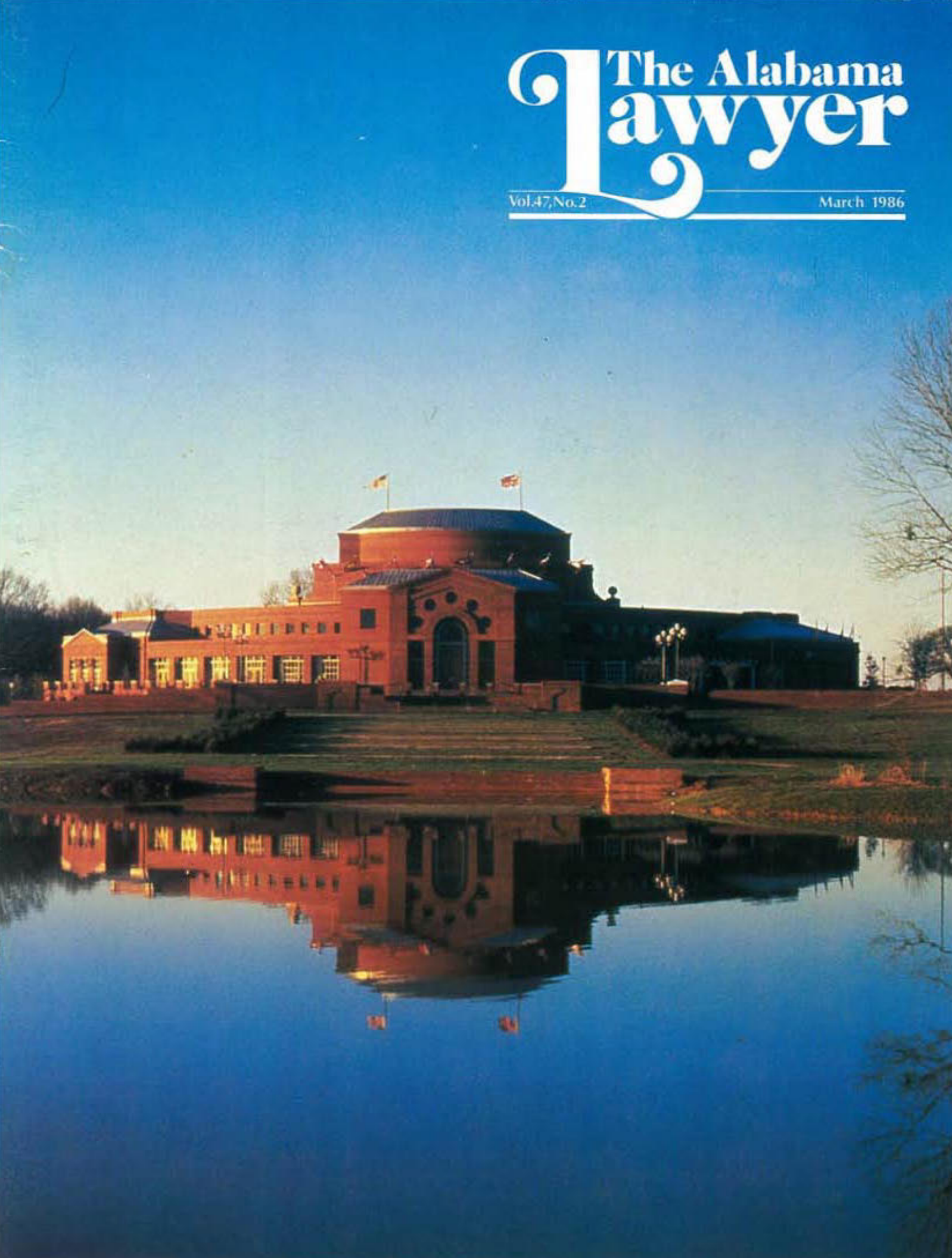
The Alabama Lawyer

Vol.47,No.2 March 1986



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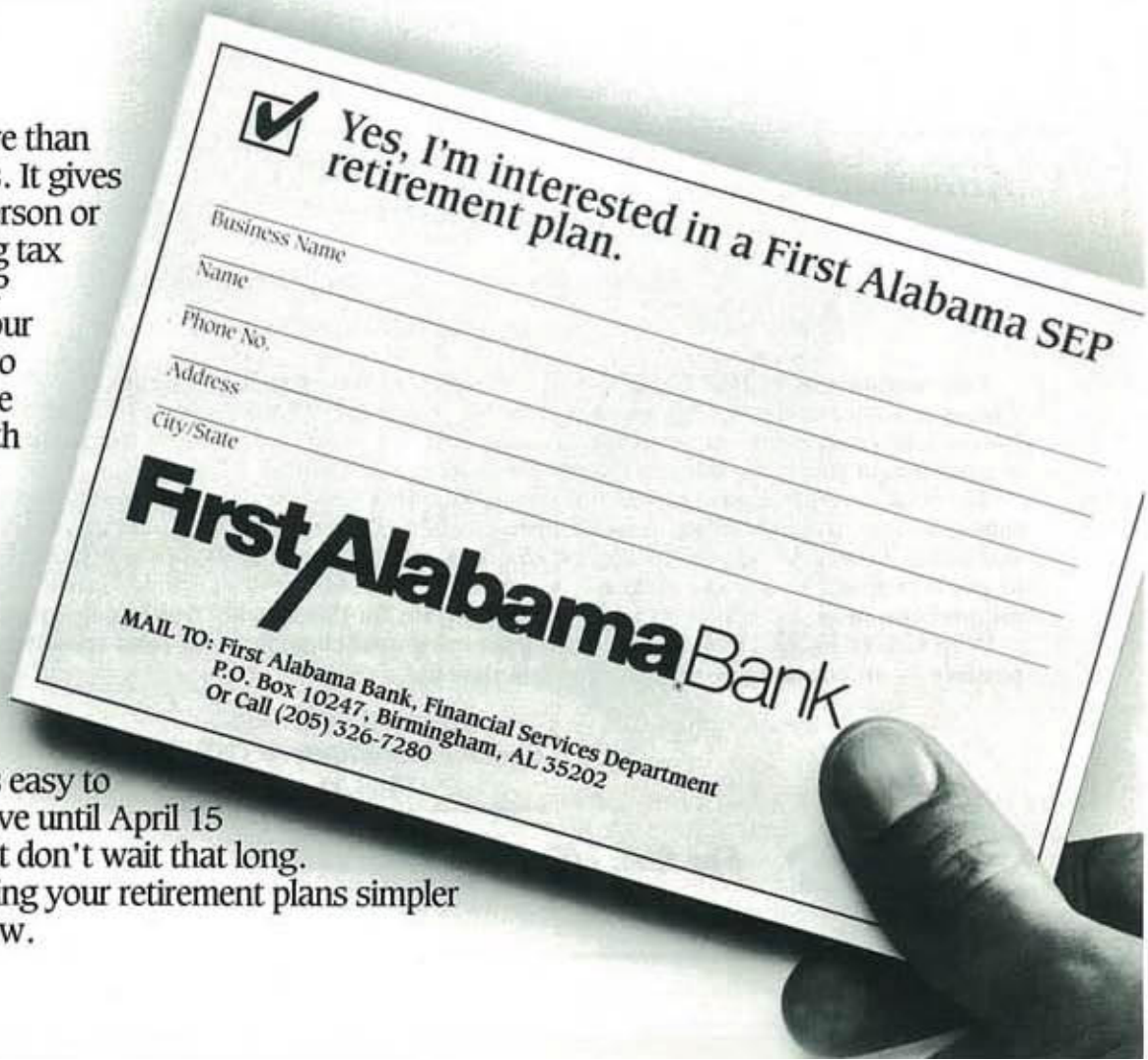

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The Alabama Lawyer

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In Brief

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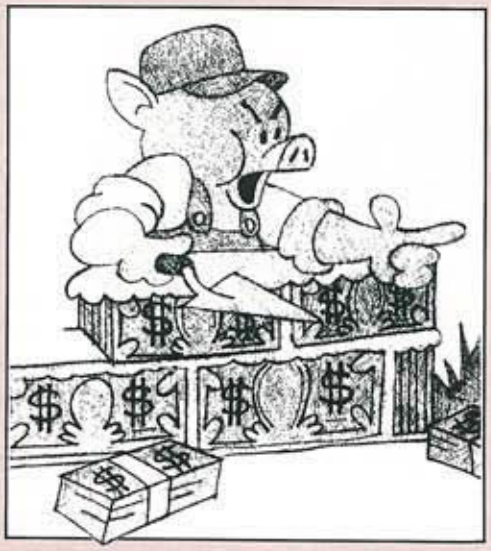
On the cover—

The Carolyn Blount Theatre is one site of the Midyear Meeting. Photograph courtesy Alabama Shakespeare Festival and Timothy Hursley

Age Discrimination and Reductions-in-Force 86

Litigation involving employment relationships continues to mount. Age discrimination suits present a typical example of this fertile area of the law.



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There are unique estate planning concepts that should be considered in advising the moderately wealthy client.

Scope and Application of the Attorney-Client Privilege—an Overview 100

One of the most misunderstood legal concepts, this privilege must be understood to preserve communications.

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President's Page

NORTH

Your state bar is moving slowly into the last portion of the 20th century. We finally have a computer, and I am pleased to tell you that after nearly driving Reggie crazy, it is up and running. We should be able to serve you more efficiently in the future. Thanks are due to Harold Speake of Moulton, Thad Long of Birmingham and the other members of your Long-Range Planning Committee for many hours of hard work selecting the best machine for our needs.

To effectively utilize our computer, we need to load it with appropriate information. Shortly, you will receive an in-depth questionnaire which John Owens of Tuscaloosa and his committee are preparing. Please fill out this questionnaire and return it to bar headquarters. Our computer will be only as helpful to us as is the information we put in it.

By the time you read this, the Alabama Legislature will be in the midst of its 1986 regular session. The bar is sponsoring a number of bills this session. Walter Byars of Montgomery is spearheading our effort. First, and my priority, is the legislation reapportioning our governing body, the board of bar commissioners, and providing some additional representation for our largest circuits. This is a matter of simple equity.

This legislation also provides for the election of our president-elect by direct mail ballot, just as you now elect bar commissioners. This permits every member of our integrated bar to participate in the election of its leadership. I feel this is particularly important to some younger members for whom travel to and expense for meals and lodging at the annual meeting possibly constitute an economic hardship.

The bar also is sponsoring legislation bringing lawyers in line with other professions regarding the statute of limitations for negligence. The statute for lawyers is now six years, and our bill would lower that to two years.

Last year your board of commissioners approved legislation providing for non-partisan election of judges. The rationale behind this is that, in an electoral landslide for one or the other party, qualified judges could be swept out of office solely because of party affiliation. The state's political parties had a problem with this earlier because of a dispute over the division of qualifying fees. We think an agreement has been reached on the disposition of fees.

Other proposed legislation, not sponsored by the bar, is of significant interest to lawyers. For example, no one who has handled a case in the Alabama Supreme Court in recent years could argue with the crying need for a new judicial building. We have committed to the chief justice the bar's enthusiastic support of legislation providing a method of funding this project. Maury Smith of Montgomery is chairman of a task force working on the new judicial building.

