback thus far in the WITL Section of ADLA. We are just getting started. We welcome your involvement. 

# LUNCH & LEARN



## ADLA Members Attend Fall CLE Luncheons for Networking and to Hear Judicial Updates from Honored Guest Judges



Judge Marks speaks to District 3 members in Montgomery

In October, District 3 held its fall CLE Lunch and Learn in Montgomery at the Alabama State Bar. Over 30 ADLA members **Judge Emily C. Marks**, Chief US District Judge for the Middle District of Alabama. Judge Marks talked to members about resources available to attorneys and current issues within the court system. Judge Marks also answered questions about the E-file process and answered general questions pertaining to procedures and policies. Members enjoyed quality time with Judge Marks before and after the luncheon.



Ashley Tidwell, ADLA District 3 Director, Megan McCarthy, and April McKay of Holtsford Gilliland alongside Judge Marks



Charles Calloway, JC Love, Gerald Swann, ALDA Secretary-Treasurer, and Dennis Bailey, ADLA Immediate Past President

**ADLA Gratefully Thanks Our Lunch & Learn Sponsor**



*Our aim is your peace of mind.*



ADLA Secretary-Treasurer, Gerald Swann and ADLA Past President and AIM Sponsor, Sharon Stuart



*Justice Sarah H. Stewart speaking to attendees*



*Raymond Bell, AIM board member & luncheon sponsor*



*ADLA President Christina May Bolin, welcomes District 4 members to the luncheon*



*Sara Liles, Catherine Kirkland, Christine Clolinger & Alex Wood of Starnes Davis Florie pictured with Justice Sarah H. Stewart*

In September, ADLA members enjoyed lunch and one on one time with **Associate Justice Sarah H. Stewart**, Supreme Court of Alabama, during a CLE Lunch and Learn. District 4 members gathered at the Admiral Hotel in downtown Mobile. Justice Stewart provided members an inside overview of the internal structure of the Supreme Court of Alabama and shared how she's working to help streamline and improve the technology challenges within the court system.

During Q&A time, an ADLA member asked Justice Stewart what piece of advice would she offer a young attorney. Justice Stewart replied "You can be a zealous advocate for your client, but more importantly, you should always respect your attorney colleagues."

**A**DLA's Women in the Law Committee welcomed honored guest judges from the 10th Judicial Circuit to a CLE Lunch & Learn in September. **Martha Thompson** of Balch and Bingham served as the program chair and moderator and **Judge Javan J. Patton**, **Judge Marshall J. Hatcher**, and **Judge Brendette Brown-Green** served as guest panelists at Balch & Bingham in Birmingham.

In September, more than 35 members listened to the judges' insight on litigation trends, tips on how attorneys can be better prepared in the courtroom, and how they are using their platform to inspire women in the legal profession. All three judges encouraged everyone to make an initial good faith effort by reaching out to opposing counsel and work towards a resolution their case, always be prepared for court, and speak to jurors after the conclusion of their case to inquire how they came to their decision.



*Conrad Anderson of Balch & Bingham LLP asks the panel of judges a question regarding motions*



*Judge Hatcher, Martha Thompson of Balch & Bingham, Judge Brown-Green & Judge Patton*

**ADLA WOMEN IN THE LAW COMMITTEE GRATEFULLY THANKS OUR LUNCH & LEARN SPONSOR**



# SECRETS TO SUCCESS:

## TIPS FROM FEMALE DEFENSE LAWYERS

**By: Diane Babb Maughan,**

Cabaniss Johnston Gardner Dumas & O'Neal LLP  
Birmingham, AL



**A**fter nearly twenty years of practicing law I have received considerable advice from successful female lawyers, and I have had the benefit of first-hand observation of how they present themselves in the courtroom and elsewhere.

This type of guidance from a seasoned trial lawyer can be invaluable to providing the foundation for a successful trial practice, and it means even more coming from a skilled female litigator to a young woman endeavoring to succeed in that arena. So, I called upon several experienced female defense lawyers in Alabama to provide a few words of wisdom, which appear below. A special thanks goes to each of these ladies for their willingness to contribute.

We hear all the time that “it’s a man’s world.” For sure, the legal field has been predominantly dominated by men. Women, however, are gaining ground with more females joining the profession. The lyrics to James Brown’s “It’s a Man’s Man’s Man’s World” read:

*You see, man made the cars to take us over the road.*

*Man made the trains to carry heavy loads.*

*Man made electric light to take us out.*

*This is a man’s world, this is a man’s world.*

*But it wouldn’t be nothing, nothing without a woman or a girl.*

The presence of women in the legal field is growing. We are making it work, juggling home and work responsibilities like a boss. Although it’s not easy, women are using their skills in organization, efficiency and productivity to participate in the legal field while at the same time keeping the dishes washed, the clothes cleaned, the husband and children fed, and getting to the afternoon activities and carpool on time. As a 20-year litigator, I’ve learned a number of lessons from working in a male-dominated field.

Although I cannot plan your schedule or clean your house, I can provide some useful tips on working with men inside and outside the courtroom.

- Use your strengths to your benefit; don’t try to mold yourself into something you are not. Women, again, tend to be efficient and organized. We have unique skills to juggle a number of balls in the air while making it seem effortless. Use those skills to your benefit instead of trying to fit a narrative or idea of how you think you should act.
- Put on your game face, even if you have to fake it. Especially as an early lawyer, I would get nervous even going into a courtroom, so I started acting like I was playing a role before I went in. I mentally prepared myself to walk in confident and assured even though I was shaking on the inside.
- Don’t be a b\*\*\*\*. Sorry to be so harsh, but one of the biggest complaints I hear from male lawyers about females is that they are just plain mean. Now, I know it’s been said that while men can be assertive, women are being aggressive; however, there is a way to defend your client and stand up for yourself without feeling like you always have to put on your gloves in order to go up against a male opponent.
- Admit when you are wrong or have screwed up. Regardless of sex, everyone agrees that owning up to what you did or did not do and taking steps to remedy the problem goes a whole lot farther than trying to make excuses or passing the buck. You will gain a lot more empathy and respect by acknowledging that you messed up and learning from your mistakes.
- Be willing to forgive and show mercy because you will need to ask for forgiveness and mercy at some point. Again, I have found that it is much easier in the long run to work to get along with your male (and female) counterparts, regardless of how contentious your work may be. We all will inevitably miss a deadline or a court appearance. Finding that you were not gracious to another attorney may come back to bite you when the tables are turned.

I love my job and am grateful that, with some advance planning, I am

able to participate in this exciting, engaging field while also raising a family with children in elementary school (and all the sports, activities, etc. that are associated therewith), not to mention taking care of myself and making time for my relationship with my husband. Keep in mind that women are built differently than men. We have our own set of skills and traits that we can and should use to our advantage. We are all in this together; we all have our own set of balls that we are doing our best to keep juggling. Be patient with each other. Show respect and some humility. Most importantly, believe for yourself that although we as women may be wound differently from men, we are all capable of being successful in the legal field, bringing our own unique personalities and strengths to the playing field. As James Brown said, “It’s a man’s world, but it wouldn’t be nothing without a woman.”

**Jennifer “Jennie” W. Pickett**

**SMITH, SPIRES, PEDDY, HAMILTON & COLEMAN, PC**

---

- Always grant extensions to your opposing counsel. I promise you will need an extension one day.
- My advice is to own who you are! There is no reason to change who you are for litigation. Your greatest asset is you – your abilities, your personality. You don’t have to be someone else in order to be successful in litigation.
- Be slow to anger. You will get angry practicing law, but the times I have shown my anger have done nothing but create a divide with opposing counsel or witnesses or even judges.
- Speak loudly and firmly and look people in the eye.
- Develop something on the side that you are passionate about and continue doing that while you practice law. It may be service work, church work or whatever. That way, even if the law is boring (and it can be day in and day out), you will have something to look forward to.
- You will spend a lot of time as a defense lawyer trying to resolve disputes (that is most of what we do). So, cultivate relationships by being involved in the Bar, in ADLA, or other organizations. If attorneys know you and trust you, then it will make it easier to resolve cases.

**Emily Sides Bonds**

**JONES WALKER LLP**

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- Be respectful to everyone you deal with - from other attorneys, to their clients, to their assistants, the court reporters, the bailiffs, the judicial assistants, the clerks, and certainly the judges. Once you get a reputation for treating others shoddily, your credibility is shot.
- Every other attorney you meet knows something you don’t – you can learn from everyone.
- Go to the courthouse and watch hearings and trials whenever you have some free time.
- Be practical. If your case has weak points, acknowledge those and move on. Many lawyers complain privately the other lawyers are becoming so

unreasonable cases can't be resolved. Your client is best served by a lawyer who can see both sides and work with the other side.

**Gaynor L. St. John**

**ST. JOHN & ST. JOHN, L.L.C**

- "We must use time creatively." Martin Luther King, Jr. I can think of no group of people to whom this quote applies more aptly than female litigators. We juggle a lot at home and at work. In my opinion, it is extremely difficult, if not impossible, to compartmentalize your professional and personal lives. I don't even try. Use all of your time wisely. Read deposition transcripts on the treadmill. Dictate report letters on the drive back from status dockets. Never go to the doctor or hairdresser without something to read. This does not mean work all the time, but using all of your time allows you to get your work done that so you can do the things you want to do outside work.
- Dress appropriately. Do not underdress or overdress. No cocktail dresses for court and no Uggs.
- Be kind. Be firm without being overly aggressive, but also just be nice.
- Learn to say no. Know your limits. Don't be afraid to refer your childhood best friend to a divorce attorney instead of trying to learn domestic law and handle it yourself. Know your limits and enforce them.

**Terri Olive Tompkins**

**PHELPS, JENKINS, GIBSON & FOWLER, LLP**

More than one of the contributors emphasized the importance of being prepared:

- Preparation is key. Be better prepared than your opponent. Angie Cameron Smith, BURR & FORMAN LLP
- There is no substitution for preparation and perspiration! It is always

smarter to be lucky, than lucky to be smart! Deborah Ann Wakefield, PARSONS, LEE AND JULIANO, P.C.

I would add that being prepared also reduces the amount of stress you carry into a given situation, and the better prepared you are, the more confident you will feel.

Reading all of these excellent words of advice inspired me to add a few more tips of my own:

- Do not make promises you cannot keep. Your word is your bond and opposing counsel and judges need to know you can be trusted. By way of example, don't tell someone you will get them a response by a certain date and then fail to do so without explanation. If circumstances arise, or life simply gets in the way, have the courtesy to apologize and make good on your promise as soon as it is feasible.
- Along the same lines, do not procrastinate. There is nothing worse than the anxiety of waiting until the last minute and rushing to meet a deadline. That is, except missing the deadline altogether.
- If you are not already, get comfortable with being the only female in the room. Though less frequent than it used to be, this still happens fairly often in court, mediations, client meetings, and other situations. Do not be intimidated.
- Don't be afraid to speak up, but also know when to listen. You can learn much from observation.
- Get to know and support other women lawyers. Tell someone when they made a great argument in court. Celebrate that trial victory or getting that summary judgment motion granted. Also, be a sounding board for someone's problems and concerns.
- Last, but certainly not least, provide mentorship to a younger lawyer when the opportunity arises. And, pass along your own words of wisdom based on your own experiences.

**Diane Babb Maughan**

**CABANISS, JOHNSTON, GARDNER, DUMAS & O'NEAL LLP** 



**PODCAST**

## WOMEN *in the* LAW Launches First Podcast

ADLA's own **Martha Thompson** of Balch & Bingham LLP sits down with **Lessie Brady** and **Mary Allison Weldon** of Synovus Bank to talk about financial issues for professional women.

Visit <https://soundcloud.com/user-418338208> to listen!

# ADLA WITL SUPPORTS BACKPACK BUDDIES OF ALABAMA



*We love our WITL ladies*



*ADLA WITL members*



*ADLA WITL Committee Chair, Meade Hartfield of Bradley*



*Lori Warren of Alabama Court Reporting and Megan Jones of Clark May Price Lawley Duncan & Paul LLC*



*WITL members sorting school supplies*



On the evening of October 9, the ADLA WITL section held its first Backpack Buddies event in Birmingham, where members and supporters had the opportunity to eat, drink, and work together to help the community. Backpack Buddies, an arm of Vineyard Family Services, provides food and other essentials to public school students when other resources aren't available.

