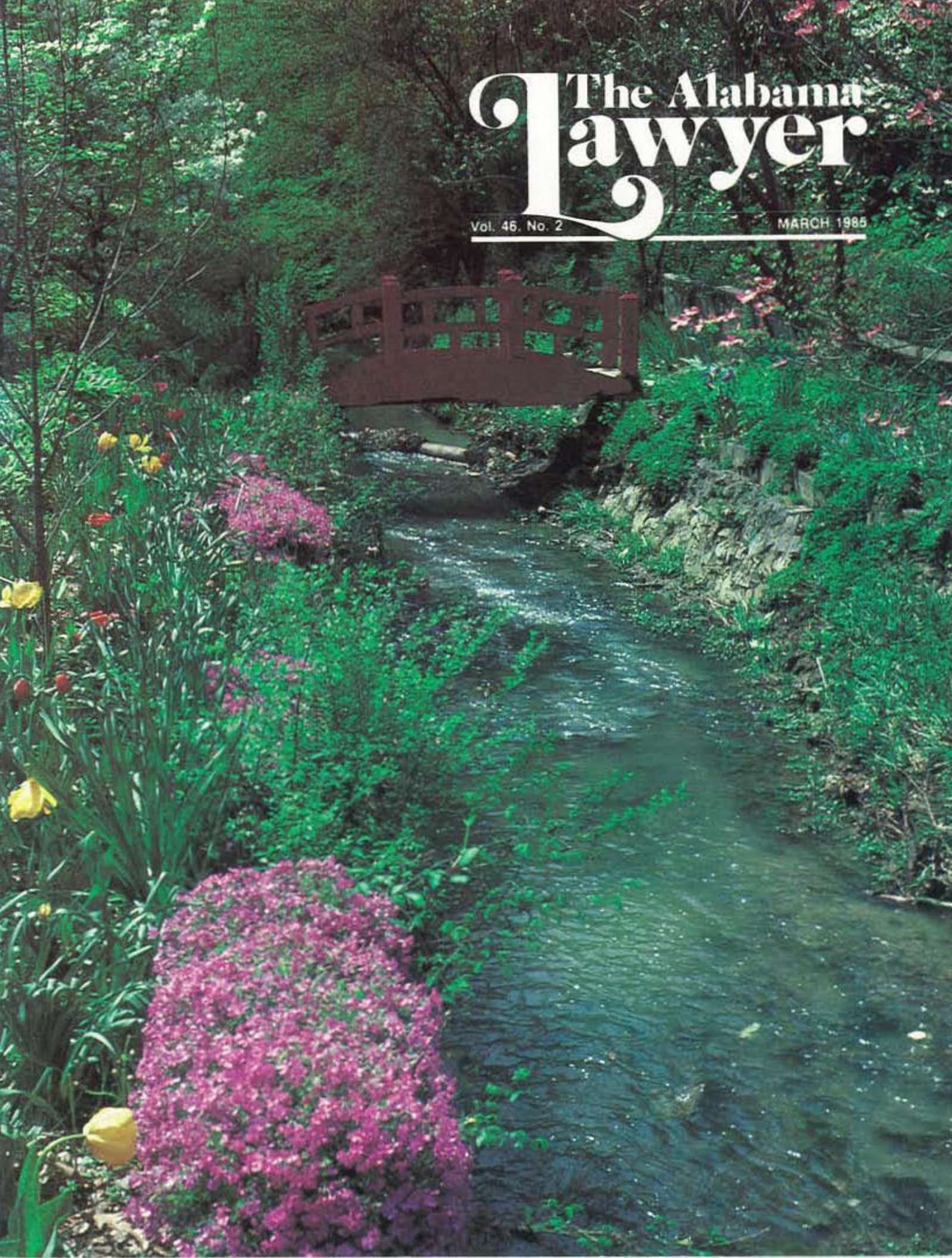

# The Alabama Lawyer

Vol. 46, No. 2 MARCH 1985

# Nursing Homes and the Law: State Regulation and Private Litigation

*by Sandra H. Johnson, Nicolas P. Terry, Michael A. Wolff*


Nursing home laws vary in almost every state and the regulatory patterns are very complex. The major trends that have emerged are treated in depth in this timely and useful new work. © 1985

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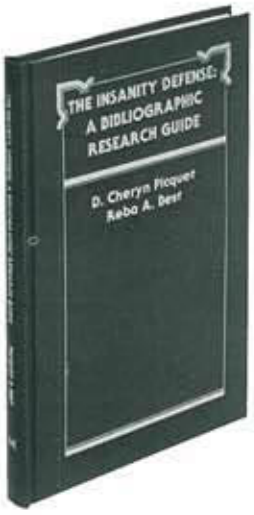


# The Insanity Defense: A Bibliographic Research Guide

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The Alabama Lawyer
Vol. 46, No. 2 MARCH 1985

Published bimonthly by
The Alabama State Bar
P.O. Box 4156 Montgomery, AL 36101
Phone (205) 269-1515

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## GENERAL INFORMATION

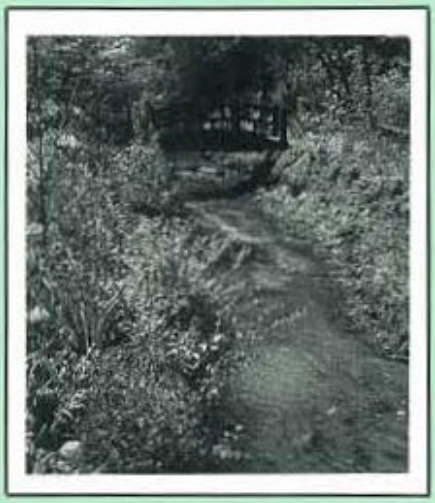
**The Alabama Lawyer**, the official publication of the Alabama State Bar, is published six times a year in the months of January, March, May, July, September and November. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the Board of Editors, officers or Board of Commissioners of the Alabama State Bar.

Subscriptions: Alabama State Bar members receive **The Alabama Lawyer** as part of their annual dues payment. Nonmember subscriptions are $15 a year in the United States, otherwise $20, and must be prepaid. Single issues are $3, plus postage.

Advertising rates will be furnished upon request. Advertising copy is carefully reviewed, but publication herein does not necessarily imply endorsement of any product or service offered.


ISSN 0002-4287.

# THE MARCH 1985



## On The Cover

This beautiful spring-like scene comes to us courtesy of Scottsboro attorney John Proctor. The creek, with its flowering banks, runs under Scott Street in Scottsboro and offers encouragement that cloudy days and cool weather cannot last forever.

## Social Security Disability Insurance

— pg. 62

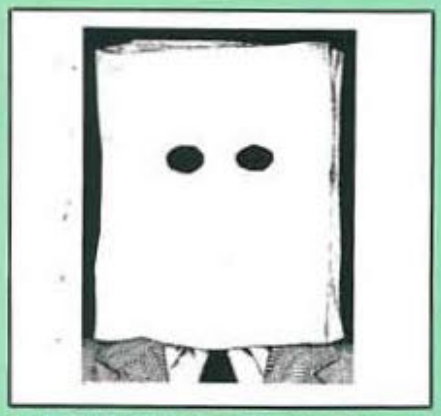
Do you have a client who is seeking social security benefits? It is important to know the ground rules for dealing with this administrative agency.

## Withholding Orders for Child Support

— pg. 72

Recent legislation has been enacted to afford remedies for delinquencies in child support payments. Strict adherence to the statutory requirements are necessary to obtain complete relief.

# ISSUE IN BRIEF

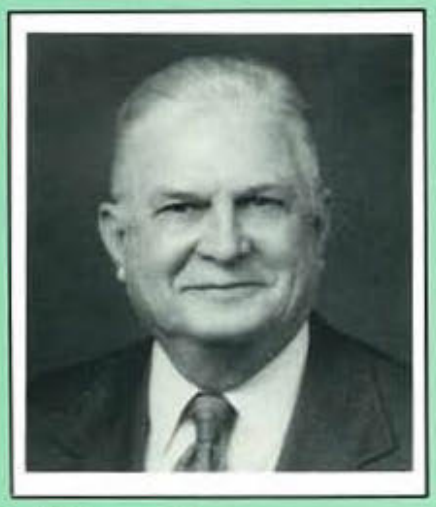


## ARCP 15(c): Relation Back of Amendments — pg. 84

Rule 15 A.R.C.P. affords a means of avoiding statute of limitations problems in adding additional parties to a civil lawsuit. Professor Hoffman of the University of Alabama law school provides an exhaustive treatment of the current Alabama law in this area.

## Opinions of the General Counsel — pg. 98

Have you ever wondered whether you, as an attorney, ethically may mail letters to alleged debtors of a client without having investigated the matter or made a good faith professional judgment the demand is for a valid and subsisting claim? Find out this and more on the subject.



## In Memoriam — pg. 105

"I believe the profession affords a splendid opportunity for service to the state and its people." This quote comes from the late J. O. Sentell's character and fitness affidavit of 1932, and probably best summarizes the ideals and beliefs of this former clerk of the supreme court. Sentell also was editor emeritus of *The Alabama Lawyer.*


## Special Thanks

*For contributions to this issue, special thanks go to Penny Weaver, Ruth Strickland and Dorothy Norwood.*


## Inside This Issue

BYARS

# President's Page

## Professionalism Synonymous with Independence

The Midyear Meeting in Montgomery was an overwhelming success. We had the utmost quality in our luncheon speakers, Caspar Weinberger, secretary of defense, and Judge Patrick E. Higginbotham of the U.S. Court of Appeals for the 5th Circuit. We indeed are grateful to Congressman Bill Dickinson for bringing to us the secretary of defense and to native Alabamian Pat Higginbotham for his participation. We are indebted to the planning committee for its outstanding program and to Reggie Hamner and our state bar staff for organizing and arranging this convention.

Exciting news came from the reports of our committees and task forces made to the board of bar commissioners and to the membership. These reports demonstrated in part the active role taken by so many of our members in our bar's business. This does not reflect, however, the totality of the work and the dedication of the more than 400 lawyers involved in committee work who gave and will continue to give so generously of their time and talents in an effort to make our profession a better one.

The best news is no more deficit financing. The Alabama Legislature passed our bill to increase license fees to $150 per annum. We are indebted to the leadership in both houses, but Lieutenant Governor Bill Baxley and Senator Charles Bishop are owed our special debt of gratitude for an "eleventh-hour save." Our co-sponsors in the house and senate, who handled the bill, are to be commended for a job ably done. Recognition of these persons will be noted in my next message.

On the local bar scene, as your president I have had the opportunity of meeting with and speaking to the Montgomery County Bar Association at its annual meeting, where the principal speaker was President-Elect William Falsgraf of the American Bar Association. I also appeared as a speaker at the annual meeting of the Calhoun County Bar Association in Anniston and at a meeting of the Madison County Bar Association. I still am committed to the proposition bar activities and actions must commence at the local level. These grass roots are of utmost importance to our professional success and the success of the programs of your Alabama State Bar. In keeping with this belief, I held a specially scheduled meeting of local bar leaders during the Midyear Meeting in Montgomery, exchanging ideas and getting the benefit of their advice.

> ***"The practice of law is a profession. It's not like making shoes or making automobiles."***
>
> **—Justice Potter Stewart**

As your president, I share with each of you as I have with the local bar groups some of my thoughts and concerns for our legal profession and our legal system. George Washington believed: "The administration of justice is the firmest pillar of government." I happen to believe further our judicial system is the cornerstone of our form of government, and lawyers *as a profession* are the cornerstone of that judicial system. As Morris Harrell, former president of the American Bar Association, expressed it: "Our system is not perfect, but is by far the best in today's world."

Yet all is not well with our system, nor with our profession. The greatest threat to our legal system is the transition of the practice of law from a profession to a trade or business.

I am in total accord with the principle expressed by Justice Potter Stewart:

> "The practice of law is a profession. It's not like making shoes or making automobiles."

*(Continued on page 71)*

# Executive Director's Report

HAMNER

# The Costs of Self-Regulation

As indicated in January, I am using this month's column to discuss the fiscal operation of your association. The two largest items of expenditure in the 1984 fiscal year were in the areas of professional licensing and regulation, the statutory responsibilities of the Alabama State Bar.

Twenty-eight percent (28%) or $210,537 was expended in the area of professional responsibility. Inclusive in this figure are the salaries of three full-time attorneys and two support staff members. A part-time clerical assistant was utilized part of the year; however, a third full-time secretarial position was created in December 1984.

Travel and per diem (22¢ per mile and up to $40 per day) for disciplinary board members required $5,841. Most per diem payments are a $5 meal allowance since one must be away from his home base over 12 hours before any additional per diem is authorized. Postage alone cost $3,289 while court reporting and newspaper notices cost $8,462; copier cost was another $930.

Rental for the Center for Professional Responsibility and state motor pool charges totalled $24,775. No attempt was made to allocate cost of general office supplies, in-house printing or telephone expenses as these are separate general budget categories.

Partial cost of the admissions process accounted for $92,141 or twelve percent (12%) of the FY 1984 budget. This partial cost figure is such because only one salary, that of the admissions secretary, is included in the above total. Actually, six other staff people perform in this area, but in a secondary role.

A breakdown of the $92,141 figure reveals the largest share was paid for examiners' annual stipends (thirteen @ $1,750), exam monitors, testing materials and services, and contract printing. This total is $46,498. Another $15,910 was spent on character and fitness reporting, court reporting and legal fees. Travel reimbursement accounted for another $1,515, examination facilities rental $4,731 and postage $2,032. Like the professional responsibility costs, there are general expenses for in-house printing, telephone charges and office rent not included in the total figure noted above.

General administrative expenses account for the bulk of the expenditures remaining. The largest single item of expense in this category is for salaries of nine full-time employees, excluding those of the admissions secretary and the disciplinary staff, totalling $172,675. The attendant benefits cost $32,942 for a grand total of $205,617 or twenty-one percent (21%). Board of commissioners' meetings cost $21,012 (travel and per diem only).

*The Alabama Lawyer* was allocated $75,285 including salaries and postage. The Young Lawyers' Section received $12,500, and the legislative counsel was paid $12,000.

Another major item of expense is communications costs — postage and telephone. Costs, other than postal expenditures for admissions and professional responsibility, totalled $22,429 while telephone charges were $28,102. General office supplies cost $13,813.

Rental of the facilities and equipment at 415 Dexter Avenue (including utilities) totalled $51,453, while out-of-state travel for officers, staff and committee members totalled $17,085 on 18 trips.

Your bar association is a big financial operation; we spent over $750,000 of your money. Approximately 6,685 members bought licenses or paid dues to the association in FY 1984. Nine hundred and fifty members were exempt from any payment during their first two years of admission. Special membership dues of $50 were paid by 1,742 of the 6,685 total paying members.

Each dues-paying member's average cost for FY 1984 was $112.70. Since no license costs over $100, the excess operating costs were paid from reserve funds, interest on investments and examination and law student registration fees.

I hope this brief analysis of your bar finances affords you some appreciation for the self-regulatory profession to which you belong and which you support. While we are an agency of the State of Alabama, we receive no general fund revenues. We all should share some pride in the manner in which we fulfill our public purpose. □

— Reginald T. Hamner

# Nuts & Bolts

# Social Security Disability Insurance

by Steven C. Emens

The Social Security Administration awarded, in 1983 alone, over $106,000,000 in attorneys' fees to lawyers representing persons with claims against the Social Security Administration. This figure should awaken the Alabama attorney to the fact there is money to be made in representing individuals concerning their Social Security benefits.

Over 80% of the $106,000,000 paid in fees last year concerned disability claims. For that reason, this article concerns itself primarily with the representation of a client seeking disability benefits under the Social Security Act.

The Social Security Act defines disability as an "inability to engage in any substantial gainful activity, by reason of a medically determinable physical or mental impairment, which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months" (20 CFR §404.1505).

Disability benefits are available under either Title II or Title XVI of the Social Security Act. Eligibility under Title II is acquired when a worker has achieved "insured status." Generally, this insured status is determined by the number of quarters of coverage the worker has obtained. An individual acquires a quarter of coverage for each quarter of a year he works under employment which is covered by the Social Security Act.

If a person cannot qualify for coverage under Title II then he may apply for benefits under Title XVI. This title is known as the Supplemental Security Income Act and is a federally administered cash assistance program available to the general public. It provides all citizens, and legally admitted aliens, have a right to a minimum income if they qualify as aged, blind or disabled and have limited resources.

The first step in representing someone seeking disability benefits is to determine what actions to obtain benefits they may have taken prior to arriving at one's office. There are five possible stages through which an application for benefits may pass. These stages are an initial application, a reconsideration review, an administrative hearing, an Appeals Council hearing and a trial in a federal district court. Benefits may be granted at any one of these levels; however, if the benefits sought are denied then the application must be appealed to the next level within sixty (60) days, or the denial becomes permanent as to that application.

In the majority of cases, the client only seeks an attorney after he has made both an initial application and a request for reconsideration, with both

*Steven C. Emens is the assistant dean and director of continuing legal education and clinical law programs with the University of Alabama School of Law. He received both his J.D. and M.B.A. from the University of Alabama.*

being denied. Because this is the status of the normal application when it is brought to an attorney, this article focuses upon the administrative hearing stage.

## The Administrative Hearing

At no stage of the process, prior to an administrative hearing, is the client afforded his "day in court." Only before an administrative law judge is a claimant allowed to present testimonial and documentary evidence. This is the first stage at which the claimant's attorney is permitted to object to evidence already in his file. An attorney should approach the hearing before an administrative law judge just as if he were trying any civil law suit involving injuries and damages.

The burden of proof in submitting evidence to support his claim for disability is on the client. Therefore, it is essential for the attorney to offer the most persuasive evidence available, including as much live testimony as possible. This evidence can be secured only through substantial pre-trial effort.

Prior to the hearing, the attorney should learn everything about the client regarding medical impairment, work history, ability to function mentally and physically, medical treatment and other general data that might have a bearing on the issue of disability.

The attorney should also review the Social Security Administration's file concerning his client. This file will be available at the administrative law judge's office and will contain a number of earlier medical narratives which were the basis upon which the initial application and reconsideration denial were handed down. In most instances, the medical evidence in the client's file is months old and will not indicate the permanency of his impairment. A physician, for example, who once stated the client to be "not disabled" may have since changed his opinion and failed to supplement his original report.

After reviewing the file and discussing its contents with the client, it then is time for the attorney to establish contact with and interview the physicians involved in the claim. Considerable time should be spent in assisting the physicians in conforming their testimony to the terminology used by the act in defining disability. Many doctors, for example, may not immediately have an appreciation for a question regarding whether the claimant can perform "light work." The attorney should translate such a term into the more practical question: "Can Mr. Smith frequently lift or carry boxes weighing more than 10 pounds?"

The hearing is held in accordance with the Administrative Procedures Act and is *de novo*. The proceedings are directed by the administrative law judge and attended by the court reporter, the claimant, the claimant's attorney and the various witnesses. The atmosphere is one of relative informality. The judge begins the proceedings by making a short statement for the record indicating who is present and offering a short statement of the law concerning the claimant's application. It is then discretionary with the judge as to whether he conducts the hearing himself by questioning the claimant and witnesses or if he allows the attorney to do the questioning.

In the event the administrative law judge allows the attorney to present his own case, he begins by calling his first witness. This should be one of the strongest witnesses — perhaps the claimant himself. It should be kept in mind this is the judge's first opportunity to see the claimant and, if his disability is one which is readily apparent, it is recommended his disability be highlighted. Like any trial involving the recovery of damages for injuries, the attorney must use his imagination to present his claimant's injuries in as demonstratively and persuasively a manner as possible. If the claimant is required to use a brace, corset, cane, an inhalator or other equipment or apparatus at his home, then these items should be available for demonstration so as to emphasize the claimant's inability to work and earn a living.

Generally, any and all evidence may be received at the hearing even though such evidence would be inadmissible under the Federal Rules of Evidence. The Administrative Procedures Act provides that in an administrative hearing such as this, the test for evidence is not as to its admissibility but the weight to be given such evidence. As a practical matter, the claimant's attorney should place into evidence every document, statement, narrative or other item which would help sustain his client's burden of proof. The attorney continually should remember, if there is an adverse decision by the administrative law judge, his subsequent appeal will be decided primarily on the basis of the record made at the administrative hearing.

In determining whether the evidence supports a finding or disability, the regulations require the administrative law judge to follow a five-step process. These five steps must be followed in sequence regardless of the nature of the claimant's impairment. If a determination an individual is or is not disabled can be made at any one of these steps, evaluation under a subsequent step is unnecessary. This "sequential analysis" must be followed by the administrative law judge in writing his opinion and, therefore, the attorney should follow this analysis in developing and presenting the case at the administrative level.

## Sequential Analysis

The first step in the sequential analysis is to determine whether the claimant currently is engaged in substantial gainful activity. This means, as a general rule, if the client is working and expects to earn more than $300 per month he conclusively is presumed to be non-disabled and his claim will be denied. (20 CFR §404.1574)

Assuming the hurdle of the first step is surmounted successfully, the focus of the second step is to determine whether the client has a "severe" impairment. A severe impairment is one which significantly limits the physical or mental capacities to perform basic work-related activities, such as standing, walking, lifting, seeing, hearing, speaking and following instructions. If the claimant is found not to have a severe impairment, the claim will be denied without further consideration. (20 CFR §1520)

The third step of the process requires a comparison of the claimant's severe impairments with a detailed listing of impairments found at 20 CFR §404, subpt P, Appendix 1. These are

impairments of such severity the Social Security Administration deems them to be disabling. If there exists an impairment which meets or equals any one or more of these "listed" impairments, then a finding of disability will be made without further consideration. In determining whether the medical equivalent of a listed impairment exists, the Social Security Administration may require a physician, selected by them, agree the client's impairment is the equivalent of one listed. (SSR 83-19)

If the client's impairment is not severe enough to meet or equal one listed, the proceedings go forward to the fourth step of the sequential evaluation. This stage of the process focuses upon a determination of whether the claimant is able to return to any work performed within the past 15 years. Before a decision can be made on this issue, specific findings must be made concerning the client's "residual functional capacity."