Perhaps the most far-reaching package of legislation filed in the 1986 Regular Session is the group of bills supported by the Alabama Medical Association and euphemistically called "tort reform" or "medical malpractice reform." Your bar usually does not take any position on legislation about which its members may disagree. I believe, however, almost any lawyer who studies these bills will be appalled at such a radical restructuring of our legal system, as it relates to one group. In effect, with these bills doctors are attempting to set themselves apart, to seek an exemption from accountability. Perhaps some change is in order in this area, but these proposals involve changes of such magnitude that they should not be adopted without much careful, reflective study. We will carefully follow this legislation.

Doctors are not the only professionals who need to be concerned about malpractice actions. Presiding Judge John Bryan of the 10th Judicial Circuit told the Birmingham Bar Association he feared malpractice suits against lawyers

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Executive Director's Report

HAMNER

Number 13 Lucky for Bar

I have chosen to use this space to pay tribute to 13 members of the Alabama State Bar who, like their predecessors, are "unsung heroes." These are the members of the board of bar examiners.

The *Code of Alabama* provides for creation of a board of bar examiners and its election by the Board of Commissioners of the Alabama State Bar. This is but one of the many highly significant duties statutorily vested in the commissioners.

Present procedures for selecting examiners were established in October 1976 when the commissioners decided to use 12 examiners and a non-examining chairman of the board. The examiners are elected to a four-year term and must rotate off at the conclusion of this period of service.

The commissioners also created an Advisory Committee to the board of bar examiners, with its membership coming from within the commission itself. The five members serve staggered terms and can be re-elected. John B. Scott, Jr., currently chairs the committee. It is the official liaison with the board of bar examiners, screening potential examiners and nominating new examiners as vacancies occur.

This column is being written as members of the board of bar examiners are in one of their two all-day (Saturday) meetings reviewing examination questions and model answers they have drafted for the February 1986 bar examination. Each examiner works with a co-examiner in one of six essay subject areas, and, while they confer prior to the exam review meeting, they submit their collective efforts to a critique by the entire board. In addition to a review of the exam questions, they discuss procedures and review results of previous exams. Since the examiners independently grade their exams, they have no chance to review the overall results until the grades on that examination have been announced.

Robert Potts, a former grading examiner, will conclude his four-year term as chairman following the July 1986 exam. Like his two predecessors, E.T. Brown, Jr., and L. Tennent Lee, he too has gained national prominence for his work in this area. Since 1971, the board of bar examiners consistently has been rated as the top board or in the top three boards when essay results are correlated with multistate performance. No other board can claim this distinction. It is the dedication and leadership of Bob, E.T. and Tennent that has made such quality performance possible.

The non-examining chairman works closely with admissions secretary Norma Robbins and the secretary of the board to insure a fair and smooth examination process. In addition, the chairman screens petitions questioning failing examinees' results. He is subjected to unfair and unfounded criticism of the process, plus the pressures of disappointed examinees and their interested friends.

The examiners meet an average of four times a year in addition to giving the exam. We have been fortunate in that most also have been able to attend the National Conference of Bar Examiners annual one-day workshop in Chicago. Their dedication, however, is really shown when they forfeit over six to eight weeks of their personal time to grade examination papers. The examiners currently are facing 275-plus examinees in February, with the July number likely to be 400-plus. This work is accomplished at night and on weekends. The total compensation for an examiner is $1,750 annually. It is obvious one does not serve in this capacity for the money.

Like the chairman, the grading ex-

Continued on page 71

Riding the Circuits

Marshall County Bar Association

The newly-elected officers of the Marshall County Bar Association are as follows:

President:
David Lee Jones

Vice president:
George M. Barnett

Secretary/treasurer:
T. J. Carnes

Mobile Bar Association

The Mobile Bar Association's annual Christmas meeting was held Friday, December 20, at the Admiral Semmes Hotel. Alabama's newest member of the supreme court, Justice J. Gorman Houston, Jr., was the guest speaker and Justice Janie Shores an honored guest. Justice Houston's son, Rev. J. Gorman Houston, III, also was in attendance and offered the invocation.

Albert J. Tully; Ralph G. Holberg, Jr.; and Joseph C. Sullivan, Jr., were recognized for their past contributions to the bar and their continued support and participation. These members have been practicing law for a combined 156 years, and each has served as president of the MBA. A 1943 photograph of the three was presented to President Kilborn and will become a permanent part of the MBA archives.

The December meeting also marked outgoing President Ben C. Kilborn's passing of the gavel to Mitchell G. Lattof, incoming president. ■

Tully, Holberg and Sullivan (Mobile Bar Association)

President's Page

Continued from page 68

were going to become much more common. Judge Bryan cautioned us all to improve our diligence and documentation. As we move into a period where clients sue their lawyers because they do not like the results obtained, I share Judge Bryan's apprehension.

Many of you continue to speak to me about your malpractice insurance. We are aware of the problem and continue to work on it. Cathy Wright of Birmingham and Phillip Stano of Montgomery attended a conference on the National Association of Bar-Related Insurance Companies in late January. Later, we will report to you on that meeting. I continue to believe that this is the direction we ultimately will be forced to take.

The Midyear Meeting of the Alabama State Bar will be held in Montgomery March 19-20, with a membership reception at the new Alabama Shakespeare Festival building the first evening. Following the Midyear Meeting is a bar-sponsored trip to Bermuda, departing March 21 and returning March 24.

Marvin Albritton of Andalusia was elected by the board of bar commissioners to fill the vacancy on the court of the judiciary created by the death of a great lawyer, Jimmy Carter.

Your commissioners were sued recently in a matter related to the disclaimer required by our rule regulating advertising. Warren Lightfoot of Birmingham volunteered to represent the board, and he and Bill Morrow, our general counsel, were successful in the defense of that suit. We owe Warren our thanks.

You hear that fewer students are graduating from our law schools. It just may be a slight blip in the general trend, but 297 applicants signed up for the February bar exam, about 100 more than last year.

We attended meetings of the Southern and National Conferences of Bar Presidents and the American Bar Association Midyear Meeting in Baltimore in early February. These meetings are always interesting and informative.

I had the pleasure of visiting with and speaking to a number of local bar associations during the past few weeks and look forward to continuing these visits. ■

—James L. North

Executive Director's Report

Continued from page 69

aminers serve four-year terms. An examiner may be elected to examine in one field and later choose to move into another if a vacancy occurs; however, initial selection is based upon an acknowledged expertise in this area for which they are selected. The advisory committee seeks both volunteer applicants and recommendations through the board of bar commissioners. Balance with respect to geographic distribution, firm size, race, gender, educational background, practice and experience, as well as general reputation for quality work and integrity, enter into the selection process.

Four examiners must rotate off the board following the July 1986 exam. They are: Jim Hughey, business organizations; Max Pope, equity jurisdiction; George Ford, pleading and practice; and Dow Perry, wills, trusts and estates. An existing vacancy in the field of wills, trusts and estates will be filled in March or April. This vacancy resulted from a mid-term resignation of an examiner.

Not infrequently, the board is called upon to fill a position on a temporary, one-time only basis when an examiner has a relative taking the bar exam. Temporary examiners frequently are chosen from among former examiners experienced in the examination technique and process used by the board of bar examiners. Lister Hill of Montgomery and Kirby Sevier of Birmingham are rendering temporary service on the February 1986 exam.

Other examiners presently serving and their rotation dates are: Cleo Thomas (2/88); Sue Thompson (2/87); Nick Braswell (2/89); Dag Rowe (7/87); Richard Dorman (7/88); and Larry Vinson (7/88).

One of the real pleasures in serving as secretary of the board of bar examiners is the opportunity to be associated with these attorneys and their predecessors. Theirs is a difficult and most important task. They have endured unfair criticism, meaningless litigation and accusations that impugn their integrity. The quality of their performance is their vindication. It is not easy to be a bar examiner. It is a thankless job. The entire bar is in their debt.

If you would be interested in serving as an examiner, please write to Bob Potts, John Scott, your bar commissioner or me, and express this desire. Include a personal resumé, and indicate the area(s) in which you would like to be considered. Even though a vacancy may not exist in the immediate future in this area, we would like to know of your interest in the event a temporary vacancy needs to be filled.

In today's world of bumper stickers, borrowing from one I see frequently, I would be happy to have one on my car inquiring, "Have You Hugged a Bar Examiner Today?" ■

—Reginald T. Hamner

Book Review

Handling Automobile Warranty and Repossession Cases

by Roger D. Billings, Jr., The Lawyers Co-op Publishing Co. 1984, pp. 479

Reviewed by Greg Ward

Since the mass production of the horseless carriage, clients have been going to see attorneys—usually late Friday afternoon—with the question, "The car that I just bought is a lemon. *What are you going to do about it?*"

Attorneys had all too often one of two reactions. They either accepted the case, went to the books and, only then, realized the jungle into which they had ventured. Or, having faced that particular underbrush before, they pled a busy schedule, and, with a knowing smile, suggested the client see the new attorney down the road.

Now there is a one-volume book dealing with the law of the automobile in a way that quickly and effectively brings such cases within the attorney's grasp.

Professor Billings states the book was conceived when he noticed that in cases decided under the Uniform Commercial Code the sale and repossession of automobiles were disproportionately represented. He concluded that automobiles are a big ticket item, and consumers are increasingly using the law to assert their rights regarding them. His goal is "to make possible for all lawyers a more orderly resolution of disputes involving defective and repossessed automobiles, and to facilitate litigation as a last resort."

Billings explains the use of not only the basic UCC remedies, Articles 2 and 9, but fills the gaps with special federal remedies, such as the Magnusson-Moss Warranty Act, the Federal Odometer Act and the Federal Trade Commission Act of 1914 as amended. Along the way the attorney is cautioned against using standard state remedies before first exploring the pertinent federal statutes and regulations.

The book is in chronological order, with chapters one through seven dealing with the purchase of a defective new car. Billings begins with contracting for the automobile and surrounding negotiations and continues through issues involving warranties on the purchased vehicle. He discusses certificate of title laws, now found in various forms in every state, and the buyer's right to reject or revoke the sale. Not willing to leave out either side, though, he discusses the dealer's remedies when the buyer refuses to pay for a vehicle already delivered. Also included is a good analysis of the various methods of arbitration and mediation available, including a look at the programs of General Motors, Ford and Chrysler.

Chapter seven is devoted to the Magnusson-Moss Warranty Act and covers who can be sued under the act, where to sue and how to recover attorney's fees. This chapter is more litigation-oriented than the others. Billings conveniently includes sample jury instructions, complaints and an assortment of discovery tools, all of which are geared toward the act. The full text of the Magnusson-Moss Warranty Act is included in an appendix and is useful as a quick reference.

The next section pertains to new and used cars and includes discussions of deceptive trade practices, odometer fraud, used car sales and warranties, and how to handle defective and negligent repair cases.