After a brief time of fellowship, the ladies got to work, packing pop tarts, applesauce pouches, and other tasty snacks into "buddy bags" that would be distributed by the Backpack Buddies organization to help in their efforts to feed over 950 public school students every week. Our WITL team packed approximately 200 bags and had a great time chatting and listening to music while working on the buddy bag assembly line.

The ADLA WITL event was possible because of a sponsorship from **Alabama Court Reporting. Bradley** generously provided the conference room space and logistics coordination for the event.



*WITL members stuffing backpacks*



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# ADLA WITL HOST LUNCH & LEARNS AT JONES SCHOOL OF LAW AND THE UNIVERSITY OF ALABAMA SCHOOL OF LAW



ADLA WITL leaders and students from Jones School of Law



Jennie Pickett of Smith Spires Peddy Hamilton & Coleman PC; ADLA Student Section Representative, Matthew Vaughn; and Michal Crowder of Maynard Cooper & Gale PC



ADLA members **Michal Crowder** of Maynard Cooper & Gale PC and **Jennie Pickett** of Smith Spires Peddy Hamilton & Coleman PC shared the important lessons (good and bad) they each learned over their legal careers with law students at Jones School of Law. Questions from the students dealt with trends in civil defense litigation, tips for interviewing, professionalism, and how women lawyers are positively impacting the legal profession.

Michal Crowder and Jennie Pickett take questions from law school students



Xeris Gregory and Daisy Karlson pictured with UA law school students

ADLA members **Xeris Gregory** and **Daisy Karlson** of Baker Donelson Bearman Caldwell & Berkowitz PC met with law students at the University of Alabama School of Law. Xeris and Daisy talked with students about the mission and accomplishments of ADLA's Women in the Law Committee, the importance of networking and participating in ADLA sponsored events and interviewing tips. Other notable bits of advice included how to apply for clerkships, the importance of volunteering for pro bono work and the necessity of always looking for ways to keep your legal mind sharp.



UA School of Law students met for lunch and participated in an ADLA Women in the Law panel discussion

Leadership from ADLA's Women in the Law Committee recently visited law school students at Jones School of Law in Montgomery and the University of Alabama School of Law in Tuscaloosa.

# LET ADLA HELP YOU FIND OUT ABOUT THE PLAINTIFF'S EXPERT WITNESS IN YOUR TRIAL

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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.

Utilize this **member benefit** for gathering information about the expert witness who may be sitting on the other side of the deposition table or across the courtroom aisle.

Visit [www.adla.org/expertwitness](http://www.adla.org/expertwitness) for more information on how to find out about the expert witness in your case.

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**ADLA hosted statewide networking mixers this past fall in Huntsville, Montgomery and Mobile. Thank you to everyone who came out, visit ADLA's website often for upcoming member events.**

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**DISTRICT 3 MIXER  
THE EXCHANGE BAR  
MONTGOMERY**



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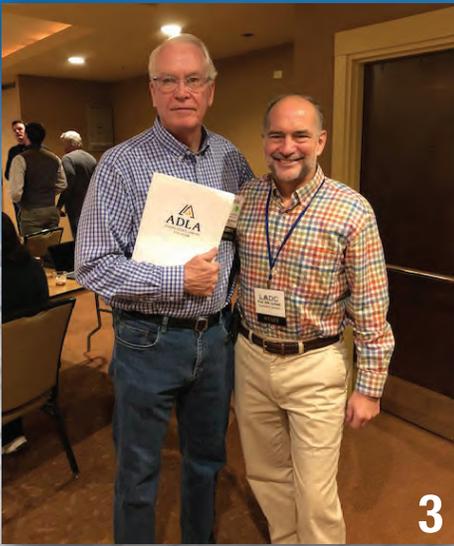
## WINTER CONFERENCE

February 5-9, 2020

In February, members from the Alabama Defense Lawyers Association, Texas Association of Defense Counsel (TADC), and Louisiana Association of Defense Counsel (LADC) met at the Elevation Resort for a tri-state ski CLE seminar in Mt. Crested Butte, Colorado. More than 125 members and their families reunited for the anticipated annual event. ADLA attendees were especially eager to return after more than a ten-year break since the last ski trip.

The seminar offered three days of education, and of course, some exciting time on the slopes. **Craig Alexander** of Rumberger Kirk & Caldwell volunteered to serve as the Alabama program chair. Craig put together an informative agenda that covered timely issues affecting civil defense attorneys not only in Alabama but also nationwide. Thank you to the **ADLA members** who volunteered their time and talents to serve as program presenters and for making the ski seminar a huge success.

- **Marc J. Ayers** of *Bradley Arant Boult Cummings*  
Judicial Deference to Administrative Interpretations of Law: Recent Developments & Effective Litigation Strategies
- **Dennis Bailey** of *Rushton Stakely*  
An Unfamiliar Ground for Removal: The “Federal Officer” Statute
- **Hannah Torbert Kennedy** of *Wade S. Anderson & Associates*  
Challenging Subject- Matter Jurisdiction: Grounds & Consequences
- **Moderator- Craig Alexander** of *Rumberger Kirk & Caldwell*; **Panelists: John Browning** of *Spencer Fane*, and **Jessica Engler** of *Kean Miller*  
Ethical Questions Posed by Lawyers’ Use of Artificial Intelligence
- **Rachel Ehlers** of *Jackson Lewis*  
Data Breach and Response
- **Matthew Smith** of *Kean Miller*  
Emojis | Social Media and The Law
- **Judge Frances Pitman**, *Court of Appeal, Second Circuit State of Louisiana* and **Judge Mike A. Pitman**, *First Judicial District Court State of Louisiana*  
Judge’s Response/Discussion of Emojis | Social Media and the Law; Informal discussion with appellate and trial judges
- **Craig Alexander** of *Rumberger Kirk & Caldwell*  
Pressing Election of Remedies as a Defense: Why, When & How
- **Bruce A. Cranner** of *Talley, Anthony, Hughes & Knight, Mandeville, La*  
Medicare Secondary Payer Compliance 5 Best Practices
- **Robert Shreve** of *Burr Forman*  
Establishing and Preserving a Claim Under The Alabama Litigation Accountability Act



**1** ADLA, LADC & TADC joint CLE session **2** ADLA Immediate Past-President, Dennis Bailey of Rushton Stakely, welcoming attendees to the seminar **3** Dennis Bailey and LADC Executive Director, Bill Corbett **4** According to Dennis Bailey, EVERYTHING is ice cold in Mt. Crested Butte **5** A beautiful shot courtesy of Susan Trousdale **6** Christopher Weller of Capell & Howard PC; Chris Weller, Jr.; Marc Ayers of Bradley; and Donna Ayers **7** The Wellers on top of the mountain **8** Fulton Shreve getting warmed up for ski school **9** Emily and Barrett Manning, daughter and son-in-law of Dennis and Stacia Bailey **10** Fulton Shreve in ski school **11** Jay Tully of Holtsford Gilliland Higgins Hitson & Howard PC and Scarlett Tully **12** LADC and TADC members obviously spotted the ALDA koozies in the hospitality suite **13** Snow rolling in on day two closed down the Gunnison airport for two days **14** Minor weather issues didn't slow down any of the ADLA skiers **15** Fulton Shreve celebrating his well deserved Cub status in ski school **16** Visibility issues were never problematic, quitting wasn't an option **17** Preston Trousdale of Trousdale Ryan PC alongside Susan Trousdale





18



19

**18** Jay Tuley enjoying the view **19** The Trousdale's enjoying dinner at Elk Ave Prime with their friends from Florence, Dr. Mike and Lib Webb **20** Robert and Julia Shreve **21** Julia Shreve of Ambrecht Jackson LLP and 3 year old son, Fulton **22** Skiing kicked off early on day one at the close of the general session **23** Apparently one of the Wellers didn't see the sign **24** Stacia Bailey enjoying every minute of the trip **25** Chris Weller, Jr. is totally in his element **26** Robert Shreve of Burr Forman



21



24



22



25



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23



26

# let's connect...



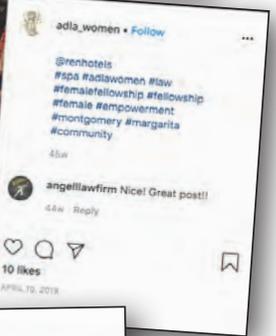
@ALDefenseLaw



Alabama Defense  
Lawyer's Association



adla\_women





**ALLEN M. ESTES**  
Alabama DRI Representative

**A**DLA and DRI continue to enjoy a great relationship in our joint effort to advance the interests of civil defense attorneys and our clients. In January, several Alabama attorneys who are leaders in ADLA and/or DRI met with other defense organization leaders in Chicago at the annual DRI Leadership Conference. The conference's agenda, crafted in part by Lana Olson, provided defense attorney leaders several

opportunities to understand better the things that are working in other states, and develop plans to tackle the challenges all of our organizations are facing. ADLA's leaders came away from the conference with several ideas that you will hopefully see take shape in the coming year.

DRI held its Annual Meeting in New Orleans in October 2019, with great attendance from Alabama attorneys. Next year's meeting has been styled the "DRI 2020 Summit" – designed to be a summit between lawyers and the clients we serve. The Summit will take place October 21-24 in Washington, D.C. Some of the already announced highlights of the Summit will be:

- A Q&A on the Largest Cybersecurity and Data Breach in History
- CEO Fireside Chats on the Future of Insurance and Other Industries
- GC Panels On Challenges/Opportunities in Key Industry Sectors
- GC Panels On Litigation and Compliance in a New Decade
- GC and Claims VP Panels on Lawyers As Trusted Partners

More information on the speakers, programs and client centric events at the Summit will be announced later this year. Check [www.dri.org](http://www.dri.org) for more details on this and other DRI programs. Everything about the Summit promises to be exciting, including being in Washington, D.C. just before the 2020 election. I hope you make plans to attend, and can bring a client with you.

As we move deeper into 2020 and the state legislative session, DRI remains ready to assist ADLA and its members (or its members' clients) in advocating for or against legislation that impacts defense attorneys and our practices. For example, we often see legislative efforts here in Alabama that are very similar to efforts previously undertaken by the Trial Lawyers in other states. DRI's Center for Public Policy has a number of resources that can be utilized in an effort to give legislators a balanced view of those efforts. If you know of an issue that DRI may be able to assist on, please contact ADLA's Legislative Committee Chair, Stephen Still at (205) 868-6085 or [ssill@starneslaw.com](mailto:ssill@starneslaw.com), so that Stephen can get DRI involved if it is appropriate. And if you have any questions about DRI, DRI programs or how DRI works to help ADLA advocate for defense attorneys, please call me. 

## ADLA LEADERSHIP ATTENDS DRI ANNUAL MEETING IN NEW ORLEANS, LOUISIANA

In October, ADLA leadership attended the Defense Research Institute's Annual Meeting in New Orleans. Other familiar faces from Alabama also made the trip, showing a sizable representation of the Southeastern Region. Excellent programming, networking and substantive CLE were just a few of the highlights of the program. ADLA member and Lightfoot partner **Lana Olson** was elected Second Vice President of DRI at the Annual Meeting. Congratulations, Lana!



*Allen Estes, ADLA DRI State Representative; Christina May Bolin, ADLA President; and Andy Rutens, ADLA President-Elect, together at the DRI Annual Meeting in New Orleans*



# SLDO LEADERS ATTEND DRI LEADERSHIP CONFERENCE IN CHICAGO

*SLDO Executive Directors together in Chicago at DRI Leadership Conference in January.*



*SLDO Executive Directors pictured- Kimberly Zibilich, LADC; Jennifer Ward, GDLA; Mary Gadd, TDLA; and Jennifer Hayes, ADLA*



*Lana Olson, ADLA member and DRI Second Vice President, addresses attendees at conference*



*Allen Estes pictured with Georgia Defense Lawyers Association President-Elect, Jeff Ward at DRI Leadership Conference*



*ADLA Executive Director, Jennifer Hayes and Lana Olson*



*ADLA President, Christina May Bolin and ADLA DRI State Representative, Allen Estes*

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

- Bradley partner **David G. Hymer** was included in the 2019 edition of the LMG Life Sciences referral guide to leading North American law firms and lawyers that focus in the life sciences industry. He was selected as a “Life Sciences Star,” who is designated as among the preeminent life sciences practitioners in the United States.

