CABA
Capital Area Bar Association

MARCH 2024

President's Column: *The Case for CABA*

By Margaret Oertling Cupples

Dear CABA Members, Your board of directors has been talking lately about how best to communicate the value proposition of being a CABA member. In this era of declining memberships in voluntary bar associations, we hope that you will help us communicate that value.

What do you get as a member of CABA? Plenty. I'm preaching to the choir here, but CABA members get CLE credit for attending events like our recent lunch meeting with programming about the future of diversity in law school admissions. They get great programming, like our recent panel discussion that attracted a packed house of lawyers and legislators to discuss why we're one of only two states that doesn't actually have no-fault divorce…yet. CABA members also enjoy unparalleled opportunities to meet other lawyers and judges, like at our recent Coffee with the Court. Members got to chat with Mississippi Supreme Court and Court of Appeals judges and enjoy some king cake (thanks, Justice Beam!).

And, CABA members get a chance to participate in CABA-sponsored legal clinics with Hinds County Chancery Court and MVLP—a great way to do some of the pro bono work that all lawyers need to do, with no wasted time getting up to speed or handling a drawn-out case. They get to compete in our annual golf tournament, which raises money for the Mississippi Volunteer Lawyers Project; they can help us welcome new bar admittees to this great profession; and they can nominate leaders in the law to win our CABA Professionalism and Community Service awards. And of course, CABA members help us plan and execute all these events, so if you're looking for a low-lift way to plug in to our legal community and meet some great folks whom you may not yet know, a CABA committee can help!

Thanks for helping us advocate about all the great things that CABA offers, including our remaining offerings for this CABA year, which ends May 31. We've got a great membership meeting coming up (at Anjou on April 16) with a panel discussion hosted by our Small Firm and Solo Practice Committee, and the annual Evening Honoring the Judiciary is right around the corner on May 1. Sponsorships and tickets are available for the dinner at caba.ms/events.

Best of all, memberships are 50% off for the balance of the year—please spread the word! See you at a CABA event soon.

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Membership Meeting

May 1
Evening Honoring the Judiciary

The views expressed in the articles published are solely those of the authors and do not represent the views of CABA, its officers, directors, or staff.

RSVP BY: MONDAY, APRIL 29, 2024

An Evening HONORING *the* JUDICIARY *Banquet*

Wednesday, May 1, 2024 at 6:00pm • Country Club of Jackson

The Right to Object to an Appointed Judge

By Luther T. Munford[1]

Both the lawyers in a case and the governor have a right to object to a judge appointed by the Mississippi Supreme Court Chief Justice to hear a case or type of cases. That right, which is crucial to the constitutionality of the appointment, unfortunately went unmentioned in the Supreme Court's most recent discussion of the appointment power, *Saunders v. State*, 2023 WL 615446 (Miss. Sept. 21, 2023).

That case upheld the power of the Chief Justice under Miss. Code Ann. §9–1-105(2) to appoint special temporary judges "to address overcrowded dockets or other emergencies." *Id.* at *11. It reached the right result, but for reasons that, when closely examined, do not withstand scrutiny and could provide a dangerous precedent for future constitutional mischief.

The state constitution sets out three ways a circuit judge can gain office. One, provided in §153, is election. The other two, set out in §165, are agreement by the attorneys to a replacement or, if there is no such agreement, appointment by the governor. Section 165 reads:

> Whenever any judge of the Supreme Court or the judge or chancellor of any district in this State shall, for any reason, be unable or disqualified to preside at any term of court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the Governor may commission another, or others, of law knowledge, to preside at such term or during such disability or disqualification in place of the judge or judges so disqualified.

In 1989, I served as chair of Governor Ray Mabus' Judicial Nominating Committee. Like Governor William Winter, Gov. Mabus organized the committee according to the recommendations of the American Judicature Society. The governor chose some members, but others were chosen by the State Bar, the Mississippi Trial Lawyers' Association, and the Magnolia Bar. When a judge died or left office, the committee recommended a replacement. Governor Mabus in almost every case accepted the committee's recommendation. Among those he appointed were Supreme Court Justices Joel Blass and Fred Banks, and Circuit Judges James Graves and Bob Evans. My understanding is that Governor Mabus was the last governor to have a committee which included members not appointed by the governor himself.

But neither Governor Mabus nor his staff counsel felt comfortable appointing judges to handle individual cases. Into that vacuum stepped Supreme Court Justice James L. Robertson, who drafted the initial version of §9–1-105 with an eye toward putting the appointment power in the hands of the Chief Justice, Neville Patterson. Upon consideration of the constitutional question, the ultimate authors of the bill included two provisions.