Chapter 11 deals with default and repossession. Few areas of automobile law become complicated as quickly as these, and few give rise to liability as quickly. This chapter gives a good introduction to issues arising in these areas; however, state laws vary on these topics, and this should be considered a good introduction from which case law and secondary sources should be consulted.

Finally, Billings deals with defending deficiency judgments, which, in the field of automobile law, are a reality of the market place on too many occasions.

The book is a useful reference point, and can help to quickly acquaint the busy attorney with his client's legal problems as well as act as a beginning point for the solution. Highly annotated, the book assists the attorney into the case law. It does not purport to be the final word on all aspects of automobile law, just a point of beginning. Such is needed. And, it might just keep those clients who otherwise would have been referred to someone else. ■

Greg Ward received his bachelor's degree from Auburn University and his law degree from the University of Alabama School of Law. He is in private practice in Lanett, Alabama, and serves on the editorial board of The Alabama Lawyer.

1986
Midyear Meeting
March 19-20, Montgomery, Alabama

DATE	ACTIVITY	LOCATION
Wednesday, March 19		
9 a.m.—noon	Registration	Montgomery Civic Center, 300 Bibb Street
	Board of Commissioners Meeting	Alabama State Bar Building 415 Dexter Avenue
Noon—1:30 p.m.	Midyear Meeting Convenes-Luncheon	Montgomery Civic Center, 300 Bibb Street
2—5 p.m.	Committee Meetings	Downtown law offices
7—9 p.m.	Cocktail Supper	Alabama Shakespeare Festival Theatre (Buses will shuttle between Governors House Motel and theatre.)
Thursday, March 20		
9 a.m.—noon	CLE seminar: "The Lawyer and the Medical Malpractice Crisis" (3.0 credits)	Governors House Motel 2705 E. South Blvd.
Noon—1:30 p.m.	Luncheon	Governors House Motel
1:30—3 p.m.	Candidates' Forum: Attorney General's Race	Governors House Motel

END OF MONTGOMERY PORTION OF MIDYEAR MEETING

(Those staying over Thursday night can avail themselves of a private showing of "Witness for the Prosecution" and a keg party at the home of the Capri Community Film Society, 1045 East Fairview Avenue.)

Friday, March 21—Monday, March 24—Midyear Meeting Continues in Bermuda

Estate

for the

by Leonard Wertheimer, III,
and Louis B. Feld

I. Introduction

Estate planning has undergone very significant and dramatic changes during the past nine years. The enactment by congress of the Tax Reform Act of 1976 heralded an era of unprecedented legislative change in the estate and gift tax area. Among the many changes enacted is a significant increase in the size of a decedent's estate exempt from federal estate tax. The estate tax exemption, conceptually changed to an estate tax credit by the Tax Reform Act of 1976, increased as follows:

Year	Equivalent Exemption
Pre-1977	$ 60,000
1977	$120,667
1978	$134,000
1979	$147,333
1980	$161,563
1981	$175,625
1982	$225,000
1983	$275,000
1984	$325,000
1985	$400,000
1986	$500,000
1987 and after	$600,000

Estate tax filing requirements have been adjusted to reflect the increase in equivalent exemption, resulting in many more estates being exempt from the requirement of even filing an estate tax return. A congressional study in 1976 projected that by 1981 98 percent of all estates would be excluded from filing an estate tax return. In spite of the effect of inflation on the valuation of estates, it nevertheless is currently projected that by 1987 95 percent of all estates will be excluded from filing an estate tax return.

The effect of the liberalized equivalent exemption should be apparent—tax considerations will play a less important role in estate planning, and estate planners can concentrate on achieving the personal goals of clients.

II. Definition of Moderate Estate

As the table indicates, by 1987 estate taxes will be no consideration whatsoever for a family having an aggregate estate (husband and wife) of less than $600,000. Further, if a husband and wife coordinate their estate plans, and the first to die passes the equivalent exemption into a "bypass" or "credit shelter" trust designed to avoid taxation of the trust assets in the estate of the surviving spouse, a husband and wife can totally avoid estate taxation on the transfer of $1,200,000 of assets to the next generation. The definition of a "moderate estate" is therefore quite liberal and contrasts sharply with the definition of "moderate estate" under pre-1977 law, where an estate having a value in excess of $60,000 was actually subject to estate taxation.

III. Get the Facts

No discussion of estate and gift taxation, however brief, would be complete without emphasis on accurately gathering factual data on a client's personal and financial affairs. Unless a practitioner thoroughly analyzes specific family prob-

Planning Moderately Wealthy

lems, such as a handicapped child or children by a prior marriage, the nature of property ownership and other pertinent facts, the estate planner will be unable to properly diagnose a client's needs and prescribe appropriate action. An estate planner must be sensitive to the drastic effects which may be caused by seemingly insignificant details and verify information himself rather than rely on a client's recollections of fact.

IV. Typical Client Profiles

Although not intended to be an exhaustive or complete description of clients who enter an estate planner's office, the following classifications set forth some typical situations an estate planner faces and problems and concerns of certain types of clients:

A. **Young Couple/No Children** These clients typically will leave everything to each other and appoint each other as executor. It is important to consider, however, the effect of a common disaster. Should the family wealth pass equally to the parents of the young couple? Should the share passing to one side of the family bypass the parents and pass to brothers and sisters? A discussion of the Alabama Uniform Simultaneous Death Act and certain provisions of Alabama's probate law dealing with presumptions of survivorship follow.

B. **Young Couple/Minor Children** Who gets the benefit of the family wealth is not an issue in this situation. The couple typically will leave everything to each other, if living, and otherwise to the children. Critical considerations center on the method of providing management for minor children during minority and, perhaps, thereafter. A testamentary trust frequently will accomplish this purpose, although devises under the Alabama Uniform Gifts to Minors Act and devises to testamentary guardians may be simpler and more appropriate in some circumstances. The estate planner also must deal with special educational or health needs of the minor children.

C. **Older Couple/Adult Children** A frequent concern of the older couple with adult children is the special needs of one or more children. The older couple frequently will advance funds to older children for the purchase of a home, the establishment of the older child in business or some other purpose. If special assistance is required in the future, these needs should be addressed in the estate plan. On the other hand, if the older couple made gifts to a particular child during life and wants to equalize distributions among all children at death, the couple can treat such prior gifts or distributions as advances upon future inheritances.

Another concern is protection from in-laws. An older couple frequently is concerned a child may get divorced or family property may evolve from a child to that child's spouse and, ultimately, to the spouse's family.

D. **Single Individual** The single individual frequently will question the need for a will. If the single individual dies without a will, however, many potential surprises lurk within the laws of intestacy. First, unless parents or heirs at law reside within the state of Alabama, family members may be unable to administer the estate. Second, it may be desirable for the single individual to pass his or her estate to someone other than his heirs at law. Third, there are the standard arguments against intestacy, such as the ability to avoid posting a surety bond,

filing an inventory and filing periodic accountings.

E. **Surviving Spouse/Second Marriage** The widow or widower may have accumulated significant personal property, such as antique furniture, silver, jewelry and collectibles. Since there are no estate tax implications to itemizing such property in the will of a "moderately wealthy" individual, a surviving spouse frequently will make specific devises of personalty. A surviving spouse may become a new bride or groom and must carefully consider the ramifications of remarriage. If the surviving spouse remarries but does not revise his or her will, the new spouse is entitled to one-half (1/2) of the client's estate. Code of Alabama (1975) Section 48-8-90 If the surviving spouse executes a new will after remarriage or in contemplation of remarriage, the surviving spouse would be entitled to an elective share of the surviving spouse's estate, which is considerably less than one-half (1/2) of the estate. The surviving spouse also should consider signing a prenuptial agreement upon remarriage, to further protect his or her assets for the benefit of children or other beneficiaries.

F. **Single Parent** The single parent with minor children is faced with many of the same considerations as the young couple with minor children. An additional factor, however, is the manner in which the former spouse fits into the estate plan. The former spouse remains a parent of the minor children, and certainly would have priority rights to guardianship in the event the single parent dies. To what extent should the former spouse also be considered or eliminated from the fiduciary positions of executor and trustee?

V. Tricks, Traps and Planning Opportunities of Estate Planning

A. Joint Bank Accounts

(1) Alabama law provides that any deposit made in any bank in the names of two or more persons payable to any such persons, upon the death of either of said persons, may be paid by the bank to the survivors jointly, irrespective of whether the form of deposit contains any provision for survivorship; the funds were deposited by only one of the said persons; there was any intention on the part of the depositing person to make a gift; there was delivery of any bank book, account book, savings account book, certificate of deposit or any other writing or evidence of ownership; or any other circumstances. Code of Alabama (1975) Section 5-5A-41

(2) Alabama case law, however, would allow allegations of fraud, duress, mistake, incompetency or undue influence to be made by the estate of the deceased depositor where appropriate. *Hines v. Carr,* 372 So. 2d 13 (Ala. 1979)

(3) While joint bank accounts may "avoid probate," they produce inherent conflicts. For example, a nephew lives in

town with the aunt and is joint owner of the bank account; his five sisters live out of state. Even if he should be a "good guy" and share the bank account with his sisters, the Internal Revenue Service has ruled that his sharing of the joint bank account is a gift. Rev. Rul. 77-372, 1977-2 CB 344

(4) A joint safe deposit box is not a survivorship account. It is a lease arrangement, and the property located within it remains in the custody, control and management of the decedent's estate. Livingston v. Powell, 57 So. 2d 521 (Ala. 1952)

(5) If "A" creates a joint bank account for himself and "B" (or a similar type of ownership by which "A" can regain the entire fund without "B's" consent), there is a gift to "B" when "B" draws upon the account for his own benefit, to the extent of the amount drawn without any obligation to account for a part of the proceeds to "A." IRC Reg. 25.2511-1(h)(4)

(6) The estate tax considerations of joint property are well defined and discussed in IRC Section 2040(a) and (b).

B. Other Joint Property

(1) Alabama law provides when one joint tenant dies before the severance of the joint property, his interest does not survive to the other joint tenants but descends and vests in his estate, provided, that in the event it is stated in the instrument creating such tenancy that such tenancy is with right of survivorship or other words used therein showing such intention, then upon the death of one joint tenant, his interests shall pass to the surviving joint tenant or tenants according to the intent of such instrument. Code of Alabama (1975), Section 35-4-7 This statutory joint tenancy provision often is referred to as a "poor man's" will.

(2) If the survivorship feature is desired, whether the property in question be real or personal property, it must be stated. A recital that property is held as "joint tenants" is merely a tenancy in common (a form of property ownership by which two or more persons own undivided, concurrent interest in an asset). Each person can transfer his interest during lifetime or at death. There is no right of survivorship.

(3) Alabama does not recognize tenancies by the entirety, (a joint tenancy between husband and wife). It cannot be terminated except by consent of both owners or operation of law. In Florida tenancies by the entirety are recognized, and husbands and wives who reside in Alabama often own condominiums in that fashion.