- 2020 Benchmark Litigation recognizes the following Bradley attorneys:

### Birmingham

**William S. “Buddy” Cox III**

**James W. Gewin**

**David G. Hymer**

**Matthew H. Lembke**

**T. Matthew Miller**

**Michael R. Pennington**

### “Future Stars”

**F. Wendell Allen**

**Jeffrey D. Dyess**

**John Mark Goodman**

**Whitt Steineker**

### Montgomery, AL

“Local Litigation Star”

**Charles Stewart**

- The following Bradley attorneys in Alabama were 2019 Mid-South Super Lawyers or Rising Stars:

### Top 50 Birmingham Super Lawyers

**Marc James Ayers** (Appellate)

**Matthew H. Lembke** (Appellate)

### Top 50 Alabama Super Lawyer

**Matthew H. Lembke** (Appellate)

### Mid-South Super Lawyers for 2019

#### Birmingham

**F. Wendell Allen** (Business Litigation)

**Marc James Ayers** (Appellate)

**William S. “Buddy” Cox III** (Environmental Litigation)

**Jeffrey D. Dyess** (IP Litigation)

**James W. Gewin** (Business Litigation)

**John E. Goodman** (Civil Litigation: Defense)

**John W. Hargrove** (Employment & Labor)

**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)

### Huntsville

**Scott Burnett Smith** (Appellate)

### Montgomery

**Charles Stewart** (Business Litigation)

### Mid-South Rising Stars for 2019

#### Birmingham

**John Mark Goodman** (General Litigation)

**C. Meade Hartfield** (Banking)

**Grant A. Premo** (Business Litigation)

**Whitt Steineker** (Personal Injury – Products: Defense)

- **Chuck Stewart**, a partner in the firm’s Montgomery office and co-chair of the firm’s Product Liability team, has accepted an invitation to join the American Board of Trial Advocates (ABOTA). The ABOTA is a national organization of trial lawyers with 97 chapters in all 50 U.S. states. Selection for membership into ABOTA carries with it considerable prestige among attorneys, judges and legislators.
- **George R. Parker**, a partner in the firm’s Montgomery office, has been selected for membership as a Fellow of the Alabama Law Foundation.

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Capell & Howard PC is pleased to make the following announcements:

- We are pleased to welcome **W. Jackson Britton** to the firm. Jackson graduated magna cum laude from The University of Alabama in 2016 with a bachelor’s degree in communications and received his juris doctorate from The University of Alabama School of Law in 2019. Jackson’s practice includes primarily civil litigation and covers various areas of law.
- **Jerusha T. Adams**, a shareholder at Capell & Howard P.C., has been selected by the Judges of the United States District Court for the Middle District of Alabama as a full-time Magistrate Judge.

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Carr Allison is excited to announce the addition of three new associates to our Birmingham Office: **Laura Lantrip**, **Ashley C. Scarpetta**, and **Hannah Stokes**.

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Christian & Small LLP is pleased to make the following announcements:

- Super Lawyers, a Thomson Reuters business, is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The annual selections are made using a patented multiphase process that includes a statewide survey of lawyers, an independent research evaluation of candidates, and peer reviews by practice area. The Rising Stars list is developed using the same selection process, however, candidates must be either 40 years old or younger and in practice for 10 or fewer years.

The following Christian & Small attorneys were 2019 Mid-South Super Lawyers:

- Helen J. Alford** (Daphne, Ala. office) – Civil Litigation Defense
- LaBella S. Alvis** – Personal Injury Defense - Medical Malpractice, Top 50 Women Mid-South Super Lawyers
- Edgar M. Elliott IV** – Civil Litigation Defense
- John W. Johnson II** – Insurance Coverage
- James L. Pattillo** – Personal Injury Defense - General
- Deborah Alley Smith** – Appellate, Top 50 Women Mid-South Super Lawyers, Top 50 Alabama Super Lawyers, Top 50 Birmingham Super Lawyers
- Richard E. Smith** – Business Litigation
- Sharon D. Stuart** (10 years on the Super Lawyers List) – Business Litigation, Top 50 Women Mid-South Super Lawyers
- Michael A. Vercher** – Civil Litigation Defense

2019 Mid-South Rising Star:

- M. Jansen Voss** – Civil Litigation Defense

- **Priscilla K. Williams** has joined the firm in its Birmingham office as an associate attorney. She will focus on civil defense litigation in the practice areas of transportation, insurance, premises liability and construction defect matters.

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Clark, May, Price, Lawley, Duncan & Paul, LLC is pleased to announce that partners **Clay Clark** (Workers' Compensation Law-Employers), **Kelly May** (Litigation-Real Estate), and **Walter Price** (Insurance Law, Litigation-Health Care, Litigation-Insurance, and Medical Malpractice Law-Defendants) have been included in the 26th Edition of The Best Lawyers in America.

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Hill Hill Carter Franco Cole & Black PC is pleased to make the following announcements:

- Attorney **David W. Henderson** has been re-elected Managing Shareholder of the firm for a fourth consecutive term. In this role, Mr. Henderson oversees the management of the firm and develops and implements the firm's long-term strategy, focusing on client service,

value billing, operational efficiencies, diversity, pro bono initiatives, and tactical growth.

- Attorney **Felicia A. Long** was selected to America's Top 100 Civil Defense Litigators® for 2019. Selection to America's Top 100 Civil Defense Litigators® is by invitation only and is reserved to identify most exceptional Civil Defense Litigators throughout the nation. Mrs. Long's practice focuses on the defense of complex civil litigation matters, with particular concentration in insurance defense.
- Attorney **Reed Morgan Coleman** has been named a shareholder of the firm. Reed practices in the firm's Fairhope office, where she focuses on insurance defense and coverage. She frequently handles casualty, commercial, and auto claims, with a particular emphasis on first-party claims and bad faith allegations. Additionally, Reed defends municipalities, corporations, and small businesses in complex and commercial litigation.

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Holtsford Gilliland Higgins Hitson & Howard PC is pleased to announce that **J. Mark Chappell, Jr.** and **M. Ashley Tidwell** have joined as associates in the Central Alabama office, and that **Daniel T. Seawell** and **Carla M. Thomas** have joined as associates in the Gulf Coast office, where they will be defending individuals, businesses, government entities, and insurers in all phases of litigation.

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

- We are pleased to welcome **Cameron Rentschler** to Huie as an associate attorney. Rentschler joins the firm's automotive litigation, product liability, trucking litigation and insurance defense practice groups.
- Huie partner **Stewart McCloud** was selected as a 2019 BBJ Rising Stars of Law honoree by the Birmingham Business Journal. Stewart concentrates his practice in the areas of insurance coverage and defense litigation, professional liability, asbestos and toxic tort litigation, trucking litigation and product liability.
- Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The patented multiphase selection process includes independent research, peer nominations and peer evaluations.

Huie attorneys selected by their peers for inclusion in the 2019 listings include the following:

Mid-South Super Lawyers

**Tom Bazemore**

**De Martenson**

**John Isaac Southerland** (new to listing)

**Gordon Sproule**

**Alan Thomas**

Mid-South Rising Stars

**Jimmy Brady**

**Bart Cannon** (new to listing)

**Elizabeth Davis** (new to listing)

**Jennifer Egbe**

**Stewart McCloud**

- Huie partners **De Martenson** and **Alan Thomas** were named Local Litigation Stars in Benchmark Litigation 2020. Additionally, Huie partner Jimmy Brady was selected for the fourth edition of the Benchmark Litigation 40 & Under Hot List. Benchmark is the only publication on the market to focus exclusively on litigation in the U.S.
- **De Martenson**, a senior partner at Huie, Fernambucq & Stewart, was inducted as a new member of the Alabama Law Foundation at the annual Fellows Dinner which was held Saturday, January 25, 2020, at the Renaissance in Montgomery, Alabama. The Fellows program was established in 1995 to honor Alabama Bar members for outstanding service and commitment. No more than 1% of bar members are invited into fellowship. Those selected have demonstrated outstanding dedication to their profession and their community.

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

- Benchmark Litigation has named Lightfoot, Franklin & White LLC managing partner **Melody Eagan** and partner **Lana Olson** to its “Top 250 Women in Litigation” list for 2019. This is the third year in a row that Olson has received this prestigious ranking.

The list recognizes leading female litigators who have participated in some of the most significant litigation matters in recent history and who have earned the respect of their peers and clients. Attorneys featured in the Top 250 Women in Litigation are selected through an extensive, six-month research process, which includes a review of their recent casework, input from attorneys at peer legal institutions and client feedback on their performance.

- **Matthew J. Winne** joined the Birmingham office as first-year associate. Winne defends clients in a variety of industries, and he has handled matters in a range of practice areas, including product liability,

medical malpractice and First Amendment law. Prior to joining the firm, he clerked for a superior court judge in Atlanta.

- Partner **Lana A. Olson** has been elected second vice president of DRI, the leading organization of defense attorneys and in-house counsel. DRI's national elections were held at the organization's annual meeting in New Orleans this week. With more than 20,000 members, DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation.
- The firm was listed as “Highly Recommended” for Alabama and 14 lawyers received mentions as either “Local Litigation Stars” or “Future Stars.”

The Lightfoot lawyers recognized by Benchmark Litigation this year are:

**Chandler Bailey**, “Local Litigation Star” — Product Liability  
**Michael Bell**, “Local Litigation Star” — General Commercial, Insurance, Medical Malpractice, Product Liability  
**Haley Cox**, “Future Star”  
**Melody Eagan**, “Local Litigation Star” — Product Liability  
**Sam Franklin**, “Local Litigation Star” — Appellate, General Commercial, Product Liability, Securities  
**Wes Gilchrist**, “Future Star”  
**Henry Gimenez**, “Local Litigation Star” — Product Liability  
**Lee Hollis**, “Local Litigation Star” — General Commercial, Personal Injury, Product Liability, Wrongful Death  
**Johnny Johnson**, “Local Litigation Star” — Environmental, Product Liability, Toxic Tort  
**Chris King**, “Local Litigation Star” — Appellate, General Commercial, Product Liability  
**Lana Olson**, “Local Litigation Star” — Environmental, General Commercial, Labor and Employment, Product Liability  
**Adam Peck**, “Local Litigation Star” — Environmental, Product Liability  
**Harlan Prater**, “Local Litigation Star” — Environmental, General Commercial, Product Liability  
**Jack Sharman**, “Local Litigation Star” — White Collar Crime Attorneys

- **Amaobi J. Enyinnia**, **Amber N. Hall** and **Bridget E. Harris** have been selected as three of The National Black Lawyers “Top 40 Under 40 Lawyers” for Alabama. The recognition is given to a select group of lawyers for their professional achievements, including superior qualifications, leadership skills and case results.
- Super Lawyers, a Thomson Reuters publication, recognizes outstanding lawyers from more than 70 practice areas who have attained a high

degree of peer recognition and professional achievement. The patented selection process involves peer evaluation and independent research across 12 categories.