The purpose of the residual functional capacity assessment is to determine to what extent the impairment keeps the individual from performing particular work activities on a sustained basis. These work-related activities are adopted from the Dictionary of Occupational Titles and are divided into five broad categories. These are defined at 20 CFR §404.1567 as follows:

1. Sedentary Work — Work which involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers and small tools. Primarily it must be a job which can be performed sitting although limited amounts of walking and standing may be required.
2. Light Work — Work which involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing or pulling of arm or leg controls.
3. Medium Work — Work which involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds
4. Heavy Work — Work which involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds
5. Very Heavy Work — Work which involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more

The administrative law judge, after considering all relevant evidence, attempts to place the client's ability into one or more of these classifications. This finding then will be compared with jobs performed by the claimant over the last 15 years to see if he retains the capacity to return to any of them. If it is found he can return to any of these previous jobs the claim will be dismissed without further consideration.

Once a claimant is able to survive this fourth step, a *prima facie* case of disability is established, and the burden of proof shifts to the Social Security Administration to show, despite the presence of the defined impairment, jobs do exist which the claimant can perform.

This proof is offered in the fifth and last step of the sequential analysis. The Social Security Administration is required to determine whether the client is able, despite an inability to perform prior work, to perform other substantial gainful activity considering his age, education, work experience and residual functional capacity. The

Social Security Administration, to assist in this determination, has established a system of tables or "grids," interrelating the factors of residual functional capacity, age, education and work experience. This grid system is designed to serve as the basis for the Social Security Administration's rebuttal of the client's *prima facie* case.

## The Grids

The grid system requires the administrative law judge to determine four vocational factors before a conclusion can be reached concerning disability. These factors are age, education, skill level and residual functional capacity. Each factor is divided further into various broad sub-classes.

When the findings of fact as to each sub-class coincide with all criteria of a particular classification within the grid system, the grid directs a conclusion as to whether the claimant is or is not disabled. (20 CFR §404, Subpt P, App 2)

The administrative law judge possesses wide discretion in making findings of fact as to these sub-classes. This gray area of broad discretion allows the resourceful attorney an opportunity to lessen the adverse effect the grid system may have upon the client's claim for benefits. A summary of these vocational factors and the areas of discretion associated with each is given below:

I. Age (20 CFR §404.1563)
   A. 18-49 years; younger individual, (age not significant)
   B. 50-54 years; approaching advanced age, (age significant if combined with other relevant factors)
   C. 55 years and up; advanced age, (age a significant factor)

This delineation of age represents vocational expectancies only and is not intended to be applied mathematically in borderline situations. Unfortunately, the regulations do not set any guidelines as to what is a borderline situation. Recently, the court in *Broz v. Heckler*, 721 F.2d 1297, (11th Cir. 1983) found the age classification of the grid system invalid as the secretary currently is applying them. The court found in disability hearings the effect of age on an individual's ability to work must be determined on a case-by-case basis in that it is improper to group all individuals within these three broad sub-classifications.

II. Education (20 CFR §404.1564)
   A. Illiterate — no formal schooling
   B. Marginal — 6th grade or less
   C. Limited — 7th grade through 11th
   D. High school and above

The regulations allow the presentation of evidence the client's effective education may be less than his numerical grade level; however, in the absence of evidence to the contrary, the numerical grade level will be used. Therefore, the attorney should always inquire as to the claimant's present ability to read, write, perform simple math skills, communicate effectively with others and engage in general reasoning ability.

III. Skill (20 CFR §404.1565)
   A. Unskilled — no acquired or transferable skills
   B. Semi-skilled — limited acquired skills
   C. Skilled — independent judgment required

Where prior work required very specialized skills not readily usable in other jobs, the claimant may be considered unskilled. The use of vocational expert testimony should be considered where transferability of skills is material, and claimant's skilled or semi-skilled work functions are not readily recognizable as transferable.

IV. Residual Functional Capacity

Determination of the client's residual functional capacity, as either sedentary, light, medium, heavy or very heavy, was made in step four of the sequential analysis.

## Beyond the Grids

If it appears the grids will direct a determination adverse to the claimant then it becomes necessary to argue why they should not control in certain cases. Even where the client appears to meet the assumptions of the grids, there are many factors which, if developed properly, may remove him from within the scope of the grid.

The grid system is based upon two intertwined administrative notices: first, jobs are available in the national economy, and second, there are specific exertional factors required to perform these jobs. The jobs administratively noticed are classified strictly according to their exertional requirements. Consequently, where a client has non-exertional impairments, the Social Security Administration must consider the additional effect these non-exertional impairments will have upon his ability to perform the noticed jobs. Circumvention of the conclusive nature of the grid system is available to the claimant who shows his impairment is a non-exertional impairment or a combination of exertional and non-exertional impairments.

If the claimant can show non-exertional impairments, the administrative law judge must determine if these limitations significantly narrow the range of work for which he is qualified, based on exertional impairments alone. [20 CFR §404, subpt P, App. 2, §200.00 (e)]

Just what is a non-exertional impairment? The original Social Security Regulations recognized their existence, but did little to provide a test or measure of what constituted a non-exertional as compared to exertional impairment.

Individual courts generally have approached this definitional problem on a case-by-case basis. Impairments such as pain, *Diorio v. Heckler*, 721 F.2d 726 (11th Cir. 1983); impaired dexterity and low intelligence, *Grant v. Schweiker*, 699 F.2d 189 (4th Cir. 1983); psychiatric problems, *McCoy v. Schweiker*, 683 F.2d 1138 (8th Cir. 1982); alcoholism, *Ferguson v. Schweiker*, 641 F.2d 243 (5th Cir. 1981); medication side effects, *Cowart v. Schweiker*, 662 F.2d 731 (11th Cir. 1982); and environmental restrictions, *Roberts v. Schweiker*, 667 F.2d 1143 (4th Cir. 1981), have been treated as non-exertional impairments.

The Social Security Administration recently issued SSR 83-13, which attempts to provide more guidance in this area. It lists five general areas of non-exertional impairments: mental impairments, posteral-manipulative impairments, hearing impairments, visual impairments and environmental restrictions. This ruling should be compared to an earlier ruling, SSR 83-10, which defines exertional activity as

one of the primary strength activities such as sitting, standing, walking, lifting, carrying, pushing and pulling.

In cases with only non-exertional impairments, such as mental impairments, the grids are not applicable, and the case will be determined without reference to them. In cases of combined exertional and non-exertional impairments the grids do not control the outcome, but the administrative law judge still must use them in relation to the exertional portion of the claimant's impairment and then determine if the non-exertional impairments further restrict or narrow working ability. [20 CFR §404, subpt. P, App 2 §200.00 (e) (2)]

Regardless of the exact definition given these impairments, it is clear most cases will have some form of non-exertional impairments associated with them and thereby prevent a conclusionary application of the grid system.

## Judicial Review

If the attorney is unsuccessful at the administrative hearing level then he may request the Appeals Council in Washington, D.C., review the administrative law judge's decision. An adverse ruling by the Appeals Council can be appealed to the federal district court where the claimant resides.

## Attorneys' Fees

The Social Security Act requires an attorney obtain approval from the Social Security Administration for any fee the attorney charges his client for representation in a Social Security proceeding. Contrary to general opinion the fee is not automatically 25% of past due benefits. The regulations state the amount of the fee approved by the Social Security Administration will be the smallest of: 25% of total past due benefits; or the amount as set by the Social Security Administration; or the amount agreed upon between the attorney and the client. (20 CFR §404.1730)

The Social Security Administration in Title II disability cases withholds 25% of any past due benefits awarded the client pending evaluation and approval of the fee petition. The approved fee then will be paid directly to the attorney by the Social Security Administration, and any remaining funds will be paid to the client. In Title XVI cases (Supplemental Security Income) the Social Security Administration does not withhold past due benefits, and the attorney must look directly to his client for payment of approved fees.

Upon receipt of a favorable decision from the administrative law judge, the attorney should submit form SSA-1560, which is the Social Security Administration's standard fee petition, within 60 days of receipt of the favorable decision. This form may be obtained at any Social Security district office and should include as much detailed information as possible concerning the attorney's representation.

## Conclusion

The handling of social security disability claims is a fast growing source of income for an attorney with an understanding of the regulatory disability process. □

# NOTICE

ALL ADS AND ARTICLES FOR THE
**MAY ISSUE**
OF *THE ALABAMA LAWYER*
MUST BE SUBMITTED BY
**MARCH 29, 1985**

# BE A BUDDY

With the number of new attorneys increasing and the number of jobs decreasing, more and more attorneys are going into practice on their own and miss the benefit of the counseling of more experienced practitioners. The Alabama State Bar Committee on Local Bar Activities and Services is sponsoring a "Buddy Program" to provide newer bar members a fellow-lawyer they may consult if they confront a problem, need to ask a question, or simply want directions to the courthouse.

If you are a lawyer who has recently begun a practice and would like to meet a lawyer in your area to call on occasionally for a hand, or if you are the more experienced practitioner with valuable information and advice you're willing to share, please complete and return the form below. Your participation in this program will certainly benefit the bar as a whole.

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# Riding the Circuits

## Birmingham Bar Association

The Birmingham Bar Association held its 99th Annual Meeting of the Membership in mid-December 1984. Honored at the meeting were members licensed to practice for 50 years. They were Charles W. Bates, D.H. Markstein, Winston B. McCall, Sr., and Walter L. Mims. The president of the Alabama State Bar, Walter Byars, was present at the meeting and addressed the assembly.

Elected as officers and new executive committee members for 1985 were:

| | |
|---|---|
| President: | J. Mason Davis |
| Vice President: | Roderick Beddow |
| Secretary/Treasurer: | Stephen D. Heninger |
| Executive Committee: | Jackson M. Payne |
| | David P. Rogers, Jr. |
| | John B. Tally, Jr. |

**Davis**

The membership approved a recommendation of the executive committee to have the 10th Judicial Circuit's representative on the state bar's board of bar commissioners serve on the executive committee.

The Birmingham Bar served over 2,500 lawyers during 1984 through its CLE programs; a total of 21 seminars was provided. The association holds a luncheon seminar each month providing 1.0 hours of MCLE credit (plus lunch) for $10 and holds an afternoon seminar on the fourth Friday of each month providing 3.2 hours of MCLE credit.

The Birmingham Bar is comprised of 1,860 members and serves the Birmingham-Jefferson-Shelby County areas.

## Montgomery County Bar Association

The Montgomery County Bar Association held its annual meeting at the Capital City Club January 16 with more than 140 Montgomery County lawyers attending. Speakers included William W. Falsgraf, president-elect of the American Bar Association, and Walter Byars, state bar president.

**Falsgraf**

Certificates were presented to Claude and Randye Rosser for their contributions to the MCBA over the past few years. The Rossers are leaving Montgomery to return to Randye's home in St. Louis, Missouri.

The resolutions committee read resolutions for the six active and retired members who died in 1984: Charles E. Porter; T.B. Hill, Jr.; Judge Leon J. Hopper; John Randolph Matthews; L.H. Walden; and Senator Lister Hill. These resolutions will be part of the minutes of the annual meeting, and copies will be sent to the families of the deceased.

Officers and directors elected for 1985 were:

| | |
|---|---|
| President: | David B. Byrne, Jr. |
| Vice President: | James R. Seale |
| Secretary/Treasurer: | Edwin K. Livingston |
| Directors: | Wanda D. Devereaux |
| | Floyd Minor |
| | Charles M. Crook |

The Montgomery County Bar Association Pro Bono Project honored those lawyers who have contributed most to the success of the project at an awards banquet December 6 at the Sheraton Riverfront.

**Judge Godbold and Euel Screws, who accepted for the mid-size firm winner of Copeland, Franco, Screws & Gill — Godbold and Screws are former law partners.**

Guest speaker and presenter of the awards was the Honorable John C. Godbold, chief judge of the U.S. Court of Appeals for the 11th Circuit.

The Pro Bono Project is a joint venture of the Legal Services Corporation of Alabama (LSCA) and the Montgomery County Bar Association. Coordinated by Robert Reynolds, the project refers indigent clients to private-practice lawyers who handle the cases — usually a domestic relations matter — for no fee. The project is funded entirely by LSCA as part of its private bar involvement program. Last year, about 300 cases were closed by lawyers participating in the project.

Judge Godbold emphasized the professional obligations and personal satisfactions of lawyers who represent indigent parties in both civil and criminal cases, and he especially encouraged members of the bar to undertake the challenge of representing clients who are appealing a death sentence.

About 110 persons attended the banquet, including local lawyers, officials of LSCA and the Montgomery County Bar Association, Alabama State Bar president Walter R. Byars and judges of various state and federal courts.

The dinner ended with Judge Godbold's presentation of awards to the following individuals and firms for their service in supporting the efforts of the project: individual winner — W. Clark Campbell, Jr., of Azar, Campbell and Azar; large firm winner — Rushton, Stakely, Johnston & Garrett; mid-size firm winner — Copeland, Franco, Screws and Gill; small firm co-winners — Cooper and Cooper, and Prestwood and Rosser.

The Montgomery County Young Lawyers announced at its January 8 meeting the election of officers for 1985. Attorneys elected are:

| | |
|---|---|
| President: | James Anderson |
| Vice President: | Joseph P. Borg |
| Secretary/Treasurer: | Terry Childers |

The association also announced the election of the attorneys to serve on its board. They are as follows:

**Anderson**

Associates: Robert Childers
Jeffrey Long
Laura Crum

The Montgomery County Young Lawyers is open for membership to all attorneys under 37 years of age. General meetings are held on the second Tuesday of each month in the trust department conference room, second floor of First Alabama Bank of Montgomery, 8 Commerce Street. All attorneys are cordially invited to attend.

## Marshall County Bar Association

The Marshall County Bar Association held a regular meeting in Guntersville January 9; several items of business were discussed, and committees were appointed for special local projects.

January 14 the bar association honored retired Judge Melvin E. Grass by presenting him with a portrait of himself to be hung in the Guntersville Courthouse. Grass was Marshall County's first district judge and served from 1971-1983.

### APPLICATIONS SOLICITED FOR LEGAL SERVICES CORPORATION BOARD OF DIRECTORS

Applications are now being accepted for eight seats on the Legal Services Corporation of Alabama's Board of Directors to be appointed by the board of bar commissioners. New board members will be seated in July 1985. There is no compensation for board members, but travel expenses will be paid.

Applicants must be members in good standing of the Alabama State Bar, must have a genuine desire to serve on the board of directors and must agree to attend quarterly board meetings in Montgomery.

The bar commissioners are seeking to appoint members from a wide variety of legal backgrounds and from all parts of the state. All interested lawyers, regardless of type of practice, and especially women and minorities, are invited to apply.

To apply, interested lawyers should submit to Mary Lyn Pike a letter detailing their qualifications, including a brief statement of their reasons for wishing to serve on the board, and their past experience, if any, with the delivery of legal services to the poor. Applications must be submitted by May 31, 1985.

# Bar Briefs

**Judge George H. Wright, Jr., of the 37th judicial circuit, Opelika, administers the oath of office to McMillan as family members observe.**

## McMillan takes oath of office

Family and friends gathered in mid-January to honor Henry Ward "Bucky" McMillan as he was sworn in as the newest judge of the Alabama Court of Criminal Appeals. McMillan assumed office and began his six-year term January 14.

McMillan, a native of Jasper, received an undergraduate degree from the University of Alabama and law degree from Cumberland School of Law. He was admitted to the Alabama State Bar in 1980; McMillan attended Northwestern University School for Prosecuting Attorneys.

Prior to this election, McMillan served as executive assistant attorney general and as a state prosecutor from 1980-84.

## Justice Maddox honored by former clerks

Also honored recently was Alabama Supreme Court Justice Hugh Maddox. October 1, 1984, marked the fifteenth anniversary of Justice Maddox's appointment to the supreme court, and several days before, a group of law clerks who served under him gathered in Montgomery to honor him.

Former Governor Albert Brewer appointed Maddox to fill a newly created position in the court in 1969; prior to his appointment, the supreme court was comprised of six associate justices and the chief justice.

As part of the evening's festivities, Justice Maddox was presented with a multi-volume set of his majority opinions.

## Ludgood elected president of LSCA

Mobile lawyer Merceria Ludgood was elected president of the Legal Services Corporation of Alabama board of directors at its December 15 meeting. Ludgood, named to the board in April 1982 by the Alabama Lawyers Association, served as board vice president and chair of the board's personnel committee last year.

**Bottom row, left to right: Herman Russomanno; George Grant, Jr.; Justice Hugh Maddox; Virginia Maddox; Ann Grace Nabers. Second row: Beth Jackson, Kay Widdop, Gregg Everett, Edward Patterson, Merrill Humphries (secretary to Maddox). Third row: Keith Norman, Honorable Paul Conger, John W. Parker, Clay Humphries, Ray Fitzpatrick, Hendon DeBray, Al Scott. Top row: David Carroll, Jeff Ash, John Alley, Bud Garikes. Former law clerks not pictured and unable to attend the dinner were Shirley Dorrough, Pete Burns, John Terry and Don Simms.**

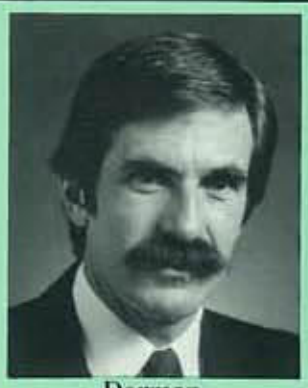
Elected to other board offices were Bill Neville of Eufaula, vice president; R.L. Raney of Florence, secretary; and the Rev. Alvin Hamilton of Grand Bay, treasurer.

## New members appointed to board of bar examiners

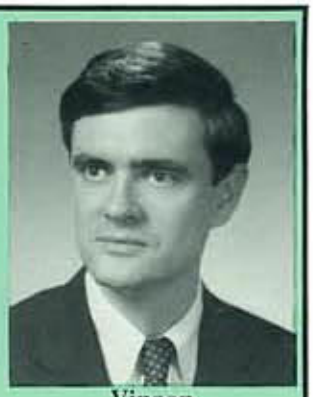
Newly appointed members of the board of bar examiners of the Alabama State Bar include Richard T. Dorman of Mobile; Mark Daniel Maloney of Decatur; and Laurence D. Vinson, Jr., of Birmingham. The new examiners began their four-year terms in February.

Dorman, a native of Mobile, received undergraduate and law degrees from the University of Alabama. He also attended Oxford University in England and graduated with a degree in international law in 1972.

Prior to becoming a partner in 1976 with the Mobile firm of Johnstone, Adams, Howard, Bailey & Gordon, Dorman was the recipient of an Office of Economic Opportunity Reginald Heber Smith Community Lawyer Fellowship and worked with the Legal Aid Society of Madison County.


Dorman


Maloney


Vinson

Maloney received his B.A. from Harvard University, J.D. from Vanderbilt University and LL.M. in taxation from New York University.

He has been with the Decatur firm of Blackburn and Maloney since 1980.

Maloney has served as president and secretary of the Morgan County Bar Association.

Vinson joined the Birmingham law firm of Bradley, Arant, Rose & White in August 1973 after graduating from the University of Alabama School of Law. He also received his undergraduate degree from Alabama.

Vinson was a contributor and a member of the advisory committee for the pamphlet, "The How, When & Where of Filing Under Article 9, Alabama Uniform Commercial Code," published in 1982 by the secretary of state and the Alabama Bar Institute for CLE.

He is a native of Gadsden.

# CLE News

by Mary Lyn Pike
Assistant Executive Director

The Mandatory CLE Commission and the Board of Commissioners of the Alabama State Bar have designated the following organizations approved sponsors of continuing legal education activities for 1985. As required, approval of their activities is contingent upon continued adherence to the standards for course approval, Regulations 4.1.1 through 4.1.13, Rules and Regulations for Mandatory Continuing Legal Education in Alabama.

Accredited law schools (ABA, AALS)
Administrative Office of Courts — Alabama Judicial College
Alabama Bar Institute for Continuing Legal Education
Alabama Consortium of Legal Services Programs
Alabama Criminal Defense Lawyers Association
Alabama Defense Lawyers Association
Alabama District Attorneys Association
Alabama Lawyers Association
Alabama State Bar and Bar Sections
Alabama Trial Lawyers Association
American Academy of Judicial Education
American Bar Association and Bar Sections
American College of Trial Lawyers
American Law Institute-American Bar Association Committee on Continuing Professional Education
Association of Trial Lawyers of America
Birmingham Bar Association
Commercial Law League Fund for Public Education
Cumberland Institute for Continuing Legal Education
Defense Research Institute
Federal Bar Association, Montgomery Chapter
Federal Bar Association, North Alabama Chapter
Huntsville-Madison County Bar Association
International Association of Insurance Counsel
Jefferson County Trial Lawyers Association
Library of Congress-Congressional Research Service
Maritime Law Association
Mobile Bar Association
Montgomery County Bar Association
Montgomery County Trial Lawyers Association
National Association of Bond Lawyers
National Bar Association
National College of District Attorneys
National College of Juvenile Justice
National District Attorneys Association
National Health Lawyers Association
National Institute for Trial Advocacy
National Judicial College
National Organization of Social Security Claimants' Representatives
National Rural Electric Cooperative Association, Legal Division
Patent Resources Group, Inc.
Practising Law Institute
Southwestern Legal Foundation
Transportation Lawyers Association
Trial Lawyers Association of Madison County
Tuscaloosa County Bar Association
Tuscaloosa Trial Lawyers Association

# President's Page

*(Continued from page 60)*

Lawyers are not like plumbers; lawyers are professionals. Yet we are in danger of becoming just an ordinary trade, measuring our success solely by profits. Some lawyers have employed the tools of big business, i.e. advertising. While the United States Supreme Court has upheld the constitutional right of lawyers to engage in advertising which is not false or misleading, no one has ever said advertising by lawyers is professional or ethical. I submit to you it is neither.