(4) Alabama case law specifically recognizes that a joint tenancy with right of survivorship is destructible. Either party to this form of property ownership may without the consent or concurrence of the other sell or give away his or her interest during life and thus destroy the survivorship feature. *Nunn v Keith,* 268 So. 2d 792 (Ala. 1972)

(5) Additionally, Alabama property law recognizes a form of concurrent ownership of property by individuals as tenants in common with provisions for the equal rights and interests during the lives of the owners with the fee to vest in the survivor. This form of concurrent ownership can be characterized as creating concurrent life estates with cross-contingent remainders in fee or a tenancy in common for life with a contingent remainder in favor of the survivor. A tenancy in common for life with contingent remainder in fee in the survivor differs from a joint tenancy with right of survivorship in that the right of survivorship in one tenant in common is not destructible by the act of the other. *Durant v. Hamrick*, 409 So. 2d 731 (Ala. 1981)

(6) If "A" with his own funds purchases property and has the title conveyed to himself, and "B" is a joint owner with right of survivorship, but one whose rights may be defeated by either party's severing his interests, there is a gift to "B" in the amount of half the value of the property. IRC Reg 25.2511-1(h)(5) Donative intent on the part of the transferor is not an essential element in the application of the gift tax to the transfer. The application of the tax is based on the objective facts of the transfer and the circumstances under which it is made, rather than the subjective motives of the donor. IRC Reg. Section 25.1511-1(g)(1)

(7) The estate tax considerations concerning joint property are well-known and discussed in IRC Sections 2040(a) and (b). Special consideration must be given to basis considerations, however, under IRC Section 1014. With reference to husband and wife survivorship property, only a 50 percent step-up in basis is obtained upon the death of one spouse. In non-marital situations, however, the basis step-up is dependent upon gross estate inclusion under IRC Section 2040(a). Care also must be taken with the special "contemplation of death" basis provisions of IRC Section 1014(e).

C. Uniform Gifts to Minors Act

(1) This act, essentially a "poor man's" trust, is set forth in the Code of Alabama (1975) Section 35-5-1 *et. seq.*

(2) The act is an administrative vehicle for the management, investment and use of certain types of property for the benefit of a minor.

(3) Although the custodianship may be appropriate in many situations dealing with relatively small amounts of property, it has the following drawbacks:

(a) The custodianship cannot own real property. Code of Alabama (1975) Section 35-52(5)

(b) All property in the custodianship must be paid to the minor beneficiary at age 19. Code of Alabama (1975) Section 35-5-5(d)

(c) In the event the minor beneficiary dies before attaining the age of 19 years, the custodianship property passes under the laws of intestacy of the state of Alabama and requires a probate administration.

(4) If the donor of the custodial property names himself or herself as custodian, the custodianship property will be included in the donor's estate for federal estate tax purposes under Sections 2036 and 2038 of the Internal Revenue Code of 1954, as amended. Rev. Rul. 70-348, 1970-2 CB 193; Rev. Rul. 57-366, 1957-2 CB 618 See *Exchange Bank and Trust Co. of Florida v. U.S.*, 69 F2d 1261 (Ct.Cl. 1981)

(5) A transfer of property to a custodianship constitutes an irrevocable gift, which qualifies for the $10,000 per donee gift tax annual exclusion under IRC 2508(c). Rev. Rul. 59-357, 1959-2 CB 212

(6) Income earned by the custodianship is taxed directly to the minor, without the necessity of filing a fiduciary income tax return, form 1041. Rev. Rul. 82-206, 1982-2 CB 356

(7) Unless a custodian avails himself of the privilege of designating his successor, or unless the minor designates a successor custodian upon attaining the age of 14 years, a court proceeding would be required to replace a custodian who for any reason becomes unable to serve. Code of Alabama (1975) Section 35-5-8

D. Testamentary Guardianship

(1) Certain individuals may be appointed testamentary guardian of the property of a minor, such appointment being contained in the last will and testament of the decedent. Code of Alabama (1975) Section 26-2-23.

(2) The will of the decedent may exempt the testamentary guardian from posting a surety bond.

(3) A testamentary guardian may be appointed by the last will and testament of a parent of a minor child, or the parent of a minor child may be appointed by the last will and testament of any relative of the minor child.

(4) Income earned from the testamentary guardianship is taxed directly to the minor child.

(5) A testamentary guardian pertains to ownership and management of property, as distinguished from a guardian of the person who will assume responsibility for the care and custody of a minor child.

E. Totten Trust

(1) This creation of Alabama banking laws is set forth at *Code of Alabama* (1975) Section 5-5A-40.

(2) A totten trust is created whenever a parent establishes a bank account in the name of "parent, as trustee for child."

(3) A parent can revoke a totten trust at any time, so there are no gift or estate tax consequences to its creation. **Treas.** Reg. 25.2511-2; *Nathan A. Wasseman, Exec.*, 139 F2d 778 (1st Cir., 1944); *Estate of Semo A. Sulovich v. Comm.* (6th Cir.) 587 F2d 845 (1978)

(4) Income earned by the totten trust is taxable to the parent. Rev. Rul. 62-1-48, 1962-2 CB 153; Rev. Rul. 58-76, 1958-lCB13

(5) A totten trust frequently is established by a parent when the true intent is to make an irrevocable gift through a custodianship or other planning tool.

F. Disclaimers

(1) The state of Alabama adopted the Alabama Uniform Disclaimer of Property Interests Act in 1981. (Acts 1981, No. 81-156) The statute is located at Code of Alabama (1975) Section 43-8-290 et. seq.

(2) The Alabama Disclaimer statute closely parallels the Federal Tax Disclaimer statute found at IRC 2518.

(3) If a person disclaims an interest in property, the property passes as if the disclaimant had predeceased the decedent or other person with a predecessor interest in the property. Code of Alabama (1975) Section 43-8-294(a) Since a disclaimer does not constitute a taxable gift, IRC 2518, this technique creates the possibility for the transfer of significant property interests from a devisee or donee to other individuals without any gift tax consequences.

(4) A disclaimer must be made within nine months from the date the interest of the disclaimant is determined, either by the probating of a will, the lapse of a power of appointment, the transfer of property by gift or otherwise. Code of Alabama (1975) Section 43-8-292

(5) A person is precluded from disclaiming property if he has accepted any interest whatsoever in the property prior to the date of disclaimer. Code of Alabama (1975) Section 43-8-295(3) If a disclaimer may be appropriate in a planning situation, it is important that the estate planner assume control of the situation immediately and prevent the potential disclaimant from depositing an interest check in his personal bank account or taking any other action constituting an acceptance of benefits. Although prior law was more limited, a person in Alabama now can disclaim interests in joint property, property passing by intestacy, life insurance proceeds and almost any type of property interest existing. Code of Alabama (1975) Section 43-8-291(a)

(6) A typical opportunity for the use of disclaimers in a non-tax setting arises when one child is joint owner of significant bank accounts owned by the parent. Upon the parent's death, the child becomes sole owner, but can share the assets with siblings, without gift tax consequences, by making timely disclaimers.

G. Living Wills

(1) In 1981, the Alabama Legislature adopted the "Termination of Life-Support Procedure" Act, enabling an adult person to write a "living will" and exercise his or her right to control decisions relating to the rendering of medical care and life-sustaining procedure. Code of Alabama (1975) Sections 22-8A-1 et. seq.

(2) It is important to note that, for rather obvious reasons, a relative of a person executing a living will, or a person who will benefit financially from his or her death, cannot be a witness to the document.

H. Durable Powers of Attorney

(1) In 1981, the Alabama Legislature adopted a Durable Power of Attorney statute. Code of Alabama (1975) Section 26-1-2

(2) A durable power of attorney is a power of attorney either not affected by the disability, incompetency, or incapacity of the principal, or which becomes effective upon such disability, incompetency or incapacity. Code of Alabama (1975) Section 26-1-2(a)

(3) The statute does not define the term "disability," placing a burden upon the estate planner to define this term in an appropriate manner for the particular situation. For example, if the power of attorney will "spring" into effect upon the disability of the principal, the fact of disability probably should be contingent upon medical certification that the principal is unable to handle his or her business affairs.

(4) Although the durable power of attorney can be limited in scope, it also can be extremely broad, giving the attorney-in-fact authority to make gifts, life insurance beneficiary changes and essentially do everything for the principal except rewrite his or her will.

(5) A durable power of attorney is a very attractive alternative to the cumbersome and expensive legal guardianship otherwise required to manage a disabled persons affairs; it also is frequently an attractive alternative to a revocable management trust which is more expensive to create and requires a present transfer of property into the trust.

I. Uniform Simultaneous Death Act

(1) This act is located at the Code of Alabama (1975) Section 43-7-1 *et. seq.*

(2) The act provides for the following presumptions of the order of death when there is insufficient evidence of survivorship:

(a) Each person's probate property will be disposed of as if he had survived the other. Code of Alabama (1975) Section 43-7-2

(b) Property owned jointly, with right of survivorship or by the entirety, will be distributed one-half (1/2) as if one has survived and one-half (1/2) as if the other had survived. Code of Alabama (1975) Section 43-7-4

(c) Insurance proceeds will be distributed as if the insured had survived the beneficiary. Code of Alabama (1975) Section 43-7-5

(3) This act will not apply if provision is made in a will, living trust, deed or contract of insurance for a different property distribution in the event of simultaneous death. Code of Alabama (1975) Section 43-7-7 It is common to insert overriding presumptions of survivorship in "marital deduction" wills, but considerations of survivorship are equally important in non-tax situations.

J. Uniform Probate Code

(1) Effective January 1, 1983, the Alabama Legislature adopted, with some modification, a substantial portion of the Uniform Probate Code. (Acts 1982, No. 82-399) The new provisions, which make substantial changes in various aspects of Alabama probate law, are located at the Code of Alabama (1975) Section 43-8-1 *et. seq.*

(2) Some areas of the new law involving "tricks, traps and planning opportunities" may be described as follows:

(a) **Elective Share** In lieu of abolished dower and courtesy rights, the surviving spouse is entitled to an elective share in an amount equal to the lesser of the entire estate of the deceased reduced by the value of the surviving spouse's separate estate, or one-third (1/3) of the estate of the deceased. Code of Alabama (1975) Section 43-8-70 This significant property right must be taken into account in each planning situation. Furthermore, during estate administration, it is important to note the elective share must be claimed within six (6) months after the probate of the decedent's will. Code of Alabama (1975) Section 43-8-73

(b) **Abatement** Under Alabama law the residuary estate is commonly charged with payment of all debts, taxes and administrative expenses. Code of Alabama (1975) Section 43-8-76(a) A testator can, by the terms of his will, override this burden and allocate responsibility for paying these expenses in another manner. Code of Alabama (1975) Section 43-8-76(b) In an estate having substantial liabilities or taxes, Alabama law may result in a substantial

or total depletion of the residuary estate. Since the residuary beneficiaries frequently are the most favored beneficiaries of the testator, a failure to consider this issue may result in a distribution of estate assets contrary to the testator's intent.