Lightfoot attorneys selected as 2019 Mid-South Super Lawyers:

**Chandler J. Bailey** (Personal Injury - Products: Defense)  
**Michael L. Bell** (Business Litigation)  
**Melody Hurdle Eagan** (Personal Injury - Products: Defense)  
**Sara Anne Ford** (Business Litigation)  
**Samuel H. Franklin** (Business Litigation)  
**Wesley B. Gilchrist** (Business Litigation)  
**Enrique (Henry) J. Gimenez** (Personal Injury General: Defense)  
**Lee M. Hollis** (Personal Injury General: Defense)  
**Sanford G. Hooper** (Personal Injury - Products: Defense)  
**Elizabeth H. Huntley** (Civil Litigation: Defense)  
**John M. Johnson** (Environmental Litigation)  
**M. Christian King** (Business Litigation)  
**Terrence W. McCarthy** (Civil Litigation: Defense)  
**Lana A. Olson** (Environmental Litigation)  
**Adam K. Peck** (Personal Injury - Products: Defense)  
**Harlan I. Prater, IV** (Personal Injury - Products: Defense)  
**David R. Pruet, III** (Business Litigation)  
**J. Banks Sewell, III** (Personal Injury - Products: Defense)  
**Jack Sharman** (Criminal Defense: White Collar)

Lightfoot attorneys selected as 2019 Mid-South Rising Stars:

**Reid C. Carpenter** (Civil Litigation: Defense)  
**Haley A. Cox** (Civil Litigation: Defense)  
**James W. Gibson** (Personal Injury - Products: Defense)  
**Brian P. Kappel** (Entertainment & Sports)  
**Rachel M. Lary** (Business Litigation)

**Jonathan R. Little** (Civil Litigation: Defense)

**Robert J. Sewell** (Criminal Defense: White Collar)

**Clinton T. Speegle** (Aviation & Aerospace)

**Amie A. Vague** (Business Litigation)

**Christopher C. Yearout** (Personal Injury - Products: Defense)

- Attorney **Elizabeth H. Huntley** has been elected to the 2019 class of Alabama Law Foundation Fellows, an honor limited to only one percent of bar members. The Foundation established its Fellows Program in 1993 to honor lawyers who have been members of the bar for at least ten years and who have demonstrated outstanding dedication to their profession and community.
- Lightfoot, Franklin & White LLC has elected **Brian P. Kappel, R. Ashby Pate** and **Christopher C. Yearout** as partners, effective January 1.
- **Charles M. Hearn** has joined the Birmingham office as an associate. Hearn has handled a variety of legal matters ranging from environmental contamination to banking and financial services, including representing lenders in large commercial loan transactions. Prior to practicing law, he served as a field artillery officer in the U.S. Marine Corps (reserve).

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Starnes Davis Florie attorney **Joe Miller** has become a Fellow of the American College of Trial Lawyers (ACTL), one of the premier legal associations in North America. Joe was inducted as a Fellow of the American College of Trial Lawyers at its annual meeting, which took place in Vancouver, British Columbia. Joe Miller is a partner in the firm of Starnes Davis Florie LLP and has been practicing for 27 years.

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Webster, Henry, Bradwell, Cohan, Speagle & DeShazo, P.C. is pleased to announce that **Dan Cowell** has joined the firm as an associate in the firm's Montgomery office. 

expectations have changed

# **CYBER SECURITY 101:** WHAT EVERY DEFENSE LAWYER SHOULD KNOW



## “The Package”

The day begins like any other. Your client opens for business at 9:00 a.m. All employees are at their desks as customers begin calling, emailing, and walking in with various questions and needs. Except this time, when the employees attempt to access customer records from your client's computer network, they immediately notice something is wrong. None of the customer files will open. The data is a garbled mess. When one of the IT employees checks the network, an ominous message appears on the screen:

**YOUR NETWORK HAS BEEN ENCRYPTED. CONTACT THIS NUMBER WITHIN 10 DAYS TO RECEIVE FURTHER INSTRUCTIONS ON HOW TO TRANSMIT PAYMENT FOR THE ENCRYPTION KEY.**

Customers grow impatient and begin asking about the delay. Panicked, the IT employee contacts the Chief Operating Officer.

Unbeknownst to the COO, just the day before, a brand new employee clicked on a hyperlink embedded in an inconspicuous email from an unknown sender. When he clicked the link, his computer downloaded a discreet package. Inside was malicious computer code written in the basement of a twenty-year-old in Russia. The code wormed its way through the client's network and encrypted all the customer data.

For you, too, the day begins like any other. You casually stroll into the office, when your assistant explains that you must speak with this COO immediately. You pick up the phone, and the COO lays out the situation. Then she desperately asks for help: “What should we do?!?”

## Cyber threats hitting closer to home

Cybersecurity used to be something we heard about in passing on the nightly news. North Korea launching volleys of cyberattacks on South Korea. Data breaches at Fortune 500 companies such as Target. But times have changed. Today, cyberattacks are weapons of both war and crime. The FBI and U.S. State Department recently placed a bounty of \$5 million on the head of a Russian cyber-criminal accused of developing the tools for ransomware attacks such as the one introduced above.<sup>1</sup> As these tools proliferate throughout the criminal underworld, the attacks now target vulnerable local businesses.

Before October 2019, the leaders at the DCH Health System could not have anticipated that they would succumb to a ransomware attack across their three hospitals in Tuscaloosa, Northport, and Fayette.<sup>2</sup> The package containing the malicious computer code encrypted DCH's network, preventing doctors and nurses from accessing patient records.<sup>3</sup> Emergency procedures were implemented and elective surgeries were canceled.<sup>4</sup>

Healthcare professionals were forced to use paper records.<sup>5</sup> While the FBI discourages businesses from doing so,<sup>6</sup> DCH did what many businesses feel compelled to do: pay the ransom and obtain the encryption key.<sup>7</sup>

The criminals treat this as a business transaction. They try not to set the ransom too high, so that businesses are incentivized to pay. The criminals know that the cost for the business to restore its system—if even possible—may be three to five times the ransom. Indeed, even with backups and other precautions, it took another week before DCH's systems were fully restored.<sup>8</sup> Ransomware attacks are now popping up across the country and will only continue to grow. Hackers will increasingly target victims that have lots of data but typically have not been at the cutting edge of security—victims such as school systems, municipalities, and young businesses.

While most losses or breaches of data are caused by external attacks—think phishing, hacking, and malware—dangers also lurk inside. Employees can create breaches, even accidentally, e.g., by storing data on the wrong drive, or by sending it to the wrong recipient. The same is true for the improper disposal or redaction of data. But there are occasions where internal theft by an employee can cause significant damage to a company such as the internal theft of valuable trade secrets or other intellectual property (e.g., source code for new product). Regardless of the nature of the attack or loss, the impact is often significant given the value of the underlying data.

## Nature of client data impacted

Data has inherent value. Medical records, for instance, are a treasure trove of valuable information that can be used against customers. The most basic example is personally identifying information. A criminal who

gains access to a customer's name, date of birth, and social security number could potentially engage in identity theft by opening credit cards or by taking out loans using the customer's information. This was one of many concerns federal employees had after the data breach at the Office of Personnel Management was announced in 2015.<sup>9</sup> In the case of Target in 2013, credit card information of 40 million customers was put at risk.<sup>10</sup>

It has been well-documented that foreign governments, such as China, regularly attempt to steal data from U.S. businesses.<sup>11</sup> Indeed, the U.S. Justice Department has started what it calls the “China Initiative” in an effort to reduce the rampant theft of intellectual property (IP).<sup>12</sup> This IP has both commercial and military applications. For instance, in Huntsville, AL, where we live and work, there is a large presence of defense contractors who are working on advanced technologies such as missile defense. Even

*Clients are free to contract away a significant amount of the risk and costs associated with cybersecurity.*

a layperson can notice the similarities of certain Chinese weapon systems that are released in short order after years of extensive research and development by the U.S.<sup>13</sup>

Now, before a business can bid on certain government contracts, certifications and audits are required to verify that necessary precautions are in place before sensitive data is shared.<sup>14</sup> Other federal rules also cover particular aspects of data breaches.<sup>15</sup> But there is still no comprehensive federal statute covering data privacy and data-breach notification. With no federal preemption over data protection, the states are writing their own rules.

## Alabama Data Breach Notification Act

As cybersecurity threats to businesses and consumers has increased, all 50 states have passed some form of data protection law.<sup>16</sup> Alabama's law took effect on June 1, 2018.<sup>17</sup> Known as the Alabama Data Breach Notification Act, the law places certain requirements on "covered entities" to notify the affected individuals when "sensitive personally identifying information" (SPII) is disclosed.<sup>18</sup>

Key to understanding the scope of the Act is the broad definition of SPII: a person's name in combination with any one of six categories of information.<sup>19</sup> SPII is the kind of data that can be used to commit fraud or identity theft. Any person, government, or business that "acquires or uses" SPII is a "covered entity" and is subject the Act.<sup>20</sup>

Covered entities must notify affected individuals within 45 days of discovery of the breach.<sup>21</sup> The notification must be in writing (by mail or email) and must include at least: (1) the date; (2) a description of the breached data; (3) actions taken to restore security and confidentiality; (4) steps the individual can take to protect against identity theft; and (5) contact information.<sup>22</sup> If the breach affects more than 1,000 individuals, then additional notifications within 45 days are required, including to the Attorney General of the State of Alabama and to consumer reporting agencies.<sup>23</sup>

The civil penalties written into the Act are for the failure to properly notify after a data breach or loss has occurred.<sup>24</sup> Though the Act includes steps that covered entities should take both before and after a data breach,<sup>25</sup> significantly, the Act does not punish covered entities for failing to take these steps. Courts have not yet interpreted this new law and there is no private right of action.<sup>26</sup> Any action to enforce the law must be brought by Alabama's Attorney General.<sup>27</sup> Given how new this law still is, limited enforcement has occurred to date.

There are exemptions to the Act.<sup>28</sup> Covered entities who are already complying with a federal law (e.g., HIPAA) governing data breach notification are exempt from the Act.<sup>29</sup> Also exempt are covered entities complying with an Alabama law that is at least as stringent as the Act.<sup>30,31</sup>

Notwithstanding the foregoing, covered entities are still required to send notification to Alabama's Attorney General if the 1,000-person threshold is exceeded.<sup>32</sup>

## Stop the bleeding

When the COO of your client asks "What should we do!?!?", you may not be familiar with cybersecurity law, or even how your own computer works. The first priority is to triage the situation. Whether your client uses an in-house or third-party IT provider, launch an immediate investigation to identify the problem. Where is the malicious code on the network? Is the data breach or loss ongoing? If the client has a comprehensive backup of its network and data, sometimes IT professionals can help quickly switch the client over to that backup, so that business continues uninterrupted. If a backup is not available, the infected components of the network may still be isolated—and the harm mitigated—with the help of outside experts.

Alabama's law outlines several steps that our clients should take in investigating a data breach.<sup>33</sup> At a minimum, they should: (1) assess the breach's nature and scope; (2) identify any SPII involved; (3) determine the

likelihood of substantial harm; and (4) restore the system's security and confidentiality.<sup>34</sup> The Act does not attach any civil penalties to these requirements. But failure to follow the guidance could open clients to actions for negligence, so consider the recommendations to be best practices.

If your client has procured insurance covering cyberattacks or data breaches, then it is vital the insurer be formally notified pursuant to the applicable policy. More insurers are writing cyber policies, many of which transfer to the insurer's designee all rights to negotiate and settle. These negotiations are becoming more

frequent and often raise serious questions regarding the legality of transacting business with criminals, especially when they are operating from sanctioned countries such as Iran or North Korea.

It might be appropriate to notify state or federal law enforcement depending on the nature of the breach. If you suspect a foreign national or criminal organization is involved, you should notify the local FBI field office. Clients sometimes worry about involving law enforcement, but their goal is to help, not to blame. Because they understand the digital footprints left by cyberweapons, law enforcement can be invaluable to the investigation.

## Internal assessment and plan

When the dust settles, hindsight kicks in. What should the client have done differently to prevent or at least minimize the threat?

Every client that acquires or uses SPII should conduct an assessment of their own security threats. The underlying inquiry divides into four

*Nearly every large-scale data breach has one common element: an employee who inadvertently delivered "The Package" of malicious code onto the computer network.*

heads: (1) what is the nature of the data; (2) how is it currently stored; (3) what are the current threats; and (4) how is the data protected from these threats. While an in-house or third-party IT professional can assist with this process, the client's leadership team should be briefed on the audit's results in order to develop a plan that is tailored to the needs of the business. The plan should be documented and updated as new threats emerge.

There is no such thing as perfect cybersecurity, and clients are not required to spend unlimited resources to protect all data from all threats. The reasonableness of a specific plan must be determined and documented by the client's leadership team. To illustrate, an assessment may reveal that a client does not maintain a complete backup of the data from its local server. There are numerous methods available to clients to back up data. Some clients choose to send daily backups to a secure, offsite, and offline storage facility. Others choose one of many cloud storage options that are now available on the marketplace. Either way, a comprehensive backup of a client's data can reduce—and in some cases eliminate—the client's financial harm suffered in the aftermath of a data breach.