Professionalism is synonymous with independence. This professionalism and independence of lawyers can and, unless we act now, will incur the interference of and be compromised by government regulation and restructuring. If the trend towards profit leads to lawyers excluding services to the public, government regulation and restructuring are inevitable.

If we drift more from a learned profession, away from public service, into the realm of a profit-oriented trade or business, lawyers are in danger of losing their monopoly on providing legal expertise. Not only will lawyers lose, the right of the public to competent legal representation likewise will be lost.

Theodore Roosevelt said: "Every man owes some of his time to the upbuilding of the profession to which he belongs."

I urge each member of the Alabama State Bar to pay your professional dues — devote your best efforts to the upbuilding of our legal profession *as a profession.* □

— Walter R. Byars

# Withholding Orders for Child Support: A Substantial Improvement

by
J. Noah Funderburg

The collection of delinquent as well as future child support payments always has been a difficult problem both for the parent entitled to receive support and the lawyer who represents the parent. This problem results in part from the lack of an effective legal mechanism ensuring child support will be paid timely and in full. The Alabama legislature recently armed lawyers with a method that, though not perfect, greatly increases the chance of collecting the maximum amount on a regular basis. On May 29, 1984, Act 84-445, the Withholding Order for Child Support Act, became effective. This act is codified at sections 30-3-60 to -71 of the Alabama Code (Supp. 1984). Courts may now issue an Income Withholding Order, similar in application to a garnishment, requiring employers to deduct child support payments from the salary due an employee to satisfy any delinquent amount and to collect future payments as they fall due. How the need for the act arose, the operation of the act and some of the questions the act leaves unanswered will be discussed in this article.

## Need for Change

Why did we need another method for collecting child support payments? Judges, lawyers and persons entitled to receive support long have realized the existing remedies for collecting delinquent support often were ineffective. Once a decree ordering support payments is entered, most clients feel they are home free. Lawyers know the sad truth is, at least in many cases, the battle has just begun. While a number of parents faithfully pay their court-ordered support, many do not. A large percentage of these parents pay either inconsistently or not at all. Another aspect of the problem in collecting child support is courts have lacked the power to ensure future child support payments are made; the courts were limited to taking action only after a parent became delinquent in support payments.

Generally, the arsenal available to collect child support arrearages included a contempt of court action, levy and execution on real and personal property and garnishments. Each method has problems limiting their usefulness in collecting the arrearages, and none provides a method for collecting future child support payments.

## How Withholding Orders Work

Withholding orders conceptually are akin to garnishments. They require an employer to deduct sums from the earnings of an employee and pay this money over to the court for distribution to the person entitled to the support. Withholding orders do not replace garnishments. Garnishments still can be used to collect child support arrearages subject to certain exemptions. The major differences between withholding orders and garnishments are the amounts that can be collected and the ability to collect future support payments on a continuous basis.

A discussion of the operation of withholding orders requires an understanding of the definition of terms used in the act. The person obligated to make child support payments is known as the "obligor." The "obligee" is any person entitled to receive child support and specifically includes the Department of Pensions and Security when that agency is entitled to receive support owed to a parent. Since persons other than parents are given custody of

*J. Noah Funderburg presently serves as associate director of the University of Alabama School of Law Clinical Program. He is a 1977 graduate of the University of Alabama School of Law and was admitted to the bar that same year.*

children and are entitled to receive support, the term obligee includes these persons.

Withholding orders are authorized either as part of any decree including an order for the payment of child support or as an independent action for collection of past due and future child support payments. The independent action can be used only if a court order requiring child support payments previously has been issued.

All court decrees in any way involving an order for the payment of child support must include a withholding order. The act specifically states:

> (a) Any provision of section 8-5-21 to the contrary notwithstanding, any original decree, judgment, or order issued by a court of this state for the payment of support, any decree or judgment entered pursuant to a petition to modify an original decree or award of support, any decree or judgment of contempt of court for failure to pay support as previously ordered by a court of this state or any decree or judgment for criminal or civil nonsupport *shall* include as a separate section a withholding order... §30-3-61 Code of Alabama (1975) (emphasis added).

Note the language of the act is mandatory. Obviously the legislature intended withholding orders be applied consistently, removing the judge's discretion from the decision of when to apply this remedy. The withholding order sets the amount of child support due the obligee, and the employer of the obligor then is required to withhold this amount from the obligor's salary or wages. The act states the employer shall pay the amount to the clerk of the court or to DPS. The best practice probably would be to have the sums paid to the clerk of the court for distribution either to the obligee or to DPS. This ensures accurate records of payments are kept and centralizes the location of payment records in the clerk's office.

One obvious drawback to the withholding order is the burden on employers to make deductions. It also places obligors willing to make their payments voluntarily in the same situation as obligors unwilling. To avoid these problems, section 30-3-61(c) provides the withholding order included as part of a decree will not be served on the employer and will not take effect until an obligor becomes delinquent in child support payments in an amount equal to one month's support obligation. This should provide an incentive to obligors to make support payments voluntarily to avoid the forced deductions. It also removes the burden on employers in keeping records and making the deductions for those obligors who keep their payments current. The act provides the obligor may request the withholding order take effect at an earlier date, and the court may in its discretion order it take effect at an earlier date.

A withholding order as an independent action may be instituted by the obligee or the district attorney (for nonsupport cases) or DPS (in cases in which it is entitled to receive the support payments). This use of a withholding order is available in cases in which a previous order of support has been entered and the obligor is delinquent in support payments. The obligor is served with a summons and a copy of the petition and then is entitled to a hearing before the entry of the withholding order. One variance from the procedures available under the Alabama Rules of Civil Procedure has been added by this section. Service of the summons and petition on the obligor may be obtained by first-class mail in addition to the other methods of service provided by the rules. This statute is silent on the question whether a responsive pleading is required to the petition. Until this issue is resolved, the better practice is to file an answer to avoid the possibility of default. Since the statute states the obligor must "have an opportunity to be heard at a hearing set for this purpose," a default apparently should not be taken without the setting of a hearing. If it finds previously ordered payments are delinquent, the court then issues a withholding order. The withholding order allocates the amount withheld between the continuing support obligation and the accumulated arrearage. The effect of this use of withholding will be to ensure both future support payments are made on a regular basis and the arrearage is paid through an additional increment above the future support. As with the withholding order as part of a decree, this withholding order requires the employer to withhold the court-ordered amounts on a regular basis from the obligor's salary or wages and to pay this amount monthly to the clerk of the court or to DPS.

## Limitation on the Amount Collectible

One substantial feature of the act is found in section 30-3-67, adopting the federal limitation on garnishments issued to enforce support obligations by 15 U.S.C. 1673(b) (2). Unlike the Alabama garnishment limitations, the federal limitation is not a fixed amount. If the obligor is supporting a second family, the amount collectible is 50% of weekly disposable earnings; if not, then 60% of the person's weekly disposable earnings may be collected. When the garnishment is for support more than 12 weeks past due, the above percentages increase to 55% and 65%. Lawyers cannot expect to obtain the maximum percentage in every case because the court has discretion to order collection at less than the maximum rate.

The real advantage of this increase in limitations is to allow the collection of more substantial arrearages. Previously, an obligor who owed as much as 40% of disposable earnings in current support was exempt from paying arrearages because of the 40% maximum set by the Continuing Garnishment Act. Obviously, subjecting an abnormally large amount of net earnings to garnishment may prove self-defeating if it results in the obligor quitting work to escape the withholding order. The temptation to collect as much as possible in the shortest period of time may prove more harmful than helpful. The psychological value gained by the increase in limitations is if an obligor knows a lawyer has the ability to collect the majority of every paycheck, then the likelihood of compliance by the obligor should be enhanced.

## Good News Yes, Bad News Maybe

As with all new legislation, the Withholding Order Act has some good news and some bad news. Let us look at some of the good news first.

Withholding orders apparently will

open up one new area for the collection of child support delinquencies. The salaries of public officials and employees have been subject to garnishments based only on judgments *ex contractu* by virtue of section 6-6-482 *Ala. Code* 1975. The Alabama Supreme Court ruled a judgment for delinquent child support in *ex delicto* rather than *ex contractu*. In *Knight v. Knight*, 409 So. 2d 432 (Ala. Civ. App. 1982), the court held public officials and employees were exempt from support-based garnishment orders. The court in *Knight* acknowledged marriage was a civil contract, but also found payments of maintenance or support arose from a duty to support imposed by the marriage contract. A failure to pay alimony or child support was thus a breach of duty as opposed to a breach of promise. This makes a judgment for delinquent child support a judgment in tort, preventing the use of garnishment to collect child support from public officials or employees.

The legislature did not address directly the question whether the Withholding Order Act would supercede section 6-6-482. One argument for allowing withholding orders against public officials and employees is a withholding order is not a garnishment and therefore section 6-6-482 does not apply. A more compelling argument is found in the language of the act itself. Employer is defined as "any person, business, corporation, partnership, company, firm or unit of municipal, county, state or federal government." § 30-3-60(5) *Ala. Code* 1975. All withholding orders, whether incorporated in a decree of support or resulting from an independent action, will order "any employer to withhold and pay to the clerk the amount set out in the order." The withholding order in both situations also is binding "upon any employer upon whom it is served." The clear language of the statute indicates all municipal, county and state governments are included in the coverage of the act. Resistance to inclusion by these entities from a policy standpoint would be unwise. The collection of child support has become a hot issue, and acceptance of withholding orders to collect child support from public officials and employees provides a convenient method to correct what has been an unfortunate discrepancy in the law.

Another piece of good news is withholding orders take precedence over any other notice of garnishment served on the obligor's employer. This priority eliminates the problem of standing in line with other creditors to collect a support arrearage. In an opinion dated October 2, 1984, the attorney general stated a withholding order would take priority over *any* notice of garnishment "issued at any time prior to, contemporaneous with, or subsequent to the withholding order." This interpretation is consistent with the clear language of the statute and puts withholding orders first in line. This same section also contains a bit of bad news for attorneys representing the obligee. When an attorney receives a court-awarded fee, one of the more effective means of collection has been by garnishment. The act does not affect the garnishment limit for the collection of other debts, such as attorney's fees, so the 25% limitation imposed by section 6-10-7 still applies. If the obligor agrees to an immediately effective withholding order and the amount withheld exceeds 25% of the obligor's income, the attorney seeking payment of the fee cannot have redress by garnishment. If child support payments consume at least 25% of the obligor's income and the withholding order remains in effect until the youngest child reaches majority, the attorney may be waiting a long time to recoup the fee. This also raises the issue of defensive use of withholding orders. If the obligor has a substantial number of unsecured debts, agreeing to have a withholding order placed into effect immediately will prevent unsecured creditors from obtaining payment by garnishment, but will not affect their ability to obtain judgment.

The bad news arising from the Withholding Order Act is the question it leaves unanswered. The seriousness of these problems will depend upon the construction given the statute by local judges and eventual interpretation by the appellate courts.

The creation of the new and inde-

pendent remedy in section 30-3-62 appears helpful in providing attorneys with a separate method to seek collection of support without using a contempt of court action. Since section 30-3-61 provides all orders henceforth issued in contempt cases must include a withholding order, why do we need a separate remedy? Lawyers are not prone to scoff at additional means of getting into court, but what does section 30-3-62 provide that section 30-3-61 does not? The answer may be nothing, but a question lurks that may greatly affect withholding order practice. Section 30-3-62 specifically states when a withholding order is sought as an independent remedy, the order will state the amount to be collected to pay continuing support and may require an amount be applied toward the arrearage. Section 30-3-61 requires a withholding order in all contempt of court cases, but it does not say whether the withholding order can be used to collect arrearages as well as future support. Not allowing a withholding order to have this effect in contempt of court actions seems impractical, especially in light of the provisions of section 30-3-62 permitting collection of arrearages as well as continuous support.

The second and major distinction between the two sections of the act is the provision in section 30-3-61(c) generally requiring the withholding order not be served on the employer until the obligor becomes delinquent the equivalent of one month's support. Section 30-3-62 does not contain a similar provision. Arguably, the withholding order obtained through an independent action could be placed into effect immediately. Lawyers may be able to choose between the withholding order as part of a contempt action and as an independent action in trying to obtain immediate collection for the obligee. When a withholding order is issued as part of a contempt of court action, the court should be agreeable to ordering the decree to take effect immediately since the obligor has already shown by past conduct an unwillingness to voluntarily pay child support. A final resolution may be reached by reading section 30-3-62 *in pari materia* with section 30-3-61 to allow both sections to act similarly in arrearage collections.

The act also creates an ambiguity that may be deemed bad news in the collection of alimony. The collection of alimony payments has been subject to the same problems as that of collecting child support. The ambiguity occurred when the legislature defined obligor as "any person ordered by the court to make periodic payments for the benefit and support of *another person or minor child*" (emphasis added). Upon seeing the language "support of another person," the thought immediately occurs alimony may also be collected by withholding orders. A closer reading of the act dispels that possibility. The term "support" is limited to "support of a minor child," and the title of the act is Withholding Order for Child Support. Since the act makes no further mention of alimony or support of another person, what the legislature intended by the language "support of another person" is unclear. This may make for some interesting litigation in the future, but apparently alimony cannot be included in withholding orders.

A last bit of bad news is not the fault of the act, but is the fault of human nature. Withholding orders cannot prevent an obligor from changing jobs to avoid paying child support in this manner. To that extent, withholding orders are not more effective than garnishments have been in the past. The obligor will be required to notify the court of any changes in employment and provide the court with the address of the new employer. The failure of the obligor to notify the court of this change will subject him to contempt of court, so additional firepower will be added to the arsenal. Employers may advise the court of the change in employment and this should occasionally assist in keeping up with the obligors. Once the clerk of the court receives notice of a change in employment, a new withholding order will be issued, which the new employer must acknowledge within 14 days of receipt. This will help reduce the burden on the obligee in filing repetitive papers with the court to ensure continued receipt of support. Certain gaps in payments obviously will occur when the obligor changes jobs. First, the clerk will have to receive notice of the change of employment and then issue the withholding order to the new employer. The withholding order becomes binding on the new employer 14 days after service on the employer, creating a two-week gap in payments. The act is silent on collecting the payments missed during this period. The act also is silent on how the obligee can collect the arrearage accrued before a withholding order initially went into effect. The statute provides the withholding order generally will not be served on an employer until the obligor becomes delinquent in an amount equal to one month's support obligation. If the obligor does fail to make payments, a simple affidavit filed with the court requesting the withholding order be served immediately on the obligor's employer should suffice. The act does not, however, authorize the collection of the arrearage accrued during this one-month period. The remedies of contempt of court or a withholding order as an independent action are available and may be the only solutions to this problem. This gap in payments and other problems raised here need legislative attention.

## Conclusion

The Withholding Order Act is not a panacea for all problems existing in the collection of child support. It is, however, a substantial improvement over former methods for collection. The act cannot overcome the skill of some parents in avoiding the obligations, but it does make avoidance more difficult. Most importantly, it shifts the burden of collection away from the parent entitled to support and places it on the parent obligated to pay. A few wrinkles need to be smoothed out to ensure clear and consistent application of the provisions of the act, but these wrinkles are far outweighed by the advantages this act provides. □

## FOOTNOTES

[1]Ala. Code § 6-10-2. Prior to 1980 the exemption was $2,000.

[2]Ala. Code § 6-10-6. Prior to 1980 the exemption was $1,000.

[3]Authorized by 42 U.S.C. 653 and operated in Alabama by the Department of Pensions. The parent entitled to support must provide the social security number of the obligated parent and pay a fee for use of the service. The obligated parent's place of employment is ascertained by tracing the earnings reported to the Social Security Administration.

# About Members, Among Firms

## About Members

**John G. Bookout** was named president of Woodmen of the World Life Insurance Society January 5 at a special meeting of its board of directors. A native of Birmingham and resident of Montgomery for 22 years, Bookout moved to Omaha, Nebraska, three years ago to assume the duties of director, vice president and general counsel of the Woodmen.

He earned his undergraduate and law degrees from the University of Alabama and formerly served as deputy attorney general, insurance commissioner and judge of the Alabama Court of Criminal Appeals before retiring from state service in early 1982.

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**John B. Givhan** is among five new Samford University board of trustee members elected by recent action of the Alabama Baptist State Convention. A partner in the Andalusia law firm of Albrittons and Givhan, Givhan is a 1972 graduate of Samford's Cumberland School of Law. He holds a bachelor of science degree from Auburn University.

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**David C. Howland** has joined the legal department of United States Pipe & Foundry Company/Jim Walter Resources, Inc. as staff attorney. His office is located at 3300 First Avenue North, Birmingham, Alabama 35202. Prior to his association with U.S. Pipe/Jim Walter Resources, Howland has been in the partnership of Davis & Howland in Birmingham.

**Harold D. Rice,** formerly in private practice in the eastern area of Birmingham, has joined the legal department of Jim Walter Resources, Inc. as staff attorney for its mining division in Brookwood, Alabama.

## Among Firms

The law firm of **Hare, Wynn, Newell & Newton** is pleased to announce **H. Thomas Heflin, Jr.,** and **S. Greg Burge** have become associated with the firm. Offices are located at 700 City Federal Building, Birmingham, Alabama 35203. Phone 328-5330.

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**Robert G. Robison** and **Anthony R. Livingston** are pleased to announce the formation of a firm for the general practice of law under the name of **Robison and Livingston,** with offices located at 475 College Street, P.O. Box 86, Newton, Alabama 36352.

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**Michael J. Bellamy** and **Marilyn C. Newhouse** of Phenix City, Alabama, announce the formation of a partnership for the general practice of law. Ms. Newhouse has been associated with Mr. Bellamy's office at 1403 Broad Street since 1982 and is a former LSCA specialist attorney.

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**John W. Gibson** and **V. Lee Pelfrey, Jr.,** are pleased to announce the formation of their partnership for the practice of law under the firm name **Gibson and Pelfrey.** Offices are located at 309 West Madison Street, P.O. Box 488, Troy, Alabama 36081.

**Wilson, Pumroy & Bryan,** attorneys at law, are pleased to announce **Bruce Adams,** formerly an associate, has become a partner. The firm will continue in the general practice of law under the name **Wilson, Pumroy, Bryan & Adams,** with offices located at 1431 Leighton Avenue, P.O. Box 2333, Anniston, Alabama 36202. Phone 236-4222.

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The law firm of **Brown, Hudgens, Richardson, P.C.,** is pleased to announce **Benjamin H. Brooks, III; Mark E. Spear; R. Alan Alexander** and **David A. Hamby** have become associated with the firm, and **Robert P. Denniston** has become of counsel to the firm. The firm also takes great pleasure in announcing the relocation of their offices to 1495 University Boulevard, P.O. Box 16818, Mobile, Alabama 36616.

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The law firm of **Smith & Taylor** is pleased to announce **Thomas S. Spires** has become an associate of the firm. Offices are located at Suite 1212, Brown-Marx Towers, Birmingham, Alabama 35203. Phone 251-2555.

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The law firm of **Spain, Gillon, Riley, Tate & Etheredge** takes pleasure in announcing **J. Birch Bowdre, Ann McMahan Perry, John Mark Hart** and **Glenn E. Estess, Jr.,** have become members of the firm, and **Deborah A. Pickens** has become associated with the firm. Offices are located at 1700 John A. Hand Building, Birmingham, Alabama 35203.

The law firm of **Lyons, Pipes and Cook** takes pleasure in announcing **Charles L. Miller, Jr.,** and **W. David Johnson, Jr.,** have become associated with the firm. Offices are located at Two North Royal Street, Mobile, Alabama 36652.

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**Hand, Arendall, Bedsole, Greaves & Johnston,** 30th Floor, First National Bank Building, Mobile, Alabama, takes pleasure in announcing **Jack Edwards, Davis Carr and R. Preston Bolt, Jr.,** have become members of the firm.

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The law firm of **Johnstone, Adams, Howard, Bailey and Gordon** takes pleasure in announcing **Alan C. Christian** has become a member of the firm, and **Bruce P. Ely, David R. Peeler** and **Peter S. Mackey** have joined the firm as associates.

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**Herman Watson, Jr., Robert C. Gammons** and **Michael L. Fees** have joined together in the practice of law under the firm name of **Watson, Gammons & Fees, P.C.** Active lawyers are **Herman Watson, Jr., Robert C. Gammons, Michael L. Fees** and **Douglas J. Fees.** Offices are located at 107 North Side Square, P.O. Box 46, Huntsville, Alabama 35804.

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**Ross Diamond, III; Francis E. Leon, Jr.;** and **James F. Barter, Jr.,** are pleased to announce the continuation of their practice of law as **Diamond, Leon & Barter.** Offices are located at 62 North Royal Street, Mobile, Alabama 36602. Phone 432-3362.

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**James W. May** and **Sharon R. Hoiles** are pleased to announce their association for the general practice of law. Offices are located in E Building Professional Court, 224 West Nineteenth Avenue, P.O. Drawer 2326, Gulf Shores, Alabama 36542. Phone 968-4757.

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**Pennington, McCleave & Patterson,** attorneys at law, take pleasure in announcing the relocation of their offices to 113 South Dearborn Street, Mobile, Alabama 36602. Phone 432-1656.

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The law firm of **Watts, Salmon, Roberts, Manning & Noojin** is pleased to announce **Frederick L. Fohrell** and **Scott E. Ludwig** have become associated with the firm. Offices are located at 102 West Clinton, Suite 200, P.O. Box 287, Huntsville, Alabama 35801. Phone 533-3500.

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**Salem N. Resha, Jr.,** attorney at law, announces the removal of his offices to 2205 Morris Avenue, Birmingham, Alabama 35203. Phone 251-6666.

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The law firm of **McPhillips & DeBardelaben** announces that **Frank H. Hawthorne, Jr.** has become a partner of the firm and the firm name is now **McPhillips, DeBardelaben & Hawthorne.** The firm offices are located at 516 South Perry Street, Montgomery 36104. Phone (205) 262-1911.