(c) **Omitted Spouse** If a testator fails to provide by will for his surviving spouse, who married the testator after execution of the will, the omitted spouse is entitled to an intestate share of the estate. Code of Alabama (1975) Section 43-8-90 The surviving omitted spouse's share would be at least one-half (1/2) of the estate, with no reduction for the omitted spouse's separate assets. Code of Alabama (1975) Section 43-8-41 This is significantly greater than the elective share, discussed above. Whenever a client remarries, consideration therefore should be given to preparation of a new will as well as a prenuptial agreement.

(d) **Divorce or Annulment** The new probate code codifies old law and provides that any provisions in a testator's will for the benefit of surviving spouse, including beneficial provisions and appointments to fiduciary capacities, are revoked by subsequent divorce. Code of Alabama (1975) Section 43-8-137

(e) **Will Contest** A will may be contested before its probate. Code of Alabama (1975) Section 43-8-190 A will also may be contested within six (6) months thereafter. Code of Alabama (1975) Section 43-8-199

(f) **Survivorship** A devisee must survive the testator by five (5) days to receive any property under the will of the testator. Code of Alabama (1975) Section 43-8-220

(g) **Ademption by Satisfaction** Property a testator gave in his lifetime to a person is treated as satisfaction of a devise to that person, in whole or in part, only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift should be so treated. Code of Alabama (1975) Section 43-8-231

(h) **Marriage Agreements** A spouse may waive the right to elect the elective share or claim various exemptions and allowances, before or after marriage, by a written contract. The waiver is effective only if the waiving spouse had fair disclosure of what is being waived. Code of Alabama (1975) Section 43-8-72

(i) **Anti-Lapse** Under prior law, a devise to a lineal descendant of the testator passed to the lineal descendant's next-of-kin in the event the lineal descendant predeceased the testator. If anyone other than a lineal descendant predeceased the testator, his or her devise lapsed and did not pass to his or her next-of-kin. Under the new probate code the anti-lapse provision has been expanded to include any lineal descendant of a grandparent of the testator. Code of Alabama (1975) Section 43-8-224 Therefore, the testamentary effect of the death of aunts, uncles, brothers, sisters, nieces, nephews and others is different under the new law. It is essential this change in law be taken into consideration during the estate planning process.

(j) **Nonexoneration** A specific devise of property passes to the devisee subject to any mortgage or lien against the property which existed at the date of death. Code of Alabama (1975) Section 43-8-228 This provision must be considered in light of the abatement provision discussed above.

K. Life Insurance and Retirement Plan Beneficiary Designation

(1) The designation of life insurance or retirement plan beneficiaries is an area of estate planning in which the traditional estate planner often is not involved. Frequently the employer or the life insurance salesman will simply present a beneficiary designation form to the employee/insured, and the form will be completed without consideration of estate planning consequences. Problems in this area arise more frequently with contingent beneficiaries than with primary beneficiaries.

(2) The effect of some common beneficiary designations are as follows:

(a) **Adult Individuals** This beneficiary designation is generally acceptable, since the adult beneficiary is legally competent, barring a mental illness or incapacity, to receive and manage the insurance proceeds.

(b) **Minor Child** Minor children frequently are named as contingent beneficiaries of life insurance. This creates an serious problem because the minor beneficiary is not legally competent to receive the benefits. The incapacity of the minor necessitates the establishment of a court-supervised guardianship to manage and control the funds until the minor attains the age of 19 years. The expenses and restrictions inherent in a court-supervised guardianship are most undesirable.

(c) **The Estate** If the employee's or insured's estate is designated beneficiary, the benefits will pass under the terms of the will. This frequently is very convenient, but the estate planner must advise the client such benefits pass through the probate estate and therefore are subject to creditor's claims.

(d) **Testamentary Trust** If a trust created under the will is designated as beneficiary, the benefits are arguably beyond the reach of creditors' claims. Alabama law is somewhat vague in this area, however, and there is a strong probability the results will be the same as naming the "estate" as beneficiary.

(e) **Revocable Trust** Whenever significant benefits are involved in an estate plan, consideration should be given to the use of a revocable trust. If a revocable trust is designated as beneficiary, the benefits are beyond the reach of creditors' claims.

(f) **Custodianship under Uniform Gifts to Minors Act** A custodian can be named as beneficiary. This avoids probate and creates a mechanism for management of the property until the minor reaches the age of 19 years; however, it may be undesirable to pay significant death benefits to a child at age 19 in which event a revocable trust should be considered.

(g) **Insurance Company Trust Designation** Many life insurance companies have created a mechanism whereby a trust arrangement is created under the terms of their beneficiary designations. This is convenient if the terms of trust are appropriate, in that it avoids the expense of creating an *inter vivos* trust and also avoids subjecting the death benefits to the reach of creditors' claims.

L. Contingent Trust Drafting

(1) Some issues to be considered in the preparation of trusts for children and other family members are:

(a) **Spray Income** Is it desirable to hold the trust estate in one "pot," spraying income among the various beneficiaries? This may be a significant factor if the trust estate is too small to divide among the various beneficiaries. Properly structured, a "spray provision" also can result in the shifting of income among several taxpayers for federal income tax purposes.

(b) **Special Needs** Beneficiaries frequently can have special needs which should be addressed in a trust document. A child may have serious health needs or require educational funds. These needs may be met by the creation of a separate trust for such beneficiary, or by a devise of additional funds to such beneficiary's trust estate, determined on a formula basis or simply stated in dollar terms.

(c) **Spendthrift Provision** Alabama law protects trust property and income held for the support, maintenance and education of any child, grandchild or other relation by blood or marriage from the anticipatory reach of creditors. Code of Alabama (1975) Section 19-3-1 A trust beneficiary of a "spendthrift trust" cannot pledge or assign his or her interest in the trust income or property prior to actual receipt. Insertion of a spendthrift provision should be considered in every trust.

(d) **Powers of Investment** Alabama law sets forth a very restrictive list of authorized trust investments. Code of Alabama (1975) Section 19-3-120 *et. seq.* A testator's will, however, can override this restrictive list and provide for authorization to invest in a broader range of assets, including common stocks, real estate and other assets not sanctioned by Alabama statute. ■

Louis B. Feld graduated from the University of Alabama, the University's School of Law and New York University Graduate Tax Program. He is an adjunct professor of law at the University's School of Business. Feld is a partner in the Birmingham firm of Wertheimer & Feld.

Leonard Wertheimer, III, is a graduate of the University of Virginia and Emory University. He is a partner in the Birmingham firm of Wertheimer & Feld, an adjunct professor of accounting at UAB and the author of several publications.

Something You May Have Been Missing

Membership in one or more sections of the Alabama State Bar is voluntary and enhances the benefits of bar membership. A description of each section and membership information follows.

Administrative Law

Section membership consists of lawyers interested in administrative proceedings at the federal and state levels. Members include government attorneys as well as private practitioners. The section presents a program during the annual meeting of the state bar and has been active in the implementation of the Alabama Administrative Procedure Act. The section also sponsors the Eugene W. Carter Medallion, an award given annually to a former public servant for excellence in balancing the rights of individuals against the interests of government. Annual dues for membership are $20 and should be sent to Roland L. Buffington, Secretary-Treasurer, P.O. Box 7067, Montgomery, Alabama, 36107.

Bankruptcy and Commercial Law

The primary purpose of the Bankruptcy and Commercial Law Section is to facilitate communications between its members concerning bankruptcy and commercial law matters and legal decisions, with a view toward promoting consistent application of these laws in the various districts and circuits of Alabama. The section has four standing committees: bankruptcy practice, commercial practice, CLE/annual meeting and communications/newsletter. Additional committees are appointed on an *ad hoc* basis. The section sponsors CLE programs and a law school writing competition and also is involved in promoting legislation needed in the commercial law practice. The annual dues for section membership are $15. Information on section membership can be obtained from Lawrence B. Voit, Treasurer, 4317-A Midmost Drive, Mobile, Alabama, 36609.

Business Torts and Antitrust Law

This section is concerned with business litigation including antitrust, trade regulation, interference with business relations, defamation of business, stockholder litigation and employment relations. An annual seminar entitled "Antitrust and Business Torts" normally is held. Meetings also are held during annual meetings of the state bar. Section dues are $15 and should be sent to George C. Lynn, Secretary-Treasurer, 12th Floor, Watts Building, Birmingham, Alabama, 35203.

Corporate, Banking and Business Law

This section is involved in projects of interest to every member of the bar. The section works with the Alabama Law Institute in revising the corporate laws of Alabama and publishes a newsletter for section members. Annual dues are $10 and information can be obtained from Curtis W. Jones, Secretary-Treasurer, P.O. Box 10246, Birmingham, Alabama, 35202.

Criminal Law

The Criminal Law Section is comprised of bar members having an interest in matters relating to the criminal justice system of our state and federal courts. No dues are required, and membership is open to all members of the state bar expressing an interest. The area of criminal law is constantly changing and provides many opportunities for active discussion and input. Involvement in this section will provide members with contacts throughout the state. Persons interested in membership should write to G. Douglas Jones, Treasurer, 2200 City Federal Building, Birmingham, Alabama, 35203.

Environmental Law

Services and activities of the Environmental Law Section are professional improvement in the field of environmental law, analysis and reporting of developments in the field and communication with other lawyers practicing in the environmental law area. For section membership contact Russell Stoddard, Treasurer, Office of the Attorney General, 250 Administrative Building, Montgomery, Alabama, 36130.

Family Law

The Family Law Section of the Alabama State Bar was established in 1984. The section publishes a newsletter for the benefit of family law practitioners. It has a legislation subcommittee whose function is to consider state and federal legislation in the area of family law and the law of domestic relations and to suggest needed reforms. The section has a legal education subsection which presents programs for the members. Annual dues are $15. The mailing address is P.O. Box 2141, Birmingham, Alabama, 35201-2141.

Labor Relations Law

This section includes lawyers from throughout the state whose practice includes work in the areas of labor law, fair employment law, employee benefits law and occupational safety and health law. In addition to providing a forum for the exchange of related information and

ideas, the section sponsors an annual, two-day labor law seminar and, with the labor law sections of various other state bars, co-sponsors an annual multi-state labor and employment law seminar. Dues are $25 for lawyers with five or more years of practice and $10 for lawyers with less than five years of practice. For information regarding section membership, contact D. Frank Davis, Chairman, 1600 Bank for Savings Building, Birmingham, Alabama, 35203.

Oil, Gas and Mineral Law

The Oil, Gas and Mineral Law Section was established in 1976 and consists of an oil and gas division and a hard minerals division. The primary purpose of the section is to keep its members apprised of developments in the mineral law area, and this is accomplished by co-sponsoring with ABICLE an annual seminar on oil, gas and mineral law, as well as sponsoring a "mini-seminar" at the section meeting during the annual meeting of the state bar. Currently, the section is working with the Energy Committee of the bar to prepare a handbook on oil, gas and mineral law in Alabama. Annual dues are $15, which should be submitted to Mary R. McKay, Treasurer, 300 Alabama Federal Building, Tuscaloosa, Alabama, 35401.