## Contractual protections

Clients are free to contract away a significant amount of the risk and costs associated with cybersecurity. Before accepting proposals or bids for new projects, many clients include a prerequisite that the contracting party must certify that their network has been inspected by a third-party auditor. Others may specify the exact locations where certain data may be stored and accessed. In the event of a data breach or loss, the parties' contract may place complete responsibility on one party to bear the costs of mitigating the loss and even reporting the loss to the appropriate parties. Contracts may also include indemnification against claims brought by those adversely affected.

Many kinds of contracts require that certificates of insurance be made available before work begins, and nothing prevents a client from mandating that another party procure cybersecurity insurance or other coverage for data breaches. Cyber-insurance is still a specialized product that can be cost prohibitive from some clients given the perceived threat to the data stored by the client. With or without insurance, there are significant costs that will be borne by the client following a cyberattack or data breach.

Finally, governing law provisions must not be overlooked given the wide array of reporting requirements and penalties structures that all 50 states have separately passed.<sup>35</sup> So if a client does business in multiple states, carefully consider which states' laws will govern.

## Employee education and training

Nearly every large-scale data breach has one common element: an employee who inadvertently delivered "The Package" of malicious code onto the computer network. Even though employees are becoming more aware—for example, of email phishing attacks—cyberattacks are becoming more complex and harder to spot.<sup>36</sup> For example, two parties to

a real estate transaction may negotiate payment via wire transfer at closing. If a criminal knows that one party is expecting to receive wiring instructions, then they can impersonate the other party and send a fraudulent email with different account numbers. Sometimes the email address is spelled differently upon closer inspection, while at other times the correct email account has already been compromised when the wiring instructions are sent. In other words, otherwise diligent employees may miss any discrepancy.

Clients absolutely must educate their employees on cybersecurity best practices. Many precautions are basic, but lapses are daily exploited by criminals around the world. Three precautions are universally applicable. First, passwords and login credentials to a client's network should be complex and reset on a scheduled basis. Access to certain data should be restricted by layered security tools such as multi-factor authentication. Second, employees should be trained on the dangers of clicking hyperlinks within emails or websites. There are numerous filters that are available on the market to either warn or prevent an employee from downloading external content onto a client's network. Three, security patches for a client's network, desktop, and mobile software should be kept up-to-date. Consider a security patch to be a vaccine to a known and diagnosed threat. Many clients fall prey to cyberattacks where the malicious code is specifically written to find and exploit software that is out of date.

Employees must be vigilant, because one click of the mouse can do irreversible damage to a client's business. Training can be made part of new employee orientation and onboarding, but it should also be part of continuing education for the client's employees. Some employees will require more training than others, but the only way to determine whether the training is working is to test the employees with real-world threats. While a written test can be effective, it is more beneficial to simulate threats through disguised emails or links. This can quickly identify those employees who need additional training and supervision.

## What the future holds

Cyberattacks will only increase in frequency and severity. The weapons are cheaper for criminals to deploy, and more client information is stored digitally. The attack at DCH Health System should be a wakeup call for many of our Alabama clients. Now that every state has passed different forms of data protection laws,<sup>37</sup> regulations will continue to be rolled out

*Cyberattacks will only increase in frequency and severity. The weapons are cheaper for criminals to deploy, and more client information is stored digitally.*

and enforced by various attorneys general.<sup>38</sup> The DFAR already contains provisions requiring many federal contractors to be cybersecure.<sup>39</sup> And the DoD's new Cybersecurity Maturity Model—rolling out this year—will mandate “basic cyber hygiene” for every entity in the DoD's supply chain.<sup>40</sup> Not surprisingly, federal preemption over data protection may be on the horizon. The piecemeal approach to legislating this issue at the state level is not sustainable.<sup>41</sup>

Alabama's law does not create a private right of action against clients who fail to comply,<sup>42</sup> but that has not prevented litigants from using negligence per se or other theories to pursue recovery. DCH has been named in a class action lawsuit currently pending in the Northern District of Alabama.<sup>43</sup> Similar class actions are popping up across the country. Clients should expect to be judged not only on the timeliness of their notifications but also on the reasonableness of their precautions.

Cloud computing has transformed the ways both we and our clients access and share information. The technology behind cloud computing is actually quite straightforward: you are using another computer to store the data that you access from your own computer. In 2000, clients might have purchased hardware from Microsoft such as a server to host data locally at the client's place of business. Two decades later, it is much more likely for clients to simply pay Microsoft a fee to store the data. This pushes much of the risk and associated costs back to Microsoft and away from the client. Microsoft expends considerable resources to maintain and keep current the network architecture supporting platforms such as OneDrive. There is built-in redundancy with storing data in the cloud as opposed to local drives. Even the U.S. Military—with all its sensitive data and programs—has awarded a \$10 billion contract to Microsoft to run its cloud.<sup>44</sup>

## Conclusion

Maybe you will never get a panicked phone call from a client concerning a real-time cyberattack. If you do, hopefully your client previously completed an assessment and took reasonable precautions to protect its data. Gone are the days when clients can turn a blind eye to cyber threats. Today, the expectations have changed. We must help our clients take reasonable precautions to protect data and to timely notify those who are affected. 



**Hal Mooty** is a litigator whose practice focuses on commercial litigation matters, including contract disputes and business torts, across the Southeast. He often handles cases where injunctive relief is requested, frequently in emergency situations where the success or failure of a business is at stake.

Hal has years of experience representing both individuals and businesses in state and federal courts, as well as in arbitration proceedings. His litigation experience includes numerous non-compete, non-solicitation, and non-disclosure cases. Hal has assisted and advised clients with emerging joint venture, partnership, and shareholder disputes.

## Endnotes

- <sup>1</sup> Maksim Viktorovich Yakubets, Fed'l Bureau of Investigation (accessed Jan. 29, 2020) <https://www.fbi.gov/wanted/cyber/maksim-viktorovich-yakubets>
- <sup>2</sup> *DCH ongoing response to cyberattack and IT system outage*, DCH Health System (accessed Jan. 8, 2020) [https://www.dchsystem.com/Articles/dch\\_ongoing\\_response\\_to\\_cyberattack\\_and\\_it\\_system\\_outage.aspx](https://www.dchsystem.com/Articles/dch_ongoing_response_to_cyberattack_and_it_system_outage.aspx) [hereinafter DCH Statement].
- <sup>3</sup> *Id.*
- <sup>4</sup> *Id.*
- <sup>5</sup> *Id.*
- <sup>6</sup> *See, e.g., High-impact ransomware attacks threaten U.S. businesses and organizations*, Fed'l Bureau of Investigation, Alert No. 1100219-PSA (accessed Jan. 29, 2020) <https://www.ic3.gov/media/2019/191002.aspx>
- <sup>7</sup> DCH Statement, *supra* note 2 (“[W]e have obtained a decryption key from the attacker to restore access to locked systems.”).
- <sup>8</sup> *Id.*
- <sup>9</sup> Cybersecurity incidents, Office of Pers. Mgmt. (accessed Jan. 29, 2020) <https://www.opm.gov/cybersecurity/cybersecurity-incidents>
- <sup>10</sup> *Target confirms unauthorized access to payment card data in U.S. stores, Target Corporate* (accessed Jan. 29, 2020) <https://corporate.target.com/press/releases/2013/12/target-confirms-unauthorized-access-to-payment-card>
- <sup>11</sup> *See, e.g., Findings of the investigation into China's acts, policies, and practices related to technology transfer, intellectual property, and innovation under Section 301 of the Trade Act of 1974*, Office of the U.S. Trade Representative, Mar. 22, 2018, 153–173 (accessed online Jan. 29, 2020) <https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-china/investigation>
- <sup>12</sup> *Department of Justice China Initiative fact sheet*, Dep't of Justice, Dec. 20, 2018 (accessed online Jan. 29, 2020) <https://www.justice.gov/opa/page/file/1122686>
- <sup>13</sup> *See, e.g., China tests laser weapon similar to U.S. Navy prototype, Maritime Exec.*, Apr. 10, 2019 (accessed Jan. 29, 2020) <https://www.maritime-executive.com/article/china-tests-laser-weapon-similar-to-u-s-navy-prototype> (Chinese system “bears a remarkable similarity to the U.S. Navy's Laser Weapon System.”)
- <sup>14</sup> *E.g.*, 48 CFR § 252.204-7012 (2019).
- <sup>15</sup> *E.g.*, Health Insurance Portability and Accountability Act (personal health information); Gramm–Leach–Bliley Act (financial services); Federal Trade Commission Act (unfair trade practices).
- <sup>16</sup> For a list only of breach-notification laws, *see Security breach notification laws, Nat'l Conference of State Legislatures* (accessed Jan. 29, 2020) <https://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx> [hereinafter NCSL List].
- <sup>17</sup> *Alabama Data Breach Notification Act of 2018*, Ala. Act 2018-396, Mar. 28, 2018 (now codified at Ala. Code §§ 8-38-1 to -12 (2020)).
- <sup>18</sup> Ala. Code §§ 8-38-1, -2, and -5.
- <sup>19</sup> § 8-38-2(6).
- <sup>20</sup> § 8-38-2(2).
- <sup>21</sup> § 8-38-5(b).
- <sup>22</sup> § 8-38-5(d).
- <sup>23</sup> §§ 8-38-6 and -7.
- <sup>24</sup> § 8-38-9.
- <sup>25</sup> § 8-38-4.
- <sup>26</sup> § 8-38-9(a)(1).
- <sup>27</sup> §§ 8-38-9(a), (b)(2), and (b)(6).
- <sup>28</sup> §§ 8-38-11 and -12.
- <sup>29</sup> § 8-38-11.
- <sup>30</sup> § 8-38-12.
- <sup>31</sup> *E.g.*, Insurance Data Security Law, Ala. Act 2019-98, Apr. 25, 2019 (codified at Ala. Code §§ 27-62-1 to -11).
- <sup>32</sup> Ala. Code §§ 8-38-11(3) and 12(3).
- <sup>33</sup> Ala. Code § 8-38-4.
- <sup>34</sup> Ala. Code § 8-38-4(a).
- <sup>35</sup> *See* NCSL List, *supra* note 16.
- <sup>36</sup> *See, e.g., North Korean regime-backed programmer charged with conspiracy to conduct multiple cyber attacks and intrusions*, Dept. of Justice, Sept. 6, 2018 (accessed Jan. 29, 2020) <https://www.justice.gov/opa/pr/north-korean-regime-backed-programmer-charged-conspiracy-conduct-multiple-cyber-attacks-and> (describing “email and social media accounts that connect to each other and were used to send spear-phishing messages; aliases, malware ‘collector accounts’ used to store stolen credentials; . . . proxy services used to mask locations”).
- <sup>37</sup> *See* NCSL List, *supra* note 16.
- <sup>38</sup> *See Letter to Congressional Leaders from the National Association of Attorneys General*, July 7, 2015 (accessed online Jan. 29, 2020) <https://www.naag.org/assets/redesign/files/sign-on-letter/Final%20NAAG%20Data%20Breach%20Notification%20Letter.pdf> [hereinafter NAAG Letter].
- <sup>39</sup> *Supra* note 14.
- <sup>40</sup> *See Cybersecurity Maturity Model Certification*, Office of the Under Sec'y of Def. for Acquisition and Sustainment (accessed Jan. 29, 2020) <https://www.acq.osd.mil/cmmc/>
- <sup>41</sup> *But see* NAAG Letter, *supra* note 38 (arguing against federal preemption).
- <sup>42</sup> Ala. Code § 8-38-9(a)(1).
- <sup>43</sup> Class Action Complaint, Daniels v. DCH Healthcare Auth., No. 7:19-cv-02086-LSC (N.D. Ala. Dec. 23, 2019) (Doc. 1).
- <sup>44</sup> Heidi M. Peters, Cong. Research Serv., IF11264, DOD's cloud strategy and the JEDI Cloud procurement (Nov. 13, 2019).

# SHAPING THE FUTURE

By: David Sikes, APCAAs President | Montgomery, AL



With ADLA's assistance, APCAAs incorporated in August 2018. We formed an organization that has never been done in Alabama – the creation of a state-wide professional and educational development association for property & casualty insurance claims adjusters. We created a membership focused website and in 2019, we offered 8 seminars for 18 education credit hours to over 190 members that attended! Also, in 2019 APCAAs made its first attendance at the ADLA Summer Conference. APCAAs members met ADLA members at the conference and attended the education segments. The information that we gained from this event has helped to shape the approach we take in handling claims.