Section 9–1-105(4) provides that when the Chief Justice appoints a judge, the judge's service will end if the governor chooses to appoint a replacement.

Section 9–1-105 (13) says "Nothing in this section shall abrogate the right of attorneys engaged in a case to agree upon a member of the bar to preside in a case pursuant to Section 165 of the Mississippi Constitution of 1890."

1. Luther T. Munford is a retired Jackson lawyer. From 1988 to 1991 he chaired Governor Ray Mabus' Judicial Nominating Committee.

Legislative Discussion Panel *January 30th*

The January membership meeting featured a legislative discussion panel and CLE on the topic of potential legislation for "no-fault divorce" in Mississippi. The panel included Judge Troy Odom, Judge Jennifer Schloegel, Senator Brice Wiggins, Tresa Patterson, and was moderated by Tiffany Graves. The event was hosted by Bradley Arant Boult Cummings LLP in Jackson, and it was presented by the CABA Women's Initiative Committee.

In effect, the way the statute works is that the Chief Justice's appointment is just a recommendation, which the governor and the lawyers in the case accept if they do not specifically object. That acceptance is what squares the statute with the constitution.

In *Saunders*, although the parties addressed the constitutionality of the statute, none of them offered this explanation for its validity. The Supreme Court also failed to mention it, and instead offered two justifications, neither of which should be taken as a precedent in future cases.

First, the court said appointments had been made for three decades without objection and wrongly gave the impression that past practice alone was a reason to ignore the plain language of the constitution. The opinion did not explain the true importance of the absence of past objections. The absence of objection mattered because it was tantamount to ratification by the governor and the lawyers in the case, and so squared the appointment with the constitution and the statute. Past practice is certainly a proper element in constitutional interpretation, but if allowed to stand alone could be a source of great mischief.

The second justification offered by the court was even more dangerous. The court declared that "Section 165 'does not state that it is the exclusive mechanism for selection of special judges.' *McDonald [v. McDonald,* 850 So.2d 1182, 1187 (Miss. Ct. App. 2002)]." *Id.* at *11. But none of the provisions in the constitution say they are exclusive. The burden on a party asserting a constitutional right is to show that it is included somewhere in the constitution. A court cannot, or at least should not, just set aside the plain language and justify it by saying the constitutional provision directly on point is not "exclusive." In fact, the opinion's separate decision – finding that appointment for a four-year fixed term was unconstitutional because it conflicted with §165 – rested entirely on a belief that the constitutional provisions are exclusive.

Although the opinion's language is ambiguous, a closer look at the *McDonald* decision, written by then-Court of Appeals Judge Leslie Southwick, shows that what it was saying was that the governor's "authority" was not exclusive, as it indeed is not. The opinion should not be read as saying that Section 165 itself was not exclusive.

In *McDonald*, a losing party challenged the actions of an appointed judge and contended that the governor was the "sole authority" who could appoint a judge. *Id*. The court rejected the argument because the party challenging the trial judge had not given notice of a constitutional challenge to the attorney general and, in any event, the judge had "de facto" authority to act. *Id.* at 1187.

But in dictum the court also addressed the "sole authority" argument. After quoting Section 165, the opinion said:

> This provision does not state that it is the exclusive mechanism for selection of special judges. The provision itself first sets out another alternative, namely, that the parties agree on a member of the bar as a replacement…

850 So.2d 1182. The ambiguity arises in the use of the word "it." If "it" refers to the party's argument that the governor is the "sole authority," then the sentence makes sense: "The provision does not state that [the governor's sole authority] is the exclusive mechanism" because the lawyers can choose. On the other hand, if "it" means "the provision," as the Supreme Court assumed, the evidence that the provision is not "exclusive" is an alternative found in the provision itself, which is a logical impossibility.

In any event, ambiguous dictum in a Court of Appeals opinion cannot justify a Supreme Court statement which, by denying that the constitution is the "exclusive" method of judicial selection, suggests the legislature would not have to give the governor and the lawyers veto power over the appointment.

The Supreme Court opinion also relies on a Voting Rights Act case, *Prewitt v. Moore*, 840 F. Supp. 428, 430 (N.D. Miss. 1993), but that opinion held only that the change from governor appointment to Supreme Court appointment subject to governor veto was not enough of a change to require Justice Department preclearance. Again, the governor's veto played a crucial role.