Practice and Procedure

The Practice and Procedure Section is composed of members interested in trial practice and the litigation process of our judicial system. Membership is open to all members of the Alabama State Bar. Dues are established on an annual basis by the executive committee of the section. A major function of the section is its educational program conducted at the Alabama State Bar annual meeting. The program consists of presentations by outstanding members of the bar and the judiciary and is intended to keep the practitioner abreast of recent developments in the litigation arena. Currently, the chairman of the section is W. Stancil Starnes, One Daniel Plaza, Daniel Building, Birmingham, Alabama, 35233.

Real Property, Probate and Trust Law

This section cooperates with and assists the Cumberland Institute for Continuing Legal Education in preparing and presenting programs relating to real property, trust and probate matters for members of the Alabama Bar. The section, in cooperation with the Cumberland School of Law, also publishes a periodic newsletter which reviews recent court decisions dealing with real property, trust and probate matters and reports other matters of current interest relating to these topics. An annual seminar is held in conjunction with the annual meeting of the state bar. Annual dues are $10 and should be sent to Joseph T. Carpenter, Treasurer, 641 South Lawrence Street, Montgomery, Alabama, 36104.

Taxation

Membership in this section is composed primarily of tax practitioners. The section gives special emphasis to Alabama tax matters and has been involved in changing Alabama law and assisting the Department of Revenue in writing tax regulations. A program is held each year during the annual meeting of the state bar. Section dues are $10 annually and should be sent to David M. Wooldridge, Treasurer, P.O. Box 3364, Birmingham, Alabama, 35255.

Young Lawyers

The Young Lawyers' Section of the Alabama State Bar is composed of all lawyers who are 36 years of age and under or who have been admitted to the bar for three years or less. The section conducts various seminars throughout the year for lawyers and other professionals. The section conducts public service projects designed to aid the public in their understanding of the law and assist them in solving their legal problems. There are no dues for this section since persons who are members of the Alabama State Bar and fulfill the age requirements automatically become members. Anyone who is interested in becoming involved with the Young Lawyers' Section should contact J. Bernard Brannan, Jr., President, P.O. Box 307, Montgomery, Alabama, 36101. ■

Bar Briefs

Jackson

Jackson elected to board of bar commissioners

Lynn Robertson Jackson assumed the position of bar commissioner for the third circuit upon the resignation of J. Gorman Houston to serve as an associate justice of the Alabama Supreme Court. Houston was elected to the board five years ago upon the death of Jackson's father, A.B. Robertson, Jr.

Jackson, a native of Eufaula, is the first woman to be elected to the Board of Bar Commissioners of the Alabama State Bar.

She is a graduate of the University of Alabama and Jones Law School and has served on many committees of the state bar. She is a member of the Alabama State Bar, American Bar Association and Association of Trial Lawyers of America.

Payne

Todd

Wrinkle

Payne, Todd, Wrinkle and Woodall elected to American College of Probate Counsel

Joe C. Foster, Jr., president of The American College of Probate Counsel, announced that Jackson M. Payne, Judith F. Todd, John N. Wrinkle and Paul 0. Woodall were elected Fellows of the College.

Payne is with the firm of Leitman, Siegal & Payne; Todd with Sirote, Permutt, Friend, Friedman, Held & Apolinsky; Wrinkle with Bradley, Arant, Rose & White; and Woodall with Thomas, Taliaferro, Forman, Burr & Murray, all of Birmingham.

The American College of Probate Counsel is an international association of lawyers. The college's purposes include improvement of the standards of persons specializing in wills, trusts, estate planning and probate, and the modernization of the administration of our tax and judicial systems in these areas.

Woodall

Legal Services elects officers and directors

Officers and committees of the board of directors of the Legal Services Corporation of Alabama were elected recently. They are as follows:

President
Merceria Ludgood*

Vice president
William Neville*

Secretary
R.L. Raney

Treasurer
McGowin Williamson*

Personnel Committee
Celia Collins, chair
R. L. Raney
Clara Williams
Merceria Ludgood*
Ceola Miller

Private Bar Involvement
William Neville, chair*
Laura Bess Cox*
Bobby Segall*
John Gruenewald*
Al L. Vreeland*
Inez J. Baskin

Finance and Audit
McGowin Williamson, chair*
Clara Williams
R. L. Raney

Service Delivery
Ceola Miller, chair
Laura Bess Cox*
Clara Williams
Sheryl Dixon
Kathleen Thomas

*Attorneys

LSCA, a private, non-profit organization funded by Congress, provides free legal help in civil matters to low-income persons in 60 of Alabama's 67 counties. Two other federally funded programs serve the remaining counties.

Last year the LSCA's total caseload was 16,411 cases, with 408 state bar members handling 2,721 of these cases, or approximately 16 percent.

Eight of nine lawyers serving on LSCA's 15-member board are lawyers in private practice appointed by the Alabama State Bar. The Alabama Lawyers Association appoints the ninth, and the remaining board members are income-eligible for LSCA's services and appointed by various community groups.

Harris and Blocker receive award for *pro bono*

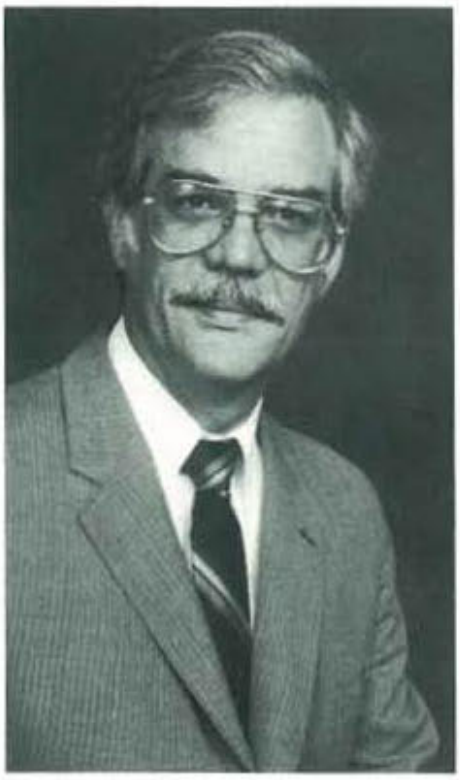
Last December, the first Clarence Darrow award was presented to attorneys Rick E. Harris of Montgomery and Walter L. Blocker, III, of Birmingham.

The award is given for outstanding post-conviction representation on a *pro bono* basis for a person sentenced to die in the electric chair.

Harris volunteered, in November 1983, to handle the case of *State of Alabama v. Bush*. After filing a writ of *error coram nobis* and a writ of *habeas corpus* a stay of execution was obtained, 12 hours before the scheduled execution. New evidence was discovered showing exculpatory evidence had not been turned over to the trial defense, and a new trial was ordered, resulting in a second death sentence. Harris is handling the appeal.

Blocker represented Clarence Womack, convicted of the capital crime of robbery/murder. He filed a petition for writ of *error coram nobis* to obtain a new trial on the grounds evidence discovered since the original trial revealed Womack

Harris



Blocker

did not commit the crime. Blocker was assisted by attorneys Mac Moorer, Nina Jones and Dave Dresher.

Harris is a graduate of the University of Pennsylvania Law School and is a partner with the firm of Moore, Kendrick, Glassroth, Harris, Bush & White. Blocker graduated from Cumberland Law School and is a partner with Smith, Hynds, Blocker & Lowther.

Grace named regional counsel of SBA

William Burke Grace has been appointed regional counsel in the southeast for the United States Small Business Administration.

He will serve as legal advisor of the agency's regional administrator and coordinate the SBA district legal staffs in Alabama, Georgia, Florida, Mississippi, North and South Carolina, Tennessee and Kentucky.

Grace started with the SBA in 1967 as a trial attorney with the southeast regional office in Atlanta. He then served as district counsel for the agency's Birmingham district for a year, before being named in 1975 assistant regional counsel for the southeast.

A native of Ozark, Alabama, Grace received his bachelor's degree from the University of Alabama in Tuscaloosa and his law degree from the Tulane University School of Law following military service as a supply officer with the U.S Navy.

Grace was associated with a private law firm in Birmingham prior to joining the SBA and is a member of the Alabama State Bar and the State Bar of Georgia.

Grace and his wife, the former Elaine Williams of Birmingham, live in Atlanta.

Grace

Dawson

Dawson chosen assistant secretary of the Army (Civil Works)

Robert K. Dawson has been chosen as assistant secretary of the United States Army (Civil Works), following his nomination by President Ronald Reagan.

Dawson will be responsible for formulating, developing and implementing administration policies regarding civil works activities of the Department of the Army and will oversee and analyze the Corps of Engineers' civil works program for water resources and its regulatory program. As the Secretary of the Army's representative, Dawson also will present testimony before Congress.

Dawson is a 1968 graduate of Tulane University and earned a law degree from the Cumberland School of Law. He was admitted to the Alabama State Bar in 1971.

In 1972 he worked as a legislative assistant to Congressman Jack Edwards of Alabama, and in 1974 he became the administrator for the Committee on Public Works and Transportation in the U.S. House of Representatives. Dawson served as the principal deputy assistant secretary of the Army (Civil Works) from 1981-84; in May 1984 he became the acting assistant secretary of the Army (Civil Works).

Dawson is a native of Scottsboro, Alabama, and he and his wife have two children. They presently reside in Alexandria, Virginia.

■

Age

I. Introduction

The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination in employment based upon age with respect to individuals between the ages of 40 and 70. The employment practices covered by the ADEA include failure to hire, discharge, demotion, denial of employment opportunities and discrimination with respect to the terms and conditions of employment. *See B. Schlei & P. Grossman, Employment Discrimination Law* 393 (1976). The ADEA is codified at 29 U.S.C. §§ 621 *et. seq.* Its purpose is the "elimination of discrimination from the workplace." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)

According to a recent informal, unscientific study, the typical ADEA plaintiff is a male, in his mid-50s and challenging his dismissal from a white-collar job. A recent survey of nearly 100 cases reported by the Bureau of National Affairs, Inc. (BNA) discovered that 89 percent of the plaintiffs were male; 77 percent worked in white-collar jobs; 70 percent had been terminated (as opposed to demoted, etc.); the average age was 55.8 years; and they had worked for their employer nearly 20 years. *Daily Labor Report*, No. 7, at A-3, January 14, 1984 (BNA)

Age discrimination claims represent the fastest growing type of discrimination suits in the country. In 1983, over 15,000 ADEA claims were filed with the EEOC. That represented an increase of 66 percent over the number filed in 1982, and that number is likely to continue to rise. The Census Bureau predicts the number of persons between the ages of 45 and 65 will increase by more than 36 percent, to a total of 60 million, by the year 2000. *Daily Labor Report*, No. 53, at C-1, March 9, 1985

This article is not intended as a primer on age discrimination; it presupposes a basic knowledge of the subject matter. Developments in other areas of the ADEA, including procedural issues, the use of statistics and even the EEOC's enforcement authority, will be reserved for future commentary.