APCAAs is looking forward to attending again in June 2020! This year, Mike Lovelady, APCAAs Secretary/Treasurer and Regional Vice-President of Claims for ALFA Insurance Company will team up with Marci Williams, APCAAs Member and Senior Claims Adjuster for the Alabama Municipal Insurance Corporation to be part of a panel discussion related to bad faith “*Bad Faith – Stay In Your Lane.*” This will be another opportunity shape and refine the approaches for handling claims.

We are looking forward to joining ADLA members on Friday, June 19<sup>th</sup> for the educational session and then on June 20<sup>th</sup>, APCAAs members attending will break out into a separate room to have education topics focused more for claims adjusters. Our focus for our participation with ADLA will be with a view of “*Train the Trainer*” where APCAAs members in attendance can learn new information and be able to take the material home with them and educate/train their co-workers and staff.

Aside from the Summer Conference, we have other seminars planned. By the time this article is published, we will have had an Insurance Fraud Seminar in Oxford, Alabama featuring speakers from the Alabama Department of Insurance and State Fire Marshal's Office and other law enforcement professionals.

We have planned for a seminar on the Alabama Insurance Data Security Law that Governor Ivey signed in 2019. We have also planned for a seminar on electrical claims with the generous assistance from Alabama Power Company.

Follow us on LinkedIn and Twitter as we will post some updates from our website, [www.apcaa.org](http://www.apcaa.org). With any luck, everyone will get to see your picture standing in support of APCAAs and its claims adjuster membership!



ADLA President-Elect, Andy Rutens, presents at APCAAs seminar



ADLA member, Tom Galliard of Helmsing Leach Herlong Newman & Rouse PC, addresses APCAAs members at seminar



**CRAIG ALEXANDER**  
Chair

Greetings from the ADLA *Amicus Curiae* Committee. We are pleased to report that Joseph H. Driver recently became a member of the committee, and we are proud to report that the purpose of Joe's addition to the ranks was a vacancy occasioned by the ascension of former committee member R. Austin Huffaker, Jr. to the bench of the United States District Court of the Middle District of Alabama. The other members of the committee, as currently and capably constituted, are Marc J.

Ayers, Gregory C. Cook, William J. Gamble, Ed R. Haden, Mark D. Hess, Alex L. Holtsford, Jr., H. Edgar Howard, Kathleen C. Kaufman, Forrest S. Latta, James H. Pike, Patrick L. W. Sefton, and Sharon D. Stuart.

As an update to the committee report published in the Fall 2019 issue of the Journal, the ADLA did not file an amicus brief in the *Tenax SPA v Dees* case. The appeal was dismissed after the case was settled through appellate mediation.

Since the committee's last report, ADLA has appeared as an *amicus curiae* in two appellate cases.

In *Nucor Steel Birmingham v. Otwell*, a workers' compensation case in the Circuit Court of Jefferson County, the trial resulted in an award of permanent and total disability benefits. The employee suffered from longstanding lower back and chronic pain problems that originated from an on-the-job accident while working a previous employer. The employee did not claim that he re-injured his back in an on-the-job accident, but instead claimed a cumulative trauma injury caused by his work duties as a relief crane operator. The compensability of this claimed injury and the timeliness of notice were the principal issues at trial.

ADLA's amicus brief was authored by Steven T. McKeekin. The brief urged that the court should reconsider its prior holdings that the running of the requirement to give notice of a cumulative trauma injury begins on the date of the employee's "last injurious exposure," and instead should be the date that when the employee has reason to know that he has suffered an injury caused by his work activities. The brief also urged the court not to relax the statutory standard that cumulative trauma injuries must

be proven by clear and convincing evidence, and not just evidence that is based on speculation and conjecture.

This appeal remains pending as of the date of the preparation of this report.

In *Ex parte Aladdin Manufacturing Corp.*, 2019 WL 6974629, \_\_\_ So.3d \_\_\_ (Ala. December 20, 2019), the Supreme Court issued an opinion concluding that the trial court erred in denying several defendants' motions to dismiss for lack of personal jurisdiction, and by a plurality, declining to find error in the trial court's denial of similar motions by other defendants. The defendants whose petitions were denied filed a joint application for rehearing on January 3, 2019, and requested an amicus brief from the ADLA in support of their applications.

The petitioners operate carpet-manufacturing businesses in and around Dalton, Georgia. The plaintiffs allege that these businesses generate wastewater containing unsafe amounts of certain chemicals, that the wastewater is treated by a utility in Dalton and then sprayed onto a 1,800 acre "Land Application System," and that some of this wastewater seeps into the Conasauga River and eventually makes its way into the Coosa River in Alabama, eventually resulting in the contamination of plaintiffs' water supply.

William H. Webster filed ADLA's motion for leave to file a proposed amicus brief. This brief will argue that the plurality opinion of the court should be reconsidered based in part on the court's recent opinion in *Facebook v. K.G.S.*, \_\_\_ So.3d \_\_\_, 2019 WL 2710235 (Ala. June 28, 2019), and that the specific allegations against the applicants demonstrate that there was no "purposeful direction" or "express aiming" toward Alabama, but instead that by plaintiffs' own allegations, applicants' contacts with the State of Alabama were too attenuated to support an Alabama court's exercise of "specific" personal jurisdiction over them.

The joint application for rehearing and ADLA's motion for leave remain pending as of the date of the preparation of this report.

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

## Keyword Search Our Brief Bank

by Name, Case Number & Brief Title

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## 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 is participating as an *amicus curiae*, shall identify as counsel for ADLA the author of the brief, the President of ADLA, and the Chair of the *Amicus Curiae* Committee.

## VI. FEES AND COSTS

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

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

***Adopted unanimously by email poll of the Board of Directors dated: January 9, 2019***

# On ADLA Members the Record

*Nobody tells your story better than you do. Our ADLA Members On the Record feature spotlights several members in each issue. ADLA members 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.*

## Bruce Barze

Barze Taylor Noles Lowther LLC  
Birmingham, AL

### Where did you grow up and what college did you attend?

I was born in Tuscaloosa, but I've lived all over as an "insurance brat." My dad worked for Aetna Life & Casualty, so we lived in Birmingham, Atlanta, and Savannah through my 2nd grade year. In 1971, we moved to Los Angeles and lived there until I started 9th grade, and then we moved to St. Louis where I went to high school. I attended Vanderbilt University. During the summer of my junior year, my parents moved back to Atlanta, where my mom still lives today.

### Most memorable moment on the job?

**1** Bruce visiting the Taj Mahal in Agra, India in September 2016 **2** Attending a Fulham F.C. football match at Craven Cottage in London with godson Curtis (L) and son Murphy (R) **3** A memorable day in St. Andrew's, Scotland **4** Murphy, Missy, Bruce, and Sarah Patrick



I've had many noteworthy moments over the last 27 years, but one of the most memorable has to be obtaining a \$4.7 million jury verdict for a client in federal court in Tennessee. Todd Lowther and I had to try that case twice. After a trip to the Sixth Circuit, the second trial win was particularly sweet.

### Unusual job perk?

Although I'm a hacker, I get to play golf on some of the most storied courses in connection with work meetings. Among others, I've been fortunate to play Pebble Beach, the Old Course at St. Andrews, Number 2 at Pinehurst, and Torrey Pines.

### What is the furthest you have traveled for work?

In both 2016 and 2017, I traveled to India for a week to meet with clients in connection with commercial litigation we handled here in the U.S. India is an amazing, vibrant, and sometimes chaotic country, but I especially love the people and the food. The experience was even more memorable due to our clients' practice of Atithi Devo Bhava, a dynamic of the host-guest relationship that embodies the traditional Indian Hindu-Buddhist philosophy of revering guests with same respect as god. And pictures simply don't do justice to the jewel that is the Taj Mahal!

### What is the most rewarding aspect of your career?

I love solving problems and

learning new things. But my parents also kindled my love of travel from an early age. I'm very fortunate to represent a number of foreign clients with their claims and litigation here in the States. Thus, I regularly travel abroad for work. I go to London 2-3 times a year, and over the last couple of years, I've defended depositions in places like Germany and Amsterdam. I enjoy interacting with people, am a student of world affairs, and am passionate about "living like a local" and understanding various cultures, so combining these interests with my work has been incredibly rewarding.

**Most frustrating?**

TSA lines; delayed or cancelled flights; third-party bill auditing firms!

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

1. Don't focus on billing hours. Focus on thinking strategically about your cases, solving your clients' problems, and being a responsive and proactive lawyer. Know more about the file than your partner does. If you do these things, the billable hours will take care of themselves.
2. When you are a very young lawyer, your emphasis should be on your true "clients:" your partners. When you proactively take care of their needs and problems, you model for them your ability to interact directly with firm clients and take the lead on solving larger and more complex issues and problems.

*When you are a very young lawyer, your emphasis should be on your true "clients:" your partners. When you proactively take care of their needs and problems, you model for them your ability to interact directly with firm clients and take the lead on solving larger and more complex issues and problems.*

**What was your biggest lesson learned when you started to practice that you didn't already know?**

Clients want decisive lawyers who will give them advice. In law school we were taught to view problems from both sides. I learned that it's okay to provide various options to your client, but you ultimately need to make a call and tell the client your recommendation.

**Why are you a member of ADLA?**

I was first introduced to the ADLA in 1994 through the Trial Academy. That led to attendance at Midyear meetings and Annual Meetings at the beach, which ultimately turned into leadership and speaking opportunities. I have especially fond memories working with Ed Livingston and the Board as an officer and director. At every stage, I've made lasting friendships and developed a network of outstanding lawyers around the State.

**If you had to choose a different profession, what do you think you would want to do?**

There's little risk of me abandoning my day job, but I'd love to be able to make a living painting or cooking. I love to create.

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

I've been fortunate to have a number of wonderful role models, but there are two who stand out. One of my first was Harold Bowron, a partner at Balch & Bingham. Harold was always mild-mannered and a consummate gentleman, and he gave me the opportunity to try my first jury trial. Allen Baker is another role model who modelled hard work, but he always put his family first. I'm also inspired by Allen's powerful combination of humility and tenacity.

**Who do you pull for on football Saturday's?**

The first place I lived was in married student housing at the University of Alabama...what do you think? Roll Tide!

**What do you like to do in your spare time when you are not focused on work?**

I enjoy hacking at golf balls, travel, learning about and drinking wine, and spending as much time as I can with my family.

**What is the last book you read?**

The Power of A Humble Life, by Richard A. Simmons III



**Favorite movie?**

The Shawshank Redemption. "I guess it comes down to a simple choice, really. Get busy living or get busy dying."

**Biggest Pet Peeves?**

Answering interrogatories and requests for production.

**Favorite concert you've attended?**

It's hard to pick just one. I attended some Grateful Dead shows back in the 1980s that were pretty memorable (I think), but my favorite recent one was An Acoustic Evening with Jason Isbell at the Lyric Theater in December 2018. It was awesome.

**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.**

Chuck Stewart has always been a special friend and a sort of "big brother"

*Who do you pull for on football Saturday's? The first place I lived was in married student housing at the University of Alabama....what do you think? Roll Tide!*

to me. He was instrumental in nominating me for the officer track of ADLA, which led to leadership opportunities in DRI and helping me to build a national referral network. I'll always be grateful and have tried to pay it forward whenever I can.

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

I've been married to Missy for 25 years, and we've had three amazing children. Our son, Murphy, is 22 and a senior at Furman University. Our daughter, Sarah Patrick, is 14 and attends

8th grade at the Altamont School. Our daughter, Mary Parker, passed away in 2004 at the age of two with a heart condition, but we speak of her often and know we will see her again one day! We round out our family with our two rescue dogs, Porter and Dagger.

**Ben Heinz**

Ball Ball Matthews & Novak PA  
Mobile, AL

**Where did you grow up and what college did you attend?**

I grew up in Mobile but was born in Raleigh, North Carolina. I attended Duke University as an undergraduate and the University of Alabama for law school.