---

The firm of **Otts & Moore** announces **Michael D. Godwin** has become a partner in the firm, and the firm name has been changed to **Otts, Moore & Godwin.** Offices are at 401 Evergreen Avenue, Brewton, 36426.

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**David B. Cauthen** is pleased to announce his son, **Britt Cauthen,** is now associated with him in the practice of law. The firm offices are located at 217 East Moulton Street, P.O. Box 1702, Decatur, Alabama 35602. Phone 353-1691.

## WE WANT *YOU* TO JOIN OUR SPEAKERS BUREAU!

The Committee on Lawyer Public Relations, Information and Media Relations is instituting a statewide speaker's bureau to provide speakers for civic organizations, schools, churches and other interested groups. The committee will compile a list of all lawyers in the state who are interested in serving on the speaker's bureau and will endeavor to provide speakers from the same community or general area from which a request for a speaker is received. All requests will be handled through the Alabama State Bar Headquarters. If you are interested in serving as a member of the speaker's bureau please fill out the following form and return it to the Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101.

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**Name** _____

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**Address** _____

**City** _____ **State** _____ **Zip** _____

**Telephone** _____

**Please list subjects on which you are willing to speak:**

1) _____

2) _____

3) _____

**Copeland, Franco, Screws & Gill, P.A.,** is pleased to announce **E. Terry Brown** and **James M. Edwards,** former associates, have become members of the firm, and **Lee H. Copeland** and **Truman M. Hobbs, Jr.,** have become associates of the firm. They announce the temporary move of their offices to 804 South Perry Street, Montgomery, Alabama 36104.

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**George E. Trawick** and **Ray T. Kennington,** of **Trawick and Kennington, Attorneys, P.C.,** take pleasure in announcing **George Howard Trawick** is now a shareholder of the firm. Offices are located at Clio Road, North, Ariton, Alabama 36311. Phone Ariton 762-2356 or Ozark 774-3175.

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The law firm of **Rosen, Harwood, Cook & Sledge, P.A.,** is pleased to announce **H. Edward Persons** and **W. Perry Webb** have become associates of the firm. Offices are located at 1020 Lurleen Wallace Boulevard, North, Tuscaloosa, Alabama 35403. Phone 345-5440.

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The law firm of **Culp & Johnson** is pleased to announce **Millard L. Jones** has become a member of the firm. Offices are in the Rhodes Professional Building, 2956 Rhodes Circle, Birmingham, Alabama 35205. Phone 933-8383.

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**David Chip Schwartz,** attorney at law, announces the association of **Mark A. Duncan** in the practice of law under the firm name of **Law Offices of David Chip Schwartz.** Offices are located in The Bradford Building, 2025 Second Avenue North, Birmingham, Alabama 35203. Phone 326-0591.

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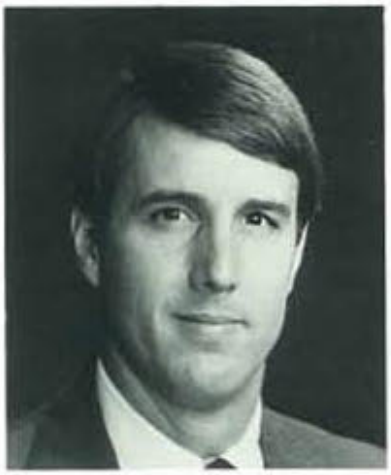
**Michael G. Graffeo,** formerly with the firm of **McMillan & Spratling,** announces the opening of his office for the general practice of law at 301 Title Building, Birmingham, Alabama 35203. Phone 252-1146.

# Young Lawyers' Section



by Robert T. Meadows III
YLS President

By the time this article goes to press the 1984-85 year of the Alabama Young Lawyers' Section will be three-quarters completed. Much has been accomplished thus far; the YLS has been extremely busy conducting projects of benefit to the YLS of the state bar, to the various professions throughout the state of Alabama, to the youth and to the state bar itself. Briefly, let me bring you up to date on these particular activities.

In February 1985, the YLS sent several representatives to the Young Lawyers' Division of the American Bar Association's Midyear Meeting held in Detroit. Ron Davis of Tuscaloosa and Bent Owens of Birmingham represented the young lawyers there, along with Edmon McKinley who attended in his capacity as district representative for Alabama and Georgia. Ron, Bent and Edmon attended numerous meetings designed to acquaint them with activities being conducted by other Young Lawyers' Sections across the nation. Each brought back expertise used to better the section and increase its activities in the future.

In March 1985, Randy Reaves of Montgomery, with the assistance of the YLS, sponsored the Annual Conference on the Professions. This year's conference was held in Gulf Shores and, as usual, was a tremendous success. Professions such as nursing, pharmacy, law and medicine were represented. Each individual participated in a seminar designed to update him or her on new legal requirements in specific areas of practice and to promote the relationship between the lawyers of the state of Alabama and various other professions.

***". . . the state YLS stands ready, willing and able to assist any local Young Lawyers' Sections who have a need."***

Another project sponsored with the assistance of the YLS occurred at the Annual Midyear Meeting of the Alabama Bar Association held in Montgomery March 1 and 2. The first annual Midyear Interviewing Conference was co-sponsored by the University of Alabama School of Law, the Cumberland University School of Law and the Alabama YLS. This particular conference was designed to bring together, at a mutually convenient place and time, prospective second- and third-year law students and law firms who were in the market for such students. This year's program was a huge success. I hope this conference becomes a permanent part of the midyear meeting. Credit goes to Penny Parker, placement director at the University of Alabama School of Law, and to Jeanette Rader and Sylvia Hollowell of the Placement Office at Cumberland University.

The Annual Sandestin Seminar sponsored by the YLS will be held in mid-May in Sandestin. This seminar has become one of the best attended and best received of any sponsored in Alabama. This year's seminar promises to be no exception. A large turnout of young lawyers and other lawyers is expected. Caine O'Rear and Charlie Mixon of Mobile, who team up to put on this seminar, should be encouraged and congratulated by all who plan to attend. Those of you who have not made plans to attend should do so as soon as possible.

The YLS' 1984-85 year is fast drawing to a close. It will be culminated by the annual meeting held in Huntsville in July. All of you should make plans to attend this particular convention as it promises to be one of the best in recent years.

Finally, the state YLS stands ready, willing and able to assist any local Young Lawyers' Sections who have a need. Contact me or Bernie Brannan in Montgomery for assistance. □

# LEGISLATIVE WRAP-UP

by Robert L. McCurley, Jr.

The Council of the Alabama Law Institute approved the drafting committee's proposed revision of Alabama's Eminent Domain Code after first making several amendments.

Maurice Bishop served as chairman of the committee from 1978 until his death in June 1982. This revision reflects his insight and scholarly guidance.

Mr. Bishop, in his introductory remarks to the Eminent Domain Code, said: "It is estimated approximately 100,000 land parcels are being acquired annually for public purposes in this country involving a cost in excess of $1.5 billion and that this volume will increase in this new decade of the '80s. One of the reasons is today there are over 200 million Americans, and approximately 75 million new Americans will be added before the turn of the century. In 40 years, there will be 400 million Americans. They will require public works and community facilities of all kinds, involving the acquisition of private property for public use. Confronted with these facts, it appears timely and in the public interest that to the best of our ability we make certain the procedures for acquisition keep pace with this exploding development. Should the members of any profession fail to develop, improve and expand, their destiny is atrophy and defeat.

"Prior studies and suggested revisions of eminent domain statutes have not been enacted for various reasons, perhaps because sufficient consideration was not given to the multiple interests involved and affected. The present committee, through many conferences and extended debates, has sought to inject and resolve all interests."

The present Eminent Domain Law was enacted piecemeal over the past 100 years by the Alabama Legislature and is found in Sections 18-1-1 through 18-1-32 Alabama Code. This proposed law follows the draft of the Uniform Eminent Domain Code as drafted by the National Conference of Commissioners of Uniform State Laws and takes into account prior revisions suggested in Alabama, including those of an earlier code committee of the Alabama Bar, and recommendations from attorneys, judges, appraisers and property owners have been incorporated into the code recommended by the committee.

The proposed code is composed of 15 articles and includes definitions, proceedings before condemnation, commencement of the action by the condemnor, the defendant's response, the procedure for determining just compensation including compensation standards, evidence, judgment and post-judgment procedure. Virtually all of our present law remains in effect and has been repositioned to include them in this code. There has been no change as to the authority to condemn.

In addition to Maurice E. Bishop, the drafting committee consisted of: Gerald D. Colvin, Jr., Birmingham; Edward S. Allen, Birmingham; Michael F. Ford, Tuscumbia; Andrew J. Gentry, Jr., Auburn; Henry Graham, Birmingham; Professor Tom Jones, University of Alabama School of Law; H.J. Lewis, Clanton; Bert Nettles, Mobile; G. William Noble, Birmingham; Judge Joseph D. Phelps, Montgomery; Romaine S. Scott, Jr., Birmingham; A.J. Coleman, Decatur; and Samuel L. Stockman, Mobile. □

*Robert L. McCurley, Jr., director of the Alabama Law Institute, received his B.S. and LL.B. degrees from the University of Alabama. In this regular column, Mr. McCurley will keep us updated on legislation of interest and importance to Alabama attorneys.*

# PINKERTON'S INVESTIGATIVE TEAM.

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"With 12 years experience in the private investigation industry on a national and international level this man is an invaluable asset to you and your client. With his experience and expertise he achieves the kind of investigative results that Pinkerton's Reputation was built on. Mr. Hurd has also established himself as a valued member in Local Law Enforcement circles serving in a variety of Investigative functions."

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"After several years of experience as one of Pinkerton's high level investigators in the South Florida area he now directs the operations of The Investigation Department of the Mobile office. His direct experience in undercover operations, Video surveillance and other investigative techniques proves as an important asset in his directing of operations in this district."

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*Founded in 1850, Pinkerton's was the first private detective agency on the North American continent. Today, as the largest private investigative firm, our expertise is regularly called on by attorneys to assist in a variety of ways. The following brief outline of our services might suggest an area in which we might be of help to you or to one of your clients.*

VIDEO DEPOSITIONS - We will conduct and edit video recordings of depositions for more accurate records of testimony.

LOCATING WITNESSES OR THIRD PARTIES - We actively seek out individuals, obtain interviews and depositions with consistent success even though substantial periods of time might have elapsed since the origination of the claim.

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SURVEILLANCE - In response to a variety of problems, our personnel, equipped with photographic equipment, conduct surveillance of individuals, property and automotive equipment.

PERSONNEL PROTECTION - At the request of attorneys we regularly provide protection for individuals and families against the threat of kidnapping, bodily harm, extortion or terrorism.

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**Mobile, Alabama 36609**

# cle opportunities

## march

### 8 friday

**PREVENTING LEGAL MALPRACTICE**
Sheraton, Mobile
Sponsored by: Alabama Bar Institute for CLE
Credits: 3.9 Cost: None
For Information: (205) 348-6230

**SPORTS AND ENTERTAINMENT LAW**
First Alabama Bank, Birmingham
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Credits: 1.0 Cost: $10
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**LABOR LAW FOR THE GENERAL PRACTITIONER**
Royal Savannah Inn, Savannah
Sponsored by: ICLE of Georgia
Credits: 7.2 Cost: $55
For Information: (404) 542-1121

### 14-15

**HEALTH LAW**
New Orleans
Sponsored by: American Bar Association
For Information: (312) 988-5000

### 15 friday

**LABOR LAW FOR THE GENERAL PRACTITIONER**
Atlanta
Sponsored by: ICLE of Georgia
Credits: 7.2 Cost: $55
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### 17-22

**ADVANCED TRIAL ADVOCACY WORKSHOP**
Holland Law Center, Gainesville
Sponsored by: National Institute for Trial Advocacy
Credits: 42.0 Cost: $950
For Information: (612) 644-0323

### 20-22

**BASIC ESTATE AND GIFT TAXATION**
Hilton, Scottsdale
Sponsored by: ALI-ABA
Credits: 21.6 Cost: $395
For Information: (215) 243-1600

### 21-22

**INCOME TAXATION OF ESTATES AND TRUSTS**
The Fairmont, New Orleans
Sponsored by: Practising Law Institute
Credits: 12.6 Cost: $390
For Information: (212) 765-5700

### 22 friday

**WORKMEN'S COMPENSATION AND RELATED LITIGATION**
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For Information: (205) 251-8006

### 22-23

**PRODUCTS LIABILITY LAW**
Marriott, Chicago
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Credits: 12.6 Cost: $175
For Information: (612) 338-1977

### 27 wednesday

**BANKING LAW**
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Sponsored by: Alabama Bar Institute for CLE
For Information: (205) 348-6230

### 29-30

**PERSONAL INJURY: PREPARATION AND TRIAL**
Maison Dupuy, New Orleans
Sponsored by: Cambridge Courses
Credits: 12.0 Cost: $355
For Information: (415) 331-5374

## april

### 5 friday

**SOUTHEASTERN TRIAL INSTITUTE**
Birmingham-Jefferson Civic Center
Sponsored by: Alabama Bar Institute for CLE
For Information: (205) 348-6230

### 11-12

**PROOF OF DAMAGES**
Washington
Sponsored by: Association of Trial Lawyers of America
For Information: 1-800-424-2725

### 11-13

**SOUTHEASTERN CORPORATE LAW INSTITUTE**
Grand Hotel, Point Clear
Sponsored by: Alabama Bar Institute for CLE
For Information: (205) 348-6230

### 19 friday

**REPRESENTING SMALL BUSINESSES**
Birmingham-Jefferson Civic Center
Sponsored by: Alabama Institute for CLE
For Information: (205) 348-6230

### 22-23

**LEGAL MALPRACTICE INSTITUTE**
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Sponsored by: American Bar Association
For Information: (312) 988-5000

## 24-26

SECURITIES REGULATION
The Fairmont, Dallas
Sponsored by: Southwestern Legal Foundation
For Information: (214) 690-2377

## 26 friday

BRIDGE THE GAP: A SEMINAR FOR NEW LAWYERS
Civic Center, Birmingham
Sponsored by: Alabama State Bar Young Lawyers' Section and Alabama Bar Institute for CLE
For Information: (205) 348-6230

## 26-27

ANNUAL SPRING SEMINAR
Sheraton Riverfront, Montgomery
Sponsored by: Montgomery County Trial Lawyers Association
For Information: (205) 262-2715

# may

## 2-3

LITIGATION IN AVIATION
Hyatt Regency, Washington
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SECURITIES LAW FOR NONSECURITIES LAWYERS
The Mark Hopkins, San Francisco
Sponsored by: ALI-ABA
For Information: (215) 243-1600

## 7-17

OIL AND GAS LAW AND TAXATION
Sheraton Park Central, Dallas
Sponsored by: Southwestern Legal Foundation
For Information: (214) 690-2377

## 9-10

WORKER'S COMPENSATION
Municipal Auditorium, Mobile
Sponsored by: Alabama Department of Industrial Relations
Credits: 11.1 Cost: $55 until April 25; $75 after April 25
For Information: (205) 261-2868

INSTITUTE ON WILLS AND PROBATE
The Registry, Dallas
Sponsored by: Southwestern Legal Foundation
For Information: (214) 690-2377

## 9-19

SOUTHEAST REGIONAL TRIAL ADVOCACY INSTITUTE
UNC School of Law, Chapel Hill
Sponsored by: National Institute for Trial Advocacy
Credits: 84.5 Cost: $1250
For Information: (612) 644-0323

## 10 friday

BUSINESS TORTS AND ANTITRUST
Sheraton Mountainbrook, Birmingham
Sponsored by: Cumberland Institute for CLE
Cost: $75
For Information: (205) 870-2865

## 10-11

ANNUAL TAX SEMINAR
Grand Hotel, Point Clear
Sponsored by: Alabama Bar Institute for CLE
For Information: (205) 348-6230

## 13-17

LABOR LAW AND LABOR ARBITRATION
The Registry, Dallas
Sponsored by: Southwestern Legal Foundation
For Information: (214) 690-2377

## 16-17

CRIMINAL TRIAL ADVOCACY
Houston
Sponsored by: Association of Trial Lawyers of America
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## 17 friday

ANNUAL SEMINAR ON THE GULF
Sandestin, Destin
Sponsored by: Alabama State Bar Young Lawyers' Section and Alabama Bar Institute for CLE
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## 24 friday

OIL, GAS AND MINERAL LAW
Law Center, Tuscaloosa
Sponsored by: Alabama Bar Institute for CLE
For Information: (205) 348-6230

## 30-June 1

APPELLATE ADVOCACY
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# ARCP 15(c): Relation Back of Amendments Adding, Changing or Substituting Parties or Names of Parties

by Jerome A. Hoffman

"Relation back" is a legal fiction under which a pleading, usually an amendment or a counterclaim, is treated as if it had been filed at some specified time earlier than it was actually filed. As is true of amendments generally, the question whether an amendment adding, changing or substituting a party or the name of a party relates back typically becomes crucial only if the statute of limitation has run when the amendment is offered. If the statute has not yet run when the amendment is offered, there is no other commonly recurring need to treat the amendment as if it had been offered at an earlier time. Where relation back need not be invoked, of course, the requirements for relation back need not be satisfied.

## A. Controlling Rules

The relation back of amendments adding, changing or substituting parties or names of parties in civil actions is controlled by the Alabama Rules of Civil Procedure. Rule 15(c) provides:

> (c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading except as may be otherwise provided in Rule 13(c). An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. An amendment pursuant to Rule 9(h), *Fictitious Parties*, is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

Rule 9(h) provides:

> (h) *Fictitious Parties.* When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

Rule 9(h) was drawn from and under the authority of title 7, section 136,[1] making it unnecessary to consider whether it would also have been authorized by the Rules Enabling Act.[2]

## B. Tactical Contexts in which Relation Back May Save the Day

The general problems, of course, are short statutes of limitation and procrastinating people. Some of these people, unfortunately, are lawyers, but not all lawyers procrastinate, and not all procrastinators are lawyers. A lot are clients, as each knows to his occasional sorrow. In addition to these pervasive general problems, there are specific problems related to the contexts of particular cases.

1. **Flesh-and-Blood Wrongdoers Hiding Behind Fictitious Entities** *Roth v. Scruggs*,[3] the granddaddy of Alabama's fictitious party cases, illustrates a recurring litigation context for which some kind of relation back is sorely needed and quite plainly justified. It perhaps also illustrates *the* context in which Alabama's Doe practice originally was intended to apply. Roth, injured in an elevator accident, sued two Scruggses individually, as owners of the building in which he was injured, only to discover at trial, after the statute of limitation had run, the Scruggses were hiding behind a corporation, the Scruggs Investment Company. Even though the Scruggses as owners of the stock of the corporation, were, in practical effect, the owners of the building (and probably would have told you so, if the subject had come up over cocktails rather than in court), the court *held*, as courts still do, the Scruggs corporation was an entirely new and distinct party. Roth could not recover against the Scruggses individually because they were not liable individually — only the Scruggs corporation was liable. He could not recover against the Scruggs corporation because he was barred by the statute of limitation, which had run out while his lawyer was learning about his case. He could not avail himself of the brand new Doe practice statute[4] because his lawyer failed to follow the proper procedure, a bad example to which some lawyers continue to be attracted even in 1985.

A recent case, *Columbia Engineering International v. Espey*,[5] demonstrates the problem has not abated with time. In fact, under modern techniques of protective business organization, fictitious entities now may be arrayed two or more layers deep, as was done by the manufacturer-defendant in *Columbia Engineering*. In a society owned and operated, as the law pretends, largely by fictitious business entities, it does not seem unfair to counter the fiction of corporate personality with the fiction of relation back.

**2. Observed but Anonymous Wrongdoer** In our increasingly impersonal society, an injured person may have seen the wrongdoer face-to-face, but may have lacked the opportunity or the foresight to ascertain his name. A very recent case, *Denney v. Serio*,[6] demonstrates the point. There the plaintiff was, she alleged, negligently treated by an emergency room physician whose name she did not know. The applicable relation back provision gave her attorney some additional time in which to discover the physician's name. There are other factual contexts in which such additional time may be welcomed and sometimes even justified. Examples might include hit-and-run motor vehicle accidents.

3. **Observed Wrongdoer Possibly an Agent for Another Responsible Person or Entity** Often, a plaintiff will or should know immediately the person who allegedly injured him was acting for another identified person or entity. When this is so, there arguably may be no reason, as *Hinton v. Hobbs*[7] illustrates, to afford additional time in which to discover and name respondent superior defendants. In a society increasingly characterized by complex and masking relationships, however, courts often may deem it justified to afford additional time to identify those potential defendants without whose initiative the alleged injurious activity would not have been undertaken.

4. **Wrongdoer Known Only by Function or Position** Until a plaintiff has been afforded time for investigation and discovery, he often may be able to designate his wrongdoer only as, for example, whoever was responsible for maintaining the injurious street[8] or whoever manufactured or should have inspected the injurious product.[9] Under some circumstances, it may be thought justified to apply a doctrine of relation back to information about identity discovered after the statute of limitation nominally has run.

5. **Potential Unknown Wrongdoer in a Complex Transaction** In our modern era of subcontractors and sub-subcontractors, a year measured from the commencement of discovery, much less from the commencement of the action or the accrual of the claim, often is scarcely long enough to unravel the complex interrelationships among numerous potential defendants who are determined to reveal as little as possible just as slowly and expensively as possible.[10] Most statutes of limitation, being of ancient derivation, do not take this modern reality into account. Although one might have expected courts steeped in the flexible common law tradition to apply techniques of relation back to alleviate the mischief of outdated statutes, one often finds relation back applied less willingly to this category of cases than to others.