II. Reduction-in-Force: *Prima Facie* Case

The Fifth Circuit in *Marshall v. Goodyear Tire and Rubber Co.*, 554 F.2d 730, 735, (5th Cir. 1977), adopted for ADEA cases the criteria for the establishment of plaintiff's *prima facie* case, which were originally established for Title VII actions in the case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, (1973). The elements of plaintiff's *prima facie* case are as follows: (1) plaintiff is a member of the protected class; (2) plaintiff was discharged; (3) plaintiff was qualified for the position; and (4) plaintiff was replaced by someone outside the protected class. *See also Krieg v. Paul Revere Life Insurance Co.*, 718 F.2d 998, 999 (11th Cir. 1983).

In reduction-in-force cases, however, it is unlikely an employer will be "replacing" a discharged employee. Otherwise, there would not be a reduction in force. Therefore, the courts had to adopt a modified formula for establishing a *prima facie* case which is used in reduction-in-force situations. The formula is essentially the same as the one cited above, with the exception of item number four. The 11th Circuit, in *Coker v. Amoco Oil Company*, 709 F.2d 1433, 1438 11th Cir. (1983), stated the plaintiff must produce evidence, either circumstantial or direct, from which a fact-finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. Other circuits, while stating virtually the same element, have used different language. For example, the Third Circuit indicated that a plaintiff terminated during a reduction-in-force need only demonstrate, in addition to the other items cited above, that others not in the protected class were treated more favorably by the employer in reaching its employment decisions. *See Massarksy v. General Motors Corp.*, 706 F.2d 111, 118 n.13, (3d Cir.), cert. denied, 464 U.S. 1017 (1983).

Once the plaintiff establishes its *prima facie* case, the defendant employer is under an obligation to articulate some legitimate, non-discriminatory reason for its actions. After the defendant meets that burden of proof, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the reasons offered by the employer are merely pretextual, or not true as a matter of fact. *See Everett v. Comsat*, 33 Fair Empl. Prac. Cas. (BNA) 793, 795-96 (D.C. Cir. 1983).

III. Legitimate Use of Reductions-in-Force

Reductions-in-force in the business community are recognized by the courts as a fact of life. Obviously, people in the protected age group will be laid off or demoted during these situations. Such actions taken by an employer are perfectly acceptable, as long as age is not the criterion used to determine the layoffs or demotions. As one court recently stated, "[T]he Court is persuaded that a reduction in [the employer's] work force was necessary for economic reasons; even plaintiffs agree with that proposition. The ADEA does not preclude a business decision such as defendant's; it does preclude, however, using age as a criterion in realizing that legitimate business goal." *Franci v. Avco Corp.*, 538 F. Supp. 250, 259 (D. Conn. 1982)

Quite clearly, though, the "ADEA prohibits a reduction-in-force that is intentionally targeted against older employees." *Kneisley v. Hercules, Inc.*, 577 F. Supp. 726, 729 (D. Del. 1983) Even during legitimate reorganizations or workforce reductions, employers may not dismiss employees for unlawful discriminatory reasons, including discrimination under the ADEA. *See, e.g., Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 81 (2d Cir. 1983).

One federal district court judge has been bold enough to state the obvious. In a decision handed down September 19, 1983, the Federal District Court for the Northern District of Ohio in *Kiel v. Goodyear Tire and Rubber Co.*, 575 F. Supp. 847, 849 (N.D. Ohio 1983), *aff'd*, 762 F.2d 1008 (6th Cir. 1985), observed that when businesses must lay off employees or grant early retirements in order to cope with a depressed economy "[i]t appears that Congress . . . has indirectly mandated that employers must

Discrimination and Reductions-in-Force

by Richard E. Neal

lay off young rather than older employees whenever the general economic conditions mandate a reduction in workforce. Otherwise, the employer exposes itself to litigation for wrongful discharge for age discrimination . . . ." (Id.)

IV. Successful Employer Responses

One of the best examples of a successful technique for implementing a reduction-in-force not resulting in age discrimination was exhibited by a company called CPC International, which operates a labor intensive corn milling business in Corpus Christi, Texas. The case from which this arises is entitled *Rodriguez v. CPC International, Inc.*, 31 Fair Empl. Prac. Cas. (BNA) 455 (S.D. Tex. 1983).

The company refuted charges of age discrimination by demonstrating to the court that the criteria used to accomplish its reduction-in-force was completely devoid of any reference to age. To streamline its operations, the company effected a major reorganization. Jobs were merged, functions streamlined and performance minimums markedly increased. The resulting jobs, therefore, took on a much different character. To select the employees remaining with the company and performing these new positions, a select company committee prepared a list of job qualifications for each new position, together with a comprehensive list of criteria for rating the various candidates for each position. Each employee was individually graded by each of the six committee members who assigned numerical ratings to the employees. The committee then discussed the ratings and attempted to

achieve a consensus. The numbers were tabulated, and the employees with the highest totals received the job assignments.

The tests for the various jobs were strictly adhered to by all members of the committee, and the final reduction-in-force decisions were based exclusively on the scores received. The system, incidentally, was indirectly weighted in favor of older employees because in the case of ties, jobs were given to the employees with the most seniority with the company. In the face of this evidence, the district court granted summary judgment to the employer. The employer also was able to statistically demonstrate that the average age of its employees actually increased after the reduction in force was implemented.

Another successful response to an age discrimination claim brought about by a reduction-in-force was accomplished by Pan American World Airways, as demonstrated in the case of *Coburn v. Pan American World Airways*, 711 F.2d 339 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983). To effectuate its reduction-in-force for the purpose of reducing surplus management personnel, company guidelines called for the termination of the "least productive" employee in certain designated peer groups. Pan American used a numerical ranking system and evaluated its supervisors on the basis of job qualifications, abilities, productivity and length of service.

The jury at the district court trial level returned a verdict in favor of the plaintiff and against Pan American on the employee's claim of age discrimination. The district court judge, however, disregarded the jury's verdict and entered JNOV in favor of Pan American. The plaintiff appealed that decision to the circuit court of appeals, and the circuit court affirmed the trial judge's action. It stated that Pan American carried its burden of proof by offering a legitimate, non-discriminatory reason for terminating the employee through its institution of a written policy, following it to the letter and making its employment decision based on the results. (*Id.* at 343)

In another instance in which a jury's verdict of age discrimination was reversed by a circuit court, the Fifth Circuit, in the case of *Elliott v. Group Medical and Surgical Service*, 714 F.2d 556 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2658 (1984) found that the defendant employer had presented sufficient evidence to justify and explain the employee's discharge. Among the reasons given by the employer for discharging the various employees were disloyalty, failure to achieve the company's desired market penetration or productivity, lack of "inner drive," lack of the necessary personality to deal with others in management positions, failure to develop a sales training program and violation of company policy.

The ADEA does not require an employer to give special treatment to employees over the age of 40.

The Fifth Circuit commented on each of these reasons as follows:

> It cannot be said that any of these reasons is irrational or idiosyncratic. To the contrary, each is, on its face, an adequate, non-discriminatory one. [citations omitted] . . . When no more evidence of discrimination is presented than that of these plaintiffs and the defendant presents evidence justifying and explaining the discharge, the trier of fact is not free to disregard that explanation without countervailing evidence that it was not the real reason for the discharge.

(*Id.* at 566)

Naturally, instances of misconduct on the job and insubordination always will be sufficient to support the discharge or demotion of an employee within the protected age group. The Fifth Circuit, in *Bohrer v. Hanes Corp.*, 715 F.2d 213 (5th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984) reversed the district court's finding of age discrimination because the record was replete with instances of the employee's deliberate violation of company policies and management directives. The court found that whenever the plaintiff disagreed with a particular rule or instruction, he simply refused to implement it. The court concluded that "no jury should reasonably have concluded that age was a determinative factor in [the employer's] decision to fire [the employee]." (*Id.* at 218)

Other legitimate, non-discriminatory, reasons for terminating an employee either upheld as sufficient to defeat an ADEA claim or shift the burden back to the plaintiff to demonstrate pretext include: organizational competitiveness, jealousy, creative "burn-out," personality conflicts with management, customer complaints and "bad attitude." See *Lenz v. Erdmann Corp.*, 773 F.2d 62 (6th Cir. 1985); *Cebula v. General Electric Co.*, 614 F. Supp. 260, (N.D. Ill. 1985); *Graham v. F.B. Leopold Co.*, 602 F. Supp. 1423 (W.D. Pa. 1985); *Chamberlain v. Hissel, Inc.*, 547 F. Supp. 1067, 1077 (W.D. Mich. 1982).

The ADEA does not require an employer to give special treatment to employees over the age of 40. It merely requires that an employee's age be treated in a neutral fashion, neither facilitating nor hindering the employee's advancement, demotion or discharge. *Parcinski v. Outlet Co.*, 673 F.2d 34, 37, (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983) Furthermore, the ADEA does not authorize the courts to sit in judgment concerning the wisdom of a corporation's business decisions. (*Id.*) The law does not prohibit a company from making errors in its personnel decisions, as long as the employer does not discriminate on the basis of age. *See Berkowitz v. Allied Stores of Penn-Ohio, Inc.*, 541 F. Supp. 1209, 1219 (E.D. Pa. 1982).

Subjective assessments of an employee's qualifications are perfectly legitimate reasons upon which to base decisions to

demote or discharge. The Fourth Circuit recently observed, the defendant

> testified that while most of the supervisors demoted were good supervisors, poor business conditions required a reduction in the number of supervisors, and the supervisors selected for demotion were less qualified, based on their performance and expertise, than those supervisors retained. We find no reasons legally sufficient to discredit this testimony. It is true that the trial court held that the qualification assessments were subjective. That appellation, however, does not convert an otherwise legitimate reason into an illegal one.

EEOC v. Western Electric Co., 713 F.2d 1011, 1016 (4th Cir. 1983)

In *Allison v. Western Union*, 680 F.2d 1318 (llth Cir. 1982), the decision to demote or dismiss employees was made on the basis of "the person you will miss the least." Even this highly subjective criterion, standing alone, does not violate the ADEA.

> [T]he subjective criteria 'chose the person you will miss the least' which plaintiffs challenge, is not as fatal as plaintiffs would argue. An employer's decision may properly be based on subjective factors. [citation omitted] Such criteria is not in and of itself violative of the ADEA. It is only when such criteria result in discriminatory impact that a violation occurs.

V. Not-so-Successful Responses

The existence of a reduction-in-force scenario does not insulate an employer's actions from the scrutiny of the ADEA. *Rosengarten v. J.C. Penney Co.*, 605 F. Supp. 154 (E.D.N.Y. 1985) The plaintiff employee has the opportunity to demonstrate that the defendant employer's stated reasons for discharging or demoting the employee were pretextual, and thus overcome the employer's defense. This often occurs in situations where the reasons for discharge or demotion are inconsistent with existing information in the employee's personnel file. For example, in the case of *Franci v. Avco Corp.*, 538 F. Supp. 250 (D. Conn. 1982), the employer's reasons for terminating the employee were that he had not been performing well at his job, and he was not capable of assuming new responsibilities. The court, however, noted that the credibility of the employer's managers, who testified at trial about the employee's poor job performance, was severely undermined by positive performance reviews and letters of recommendation directed to the employee. (*Id.* at 259) *See also Stacey v. Allied Stores Corp.*, 768 F.2d 402 (D.C. Cir. 1985). The court ultimately concluded the employer did discriminate on the basis of age.