**Most memorable moment on the job?**

There have been a lot. However, the one I get the most story-telling

mileage out of is the day I defended depositions of a few carnival workers in the "office" for the traveling carnival I was representing. The office was basically a cargo trailer. The location was the county fairgrounds in Columbus, Mississippi.

**Unusual job perk?**

My personal office likely has the best view of any lawyer's office in Mobile and quite possibly the entire state.

**What is the furthest you have traveled for work?**

By actual distance for actual work, it is probably to Baltimore, Maryland. However, a week of



**1** Ben, Teresa, Clara, and Charlie with Connell's Big Head **2** Ben and wife Teresa **3** Ben, Teresa, Connell and Charlie **4** Ben and Clara, Charlie, and Connell **5** Ben, Connell (assistant coach), Charlie and his teammates after winning 4th Grade championship **6** Ben (as Shrek) throwing an onion to Connell and Clara



depositions at a ratty motel in Newton, Mississippi, sure seemed like a much farther trip.

### **What is the most rewarding aspect of your career?**

I get the opportunity to learn something new every day. Whether it is reading a recently released decision, getting involved in a case with a subject matter I have not dealt with before, or watching how other lawyers argue motions or question witnesses, I try to learn all the time. I think I am a pretty good lawyer, but I know I should try to always get better.

### **Most frustrating?**

There are actually people who dare to disagree with me.

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

1. Quality first. While the practicalities of being a defense lawyer involve billable hours and receivables, the quality of your work is what will carry you throughout your career. Clients and senior lawyers can quickly figure out the difference between and true value of 5 hours of high-end legal work compared to 10 hours of mediocre clock-churning work.
2. Don't take yourself too seriously and have a sense of humor. Being a lawyer is definitely serious work, but do not forget to laugh, especially at yourself.

### **What was your biggest lesson learned when you started to practice that you didn't already know?**

I learned that my personal opinion, pride, and ego really have no place in my cases. I am a highly competitive person, like to win, and have always had a tendency to keep a mental "score" in everything I did. However, I learned early on that the ultimate outcome of every case is primarily driven by how my clients want to resolve the dispute. Most of the time that resolution is a settlement or, to this competitive person, a tie. Ties are most often a very good result.

### **Why are you a member of ADLA?**

I think I initially joined just because it was standard procedure for the lawyers in my firm at the time. However, I remain a member because I find ADLA to be made of a great people that I enjoy being around and that set examples for me look at as I continually try to improve myself as a lawyer.

### **If you had to choose a different profession, what do you think you would want to do?**

In a semi-homage to George Costanza, I think I would be an architect (but only of golf courses). I have played golf my whole life and have always enjoyed the aspects involving the actual make-up and variations of golf courses. I have built or renovated many courses in my head over the years.

### **Who was/is your role model/mentor in the profession?**

I have tried to learn the good and the bad from lawyers of all sorts throughout my career. On a day to day basis though I lean on my partners in Mobile, Monty Montgomery and Kirby Howard, for ideas and advice on almost every one of my cases.

### **Who do you pull for on football Saturday's?**

Duke and Auburn. My parents grew up in Iowa so I had no allegiance to any schools from Alabama by birth. I went to Duke (and we started 7-0 when I was a freshman) so my allegiance there is obvious. As for Auburn, my wife Teresa went there, but I also started following college football when Bo Jackson was at Auburn and when Alabama was rather mediocre. I chose Bo and Auburn. Who wouldn't?

### **What do you like to do in your spare time when you are not focused on work?**

Most of the spare time is dedicated to my kids' various activities. My

*While the practicalities of being a defense lawyer involve billable hours and receivables, the quality of your work is what will carry you throughout your career. Clients and senior lawyers can quickly figure out the difference between and true value of 5 hours of high-end legal work compared to 10 hours of mediocre clock-churning work.*



involvement varies from that of a proud parent just watching them to helping raise money to fund their team or event. My wife and kids will tell you that there is no doubt I most enjoy coaching youth basketball in the catholic school youth league in Mobile. Otherwise, I am guilty of being more than content to sit on my deck while cooking many varieties of meat on my Big Green Egg.

**What is the last book you read?**

The Guardians by John Grisham.

**Favorite movie?**

Hoosiers.

**Biggest Pet Peeves?**

Parents who get out of the car to hug their kids in the carpool line. That is what the parking lot is for.

People either staring at their cellphones while they are at a live event or using it to record the live event. Just be there and enjoy it with your own eyes.

**Favorite concert you've attended?**

I am not a big concert guy. If I had to choose one though, I'd say Big Head Todd & the Monsters opening for Dave Matthews Band in Cameron Indoor Stadium in 1995 was pretty cool.

**What is one of your most embarrassing moments?**

I dialed the wrong number when inviting a girl to a fraternity dance in college. In a strange turn of events, the number belonged to a girl with the same first name as the intended invitee. The invitation was made and accepted on the phone call. Upon hanging up, I had a funny feeling that the girl to whom I had spoken sounded a little different than the girl

*My wife and kids will tell you that there is no doubt I most enjoy coaching youth basketball in the catholic school youth league in Mobile. Otherwise, I am guilty of being more than content to sit on my deck while cooking many varieties of meat on my Big Green Egg.*

I had intended to call. I soon realized I had dialed the wrong number. With the help of a few fraternity brothers and while essentially being the laughingstock of the other brothers, I figured out who my now date was. I went through with the date and had a good time. She was a good sport about it too as I am fairly sure she knew before the actual dance of my dialing misstep.

**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.**

Christina Bolin (how's that for sucking up to the current President). Seriously though, Christina brought me into the fold as a faculty member for the Deposition Boot Camp back in 2012 and then handed off the Director spot for the Boot Camp to me in 2018. The 2 to 3 days every year in March I spend at the Boot Camp are always great and something I look forward to when January rolls around. I really do have to thank Christina for that.

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

My wife Teresa and I have three children: Connell (18), Clara (15), and Charlie (11). Teresa is the Chief Assistant District Attorney in Baldwin County and the "real lawyer" in the family according to our wonderful children as she tries many more cases and gets interviewed by the local news. Unfortunately, with 2 lawyer parents, our kids have grown up being deposed or cross-examined their entire lives. They have learned that "fine" or "good" as an answer to a question will likely be followed by 17 much more probing questions about the who, what, when, and where of their days. Somehow we think they still love us.

**Megan Jones**

Clark May Price Lawley Duncan & Paul LLC  
Birmingham, AL

**Where did you grow up and what college did you attend?**

I grew up in Carrollton, Georgia. I attended Florida State University – Go Noles!

**Most memorable moment on the job?**

My most memorable moment was probably the first time I gave opening statements in a jury trial. I was in Shelby County, and so nervous. I stood up, and being only 5 ft tall, the Judge's bench towered above me. There was nothing else to do, but to make a joke about being so small. The jury laughed, I laughed, my nerves calmed, and I gave

my opening. We ended up winning the case. It was certainly a trial to remember.

**Unusual job perk?**

The morning donuts that our favorite Court Reporters bring.

**What is the furthest you have traveled for work?**

Los Angeles, California

**What is the most rewarding aspect of your career?**

Handling a case from start to finish.

**Most frustrating?**

When there is a lack of professionalism and cordiality between lawyers.

**What is your best advice to**

*Unusual job perk?  
The morning donuts that our favorite Court Reporters bring.*

**young lawyers? Two things:**

1. Ask for opportunities! If you want to take a deposition or a witness at trial, ask. And, ask again.
2. Find a mentor and learn as much as you possibly can. Ask questions and write down their words of wisdom.



*Best advice to young lawyers?  
Ask for opportunities! If you want to take a witness at trial, ask. And, ask again.*



**when you are not focused on work?**

I love to travel, play lots of tennis, and spend time with my family.

**What is the last book you read?**

The Time Traveler's Wife

**Favorite movie?**

French Kiss

**What was your biggest lesson learned when you started to practice that you didn't already know?**

The legal community is small; so be kind and considerate.

**Why are you a member of ADLA?**

My favorite part of being an ADLA member is that there are so many opportunities to learn, teach and share wisdom. It is truly a community where you can ask questions or ask for help, and help will be given.

**If you had to choose a different profession, what do you think you would want to do?**

I'd probably want to be some type of physician.

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

First, my dad. Then some of the amazing women I've had the opportunity to work with over the years.

**Who do you pull for on football Saturday's?**

My Seminoles, of course!

**What do you like to do in your spare time**

**Biggest Pet Peeves?**

When someone uses the last paper towel and does not replace the roll.

**Favorite concert you've attended?**

Any John Mayer concert.

**What is one of your most embarrassing moments?**

I was playing softball as a law clerk. I took a swing, hit the ball and did not let go of the bat. I proceeded to fall flat on my face.

**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.**

David Brown. He is always ready to share words of wisdom, particularly when it comes to trial strategy.

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

Simply that I have the most wonderful husband and two beautiful baby boys. I am so thankful for my family.



*Who do you pull for on football Saturday's?  
My Seminoles, of course!*



1



2

1 Megan and Justin on a rooftop in Florence, Italy 2 Megan enjoying time in Panama City Beach 3 Megan, Justin, Sawyer and Wilder at their family Lakehouse in Wedowee, AL where they spend every Thanksgiving and most of the summer



3

## Ed Livingston

Honorary Member and former  
ADLA Executive Vice President  
*Montgomery, AL*

### Where did you grow up and what college did you attend?

Montgomery, AL. Attended University of Alabama undergraduate and law school.

### Most memorable moment on the job?

I actually pursued three careers: after commissioning through ROTC I served 2 years active Army, including a tour in Vietnam, followed by 28 years in the Alabama Army National Guard. Following law school I clerked for the Honorable Robert Varner, U.S. District Judge, Middle District, then began 47 years private practice. In 1990 I began a 20 year career in association management as Executive Vice President of ADLA. My first jury trial still stands out from my years in private practice. In district court my plaintiff client was awarded a disappointing \$250 on her \$1,100 claim. I advised her it was not feasible to appeal to circuit court. Amazingly, the defendant's lawyer

did, and demanded a jury! After a 10-minute deliberation the jury awarded my client her total claim. The smile on her face and thrill of winning are unforgettable. As ADLA ExVP, there are too many memorable moments to recount. Ski trips, cruises, annual meeting fireworks, a highly successful first, and subsequent, young lawyers trial academies; I could go on and on.

### Unusual job perk?

No perks as a solo practitioner. If you have to pay, it's not a perk! For ADLA, attending many DRI leader conferences, regional and annual meetings, was a definite perk. We visited many interesting places, and met outstanding defense lawyers from around the country.

*What is the most rewarding aspect of your career? As ADLA ExVP, the honor and privilege of working for and with an outstanding group of defense attorneys, and putting on family-friendly and educational meetings that hopefully enhanced their practice.*

### What is the furthest you have traveled for work?

Probably Arkansas for a deposition. For ADLA, San Francisco to attend leader conference and an annual meeting.

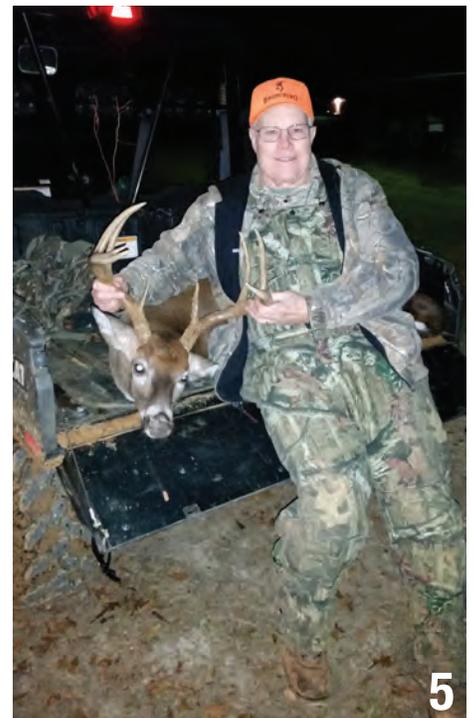
### What is the most rewarding aspect of your career?

Successfully, when I was, helping clients resolve conflicts and issues that seemed insurmountable to them. As ADLA ExVP, the honor and privilege of working for and with an outstanding group of defense attorneys, and putting on family-friendly and educational meetings that hopefully enhanced their practice.