## C. Two Kinds of Relation Back of Amendments as to Parties

Unlike most jurisdictions (including the federal jurisdiction), Alabama has two alternative kinds of relation back of amendments as to parties. One is the ordinary, unpredicated kind of relation back familiar to the attorneys of perhaps every other jurisdiction. The other is, from the national point of view, a relatively rare and unusual kind of relation back. Known as "fictitious party practice" or "Doe practice," it is predicated upon the allegation of fictitious parties in the pre-bar pleading[11] to be amended. Both are embodied in Rule 15(c).

1. **Ordinary Relation Back and Doe Practice Compared** Although they overlap substantially, the two kinds of relation back are not identical. Each can serve the attorney best in somewhat different procedural contexts. Each imposes somewhat different demands. Although some of its provisions must be qualified, the thumbnail table on page 86 may be helpful.

2. **Do Not Overlook Ordinary Relation Back** Doe practice gets all the attention in Alabama. Every Alabama attorney knows about it and many overwork it. The Alabama Supreme Court continues to wrestle with it. Three important cases are a year old or less. Nine others are less than four years old. Ordinary relation back has pretty much gotten lost in the shuffle and excitement. Alabama attorneys have, it seems, virtually ignored it, often to their cost. In several of the important recent cases, amendments lost under the Doe practice provisions might have been saved had the amending attorney invoked the ordinary rela-

tion back provisions.

a. *Hinton v. Hobbs*[12] The Alabama Supreme Court *held* the statute of limitation barred Hinton's amendment substituting the First State Bank for fictitious party "A" because Hinton had not been ignorant of the name, identity or involvement of the bank when he filed his pre-bar complaint. The procedural facts satisfied the first two requirements for ordinary relation back without much room for argument. The claim asserted against the bank arose from the same transaction or occurrence as that asserted against the flesh-and-blood defendants, who were the bank's president and principal stockholder. Under principles of agency law, the bank received notice of Hinton's lawsuit when its president was served with process.

As to the third requirement, the case is a little closer. Was Hinton mistaken "concerning the identity of the proper party," as required by Rule 15(c)(2)? Because Hinton did not invoke ordinary relation back, the court did not see (or at least did not choose to take) its opportunity to decide this novel definitional question. I have, as yet, found no case squarely in point. The words "mistake concerning the identity" could, of course, be construed to function precisely like the words "ignorant of the name" in Rule 9(h), barring amendments whenever the Doe practice would do so and, thus, crippling ordinary relation back as an alternative to fictitious party relation back. Or the words could, as arguably they should, be construed in harmony with the basic proposition that "[b]eing able to take advantage of plaintiff's pleading mistakes is not one of [the] protections" properly afforded by either the statute of limitations or our modern system of civil procedure.[13] This latter construction would recognize also the provision emphasizes the belated party's timely knowledge of his potential involvement (a requirement certainly satisfied in *Hinton*) and not the nature or quality of the amending party's procedural mistake.

The court might have gone either way on this issue, had it been brought to the court's attention, and thus, Hinton might still have failed to save his amendment, but he might have succeeded. The point is he forfeited all opportunity to do so by limiting his argument to the general and apparently fairly typical obsession with fictitious party practice.

b. *Threadgill v. Birmingham Board of Education*[14] In Threadgill's negligence action against the Birmingham Board of Education, the Alabama Supreme Court *held* the statute of limitation barred her amendment substituting the superintendent of the board for a fictitious defendant, because she had not been ignorant of the superintendent's identity when she filed her pre-bar complaint. Once again, the first requirement for ordinary relation back was satisfied beyond preadventure. The claim asserted against the superintendent arose from the same transaction or occurrence as that asserted against the board.

In *Threadgill*, however, the second requirement was not so clearly established as it was in *Hinton*. Notice to the board was not notice to the superintendent as a matter of legal doctrine, but it is very likely the superintendent did have notice as a matter of fact, which is what counts under Rule 15(c). Under that provision, Threadgill had at least the opportunity (apparently not seized) to show the superintendent had had notice of her lawsuit before the statute of limitation ran out.

The third requirement, on the other hand, would seem to have been a less difficult hurdle in *Threadgill* than in *Hinton*. Threadgill knew, of course, the board had a superintendent and, apparently, even knew his name, but she could not, as the court seems to have recognized, identify him with confidence as an actual defendant until the board responded to her interrogatories with certain information. Thus, she could have sustained more easily the argument the superintendent "knew or should have known that, but for a mistake concerning [his] identity [as a] proper party, the action would have been brought against him." If the superintendent and the board were communicating with one another as they should, it is most likely the superintendent had timely knowledge of his potential involvement with Threadgill's grievance.

| | Ordinary Relation Back | Doe Practice |
|---|---|---|
| **Source** | Sentences 1 and 2 of Rule 15(c) | Sentence 3 of Rule 15(c), incorporating Rule 9(h) by reference |
| **Fictitious party (placeholder) allegations** | Pre-bar pleading need not have placeholder allegations. | Pre-bar pleading *must* have adequate placeholder allegations. |
| **Same transaction requirement** | Party-changing amendment must assert a *claim* arising from the same transaction or occurrence as the pre-bar pleading. | Name-substituting amendment must assert a *theory* already alleged and waiting in the pre-bar pleading. |
| **Notice of lawsuit** | Belated party must have received pre-bar notice of the lawsuit commensurate with due process of law. | Case law not clear whether belated party must have received any actual pre-bar notice of the lawsuit. |
| **Belated party's knowledge of his involvement** | Belated party must, pre-bar, have known or had reason to know that he was an intended party from the beginning. | Case law not clear as to what extent, if any, belated party must have known he was or might have been an intended party from the beginning. |
| **Amending party's pre-bar knowledge of belated party's true identity** | No requirement that amending party have been ignorant of belated party's true identity at any time. | Amending party must have been "ignorant of the name" of the belated party at the time the pre-bar pleading was filed. |

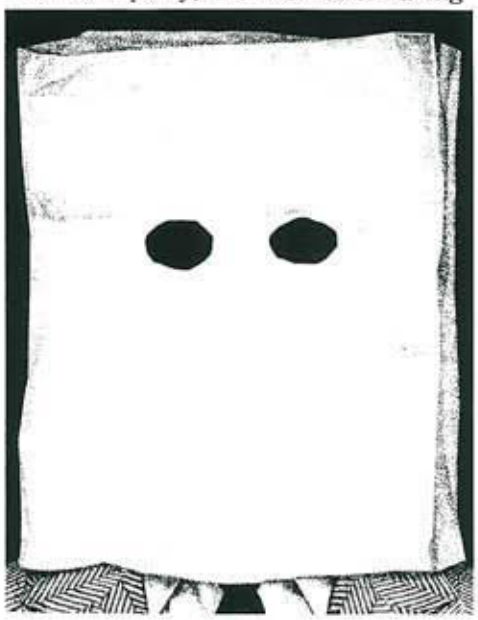
We cannot be certain from the case report whether Threadgill actually could have established notice and knowledge as required by Rule 15(c). Once again, the point is, on its face, the case looks like one in which she had a fair opportunity to do so, an opportunity which, for ought that appears in the report, she failed to recognize because it stood in the shadow of her Doe practice argument.

c. *Minton v. Whisenant*[15] The Alabama Supreme Court *held* the statute of limitation barred Minton's amendments substituting several fellow employees for "fictitious party No. 20" and Whisenant, the manufacturer of an allegedly injurious component of allegedly faulty machinery, for "fictitious party No. 1." The amendments were not allowed to relate back, because they asserted theories of liability not alleged and waiting in the body of Minton's pre-bar complaint. The claims asserted against fellow employees and Whisenant all arose from the same transaction or occurrence as asserted in Minton's pre-bar complaint. Minton may well have been able to show that his fellow employees had pre-bar notice of his lawsuit. Whisenant may or may not have had such notice. Assuming a reasonably hospitable definition of "mistake concerning the identity," Minton may also have been able to show both his fellow employees and Whisenant had the requisite pre-bar knowledge of their potential involvement with Minton's grievance. Yet again, the point is, on its face, the case looks like one in which the amending party should have invoked ordinary relation back as an alternative argument to save his amendments.

## D. The Case Law Evolution of Alabama Doe Practice

Fictitious party relation back came alive less than eight years ago and continues to be one of our more active jurisprudential volcanos. The Alabama Supreme Court has decided 18 cases since 1977. There were three in 1983 and four more in 1984. In addition, the local federal courts have, in several decisions, wrestled with problems of removal procedure aggravated by Alabama's Doe practice. We have probably not seen the end of it. This section first identifies the essential elements of Doe practice, as they have so far emerged, and then examines the recent Alabama cases.

1. **Elements of Doe Practice** The Alabama Supreme Court has adopted the following formulation: "Plaintiff must state a cause of action against the fictitious party in the body of the original complaint, and plaintiff must be ignorant of the identity of the fictitious party, in the sense of having



no knowledge at the time of the filing that the later named party was in fact the party intended to be sued."[16] The formulation in *Columbia,* plus the holdings of *Columbia* and other important recent cases, can be rolled into a nutshell somewhat as follows: One must allege *placeholder names* in the summons and in the caption and body of the complaint; one must allege *placeholder theories of liability* in the body of the complaint.

a. *Placeholder names* "[P]laintiff must [have been] ignorant of the [true] identity of the . . . party [identified by a fictitious name]" and must have so alleged in his pre-bar complaint. This is a moderate restatement of the language of *Columbia* which, I believe, captures faithfully what the court wants one to understand. It represents the judicial evolution of the "ignorant of the name" requirement of Rule 9(h) and its predecessor statute.

1) *Fictitious names* Places in the summons and in the caption of the complaint can be held by the insertion of "any name." Lawyers typically choose obviously fictitious names as a clear and early signal they intend to invoke the provisions of Rule 9(h). "John Doe," being legal history's most famous fictitious name, frequently is (though not always) chosen. Thus, the term "Doe practice."

2) *Allegations of ignorance of true identity* Rule 9(h) requires not only a party must actually be ignorant of the true identity of a party for whom a placeholder is used, but the pleader must allege his ignorance "in his pleading." Read strictly, this would require the allegation of ignorance to appear in the *body* of the pleading, but (for ought that appears in the case reports) lawyers have, without disaster, typically placed their allegations of ignorance only in the caption of the complaint.[17] Nevertheless, Rule 9(h) says "in his pleading," and very cautious attorneys are putting allegations of ignorance in the caption of the summons, the body of the summons, the caption of the complaint and the body of the complaint. Given the general uncertainty about what actually is required, this boilerplating is understandable, but it is horribly wasteful, even in this era of word processors, and one hopes the supreme court will soon tell us clearly it is not necessary.

3) *Descriptive allegations in summons and caption of complaint* Parties of unknown identity may be provisionally identified by fictitious names, but allegations in the summons and in the caption of the complaint must describe them as fully as is then possible, for example, the physician who treated the plaintiff in the emergency room at a certain place and time,[18] or the person or entity responsible for maintaining the injury-causing street,[19] or the person or entity who manufactured or should have inspected the injury-causing product.[20] The party later to be substituted for a placeholder must fit one of the descriptions previously alleged in the summons and caption of the complaint. If not, one's amendment will most likely fail.[21]

4) *Descriptive allegations in body of complaint* According to two very recent cases,[22] the word "defendants" (NOTE: plural) is a sufficient allegation

of placeholder names and identities in the *body* of the complaint.

b. *Placeholder theories of liability* One must allege, *in the body of the pre-bar complaint,* the theory(s) of liability supporting recovery against fictitiously named defendants.[23] If the invocation of Rule 9(h) is to give perfect protection, one will have to anticipate perfectly every relationship and every theory of liability that *might* arise from the conduct, transaction or occurrence upon which the client's claim rests. In other words, one will have to know the substantive law inside out, not only what the law is but what it soon may become.

This waiting-theory requirement is more demanding than the comparable provision for ordinary relation back, under which the theory applicable to the belated party may be alleged for the first time in the amendment, so long as it arises from the same transaction or occurrence asserted in the pre-bar complaint. Although the Alabama Supreme Court has said allegations against Doe defendants need be no more specific than allegations against truly identified defendants,[24] this assertion must be doubted since the modern pleading philosophy embodied in Alabama Rule of Civil Procedure 8(a) and (f) does not contemplate a plaintiff must (although he may) allege his *theories* of recovery at all.

When the theory applicable to a belatedly substituted defendant is the same as a theory already alleged against a truly identified defendant, the waiting-theory requirement is satisfied, and no repetitious allegation of the same theory need have been made to hold the belated defendant's place.[25] Not even the unwary will be trapped in such cases. When, however, a Doe defendant could be held liable only on a theory applicable to none of the original and truly identified defendants, the trap is set, and only the lawyer with perfect foresight will safely avoid springing it. In *Fowlkes v. Liberty Mutual Insurance Company,*[26] for example, the plaintiff named real and Doe defendants, alleging they were "responsible for the manufacture, sale or maintenance of the equipment, fixtures and premises where Fowlkes was employed."[27] Liberty Mutual, however, was not responsible for manufacture, sale, or maintenance, but could be held, if at all, only for failing to provide safety inspections and programs, concerning which the complaint contained no allegations. Thus, when Fowlkes sought to substitute Liberty Mutual for one of the Does, there was no theory waiting and the amendment failed.[28]

Very thin allegations may sometimes be forgiven. As it *held* in *Phelps v. South Alabama Electric Co-op,*[29] the Alabama Supreme Court may incorporate by reference allegations from the caption in order to eke out vague, general, incomplete or boilerplated allegations in the body of the complaint, but dictum in *Columbia Engineering*[30] cautions not yet to rely upon forgiveness. It is still best to be specific, thorough and exhaustive, at least until one's certain the supreme court is going to stand by *Phelps.*

c. *Prompt substitution* Once one has learned the true identity of a Doe defendant, file an amendment making the substitution without delay. If not, the amendment may not relate back, even if one has proceeded flawlessly otherwise. In *Walden v. Mineral Equipment Company,*[31] for example, a delay of 34 months was *held* fatal, and in *Shirley v. Getty Oil Company,*[32] 16 1/2 months were too long. In *Denney v. Serio,*[33] on the other hand, an amendment filed in five months was *held* timely, but do not rely too literally on that holding. Under other procedural circumstances, five months might be ruled a fatal delay.

d. *Belated party's pre-bar notice and knowledge* Belatedly substituted parties probably need not have had *actual* pre-bar notice the amending party's lawsuit was pending or *actual* pre-bar knowledge they were intended parties. Rule 9(h) and its statutory predecessor express no requirement of notice or knowledge, and the fictitious party cases have not (until recently) spoken of notice or knowledge. The absence of those requirements would, indeed, seem to give Doe practice its special charm, as well as its greatest advantage over ordinary relation back, which requires pre-bar notice and knowledge.

In mid-1983, however, the Alabama Supreme Court injected pre-bar notice and knowledge into the calculus of Doe practice. The case was *Phelps v. South Alabama Electric Co-op.*[34] Holding Phelps' complaint contained sufficient allegations of a theory of liability against the belatedly substituted defendant, the court distinguished a previous case wherein the complaint had contained no such allegations. As its policy justification for the distinction, the court reasoned as follows:

> Thus, [in *Walden v. Mineral Equipment Co.*] there was virtually no way for the defendant to be put on notice by the original complaint that it might be a party to that suit. In the case before us, however, it is clear that defendant South Alabama Electric Co-op was put on notice at the outset that it might be liable for negligence in the maintenance of the right-of-way.[35]

It is too early to tell what the court may make of this newfound concern for a Doe defendant's pre-bar notice and knowledge. Requirements of actual notice and knowledge similar or identical to those for ordinary relation back may, in time, evolve. This would, of course, effectively write Doe practice out of the rules, since it would eliminate the benefits for which attorneys have been willing to bear the considerable pleading burdens imposed by the practice. More likely, perhaps, the court will eventually hold constructive notice and knowledge suffice to relieve its concern for the Doe defendant, and the required allegations of theory in the body of the pre-bar complaint suffice to establish constructive notice and knowledge.

2. **The Recent Doe Practice Cases** This section contains synopses of the Doe practice cases decided since the adoption of Rules 15(c) and 9(h).

a. *Hinton v. Hobbs*[36] *Held,* the statute of limitation barred Hinton's amendment substituting the First State Bank for fictitious party "A," because Hinton had not been ignorant of the name, identity or involvement of the bank when he filed his pre-bar complaint. Embry, Bloodworth, Jones, Almon, Shores, JJ.

b. *Browning v. City of Gadsden*[37] The case is almost identical to *Moorer,* below, except Browning did not know she "did not know who was responsible for the maintenance of the street." *Held,* "Browning was 'ignorant of the name of the opposing party' within the

meaning of Rule 9(h) at the time of the filing of the original complaint because Browning lacked knowledge of facts giving rise to a cause of action against the City of Gadsden." Browning had originally sued Baptist Memorial Hospital and only sought to amend in Gadsden when she learned via answers to interrogatories Gadsden, not the hospital, was responsible for maintaining the driveway on which she was injured. It seemed for a while the court might have abandoned *Browning's* broad "involvement" definition of "ignorant of the name," but it seems, in *Columbia Electric*, below, to have reaffirmed that definition. Torbert, C.J., Maddox, Jones, Shores, JJ. Beatty, J., concurred in the result.

c. *Shirley v. Getty Oil Company*[38] *Held,* Shirley waited too long (16 1/2 months) after learning Smith's identity and involvement before she moved to amend him in. *Held* also the scope of relation back would not be expanded to accommodate intervening changes in the substantive law. Shores, J., Torbert, C.J., Maddox, Jones, Beatty, JJ.

d. *Fowlkes v. Liberty Mutual Insurance Company*[39] The first landmark in the *Fowlkes-Minton-Phelps* line of authority. Fowlkes named real and Doe defendants, alleging they were "responsible for the manufacture, sale or maintenance of the equipment, fixtures and premises where Fowlkes was employed." Liberty Mutual, however, was not responsible for manufacture, sale or maintenance, but could be held, if at all, only for failing to provide safety inspections and programs, concerning which the pre-bar complaint contained no allegations. Thus, when Fowlkes sought to substitute Liberty Mutual for one of the Does, there was no applicable theory waiting in the pre-bar complaint and the amendment failed. Unless one reads "in the complaint" to mean "in the *body* of the complaint," the opinion does not say precisely where in the complaint the theory must be waiting. It was not necessary to the decision to do so, since neither the *body* nor the *caption* of Fowlkes' pre-bar complaint contained the necessary allegations. Per Curiam: Torbert, C.J., Maddox, Faulkner, Jones, Almon, Shores, Embry, JJ. Beatty, J., did not sit.

e. *Eason v. Middleton*[40] Eason named Middleton as a defendant in her original complaint, dropped her from the suit and then sought to substitute her for a Doe defendant. *Held,* affirming the trial court, Middleton could not be amended back in under Doe practice, because Eason had not been ignorant of her name at the time she filed her original complaint. Beatty, J., Torbert, C.J., Maddox, Shores, JJ. Jones, J., concurred in the result.

f. *Minton v. Whisenant*[41] The second landmark in the *Fowlkes-Minton-Phelps* line of authority. Minton alleged theories of liability against her Doe defendants in the *caption* of her pre-bar complaint in the course of describing the Does. The court saw no allegations of theories against Does in the *body* of that complaint, however, and *held* her amendments did not relate back because there was no applicable theory awaiting the belated Does in the *body* of the pre-bar complaint. Per Curiam: Torbert, C.J., Maddox, Faulkner, Jones, Almon, Shores, Embry, Beatty, Adams, JJ.

g. *Walden v. Mineral Equipment Company*[42] As to defendant Mineral Equipment Company, *Walden* descends from the *Fowlkes-Minton* line of authority, but it breaks no new ground. Although Walden's pre-bar complaint alleged at least five theories of liability (for each of which she identified at least one known defendant), it did not allege the theory (extended manufacturer's liability) under which Mineral Equipment later would have to be held. Thus, there was no theory of liability waiting in the *body* of (or anywhere in) the pre-bar complaint for Mineral Equipment when Walden sought to amend it in. As to the other belated defendants, *held* Walden had waited too long (34 months) after learning their identities before she moved to amend them in. Per Curiam: Torbert, C.J., Maddox, Jones, Shores, Beatty, JJ.

h. *Threadgill v. Birmingham Board of Education*[43] *Held,* the superintendent of the Birmingham Board of Education could not be substituted for a fictitious defendant after the statute of limitation had run out, because "the identity of defendant Cody [the superintendent] was known to plaintiff in advance of the statute of limitations having run." Thus, ARCP 9(h)'s "ignorant of the name" requirement was not satisfied. This is the decision that temporarily encroached upon *Browning's* broad "involvement" definition of "ignorant of the name." Note the court did not say Threadgill was not ignorant of Cody's identity or involvement at the time she filed her pre-bar complaint. Adams, J., Torbert, C.J., Faulkner, Almon, Embry.

i. *Hamby v. Zayre Corporation*[44] Including Doe defendants delay removal from state court to federal court until it is determined there are no real defendants — or no real defendants of non-diverse citizenship — to be substituted. Plaintiff's declaration of readiness for trial without having substituted for Does amounts to the requisite determination, and a defendant can, at that time, remove to federal court. Pointer, Hancock, Guin, Haltom, Propst, Clemon, Lynne, JJ.

j. *Kuhlman v. Keith*[45] Kuhlman waited over two years after she learned of Hilda Tant's "identity and actions [i.e., involvement?]" before she sought to substitute Tant for fictitious party "X." *Held,* "appellant's action against Tant is barred by the statute of limitations." The court said, "It makes no difference to the disposition of this case whether the appellant tried to amend to add Tant pursuant to the fictitious party rule . . . or pursuant to Rules 15(a) and 15(c)." And, indeed, the belated amendment might have been denied under the "when justice so requires" clause of ARCP 15(a). *Kuhlman* probably should not be read as endorsing an "ignorant of the name" requirement for ordinary relation back. Shores, J., Torbert, C.J., Maddox, Jones, Beatty, JJ.