As a practical matter, this distinction may be more important to the future of our constitutional law than to the service of appointed judges. Governors have apparently not sought to involve themselves in the process, and it would perhaps be an unusual case in which opposing parties could agree on a replacement judge. But they have that right. And the language of §165 certainly suggests that it is independent of approval by the governor.

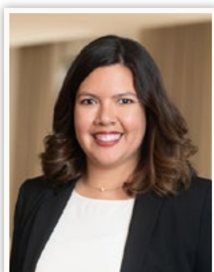
CABA Membership Luncheon *Meeting*

Tuesday April 16, 2024

Lunch at 11:30 • Anjou Restaurant in Ridgeland

Diversity, Equity, and Inclusion:
Developments and Paths Forward Post-SFFA

By Christina Marie Nunez[1]



A review of the Google search results for "Diversity, Equity, and Inclusion" is a quick indicator of how DEI has become a topic of conversation for all forums. Educators, legislators, corporations, and legal practitioners have all chimed in to discuss DEI from its framework and underlying principles to formalized DEI programs and initiatives. DEI has recently garnered intense scrutiny and sparked polarizing conversations. Setting aside our personal views, as legal practitioners we should be cognizant of how DEI can affect our practice. The February CABA Membership Meeting provided a brief overview of different aspects of DEI for consideration by members as legal practitioners, as advisors to clients, and as members of large organizations. The presentation was followed by a poignant discussion from panelists Dean John Anderson of Mississippi School of Law, Dean Fred Slabach from the University of Mississippi School of Law, and Don Smith, Chief Talent & Inclusion Officer of Crowell & Moring, LLP.

On June 29, 2023, the United States Supreme Court issued its landmark decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina et al.* ("SFFA") holding that race-based affirmative action in college admissions was unconstitutional.[2] The Supreme Court found that Harvard and the University of North Carolina's affirmative action programs violated the Equal Protection Clause of the Fourteenth Amendment. The decision overruled 45 years of precedent established in prior Supreme Court decisions, including *Regents of the University of California v. Bakke, Grutter v. Bollinger,* and *Fisher v. University of Texas*. However, the ruling permitted colleges to consider how race has affected a student's life and their ability to contribute to the educational institution. While educational institutions immediately began examining the impacts of the decision, not long after the holding, entities and organizations not directly affected by *SFFA*'s ruling began asking what legal actions were on the horizon with broader implications.

As legal practitioners, we are responsible for keeping informed of proposed and recently enacted legislation. The Chronicle of Higher Education provides a DEI Legislation Tracker that summarizes legislation focused on DEI and tracks the status of the legislation.[3] The DEI Legislation Tracker characterizes legislation with four types of identified proscriptions: 1) legislation that would prohibit colleges from having diversity, equity, and inclusion offices or staff; 2) legislation that would ban mandatory diversity training; 3) legislation that would forbid institutions to use diversity statements in hiring and promotion; or 4) legislation that would bar colleges from considering race, sex, ethnicity, or national origin in admissions or employment. While certain states have legislation focused on one such proscription, others have proposed legislation that addresses all four proscriptions. As of March 22, 2024, 81 bills have been introduced, 13 have received legislative approval, 11 have become law, and 33 have been tabled, failed to pass, or vetoed. Mississippi Representative Becky Currie introduced House Bill 127, described in the bill summary as "[a]n Act To Prohibit State Supported Postsecondary Educational Institutions Under The Purview Of The Board Of Trustees Of State Institutions Of Higher Learning Or The Mississippi Community College Board From Soliciting Pledges Or Expending Any Funds, Regardless Of The Sources From Which Such Funds Are Derived, For The Purpose Of Promoting Or Implementing Diversity, Equity And Inclusion Initiatives For Students And Employees Of The Postsecondary Educational Institution; And For Related Purposes."[4] House Bill 127 died in committee, but it may not be the last anti-DEI legislation Mississippi considers. The DEI Legislation Tracker is just one source that shows how multiple states have already considered, and in 11 cases, passed, DEI bills of varying scope. DEI legislation is not likely to slow down in years to come, so it is imperative that as practitioners we stay informed of state-level legislation.