### Most frustrating?

Rude opposing counsel who lack civility, and

**1** Ed & Louise in Yellowstone **2** ADLA kids compete at annual meeting **3** Pumpkin loves to travel! **4** Vietnam 1968 **5** Ed got lucky! **6** Pumpkin is adventurous



judges who are slow to rule on routine procedural motions. With ADLA, I honestly can't recall anything frustrating enough to mention. The whole ride was a blast!

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

1. Never forget that you are engaged in an honorable public service profession, and everything you do reflects not only on yourself, but on all lawyers and the entire legal system.
2. Don't get too consumed by your practice, to the exclusion of family and friends. Get involved with your bar associations and other community organizations, but make quality time for friends and family, especially your spouse and children.

**What was your biggest lesson learned when you started to practice that you didn't already know?**

How stressful law practice can be, and even detrimental to your health if you don't learn how to handle it.

**Why are you a member of ADLA?**

I became a member when the Board hired me to replace B. J. Russell when he was appointed to the Court of Civil Appeals. I was a general practitioner, neither heavy on plaintiff nor defense work, mostly an office type practice. I quickly became defense oriented and remain so today. When I retired in 2011, the Board generously voted me and Louise honorary lifetime members.

**If you had to choose a different profession, what do you think you would want to do?**

Veterinarian. I am service oriented, and I love all animals.

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

The first was U.S. District Judge Robert Varner, for whom I was law clerk right after law school. He always had his law clerks in the courtroom every time he conducted dockets, hearings or trials, and during breaks would coach us on good and not so good, points the opposing counsel made. He often said he felt he had a duty to train his law clerks to become the best attorneys possible after their clerkships. Second was Drayton Hamilton, to whom Judge Varner introduced me. Drayton was practicing solo, his partner having passed 2 years before. He took me in like I was his own son, gave me free office space, secretarial services and utilities until I could afford to start paying my share. He gave me invaluable advice on conducting a solo practice, dealing with clients, and with other lawyers. We shared offices for 18 years until his death in 1990.

**Who do you pull for on football Saturday's?**

Alabama first, then all SEC teams against non-conference opponents.

**What do you like to do in your spare time when you are not**

**focused on work?**

Since I retired last October, all my time is spare time. So I attend my Kiwanis club luncheons, hunt, fish, golf, do yard work, and honey-do's, but not always in that order.

**What is the last book you read?**

Killing Patton, but my all-time favorite is Atlas Shrugged.

**Favorite movie?**

Lion King.

**Biggest Pet Peeves?**

Telemarketers, unprofessional lawyer ads, and TV hosts/guests who don't use pronouns correctly, ie "He asked him and I..."

**Favorite concert you've attended?**

Many, but really enjoyed Ray Stevens and Tommy Emmanuel.

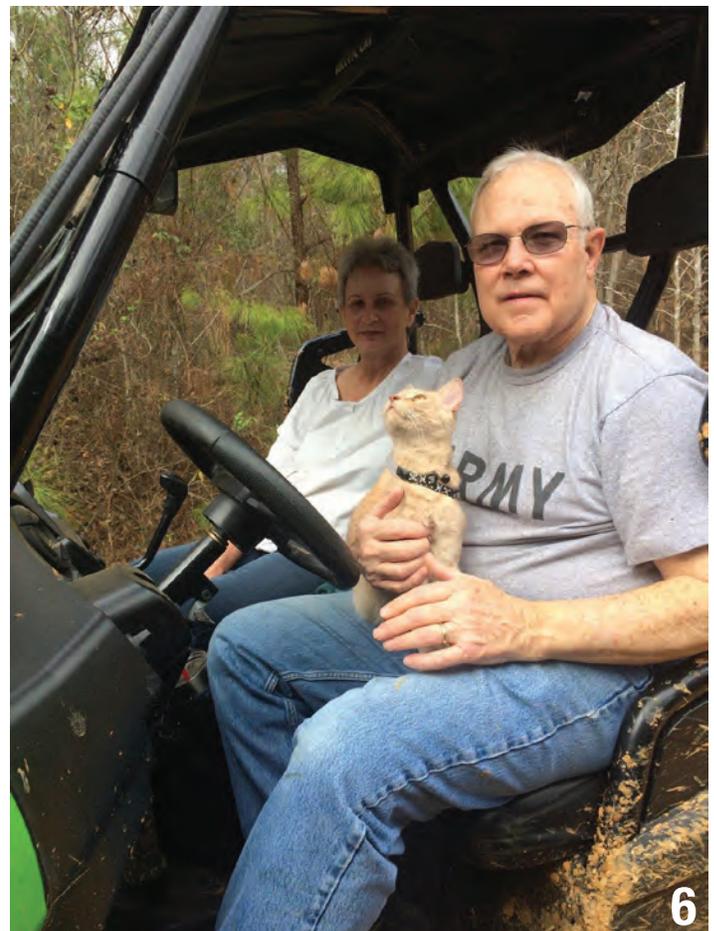
**What is one of your most embarrassing moments?**

All are too embarrassing to repeat.

**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 could not choose just one without wrongly omitting many others who

*Never forget that you are engaged in an honorable public service profession, and everything you do reflects not only on yourself, but on all lawyers and the entire legal system.*



have supported and befriended me throughout my tenure with ADLA, and since my retirement.

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

By the time this is published my wife, Louise, will have been my partner, soul mate, and number one supporter for over 50 years. She retired as Assistant Clerk of the Supreme Court of Alabama in 2000, after 27 years with the court. Then until 2011 she continued to assist me with ADLA

*By the time this is published my wife, Louise, will have been my partner, soul mate, and number one supporter for over 50 years.*

duties, most of that time as my only assistant. We have no children, but have a shelter cat we treat as the human he is. I am also proud of my legal heritage. My grandfather served over 30 years on the Supreme Court of Alabama, the last 18 as Chief Justice. My great-uncle

practiced law in Tuscaloosa, my father was a career state attorney, retiring as Chief Counsel of the Revenue Department's Legal Division, my uncle practiced in Sylacauga, and his son practices there today.

**Jessica M. McDill**  
Chason & Chason PC  
Bay Minette, AL

**Where did you grow up and what college did you attend?**

Destin, Florida before it seemed like it was a destination. University of West Florida, undergraduate; Cumberland for law school.

**Most memorable moment on the job?**

I cannot settle on a response to this question. There have been moments that are great, wonderful, good, so-so, funny, disheartening, sad, and heart breaking. The job involves people and there is no end to the variety of moments the people we come into contact with create.

**Unusual job perk?**

Having the ability to make a choice in the kind of work I do as the

times and my interests change.

**What is the furthest you have traveled for work?**

West Coast.

**What is the most rewarding aspect of your career?**

Closing a file. When I close a file it generally means that my client is moving forward and onto something other than the problem that brought them to me.

**Most frustrating?**

Not getting the result that, in my opinion, was or should have been

attainable. The "would have, should have, could have" analysis looking backwards from a bad result in a case is extremely frustrating for me. However, in the long run, I learn more from losses than wins.

**What is your best advice to young lawyers?**

I am not sure that I am in any position to be giving advice at this point in my career. But, two observations I would share with younger lawyers that I think they might find helpful are:

1. Something I heard that has stuck with me: "Be where your feet are." Get out and do

*Something I heard that has stuck with me: "Be where your feet are." Get out and do things that are and are not work related. I think it helps me be more productive when I am at work.*



things that are and are not work related. I think it helps me be more productive when I am at work.

2. On almost a daily basis, aspersions are cast over the legal sector as a whole that I dislike. Some of those aspersions are well-founded on the actions of a few; most are not. Seek to prove those aspersions wrong in your daily work. What does that mean? Work at being a professional – knowledgeable, prepared, prompt, courteous, and advocating with integrity and decorum. Some days are better than others, but I think that professionalism leads to long lasting job satisfaction.

**What was your biggest lesson learned when you started to practice that you didn't already know?**

The importance of listening. Taped to my desk is the phrase “seek to understand before being understood.”

Listening is key to communicating effectively.

**Why are you a member of ADLA?**

I wanted to get more engaged with lawyers outside the day to day practice of law/case discussion.

**If you had to choose a different profession, what do you think you would want to do?**

Sell shoes. I like shoes. My husband says I have too many shoes. He is wrong.

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

Allan Chason and John Earle Chason were my first professional mentors and remain mentors for me today. The first twenty-four years of my law practice has provided me many opportunities to watch, to listen, and to learn from other great lawyers – regardless of whether they were co-counsel or opposing counsel. They all have made an impact on me that I hope I use to be a better lawyer.

**Who do you pull for on football Saturday's?**

My family pulls for Auburn. I pull for all the athletes, particularly at the college level. It always strikes me that the pressure to perform at such high level at such a young age is enormous.

**What do you like to do in your spare time when you are not focused on work?**

**1** Jessica pictured with Allan Chason and Joseph Thetford **2** Family crabbing at Tensaw Point near the Mobile Causeway in September of 2019 on Ron's new boat **3** Jessica, Tonya Harville, Amy Parlier, and Kayle Hall volunteering at Drug Court Community Awareness Program featuring Lt. Col. Oliver North **4** Pasture photo at my house that reminds me of each day's possibilities

Be wherever my family is and engaged in whatever they are doing.

**What is the last book you read?**

Outliers

**Favorite movies?**

Syrianna and McClintock

**Biggest Pet Peeves?**

Lack of empathy

**Favorite concert you've attended?**

Much to my surprise, Dolly Partin. It was last year. At 72, she sang and play at least seven different instruments for 2 hours with a 15- minute break to a sold out crowd that sang along to almost every song.

**What is one of your most embarrassing moments?**

Long list to choose from here for me. Sometimes I talk before listening and I am not particularly coordinated. A court room incident that

still makes my face burn remarkably had nothing to do with my talkative nature or lack of coordination. A few weeks before a jury trial before Judge Charles Partin, I had sinus surgery. I felt fully recovered. While questioning a witness, I bent over to pick up a blow-up. Y'all remember blow-ups and how tight that court room is near the jury box? As I stood up with my blow-

*One ADLA member who has had a special impact on me is Michael Upchurch. I doubt I am saying anything everyone does not already know. He proactively tackles tough problems with humor, empathy, creativity, and integrity. He is a role model for me.*



up in one hand and a purpose filled question in my mind, a wad of snot fell out of my nose without warning. There was no saving face or recovery; just a clean-up effort. Judge Partin very quickly and kindly said "Ms. McDill we will take a five minute break." When trial resumed, I explained my recent sinus surgery and my hopes that another surprise event would not occur.

**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.**

Michael Upchurch. I doubt I am saying anything everyone does not already

know. He proactively tackles tough problems with humor, empathy, creativity, and integrity. He is a role model for me.

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

Busy hands calm a busy mind. My husband and son are always busy doing something, usually outside. They golf, fish, hunt, and ride regularly. We have raised dogs, cats, chickens, cows, horses, hermit crabs, and fish. They keep me grounded and there is always something to do to keep your hands busy.

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## **Case Law Update on Employment Law Issues**

Presenter: Hope Hicks of Ball Ball Matthews & Novak, PA

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Presenter: Hal Mooty III of Bradley Arant Boult Cummings LLP

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Presenter: Bains Fleming III of Norman Wood Kendrick & Turner

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Presenter: Hal Mooty III of Bradley Arant Boult Cummings LLP



## **Ten Civil Procedure Answers Your 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 for Ethics Credit*

## **WEBINAR PARTICIPANT TESTIMONIES:**

### **Trey Holtsford of Holtsford Gilliland PC, Montgomery**

*I found the webinar to be insightful and informative on current issues involving prevention of cybersecurity threats, and believe the ADLA webinars to be a valuable member benefit overall*



### **Mary Lauren Kulovitz of Thornton Carpenter O'Brien Lawrence & Sims, Talladega**

*This was my first ADLA webinar, and I do find it to be a valuable member benefit. The ease of a CLE from my office with helpful information.*



### **Andrew Knowlton of Hal Booth Smith PC, Birmingham**

*Being able to access a free CLE webcast on relevant current topics is very valuable.*



### **Jack Gray of Smith Spires Peddy Hamilton & Coleman PC, Birmingham**

*Very informative webinar. This is my first ADLA webinar and I will be doing more. I'm glad I know about this resource.*





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