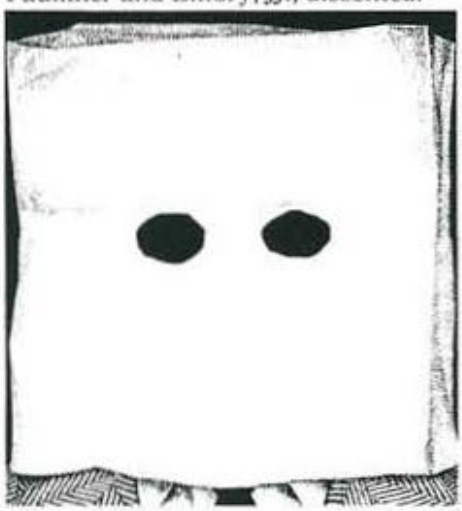
k. *Weeks v. Alabama Electric Co-op*[46] Faulty pre-bar description of Doe defendant defeated post-bar substitution. Fictitious party "X" was described in the pre-bar complaint as the owner or controller of the premises on which Weeks was injured. Weeks' post-bar amendment described Burns & McDonald (to be substituted for "X") as the "alter ego [etc.]" of Alabama Electric, the owner and controller of the premises. *Held,* affirming summary judgment for Burns & McDonald, that

Burns & McDonald was not properly substituted for "X." Torbert, C.J. "All Justices concur."

l. *Ex parte Smith*[47] In *Deese v. Smith* (the underlying action), the Deeses defeated Smith's motion to change venue by substituting in a non-Alabama defendant for fictitious party "16." The supreme court denied Smith's petition for a writ of mandamus against the trial court's denial of his motion, thus holding in effect the Deeses' amendment cured the asserted defect in venue nunc pro tunc. Like *Hamby*, above, this case illustrates the use of Doe practice for a purpose other than ameliorating the effect of a short statute of limitation. Beatty, J., Torbert, C.J., Maddox, Jones, Almon, Shores, Embry, Adams, JJ. Faulkner, J., did not sit.

m. *Columbia Engineering International v. Espey*[48] *Columbia Engineering* descends from the *Fowlkes-Minton* line of authority but it breaks no new ground. Espey's complaint did not even meet the *Fowlkes* requirement (theory waiting in the complaint), much less the *Minton* requirement (theory waiting in the *body* of the complaint). First, the only description of Doe defendants appeared in the *summons*. The pre-bar complaint did not even have a *caption*. Furthermore, the descriptions of the Doe defendants contained no allegations regarding the theory(s) upon which the Does might be liable. *Held*, reversing and remanding, Espey's amendment substituting Columbia Electric for fictitious defendant "No. 1" did not relate back. Jones, J., Torbert, C.J., Maddox, Almon, Shores, Beatty, Adams, JJ. Faulkner and Embry, JJ., concurred specially.

n. *Phelps v. South Alabama Electric Co-op*[49] The third landmark in the *Fowlkes-Minton-Phelps* line of authority is important because it ameliorates the *Minton* requirement an applicable theory of liability be waiting for the belated defendant in the *body* of the pre-bar complaint. Here, the theory against South Alabama was actually alleged in the *caption* of Phelps' pre-bar complaint in the course of describing fictitious defendant "No. 13." This "description of their various functions" was *held* to have been incorporated by reference "into the body of the complaint" by the most general kind of boilerplate allegations in the *body* of the pre-bar complaint. I think it defensible to conclude *Phelps* trivializes the *Minton* requirement. Those who thought the *Minton* requirement a pointless one from the beginning will not be sorry to see it reduced to a mere boilerplate formality. Torbert, C.J., Maddox, Jones, Almon, Shores, Beatty, Adams, Faulkner and Embry, JJ., dissented.



o. *Moorer v. Doster Construction Company*[50] Landmark case establishing the standard for alleging placeholder names in the *body* of the complaint. *Held*, "the complaint satisfies the rule by alleging the defendants, plural, negligently maintained the streets, etc." Until the City of Birmingham (the named defendant) supplied the information in its answers to interrogatories, Moorer was ignorant of the *identity* of the entity responsible for maintaining the section of street that injured her. Since the one theory of liability asserted in Moorer's pre-bar complaint (negligent maintenance of a public street) applied to all defendants, known and unknown, a theory of liability was waiting for Doster when it was amended in. The case also illustrates acceptable identification of Doe defendants in the *caption* of the pre-bar complaint. "Not knowing [who was responsible for maintaining the street], she properly included them by [1] naming them fictitiously and [2] *describing them by the function they performed.*" *Held*, reversing and remanding, Moorer's post-bar amendment substituting Doster for "X" related back. The decision would also seem to restore *Browning's* liberal "involvement" interpretation of the phrase "ignorant of the name." Shores, J., Torbert, C.J., Adams, Jones, Faulkner, Embry, Maddox, Beatty, JJ. Almon, J., did not sit.

p. *Harvell v. Ireland Electric Company*[51] The decision reinforces *Moorer* in laying to rest any lingering uncertainty regarding the specificity with which Doe defendants must be identified in the *body* of the pre-bar complaint. *Held*, reversing and remanding, "the use of the phrase 'the defendants' in each paragraph of plaintiff's complaint is sufficient to incorporate by reference all the named defendants and all the fictitious defendants described in the caption of the complaint." Harvell's pre-bar complaint successfully identified all theories of liability which were or might become relevant to the transaction or occurrence out of which his claim arose. Thus, a theory of liability was waiting for Ireland Electric when it was amended in. Until a named defendant supplied the information in his answers to interrogatories, Harvell was ignorant of the general electrical contractor's *identity*. Faulkner, J., Torbert, C.J., Almon, Shores, Adams, JJ.

q. *Denney v. Serio*[52] This is a textbook application to easy facts. Denney was truly ignorant of the *name* of Dr. Serio when she filed her pre-bar complaint. Even in her first post-bar amended complaint, she identified him only as "a certain Cullman County emergency doctor whose name was unknown." *Held*, reversing and remanding, Denney's amendment substituting Dr. Serio for John Doe related back to the filing of Denney's pre-bar complaint. "Each of the defendants" was sufficient identification of fictitious defendants in the *body* of the complaint. Because Denney's theory of "negligent and/or wanton failure to diagnose" applied to all defendants, known and unknown, a theory of liability was waiting for Dr. Serio when he was amended in. Almon, J., Torbert, C.J., Faulkner, Embry, Adams, JJ.

r. *Peek v. Merit Machinery Company*[53] The decision breaks no new ground. The Alabama Supreme Court merely applies the teachings of *Fowlkes-Minton-Phelps* (appropriate theory must await belated defendant in *body* of

complaint), *Moore-Harrell* ("defendants" is sufficient allegation of placeholder names in *body* of complaint), and *Serio* (belated defendant must show prejudice to defeat amendment on ground of undue delay) to the facts before it and reaches the proper and predictable result. *Held,* Peek's post-bar amendment substituting Merit in lieu of defendant "X" related back to the date of Peek's pre-bar complaint, which contained sufficient allegations of placeholder names and a placeholder theory.

s. *Robinson v. Graves*[54] The decision breaks no new ground. Here, the plaintiff's amendment was doubly doomed under established criteria. There was no allegation of a placeholder name in the body of the complaint. Furthermore, no applicable theory awaited the belated defendant in the body of the complaint.

## E. The Justification and Future of Doe Practice

These questions deserve more careful study than they can be given here and now, but several preliminary propositions stand out. As the Alabama Supreme Court said in *Columbia Engineering,* "[M]any of the arguments made as to the proper interpretation of our fictitious party practice are addressed to the 'unreasonableness' of the one-year statute of limitations for personal injury negligence actions."[55] In this era of complex litigation, compounded as it is by intentionally disguised relationships and responsibility, many thoughtful persons will continue to deem one-year statutes of limitation unrealistically and unfairly short. Until the legislature acts, thoughtful courts will continue to ameliorate the perceived injudiciousness of short statutes by applying doctrines of relation back. Most jurisdictions are said to make do with one variety; Alabama has two. Whether this procedural plenty blesses us more abundantly with choice than it curses us with confusion remains an open question. □

## FOOTNOTES

[1]According to the Table of Comparative Sections, 2 CODE OF ALABAMA 309 (1975), title 7, section 136 was not carried over to the current Code.

[2]The Rule-Making Act, Pub. Act No. 1311, 1971 Ala. Acts 2259, 2260. This Act was not carried verbatim into the current Code. It is substantially represented by ALA. CODE § 12-2-7(4) (1975).

[3]214 Ala. 32, 106 So. 182 (1925).

[4]ALA. CODE § 9515 (1923).

[5]429 So. 2d 955 (Ala. 1983).

[6]446 So. 2d 7 (Ala. 1984).

[7]349 So. 2d 28 (Ala. 1977).

[8]*See, e.g.,* Moorer v. Doster Const. Co., 442 So. 2d 97 (Ala. 1983); Browning v. City of Gadsden, 359 So. 2d 361 (Ala. 1978).

[9]*See, e.g.,* Walden v. Mineral Equipment Co., 400 So. 2d 385 (Ala. 1981); Fowlkes v. Liberty Mut. Ins. Co., 392 So. 2d 803 (Ala. 1980).

[10]*See, e.g.,* Craig v. United States, 413 F.2d 854 (9th Cir. 1969). *And cf.* Walden v. Mineral Equipment Co., 400 So. 2d 385 (Ala. 1981); Fowlkes v. Liberty Mut. Ins. Co., 392 So. 2d 803 (Ala. 1980).

[11]"Pre-bar pleading" means a pleading filed before the statute of limitation has run.

[12]349 So. 2d 28 (Ala. 1977).

[13]3 MOORE, FEDERAL PRACTICE 15-191 (1983).

[14]407 So. 2d 129 (Ala. 1981).

[15]402 So. 2d 971 (Ala. 1981).

[16]Columbia Engineering Int'l v. Espey, 429 So. 2d 955, 958-59 (Ala. 1983).

[17]*See, e.g.,* Denney v. Serio, 446 So. 2d 7 (Ala. 1984); Moorer v. Doster Const. Co., 442 So. 2d 97 (Ala. 1984); Phelps v. South Alabama Elec. Co-op, 434 So. 2d 234 (Ala. 1983); Columbia Engineering Int'l v. Espey, 429 So. 2d 955 (Ala. 1983); Walden v. Mineral Equipment Co., 406 So. 2d 385 (Ala. 1981); Minton v. Whisenant, 402 So. 2d 971 (Ala. 1981).

[18]Denney v. Serio, 446 So. 2d 7 (Ala. 1984).

[19]Moorer v. Doster Const. Co., 442 So. 2d 97 (Ala. 1983).

[20]Walden v. Mineral Equipment Co., 400 So. 2d 385 (Ala. 1981); Fowlkes v. Liberty Mut. Ins. Co., 392 So. 2d 803 (Ala. 1980).

[21]*See, e.g.,* Weeks v. Alabama Elec. Co-op, 419 So. 2d 1381 (Ala. 1982).

[22]Harvell v. Ireland Elec. Co., 444 So. 2d 852 (Ala. 1984); Moorer v. Doster Const. Co., 442 So. 2d 97 (Ala. 1983).

[23]Phelps v. South Alabama Elec. Co-op, 434 So. 2d 234 (Ala. 1983); Minton v. Whisenant, 402 So. 2d 971 (Ala. 1981).

[24]Columbia Engineering Int'l v. Espey, 429 So. 2d 955, 960 (Ala. 1983).

[25]*See, e.g.,* Denney v. Serio, 446 So. 2d 7 (Ala. 1984); Moorer v. Doster Const. Co., 442 So. 2d 97 (Ala. 1983); Browning v. City of Gadsden, 359 So. 2d 361 (Ala. 1978).

[26]392 So. 2d 803 (Ala. 1981).

[27]*Id.* at 804.

[28]*Id.* at 806. *See also* Columbia Engineering Int'l v. Espey, 429 So. 2d 955 (Ala. 1983); Minton v. Whisenant, 402 So. 2d 971 (Ala. 1981).

[29]Phelps v. South Alabama Elec. Co-op, 434 So. 2d 234 (Ala. 1983).

[30]429 So. 2d 955, 959 (Ala. 1983) ("Plaintiffs incorrectly conclude that this language refers to all defendants, and thereby draws the description of fictitious party No. 1, which appeared in the summonses, into the complaints.")

[31]406 So. 2d 385 (Ala. 1981).

[32]367 So. 2d 1388 (Ala. 1979).

[33]446 So. 2d 7 (Ala. 1984).

[34]434 So. 2d 234 (Ala. 1983).

[35]*Id.* at 237.

[36]349 So. 2d 28 (Ala. 1977).

[37]359 So. 2d 361 (Ala. 1978).

[38]367 So. 2d 1388 (Ala. 1979).

[39]392 So. 2d 803 (Ala. 1980).

[40]398 So. 2d 245 (Ala. 1981).

[41]402 So. 2d 971 (Ala. 1981).

[42]406 So. 2d 385 (Ala. 1981).

[43]407 So. 2d 129 (Ala. 1981).

[44]544 F. Supp. 176 (N.D. Ala. 1982).

[45]409 So. 2d 804 (Ala. 1982).

[46]419 So. 2d 1381 (Ala. 1982).

[47]423 So. 2d 844 (Ala. 1982).

[48]429 So. 2d 955 (Ala. 1983).

[49]434 So. 2d 234 (Ala. 1983).

[50]442 So. 2d 97 (Ala. 1983).

[51]444 So. 2d 852 (Ala. 1984).

[52]446 So. 2d 7 (Ala. 1984).

[53]456 So. 2d 1086 (Ala. 1984).

[54]456 So. 2d 793 (Ala. 1984).

[55]429 So. 2d 955, 959 (Ala. 1983).

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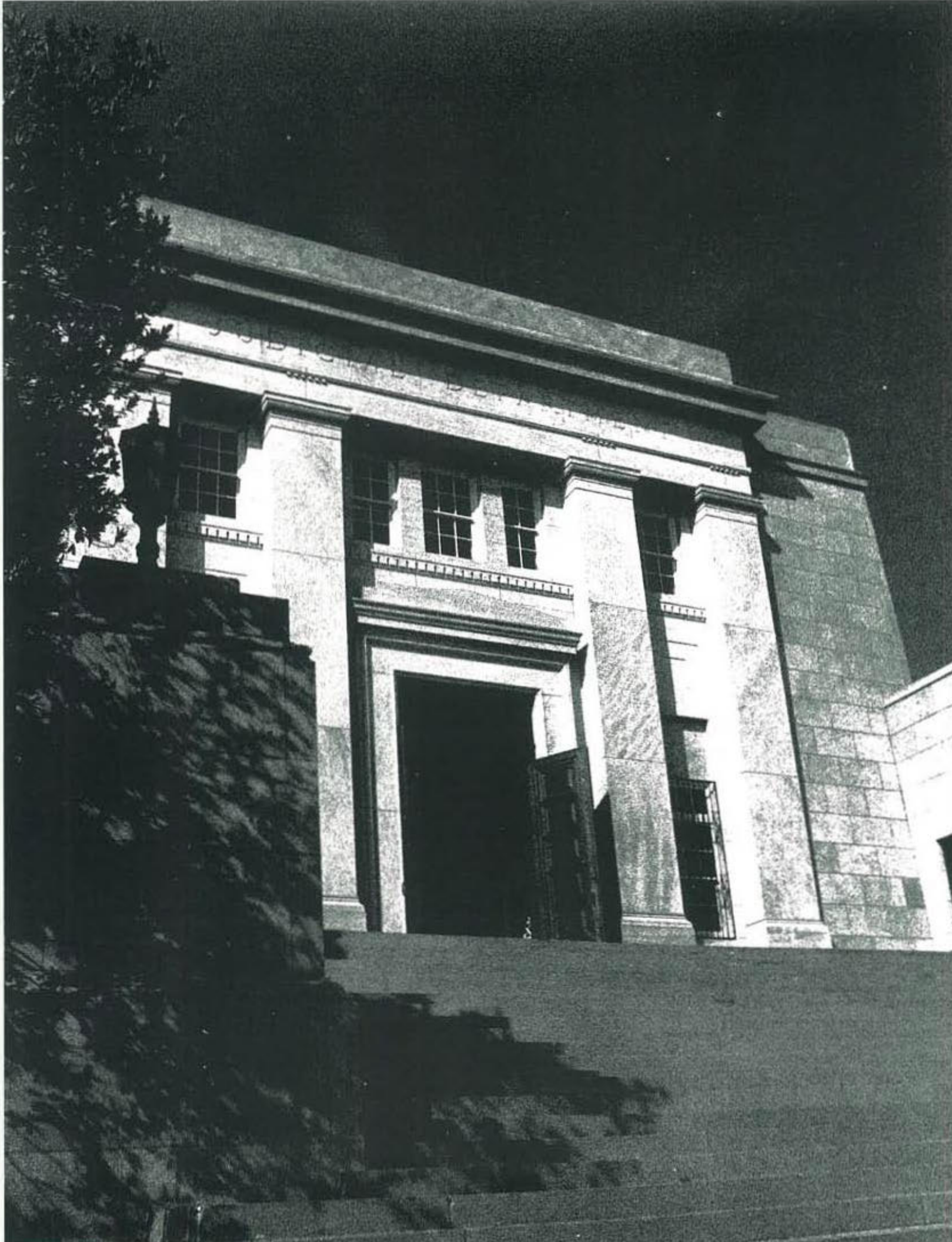

# Recent Decisions

by John M. Milling, Jr.
and David B. Byrne, Jr.

## Recent Decisions of the Alabama Court of Criminal Appeals

### Improper impeachment . . . prior convictions

*Neary v. State*, 6th Div. 443 (January 8, 1985). Neary was indicted and convicted under a three-count indictment charging trafficking in marijuana and cocaine in violation of the Alabama Controlled Substances Law. The court of criminal appeals reversed the convictions because the trial judge erroneously charged the judge Neary had a prior conviction for a crime involving moral turpitude.

At trial, on cross-examination by the prosecution, the defendant testified, without objection, in 1976 in New York he pled guilty to a misdemeanor for possession of marijuana and was sentenced to three years' probation and received a $3,000 fine. During the trial court's oral charge, the judge charged the jury they could consider the conviction in the state of New York for possession of marijuana as being a crime involving moral turpitude and could be considered by the jury as going to the credibility of the witness.

Presiding Judge Bowen held:

> "In cross-examining a witness for the purpose of impeaching him by showing the commission of a crime involving moral turpitude, care should be exercised so as not to include an offense that does not involve moral turpitude." *Kennedy v. State*, 371 So.2d 464, 468 (Ala.Cr.App. 1979)

The misdemeanor and felony offenses of possession of marijuana are not crimes involving moral turpitude. See *Ex parte McIntosh*, 443 So.2d 1283 (Ala. 1983). Consequently, the defendant should not have been cross-examined about his prior convictions for possession of marijuana, and the jury should not have been instructed such convictions involved moral turpitude and affected the defendant's credibility.

### The 1980 vehicular homicide statute held unconstitutional

*Whirley v. State*, 3rd Div. 25 (January 8, 1985). Whirley was indicted for murder pursuant to § 13A-6-2(a)(2), *Ala. Code* 1975, in that he recklessly engaged in conduct which manifested extreme indifference to human life and created a grave risk of death to a person . . . and did, thereby, cause the death of Charles Lockett and Michael Lockett. On appeal, Whirley claimed the vehicular homicide statute under which he was convicted was unconstitutional.

In declaring the statute unconstitutional the court noted Alabama courts have long held a statute establishing an offense, punishable both as a felony and as a misdemeanor, is unconstitutional. *McDavid v. State*, 439 So.2d 750, 751 (Ala.Cr.App. 1983). The vehicular homicide statute, in effect at the time of the collision, in this case, constitutionally is infirm because it provided both felony and misdemeanor punishments for the named offense. [The statute has since been amended. See § 32-5A-192, *Ala. Code* 1975.]

## Recent Decisions of the Supreme Court of Alabama—Civil

### Age discrimination . . . elements of prima facie case stated

*Burroughs v. The Great Atlantic and Pacific Tea Co., Inc.*, 19 ABR 534 (December 28, 1984). The plaintiffs filed suit complaining that A & P discriminated against them in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621, *et seq.*, in two ways: first, by reducing them to part-time status due to their age; and second, by discharging them because they filed ADEA actions. In order to preserve an ADEA action, a plaintiff must file administrative charges with the EEOC within 180 days after the alleged unlawful practice. The plaintiffs, however, waited more than 200 days after *initially* being reduced to part-time status. Consequently, the threshold issue is whether administrative charges were timely filed. The plaintiffs contended, and the supreme court agreed the reduction to part-time status constituted a continuing violation for purposes of tolling the 180-day period. The court noted Title VII cases have been recognized as precedent for ADEA cases, and Title VII expressly recognizes the concept of a continuing violation. The weekly assignment of varying hours constituted continuous maintenance of allegedly illegal practices extending the 180-day period.

Considering the merits, the court set out the elements of proof necessary to make out a prima facie case:

> "Facts sufficient for a reasonable jury to infer that discrimination has occurred (citation omitted). Such an inference generally is established by proving that the plaintiff (1) belongs to the statutorily protected age group; (2) was qualified for the job; (3) was discharged; and (4) was replaced by a person outside the protected age group."

Once a prima facie case has been established, the burden of producing evidence shifts to the employer who must show the employer's reason for discharge is legitimate and non-discriminatory. If the employer meets his burden, then the employee must show the reason for discharge is merely pre-

textual. The court found A & P did not discriminate against the plaintiffs on the basis of age because A & P eliminated *all* full-time checker positions in order to increase efficiency and reduce costs. The court, however, did find there was evidence the plaintiffs were fired illegally since the plaintiffs were the only employees fired for violating a stated A & P rule, despite the fact many employees violated the same rule and were not fired.