1. Christina Marie Nunez is an associate at the Jackson office of Balch & Bingham in the Business and Health Law practice groups. She is co-chair of the CABA Diversity Committee. Views expressed in this article are solely those of the author and do not represent the views of Balch & Bingham, CABA, its officers, directors, or staff.
2. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).
3. The Chronicle of Higher Education, DEI Legislation Tracker, Feb. 14, 2024. Available at http://www.chronicle.com (Last accessed Mar. 24. 2024).
4. HB 127 is available at https://billstatus.ls.state.ms.us (Last accessed Feb. 19. 2024).

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As lawyers we have the privilege of serving as advisors to clients. It is our responsibility to guide them through the oftentimes grey legal landscape. DEI is one such landscape. While we cannot definitively predict when or if our clients will be the subject of a suit challenging their DEI initiatives and programs (or lack thereof), we should keep our pulse on how entities are responding to challenges. As with any hot-button issue, there are differing viewpoints. Tesla Chief Executive Officer Elon Musk and investor Bill Ackman have been vocal critics of DEI strategies, while Dallas billionaire Mark Cuban has spoken in support of DEI and the positive effects DEI has had on his business.[5] Several firms have recognized the business development opportunities associated with counseling clients on DEI strategies and best practices. This recognition has even resulted in the expansion or creation of DEI practice groups.[6]

The practice of law at the end of the day is a business. Whether you are a solo practitioner or a member of a firm, a legal organization may be faced with similar questions as its clients about how to navigate challenges to DEI. On August 29, 2023, five Attorneys General from the states of Montana, Arkansas, Kansas, Iowa, and Kentucky were signatories on a letter addressed to Managing Partners, Chairs, and CEOs of American Lawyer (Am Law) 100 Firms. The letter advised the addressees to "immediately terminate any unlawful race-based quota or preferences" that the firms had adopted and cautioned that the addressees would be held accountable for treating individuals differently because of the color of their skin.[7] Legal organizations are just as at risk as other businesses of being caught in the crosshairs of challenges to DEI.

Lawyers are in a unique position with respect to DEI. As practitioners, laws–including DEI legislation–serve as the basis for our practice. As advisors, clients will potentially look to us for sound counsel on how to operate amidst the seemingly unstable DEI environment. As members of organizations, lawyers themselves are faced with choices about how to approach DEI. For some, DEI is much more than an evolving legal matter—it is a framework of principles rooted in a deeper, often personal, mission. Whether a lawyer is an advocate or opponent of DEI, it is indisputable that DEI is a relevant and evolving topic.

5. Mark Cuban [@mcuban]. "Let me help you out and give you my thoughts on DEI 1. Diversity Good businesses look where others don't, to find the employees that will put your business in the best possible position to succeed. You may not agree, but I take it as a given that there are people of various races, ethnicities, orientation, etc that are regularly excluded from hiring consideration. By extending our hiring search to include them, we can find people that are more qualified. The loss of DEI-Phobic companies is my gain. 1a. We live in a country with very diverse demographics. In this era where trust of businesses can be hard to come by, people tend to connect more easily to people who are like them. Having a workforce that is diverse and representative of your stakeholders is good for business." *Twitter*, 3 Jan. 2023, 3:33 p.m., https://x.com/mcuban
6. For example, Seyfarth Shaw and Ogletree Deakins have DEI practice groups on their website. See, respectively, https://www.seyfarth.com and https://ogletree.com (Last accessed Mar. 24. 2024).
7. https://www.ag.ky.gov (Last accessed Mar. 24. 2024).

CABA Membership Meeting *February 20th*

To view more photos of this CABA Membership Meeting please visit caba.ms

32nd Annual GOLF OUTING

March 18, 2024 at Country Club of Jackson

The 32nd Annual Lawyers Golf Outing was held on Monday, March 18th at the Country Club of Jackson. Proceeds from the tournament were donated to the MS Volunteer Lawyers Project. Shown are scenes from the tournament. A big "thank you" to all of our tournament sponsors for making this event possible.

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JOEL HOWELL Remembrance

A CABA CONTRIBUTOR FROM 1996-2023

Our longtime CABA newsletter contributor and colleague, Joel Howell, passed away at home in Jackson on January 28, 2024, after a battle with cancer. He was 74. Joel had a keen interest in computer technology and began writing his regular column in the newsletter, “On Computing,” in 1996.

His early articles explained how “the internet” came to be, the basics of the “world wide web,” and the impact of modem speed. By 2023, Joel was explaining how to navigate the world of AI. Joel’s helpful hints on how to make our lives easier with technology impacted a couple of generations of capital area practitioners. He will be missed.

Coffee with the Court
February 13, 2024

To view more photos of this event, please visit caba.ms

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