### Civil procedure . . . rule 23 ARCP, res judicata effect considered

*Taylor v. Liberty National Life Ins. Co.*, 19 ABR 116 (November 21, 1984). In this case, the supreme court determined the res judicata effect of a judgment entered in a federal class action on a subsequent state court action between "members" of the federal class action by considering whether the "notice" required by the federal court complied with due process. The plaintiffs in this action were policyholders of Liberty National Life Insurance Company. They contended they were denied due process in the federal class action case because they had no notice of the class action and were not afforded an opportunity to be heard. The federal class action was certified under Rule 23(b)(2) which does not require "notice." The plaintiffs thus had received neither actual nor constructive notice of the federal class action. The federal court, however, expressly determined the "best practical notice" had been given, and the requirements of due process were satisfied.

In considering the issue, the supreme court held the federal case should have been certified as a Rule 23(b) (3) class which is the only class where notice is mandatory. Rule 23(b) (3) suits involve the adjudication of property rights and the relief requested is predominately monetary. The court also considered the type of notice which satisfies due process in a Rule 23(b) (3) suit. The plaintiffs argued they were entitled to actual notice. The court held the plaintiffs were entitled to at least constructive notice by publication. According to the court, routine newspaper and television "media coverage" does not constitute constructive notice. Constructive notice requires some sort of formal attempt of notice in order to have the "best notice practical under the circumstances."

### Civil procedure . . . waived affirmative defense may not be revived in summary judgment memorandum

*Wallace v. Alabama Association of Classified School Employees*, 19 ABR 160 (November 30, 1984). In this case, the supreme court held a defendant may not raise the statute of limitations defense in his motion for summary judgment when he previously has filed an answer without pleading the defense. The court noted since the statute of limitations defense is an affirmative defense which is waived if not pled, the defendant cannot revive that affirmative defense in his motion for summary judgment. Of course, if a defendant moves for a summary judgment before he files an answer, the court may recognize the affirmative defense argued in support of the motion for summary judgment.

### Insurance . . . uninsured motorist coverage inures to the person, not to a vehicle

*State Farm Mutual Auto Ins. Co. v. Jackson*, 19 ABR 413 (December 21, 1984). In the certified question from the Eleventh Circuit Court of Appeals, the supreme court was asked to determine whether UM coverage existed as to Kenneth Ivey, a passenger in an uninsured vehicle owned by a relative member of the same household. State Farm had issued seven automobile liability policies. Kenneth Ivey was the named insured in only four of the policies. His mother was the named insured in the other three policies and the court had to determine whether *State Farm Automobile Insurance Company v. Reaves*, 292 Ala. 218, 292 So.2d 95 (1975), extended coverage to a passenger in an uninsured vehicle. The court answered the question in the affirmative.

The court noted uninsured motorist coverage inures to a *person*, not to a vehicle. The coverage is not dependent on the insured person's being injured in connection with a vehicle which is covered by the liability insurer against whom recovery is sought. While the person seeking coverage must have some liability coverage, he need not have liability coverage for all purposes. Consequently, it is not necessary to find the automobile in which Kenneth Ivey was passenger was covered by liability provisions of all seven policies in order for Ivey to have been covered under the uninsured motorist provisions.

### Venue . . . a national bank domiciled in Alabama is not a foreign corporation for venue

*Ex parte: First Alabama Bank of Montgomery (In Re: Barclay International, Inc. v. First Alabama Bank of Montgomery)*, 19 ABR 349 (December 21, 1984). In a case of first impression in Alabama, the supreme court held a bank organized under the national banking laws with its principal place of business in Alabama is a domestic corporation for the purpose of determining venue. The court noted there is no statutory definition of "domestic"

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or "foreign" corporation *for the purpose of venue.* Moreover, the 1975 Alabama Code provides in one context a national bank is a foreign corporation and in another context it is not a foreign corporation. Consequently, the court examined the Alabama law prior to the adoption of the 1975 code and determined it was the settled rule that a "corporation created by Congress in the exercise of its powers as the legislature for the United States . . . is not to be regarded as a foreign corporation, but as a domestic corporation, in any state in which it may do business . . ." Therefore, a national bank with its principal place of business in Alabama is not a foreign corporation for purposes of venue and the appropriate venue is determined by §6-3-7, *Ala. Code* 1975.

## Recent Decisions of the Supreme Court of Alabama—Criminal

### Police officer's unverified ticket does not vest jurisdiction in the district court

*Ex parte Dison III,* 19 ABR 87 (November 16, 1984). In an opinion, with far-reaching implications, the supreme court held an unsworn DUI ticket and complaint by a police officer does not vest jurisdiction in either the district or circuit court.

Dison was tried for DUI before the district court of Jefferson County, Alabama. The ticket was signed by the officer, but it never had been verified under oath before the district or municipal court, nor had a separate warrant been issued by a judge, magistrate or warrant clerk. After conviction in the district court, Dison appealed to the circuit court where the district attorney filed a separate complaint. Dison moved to dismiss for want of jurisdiction.

The supreme court, through Justice Beatty, focused the issue as follows:

> "Jurisdiction of the offense and of the person must concur to authorize a court of competent jurisdiction to proceed to final judgment in a criminal prosecution. This to the end, a formal accusation sufficient to apprise the defendant of the nature and cause of the accusation is a prerequisite to jurisdiction of the offense. Irregularities in obtaining jurisdiction of the person may be waived, but a formal accusation by indictment, or authorized information, or complaint supported by oath, is essential to complete jurisdiction and cannot be waived."

The court reasoned further that:

> "When the initial affidavit in a misdemeanor case is not merely irregular, but void, it will not support the filing of a sufficient information or complaint by the district attorney for a trial *de novo* in Circuit Court."

### Sentence cannot be increased after appeal

*Ex parte Tice,* 19 ABR 491 (December 21, 1984). Tice was indicted for illegal possession of three different controlled substances. He was convicted and sentenced to serve three consecutive ten-year terms of imprisonment, one term for each particular possession. Thereafter, the defendant filed a petition for writ of habeas corpus with the Elmore County Circuit Court. Relying on *Vogel v. State,* 426 So.2d 863 (Ala. Cr.App. 1980), Tice argued his sentence was improper.

The court in *Vogel, supra,* held multiple sentences cannot be based on possession of several types of controlled substances, where the possession occurs at the same time and in the same place. The Circuit Court of Elmore County granted the petition and remanded the case to the Circuit Court of Montgomery County for proper sentencing. Tice was sentenced to a term

of 15 years' imprisonment, and the Alabama Court of Criminal Appeals affirmed.

The supreme court reversed and remanded. Justice Adams, writing for the court, relied on the language in *Rice v. Simpson*, 274 F.Supp. 116 (M.D. Ala. 1967):

> "In Alabama, there can be no increase in a sentence in a criminal case after the sentence is imposed. This is a protection that is given to all convicted criminals in this state. To deny such protection to convicted criminals who elect to exercise their post-conviction remedies and who do so successfully is unfair discrimination and does nothing except serve to limit the use of post-conviction proceedings in the Alabama state courts by prisoners. It denies the prisoner the protection of his original sentence as a condition to the right of appealing his conviction, or exercising his post-conviction remedies."

Applying the reasoning of *Rice*, the maximum sentence Tice could receive was 10 years. The trial court was bound at the resentencing hearing to its initial determination 10 years' imprisonment was the appropriate punishment for the crime. To hold otherwise, and allow a harsher sentence to be imposed against Tice without some justification in the record for the increase, would be a violation of the petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

### Witness fifth amendment privilege . . . necessity of an offer of proof

*Ex parte Reeves*, 19 ABR 266 (December 7, 1984). Reeves was indicted for the shooting murder of Melvin Price. At trial, the jury found the defendant guilty of criminally negligent homicide; the court of criminal appeals affirmed.

At trial, the defendant attempted to call Ernest Trehern as a witness. Trehern was present at the scene of the shooting and also had been indicted on charges arising from that shooting. Upon the advice of his attorney, Trehern informed the trial court, outside the presence of the jury, he wished to invoke his privilege not to testify, under the Fifth Amendment to the United States Constitution. Following a brief inquiry by the trial judge, the witness' request not to testify was granted, even though he had not been asked a single question by the defendant.

The defendant argued this was error, and the court of criminal appeals correctly held Trehern should have been required to take the stand in the presence of the jury and invoke his privilege in response to any question asked by the defendant which would have elicited incriminating evidence if answered. However, after correctly stating the law, the court of criminal appeals held the defendant did not sufficiently preserve the error for review.

In reversing, Justice Shores critically noted:

> "It is apparent from the record that the defendant's counsel did everything possible to preserve the error. He clearly excepted to the trial judge's ruling and claimed the right to put on evidence to establish that Trehern's testimony would have been material to the defense."

Justice Shores went on to note the court of criminal appeals' reliance upon *Gwin v. State*, 425 So.2d 500 (Ala.Crim. App. 1982), was misplaced. *Gwin* correctly states the law concerning the necessity an offer of proof be made to show the expected testimony of a witness would not be incriminating in order to predicate error upon a trial court's refusal to compel the witness to testify. In this case, however, the defendant made every attempt to make such an offer of proof, but repeatedly was cut off by the trial judge.

### Failure to provide *Brady* material

*Ex parte Kimberly*, 19 ABR 247 (December 7, 1984). Kimberly was indicted for second degree robbery. Thereafter, he filed a pretrial motion for discovery, production and inspection requesting, *inter alia:* "any and all evidence tending to exculpate this defendant."

Subsequent to the trial court's order granting the discovery, but prior to the day of trial, Lt. Roy of the Mobile Police Department interviewed Kimberly's co-defendant, Sandra Whatley, who was incarcerated in Tennessee. Although Whatley gave several conflicting statements, she indicated Kimberly had not been in the Mobile area at the time the robbery occurred. This information was passed along to the Mobile County District Attorney's Office. The assistant district attorney in charge of the prosecution of Kimberly's case, even though aware of the trial court's order concerning exculpatory evidence, did not furnish the information to Kimberly's defense counsel.

After defense counsel learned of the exculpatory evidence, he immediately moved for new trial on the basis of *Brady v. Maryland*, 373 U.S. 83 (1963). The trial court held an evidentiary hearing at which time Lt. Roy testified as to what Whatley had told him. Additionally, the district attorney testified prior to trial he knew of Whatley's statement, but "mistakenly" failed to disclose them in compliance with the court's order.

Justice Maddox, speaking for a unanimous supreme court, reversed and remanded the case. Relying upon *Ex parte Watkins*, 450 So.2d 163 at 164 (Ala. 1984), the court held the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Regardless of its reliability, there can be no doubt the evidence provided by Whatley, if believed by the jury, could have had an effect on the trial by exculpating Kimberly.

## Recent Decisions of the Supreme Court of the United States

### Defendant must testify in order to preserve appellate issue

*Luce v. United States*, No. 83-912 (December 10, 1984). Luce was indicted and tried in federal court for conspiracy to violate the drug laws and possession of cocaine with intent to distribute. During the trial, Luce moved *in limine* to preclude the government from introducing a 1974 state conviction in the event that he should take the stand.

During the *in limine* hearing, the defendant made no proffer or commitment to testify in the event his motion were to be granted.

The district court held the prior conviction might or might not be permissible impeachment depending upon the scope of the defendant's testimony of trial. Since the defendant did not take the stand in his own defense, the trial court never addressed whether Luce's prior conviction could be used.

The supreme court granted certiorari to resolve the conflict between the circuits on the issue. The court held:

> "Requiring that a defendant testify in order to preserve Rule 609(a) claims will enable the reviewing Court to determine the impact of any erroneous impeachment in the light of the record as a whole."

As an aside, the court noted this requirement would also tend to discourage making such motions solely to "plant" reversible error in the case of conviction.

### Warrantless murder scene search held illegal

*Thompson v. Louisiana*, No. 83-6775 (November 28, 1984). Louisiana sheriff's deputies were called to a house by the daughter of the petitioner, who apparently had killed her husband and then attempted to commit suicide by taking sleeping pills. She had a change of heart and called her daughter who summoned the police. Initially, the police found the body of her husband and the petitioner; they made a cursory search of the premises. The body was taken to the morgue and the petitioner to the hospital.

Approximately 45 minutes later, two investigators from the sheriff's office conducted a thorough search of the premises where they found the murder weapon, a suicide note and another note which was incriminating. The original officers had left the scene secure. The sheriff's investigators proceeded without a warrant, without consent, under the guise of a "murder scene exception" based upon *Mincey v. Arizona*, 437 U.S. 385 (1978).

On appeal, the Louisiana Supreme Court ruled all of the evidence seized at the scene was admissible. The Supreme Court of the United States reversed, citing *Katz v. United States*, 389 U.S. 357 (1967). The court held searches conducted outside the judicial process, without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions. The court reasoned there was ample time for the sheriff's investigators to obtain a search warrant and certainly ample information to constitute probable cause.

The court rejected any purported "murder scene exception" based upon the Louisiana Supreme Court's reading of *Mincey v. Arizona*, 437 U.S. 385 (1978). The court noted *Mincey* stood for the proposition police may make warrantless entries where they reasonably believe a person within is in need of immediate aid. The court, in this case, held the petitioner's attempt to receive medical attention did not constitute a waiver nor did it constitute consent within the meaning of *Mincey*. □

# Opinions of the General Counsel

**William H. Morrow, Jr.**

## QUESTION:

**"May an attorney ethically mail letters over the attorney's signature to alleged debtors of a client demanding payment without having investigated the matter and without having made a good faith professional judgment that the demand is for a valid and subsisting claim?"**

## ANSWER:

An attorney may not ethically mail letters over the attorney's signature to alleged debtors of a client without having investigated the matter and without having made a good faith professional judgment that the demand is for a valid and subsisting claim.

## DISCUSSION:

Disciplinary Rule 1-102(A) (4) provides:

> "A lawyer shall not:
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, nor be guilty of willful misconduct."

Ethical Consideration 3-6 in part provides:

> "A lawyer often delegates tasks to clerks, secretaries, and other lay persons. *Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product.*" (emphasis added)

Disciplinary Rule 3-101(A) provides:

> "A lawyer shall not aid a non-lawyer in the unauthorized practice of law."

Ethical Consideration 6-4 in part provides:

> "In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work."

Ethical Consideration 7-4 in part provides:

> "His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, *a lawyer is not justified in asserting a position in litigation that is frivolous.*" (emphasis added)

Disciplinary Rule 7-102(A) (1) and (2) provides:

> "In his representation of a client, a lawyer shall not:
>
> (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
>
> (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."

The conclusion that we have reached herein is supported by opinions of the American Bar Association Committee on Ethics and Professional Responsibility and by a number of opinions of state and local bar association ethics committees.

In Formal Opinion 68 (1932) the American Bar Association Committee on Ethics and Professional Responsibility held that it is ethically improper for an attorney to furnish his letterhead to a client who would use the letterhead for the purpose of writing collection letters to delinquent debtors over the attorney's signature. In the opinion the committee stated:

> "...a lawyer has been given certain privileges by the state. Because of these privileges, letters of the character stated in the question, purporting to be written by attorneys have a greater weight than those written by laymen. But such privileges are strictly personal, granted only to those who are found through personal examination to measure up to the required standards. *Public policy therefore requires that whatever correspondence purports to come from a lawyer in his official capacity must be at least passed upon and approved by him. He cannot delegate this duty of approval to one who has not been given the rights to exercise the functions of a lawyer.*" (emphasis added)

In Formal Opinion 253 (1943) the American Bar Association Committee on Ethics and Professional Responsibility discussed several variations of a collection letter written by an attorney. The committee held that it is unethical for an attorney to permit a client to send collection letters on his stationery when the account has not been referred to the attorney for collection. The committee observed that in the use of such letters it was the evident purpose to make the debtor believe that the account had been placed in the attorney's hands for collection. In the opinion the committee observed:

"Would it be ethical for an attorney, employed on a retainer or otherwise, to permit a client to send collection letters on the stationery of the attorney and apparently over his signature, to customers whose accounts had become delinquent?

(a) Would it be permissible if the client sent only a letter which had been previously outlined and prepared by the attorney with the understanding that such letter was to be used in the discretion of the client?

(b) Would it be ethical if the attorney was consulted in each case before such letter was sent out by the client?

(c) Would it be approved if the client prepared the letters and sent them to the attorney's office for his signature?

(d) If it was agreed by the client that such account would actually be sent to the attorney for collection if not satisfactorily arranged upon sending the first letter, would such agreement make the plan ethical?

In none of the situations set forth in the inquiry has the delinquent account been referred to the attorney for collection. Yet in each instance the evident purpose is to make the debtor believe that the account is in the attorney's hands. It is obviously unethical for a lawyer to be a party to such deception."

The opinions of the American Bar Association Committee on Ethics and Professional Responsibility hereinabove cited were rendered under the Old Canons of Professional Responsibility of the American Bar Association. However, in interpreting the Code of Professional Responsibility of the American Bar Association upon which the present Code of Professional Responsibility of the Alabama State Bar is modeled, the American Bar Association Committee adhered to the general principles set forth in Formal Opinion 68 and Formal Opinion 253. In Informal Opinion 1368 (1976) the ABA Committee refused to approve a series of collection letters written by an attorney on behalf of a creditor. Each letter carefully stated that the account had not been "turned over for collection" and further advised the addressee not to contact the attorney because the attorney did not maintain documents supporting the claim. In the opinion the committee stated:

"Formal Opinion 68 (1932) held that it was unethical for a lawyer to furnish his letterhead stationery to a client so that the client could write collection letters to delinquent debtors over the purported signature of the lawyer. Formal Opinion 253 (1943) held that a number of variations of that scheme were also unethical, including one where the attorney actually signed the letter, and that the basis on which the attorney was compensated was immaterial because the letters deceptively implied to the debtor that the account was in the lawyer's hands for collection.

The large number of letters contemplated and the fact that they will be prepared using automatic typewriters do not in and of themselves render the proposal improper. In our opinion, however, the nature and text of the letters, require more 'direct supervision' by the lawyers over whether one or the other letters should be sent in a particular case than appears to be contemplated.

. . .

Although each letter states that the account has not been 'turned over for collection' and instructs the debtor not to contact the lawyer because the lawyer has no records of the account, each still implies that the lawyer is at least familiar with the account, is following the debtor's activity, and has professionally evaluated it.

In our view it is not enough that the lawyer rely upon the client's certification of the 'validity' of the account. The lawyer must take responsibility for the reasonable accuracy of each letter and must exercise due care that no letter misstates a fact with respect to the account of the debtor. The continuing admonition in the letter not even to contact the attorney's office about the matter underscores the necessity that the lawyer's communications to the debtor be as accurate as reasonable procedures between the lawyer and the creditor can make them.

. . .

Although the proposed demand letter project is not per se unethical, violations of the Code of Professional Responsibility could frequently and easily occur unless the lawyer personally exercises the care and independent judgment required to see that each letter sent is accurate and appropriate as to the account of the debtor when it is sent.

> In the absence of the exercise of that care, judgment and responsibility we see no substantial difference from the practice condemned in Formal Opinion Nos. 68 and 253."

As hereinabove noted, numerous opinions of state and local bar associations support the conclusions reached in the above-cited opinions of the American Bar Association Committee on Ethics and Professional Responsibility. The Ethics Committee of the New York City Bar Association (1927) held that an attorney for a corporate client which has its own legal department and many small claims against debtors throughout the United States may not permit the corporation to sign the attorney's name to a form collection letter sent by it. The Ethics Committee of the New York City Bar Association (1944) held that it is unethical for an attorney for a chain store to furnish the store with form collection letters on his letterhead to which the client signs the attorney's name. The Ethics Committee of the Virginia State Bar (1948) held that an attorney who collects delinquent accounts for a client may not allow the client to use his name in form letters informing debtors that if the account is not paid, the attorney will be instructed to commence action to collect it. The Ethics Committee of the Texas Bar (1957) held that an attorney may not supply a client with signed form collection letters or signed letterheads on which the client can write collection letters. He may not sign collection letters prepared by his client if he has given no attention to the file and has no knowledge of the circumstances of the debt. The Ethics Committee of the South Carolina State Bar (1962) held that counsel for a credit bureau may not permit it to send to debtors collection letters signed by him, using his title as legal counsel, advising that the account should be paid to avoid suit, court cost, attorney's fees, and other expenses and embarrassments of litigation. The Ethics Committee of the Allegheny County Bar Association (1962) held that a lawyer may permit his client, collection agency, to print form letters to delinquent debtors on the lawyer's letterhead and send them daily to the lawyer's office for signature and mailing if the lawyer will only sign such letters as meet his approval and will satisfy himself that he has sufficient information to justify his signing and sending of the letters. The Ethics Committee of the Allegheny County Bar Association (1963) held that a lawyer may not furnish form collection letters to his client if he has not investigated the merits of the claim before making demand for payment. The Ethics Committee of the Kentucky Bar (1974) held that an attorney may not represent on a retainer a corporation engaged in the business of selling a package of computerized collection letters which includes two letters from the attorney with his preprinted signature. The Ethics Committee of the North Dakota Bar (1976) held that a counsel for an institution who permits the institution to send out, on the institution's letterhead and under his name, collection letters that are signed with the counsel's name by a secretary of the institution was guilty of a gross violation of the Code of Professional Responsibility.

In conclusion, we are of the opinion a lawyer cannot send out collection letters unless the lawyer has sufficient information and has investigated the matter and reached a good faith professional judgment that demand is being made to collect a legally valid and subsisting debt. □

# Disciplinary Report

## Private Reprimands

• A lawyer was privately reprimanded for having violated DR 7-104 (A) (1), by, during his representation of a client who was suing a corporation, having communicated on the subject of the suit with an executive officer of the defendant corporation, though he knew the corporation was represented by a lawyer in the matter, and though he did not have the prior consent of that lawyer to such communication.

• On Friday, November 30, 1984, an Alabama lawyer was reprimanded for a violation of Disciplinary Rules 5-105(A) and 5-105(B) arising from his handling of the closing of a real estate transaction. The lawyer learned that the sellers, who were taking back a second mortgage on the demised premises, were in dire need of cash funds and further, that they had been unable to locate a purchaser for the second mortgage. Arrangements were then made for the attorney's mother to purchase the mortgage, at a substantial discount, and the lawyer prepared an endorsement whereby the second mortgage was transferred at the closing. Shortly thereafter the mortgagors went into default, and the lawyer's mother made a demand for payment on the sellers under the terms of the endorsement. It was determined that the lawyer failed to properly explain to the sellers that they remained liable pursuant to the endorsement, that the attorney actually engaged in representing differing interests at the closing, and further, that his independent professional judgment was affected by the participation of his mother in the transaction, contrary to the rules mentioned hereinabove.

• On Friday, November 30, 1984, a lawyer was privately reprimanded for violation of Disciplinary Rules 6-101(A) and 7-101(A) (2), for willfully neglecting a legal matter entrusted to him and for failing to carry out a contract of employment entered with a client for professional services. The lawyer agreed, in January 1979, to file a lawsuit for his client, an insurance company. The lawyer took no action in the case for over two years and only filed suit in March of 1981 after his senior partner had been apprised of the situation by the insurance company. The Disciplinary Commission determined this conduct to be contrary to the above-cited rules and further determined that the attorney should receive a private reprimand.

• On November 30, 1984, a lawyer was privately reprimanded for having violated DR 2-111(A), by having initiated a divorce proceeding for a client and, then, when the client failed to pay the full fee promptly, by having failed to appear in court at a setting of the case, without having moved to withdraw in the case and without notifying the client of an intent to withdraw.

• A lawyer was privately reprimanded for having violated DR 2-105(A) by having given unsolicited advice to a layman that she should obtain counsel or take legal action in connection with the accidental death of her son and then having, subsequently, accepted employment from her to represent her in filing a wrongful death action in connection with her son's death.

• On November 30, 1984, a lawyer was reprimanded for having been guilty of willful neglect, in violation of DR 6-101(A), by having failed to notify an incarcerated client, either verbally or by mail, that the client's criminal conviction had been affirmed by the court of criminal appeals, thereby denying the client the opportunity to request that his case he pursued by motion by rehearing and petition for the writ of certiorari.

• On January 18, 1985, a lawyer was privately reprimanded for having violated DR 2-111(A) by having initiated an appeal to the Alabama Court of Criminal Appeals on behalf of a client and then having abandoned the appeal when the client failed to pay the full fee agreed upon, without either filing a brief or a motion to withdraw.

• On January 18, 1985, a lawyer was privately reprimanded for having violated DR 7-101(A)(2) and DR 2-111(A)(2) by having agreed and promised to file a certain suit for a client, but then having failed to do so.

• On January 18, 1985, a lawyer was privately reprimanded for having engaged in conduct that is prejudicial to the administration of justice and that adversely reflects on his fitness to practice law, in violation of DR 1-102(A)(5) and DR 1-102(A)(6) of the Code of Professional Responsibility of the Alabama State Bar, by having settled a civil suit after his client died and having signed as a "witness" to the signature of the deceased client on a General Release form, though the lawyer knew at the time that the client was dead, that the client had not signed the form and that the client's purported signature had actually been inscribed by the deceased client's wife.

## Private Reprimands

• On January 18, 1985, a lawyer received a private reprimand for violation of Disciplinary Rules 1-102(A)(4) and 6-102(A). The Disciplinary Commission determined that the lawyer in question had misrepresented to a client the status of a legal matter that he was handling for the client and that, subsequent to the filing of a grievance regarding that matter, the attorney attempted to limit his liability to the client for his personal malpractice by making a payment to the client contingent upon withdrawal of the grievance that the client had filed. The commission determined that the attorney's actions violated the above Rules which prohibit a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, or willful misconduct and which further prohibit a lawyer from attempting to exonerate himself from, or limiting his liability to, his client for his personal malpractice.

• On January 18, 1985, a lawyer was privately reprimanded for having intentionally failed to seek the lawful objectives of his client and having intentionally failed to carry out a contract of employment, in violation of DR 7-101(A), by having accepted a $460 fee for preparing a will for the client and for initiating adoption proceedings for the three children of the client's wife and then having failed to perform these services for over two years, despite a number of inquiries from the client.

## Public Censures

• Ashville lawyer **Larry W. Dobbins** was publicly censured for having willfully neglected a legal matter entrusted to him, in violation of DR 6-101(A), by having accepted a fee to probate the will of a deceased individual, and then having failed for approximately eight and a half months to file the will for probate, after having been provided with all of the information and documentation necessary to file the will for probate.

• Birmingham lawyer **James G. Stevens** was publicly censured for "misrepresentation" and "willful misconduct," in violation of DR 1-102(A)(4), Code of Professional Responsibility of the Alabama State Bar, as well as for "willful neglect," in violation of DR 6-101(A), for having misrepresented to the purchaser of certain real property that the property was free and unencumbered, though he knew it to be subject to a prior existing mortgage, and, further, for having failed to record the purchaser's deed to the property from the date of the closing, on June 17, 1982, until August 30, 1983.

The following appeared in the January 1985 issue of *The Alabama Lawyer*. The reports have been amended to include specific reasons for suspension and reinstatement.

## Suspensions

**Jamie Henagan McDowell,** a Montgomery lawyer, was suspended from the practice of law in the state of Alabama, effective October 30, 1984, by order of the Disciplinary Commission. The suspension was based upon failure to comply with mandatory continuing legal education requirements for 1983.

Dothan lawyer **Daniel E. Robison** was suspended from the practice of law in the state of Alabama, effective October 30, 1984, by order of the Disciplinary Commission. The suspension was based upon failure to comply with mandatory continuing legal education requirements for 1983.

## Reinstatement

**Deborah Farrington Coe Sawyer** of Montgomery was reinstated to the practice of law in the state of Alabama, effective September 30, 1984, by order of the Disciplinary Commission. Ms. Sawyer was reinstated after having met mandatory continuing legal education requirements for 1983.

**Notice**

Effective December 3, 1984, Disciplinary Rule 6-101(A) of the Code of Professional Responsibility of the Alabama State Bar has been amended, by order of the Supreme Court of Alabama in the following manner, to-wit:

The list of citations in footnote one (1) of said rule is amended to include the citation 'Haynes v. Alabama State Bar, 447 So. 2d 675 (Ala. 1984)', so that said footnote shall read as follows:

[1]For definition of 'willfull neglect,' see **Nelson, et al., Jury Comm'rs v. State, ex rel. Blackwell,** 182 Ala. 449, 62 So. 189 (1913); **State, ex rel. Atty. Gen. v. Martin,** 180 Ala. 468, 61 So. 491 (1913); **Haynes v. Alabama State Bar,** 447 So. 2d 675 (Ala. 1984).

In addition, the Alabama Rules of Disciplinary Enforcement are, effective December 3, 1984, amended in the following respects:

1. Rule 19(b), of the Rules of Disciplinary Enforcement is amended to substitute 'five (5)' for 'three' between the terms 'at least' and 'years,' so that Rule 19(b) shall read as follows:

(b) Time for reinstatement

A person who has been suspended for more than three months may not apply for reinstatement until the period of suspension has terminated. A person who has been disbarred after hearing or by consent may not apply for reinstatement until expiration of at least five (5) years from the effective date of the disbarment or surrender of license.

2. Rule 18 of the Rules of Disciplinary Enforcement is amended by deleting in the caption the phrase '(other than temporarily suspended attorneys)'; by adding in subparts (a) and (b) the phrase, 'other than an attorney temporarily suspended under Rule 3(c),' between the words 'attorney' and 'shall'; and by deleting in subpart (e) the sentence reading 'Notice of a suspension under Rule 3(g) for noncompliance with the Rules for Mandatory Continuing Legal Education shall not be published.'; so that Rule 18 shall read as follows:

**Rule 18**

**Disbarred or Suspended Attorneys**

(a) **Notification to clients involved in matters other than litigation or administrative proceedings**

A disbarred or suspended attorney, other than an attorney temporarily suspended under Rule 3(c), shall promptly notify or cause to be notified, by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigation or administrative proceedings, of his disbarment or suspension and his consequent inability to act as an attorney after the effective date of his disbarment or suspension and shall advise said clients to seek legal advice of the client's own choice elsewhere.

(b) **Notification to clients involved in litigation or administrative proceedings**

A disbarred or suspended attorney, other than an attorney temporarily suspended under Rule 3(c), shall promptly notify or cause to be notified, by registered or certified mail, return receipt requested, each of his clients who is involved in pending litigation or administrative proceedings, and the attorney or attorneys for each adverse party in such matters or proceedings, of his disbarment or suspension and consequent inability to act as an attorney after the effective date of his disbarment or suspension. The notice to be given to the client shall advise the client of the desirability of the prompt substitution of another attorney or attorneys of the client's own choice in his place.

In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred or suspended attorney to move in the court or agency in which the proceeding is pending for leave to withdraw.

The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended attorney.

(c) [No change]

(d) [No change]

(e) **Publication of notice of suspension or disbarment**

The Disciplinary Board shall cause a notice of the suspension or disbarment to be published in the official Bar publication and in a newspaper of general circulation in each judicial circuit of the State of Alabama in which the disciplined attorney maintained an office for the practice of law.

(f) [No change]

(g) [No change]

# *In Memoriam*

## J. O. Sentell, Jr.

At 22 years of age, an applicant for admission to the Alabama State Bar was asked why he wished to pursue law as a profession. He responded:

> I am interested in law and its various phases and enjoy its study. I consider it as one of the most honorable professions and one worthy of diligent application and pursuit. I believe the profession affords a splendid opportunity for service to the state and its people.

That statement, penned some 53 years ago in a character and fitness affidavit, bears the now familiar signature of J.O. Sentell. Treating Mr. Sentell's reasons for choosing law as covenants for future performance, it can be stated emphatically he discharged his promises fully. Throughout his career he kept his interest in the law keen and always was its avid student. The profession was honorable when he chose it, and his conduct only added to its lustre. He took full advantage of the "splendid opportunity for service to the state and its people."

James Oscar Sentell, Jr., was born at Luverne, Alabama, July 3, 1909, to J.O. Sentell, Sr., a lawyer, and Ida S. Sentell. Upon earning undergraduate and law degrees from the University of Alabama he entered the private practice of law in Luverne from 1932-1943. He served as a member of the board of bar commissioners from 1943-1946 while he was price attorney for the Office of Price Administration in Montgomery. Mr. Sentell returned to Luverne and private practice in 1946. Montgomery claimed him permanently in 1951 when he assumed the post, until 1953, of counsel for the Office of Price Stabilization. Thereafter he commenced private practice in Montgomery. In 1962 he became first assistant United States attorney for the middle district of Alabama, a post he held until his career as a clerk began in 1967 when he was named deputy clerk of the Supreme Court of Alabama. In January 1968, he became clerk of the supreme court. Upon creation of the court of civil appeals in 1969, Mr. Sentell assumed the additional responsibility of serving as its first clerk, a position he held until 1975. Mr. Sentell also was editor of *The Alabama Lawyer* from 1967-1982 and *ex officio* secretary of the Alabama Court of the Judiciary from its inception until 1976.

Also in 1976 Mr. Sentell received the Alabama State Bar's Award of Merit at the bar's annual meeting, held that year in Huntsville. At the 1982 annual meeting, he was named first recipient of the Walter P. Gewin CLE Award by the Alabama Bar Institute for Continuing Legal Education; in addition, the bar presented him and his wife with a travel certificate as a retirement gift.

Mr. Sentell was one of the founders and the first president of the National Conference of Appellate Court Clerks; he also was the first recipient of its Distinguished Service Award in 1979.


**Crenshaw, Jack**
Montgomery — Admitted: 1926
Died: January 17, 1985

**Favre, William Rudolph, Jr.**
Mobile — Admitted: 1956
Died: December 25, 1984

**Harrison, George Mortimer, Jr.**
Dothan — Admitted: 1965
Died: December 30, 1984

**Sentell, James Oscar, Jr.**
Montgomery — Admitted: 1932
Died: January 19, 1985

**Simms, Donald Russell, Jr.**
Huntsville — Admitted: 1980
Died: December 30, 1984

**Stewart, Robert Browder**
Montgomery — Admitted: 1940
Died: January 27, 1985

**Whiting, Harrington Bixler**
Alaska — Admitted: 1967
Died: December 14, 1984

These notices are published immediately after reports of death are received. Biographical information not appearing in this issue will be published at a later date if information is accessible. We ask you promptly report the death of an Alabama attorney to the Alabama State Bar, and we would appreciate your assistance in providing biographical information for *The Alabama Lawyer.*

Mr. Sentell retired as clerk of the supreme court in 1982. He was only the fifth clerk to serve the Alabama Supreme Court since 1880, but during his tenure, three chief justices and 18 associate justices served in the Supreme Court of Alabama.

Mr. Sentell long will be remembered for his loyal friendship, his keen intellect, his impeccable integrity, his elegant charm and his gentle wit. His presence and bearing was so dignified his very appearance had an uplifting effect upon the proceedings. Practitioners before the supreme court will recall with a shudder the solemnity with which he could sound the docket to a tense assemblage of advocates waiting for their precious minutes at the lectern. We also recall how remarkably accessible he was when we needed quick and sound advice on procedural niceties. His competence was universally recognized by all. He was said to possess a photographic memory.

As a frequent practitioner in the supreme court and as board member of *The Alabama Lawyer,* I shared many experiences with him. Through this proximity I came to appreciate a keen sense of humor, and I recount here simply one such instance. At a bar convention in Huntsville several years ago, Mr. Sentell and I were visiting with a sizeable group of fellow lawyers. In the conviviality of the moment, I kidded Mr. Sentell by making the wholly groundless charge that when the court announced its decisions, he claimed the privilege of telephoning only the prevailing attorneys to announce the result. Thus the deputy clerks were left with the distasteful chore of telephoning the losers. A hearty laugh followed during which Mr. Sentell protested his innocence in a good-natured way. The following Friday at precisely 10 a.m., when bothtthe pendency of an appeal in Montgomery and the joke I had told on him the preceding week were both very far from my mind, my phone rang and Mr. Sentell announced in his best ceremonial tone, "Champ, I regret I must so quickly disabuse you of your theory as to my practice of calling only prevailing counsel but it is nonetheless my unpleasant duty to advise you. . . ." The rest of his remarks were lost in our laughter as the sting of defeat was not sufficient to suppress my admiration for this clever rebuttal to my earlier joke on him. I will miss him.

Our bar lost one of its pillars when J.O. Sentell died peacefully in his sleep on the night of January 19, 1985. His picture hangs as a permanent memorial at Alabama State Bar headquarters, and his occasional visits to the bar building with his young grandchildren will be missed by the staff. A member of the First United Methodist Church, he is survived by his widow, Dr. Jane Jones Sentell of Montgomery, Alabama; two sons, James C. Sentell of Huntsville, Alabama, and Charles Edgar Sentell of Jackson, Mississippi, a third generation member of the Alabama State Bar; one daughter, Jane Sentell (Mrs. George, III) Preiss of Little Rock, Arkansas; and several grandchildren.

# Finis Ewing St. John, III

"Finis was a good trial lawyer and he was a good 'book' lawyer. He could whip you in the courtroom, and he could also whip you with the books." That statement, by a Birmingham plaintiff lawyer, is an accurate description of Finis Ewing St. John, III, who died on his farm in Cullman County October 25, 1984, at the age of 51.

Finis was also an outstanding member and leader in the Alabama Legislature, serving one term in the house of representatives, 1971-75, and two terms in the senate, 1975-83. He was unanimously elected as president pro tem of the senate in 1979. One of his fellow senators described Finis' reputation in the senate in these words: "He would 'stay hitched' ." Finis often said folks in Cullman County would tell him he was not a good politician, but that he was a good senator. He considered that a compliment.

Finis was carrying on a family tradition in the legislature, following in the footsteps of his great-grandfather, William P. St. John, who served in 1853-54; his grandfather, Finis E. St. John, Sr., who served in 1923-35; and his father, Finis E. St. John, Jr., who served in the senate in 1939-47.

Finis graduated from McCallie School in Chattanooga, Tennessee, and the University of Alabama in 1956 with B.S.L., LL.B. and J.D. degrees. He also attended Auburn University for two years before going to Alabama. He jokingly said he "attended Auburn, but he was educated at Alabama."

St. John served as president of the Student Bar Association at the University of Alabama; president of the Young Lawyers' Section of the Alabama State Bar in 1965; president of the Cullman County Bar Association in 1968; charter member and president of the Alabama Law Institute Council; director of Leeth National Bank; and president of First Federal Savings and Loan Association from 1980 until his death. In 1962 he was the youngest person ever to be elected as a member of the Alabama Board of Bar Commissioners. He was a member of Grace Episcopal Church in Cullman.

Survivors include his wife, the former Juliet Given of Birmingham; two sons, Finis E. St. John, IV, and William G. St. John; his mother, Mrs. Mary J. St. John; one brother, Warren J. St. John; and one daughter-in-law, the former Alice Rogers of Eutaw, Alabama. His son, Bill, married Elizabeth Gentry of Winston-Salem, North Carolina, in December 1984.

Finis was a man with many interests. He was a strong family man, practicing law with his father, wife and one of his sons. A serious bout with cancer in 1969 made him cherish his family ties more than ever the last 15 years of his life.

In addition to being an outstanding practicing lawyer, bar leader and legislator, he was also an avid hunter and sportsman and a dedicated "Crimson Tide" fan. His family has suffered a great loss and so have the state of Alabama, Cullman County and the legal profession. He will be missed greatly.

# Classified Notices

## books for sale

**FOR SALE:** One Alabama Code, current. $300, negotiable. Please call Ms. Newhouse at 297-9042 - 9057, Phenix City, Alabama.

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**NOTICE**

ALL ADS AND ARTICLES
FOR THE
**MAY ISSUE**
OF *THE ALABAMA LAWYER*
MUST BE SUBMITTED BY
**MARCH 29, 1985**

## miscellaneous

**LAW BOOK DONATIONS** needed! Jones Law School at Alabama Christian College in Montgomery needs legal books, journals, etc. Pickup can be arranged. Contact Kay Newman, 5345 Atlanta Highway, Montgomery, Alabama 36193-4601 or call (205) 272-5820, ext. 147 (1-800-824-4527 in Alabama). Acknowledgment will be made for tax purposes.

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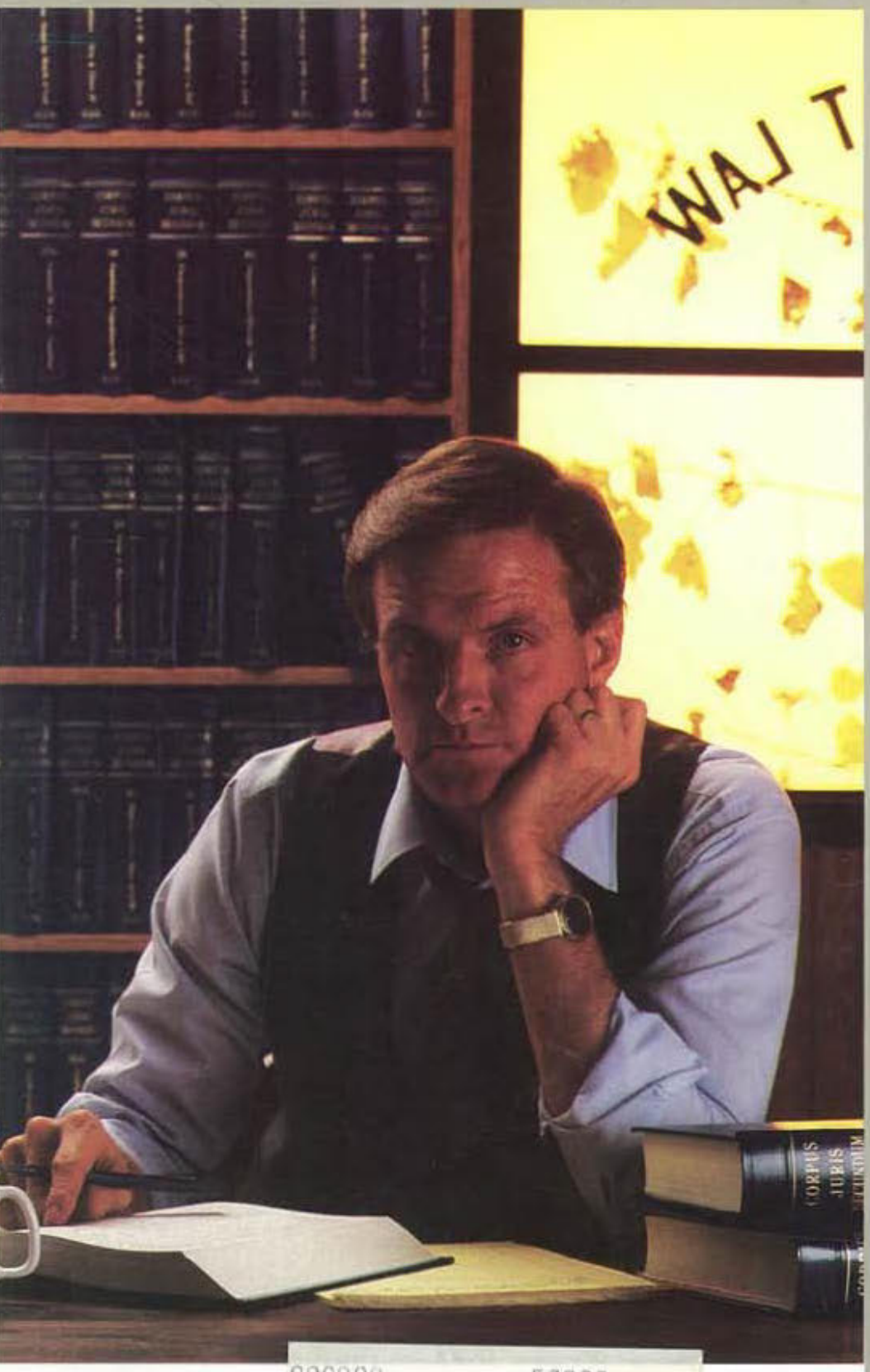


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