Discharging an employee, in the protected age group, who is clearly better qualified for the position than younger employees who are retained usually can be deemed an unsuccessful technique. While the ADEA was not intended to turn the courts into personnel managers, the enormity of a "mistake" may cause intense scrutiny of the decision. *Thornbrough v. Columbus and Greenville R.R.*, 760 F.2d 633, 647 (5th Cir. 1985) As the Fifth Circuit recently stated:

> [I]f the factfinder determines that [the plaintiff] was clearly better qualified than the employees who were retained, it is entitled to conclude that the [employer's] articulated reasons are pretexts. Everyone can make a mistake—but if the mistake is large enough, we may begin to wonder whether it was a mistake at all.

An employer's own existing policies for dealing with reductions-in-force can

cause trouble for it in an ADEA matter. For example, even though an employer is not obligated to create or locate another job for a discharged employee (see *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 920 [2d Cir. 1981]), if the employer's normal practice is to do so, then failure to do it for an older employee can cause problems for the employer. *Curto v. Sears, Roebuck & Co.*, 38 Fair Empl. Prac. Cas. [BNA] 547, 551 (N.D. Ill. 1984) Likewise, if the employer's established procedure for implementing a reduction-in-force is to institute a hiring freeze and not fill vacancies as they occur, then the discharge of an older employee in the face of such a policy clearly makes the employer's motives suspect. *See Oxman v. WLS-TV*, 609 F. Supp. 1384, 1392, 1394 (N.D. Ill. 1985).

Other employers are unsuccessful in ADEA cases because of their failure to recognize the importance of their own conduct prior to a reduction-in-force decision. One employer's favorable summary judgment ruling was reversed in large part because of a statement attributed to the employer that "the Company was going to have to get rid of some of its older employees and get a young, aggressive organization in place for when the economy turned around." *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 94 (7th Cir. 1985) Comments from management about its "cadre of young chargers," its need for a "youthful image" or its desire for "young and aggressive" employees will almost certainly lead to an unfavorable decision for the employer. *See Stacey v. Allied Stores Corp.*, 768 F. 2d 402, 404, 405 (D.C. Cir. 1985); *Hawks v. Ingersoll Johnson Steel Co.*, 38 Fair Empl. Prac. Cas. [BNA] 93, 95 (S.D. Ind. 1984)

VI. Early Retirement Plans

Another technique for accomplishing a reduction-in-force is the implementation of "early retirement" plans. By offering severence pay and benefits sufficient to induce an employee to retire early, an employer can reduce his workforce. Properly implemented, early retirement plans do not per se violate the ADEA. In the previously cited case of *Coburn v. Pan American World Airways*, 711 F.2d 339, 344 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983), the court stated:

> Early retirement is a common corporate practice utilized to prevent individual hardship. It is a humane practice, well-accepted by both employers and employees, and is purely voluntary. The evidence showed that Pan Am was justified in attempting to reduce its costs, and voluntary retirement was clearly a fair attempt to do so. It supports not a hint of age discrimination.

However, in its first formal opinion letter regarding the ADEA since it assumed enforcement authority for it in 1979, the EEOC has determined that a company's refusal to consider rehiring an employee who left the company prior to age 70 under an early retirement plan violates the ADEA. *Daily Labor Report* No. 246, at D-1, December 21, 1983 [BNA] Thus, employees who "voluntarily" accept the benefits and incentives under an early retirement program and "retire" may turn around and seek re-employment and may not be rejected solely because of their age or their status as "retirees."

Citing the 1978 amendments to the ADEA as clarifying the intention of congress not to permit the mandatory retirement of persons within the protected age group, the commission concluded that a holding that retirees must be considered for rehire would not be "contradictory." The commission also observed that the analysis with respect to employees who retire as a result of "special incentives" is no different.

The only exception to this position taken by the EEOC concerns employees in bona fide executive or high policy-making positions. These employees, who may be involuntarily retired between ages 65 and 70 under existing provisions of the ADEA, need not be reconsidered for other executive or policy-making positions. They do not, however, forfeit their right to apply for other lesser positions within the company.

VII. Remedies

The ADEA incorporates the remedy provisions of §§ 16 and 17 of the Fair Labor Standards Act, codified at 29 U.S.C. §§ 216-217. See 29 U.S.C. §§ 1626(b). In addition, §§ 1626(b) provides that the court "shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation, judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." Also, as a result of the incorporation of 29 U.S.C. §216(b), reasonable attorneys' fees and costs are recoverable by a successful plaintiff in an ADEA suit.

The courts are in general agreement that punitive damages and damages for pain and suffering are not recoverable in an ADEA case. *See Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982); *Dean v. American Security Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); *Smith v. Montgomery Ward & Co.*, 567 F. Supp. 1331 (D. Colo. 1983). The U.S. Supreme Court recently has opined on the standard of review for determining a willful violation of the ADEA for the purpose of awarding liquidated damages. *Trans World Airlines v. Thurston*, U.S., 105 S. Ct. 613 (1985)

Until recently, one area of disagreement among the courts regarding damages concerned the ability of a court to award "front pay" as opposed to being limited to ordering reinstatement of the employee. "Front pay" means a loss of wages expected to be earned in the future by the employee if the employee had not been unlawfully treated. The great

weight of authority among the circuit courts permits awards of front pay in an ADEA case, particularly when reinstatement of the employee is not feasible because of hostility and outrage exhibited by the employer toward the employee, as a result of the lawsuit. *See, e.g., Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727 (2d Cir. 1984); *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1219 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1551 (llth Cir. 1984). The basis of an award of front pay rests on the equitable nature of the relief permitted by the ADEA. *See* 29 U.S.C. § 626[b]. As the Sixth Circuit stated in *Davis, supra*, "'Front pay' does not appear to lend itself to a per se rule. It is neither mandated nor prohibited by the Act. Rather, it is but one of a broad range of remedial measures available under the ADEA." *Davis* at 922-23

The courts that previously denied awards of front pay did so generally because of the speculative nature of front pay awards. *See., e.g., Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 n.4 (lst Cir. 1982); *Foit v. Suburban Bancorp*, 549 F. Supp. 264 (D. Md. 1982). This is especially true when the plaintiff may still be relatively young—between 40 and 50 years old. *Monroe v. Penn-Dixie Cement Corp.*, 355 F. Supp. 231, 235 (N.D. Ga. 1971) The First Circuit, incidentally, recently reversed its decision in Kolb and now permits awards of front pay. *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 614-16 (lst Cir. 1985) Obviously, however, an employee cannot recover both front pay and seek reinstatement to his position. That would amount to double recovery and is not permitted. *See Grecco v. Spang & Co.*, 566 F. Supp. 413 (W.D. Pa. 1983).

VIII. Conclusion

As the workforce continues its aging process, and the economy fluctuates, the number of age discrimination cases will continue to increase. It is hopeful this material will provide some helpful hints to either avoid, or successfully respond to, charges of age discrimination. ■

Richard E. Neal received his undergraduate degree from the University of the South, graduate degree from the University of Alabama and law degree from the University of Alabama School of Law. Neal is an associate with the Birmingham firm of Sirote, Permutt, Friend, Friedman, Held & Apolinsky.

cle opportunities

march

20 thursday

MEDICAL MALPRACTICE
Governors House, Montgomery
Alabama State Bar
Credits: 3.0 Cost: included in Midyear Meeting registration fee
(205) 269-1515

21 friday

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Alabama Bar Institute for Continuing Legal Education
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21-22

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22-23

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24-26

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28 friday

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april

3-4

EMPLOYMENT LITIGATION
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Practising Law Institute
Credits: 12.0 Cost:$390
(212) 765-5700

4 friday

MEDICAL MALPRACTICE IN ALABAMA
Sheraton Riverfront, Montgomery
National Business Institute
Credits: 7.2 Cost: $96
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4-5

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MGM Grand, Las Vegas
National Association of School Board Attorneys
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10 thursday

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10-11

AGRICULTURAL WORKOUTS AND BANKRUPTCIES
Hyatt Regency, San Francisco
Practising Law Institute
Credits: 10.5 Cost: $390
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11 friday

OIL, GAS AND MINERAL LAW
Riverview, Mobile
Alabama Bar Institute for Continuing Legal Education
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11-12

TRYING CASES TO WIN
Nashville
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14-15

REAL ESTATE DEVELOPMENT AND CONSTRUCTION FINANCING
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17 thursday

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National Business Institute
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17-18

HAZARDOUS WASTE LITIGATION
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Practising Law Institute
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17-19

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ALI-ABA
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18 friday

CONSTRUCTION LAW AND CREDITORS' RIGHTS
Hyatt, Birmingham
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(715) 835-8525

BRIDGE-THE-GAP
Civic Center, Birmingham
Alabama Bar Institute for Continuing Legal Education
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22 tuesday

DEFENDING FRAUDULENT CLAIMS
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23-25

WORKER'S COMPENSATION
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25 friday

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25-26

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Sheraton Riverfront, Montgomery
Montgomery County Trial Lawyers
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may

8-9

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Southwestern Legal Foundation
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8-18

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19-25

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29-30

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■

Alabama Poets

Several months ago **The Alabama Lawyer** announced that it would sponsor a poetry contest urging "budding poets" to submit their entries for consideration. Rather than selecting a single winning entry, it was decided to publish several of the poems submitted. A purely arbitrary, but certainly quite worthy, selection of "winners" is published below.

—the editor

Greenhouse Cathedral

A church or two have I been
Far away and none too new,
Patrick's spires, Montezuma's gold,
St. Louis' pride, Rheims of old.
God is there and a saint or two,
But nearer to Him than all buildings bold
Is the long tall pine, the hickory's gold,
A wren that flits, a cardinal's flash,
A big hawk's shadow, a beaver's splash,
A doe, all grace—all delicately done—
The buck so rare, like the Son
A crown of thorns does he bear,
Remembering our Hope, there's no despair.
God made the Greenhouse land,
And gave His beauty to its span.
Listen well to preacher and priest,
But ye must most plainly see
God's presence on every tree.
No church, temple, or cathedral grand
Compare with the works of God's own hand.

N.T. Braswell, Montgomery

Conscience

First philosopher speaks:
We are but wings
soaring in the brief sunshine of life.
As the bird who soars impervious to the
demands of immortal conscience which
he vain possesses.

Second philosopher speaks:
Are we but wings soaring
in the brief sunshine of life?
Nay! Tho we soar, our conscience immortal,
always before.

W. Sidney Fuller, Andalusia

A Dog River Morning

dull gray,
silent, occasional bird,
a rooster's crow, a jet plane's roar,
autos' hum from the interstate.

The sun is hiding behind the trees
Across the river,
And the shadows of the trees
Stretch nearly to the other bank.

Wet grass,
Mosquitoes who haven't retired,
A few pointed rays of the sun,
Extended shadows on the water,
The grains in the water sparkle,

And suddenly,
The sun outgrows the trees in height
Across the river.
Orange is sandwiched between shades of black,
A curtain of black in the sky above.

Noises rise to a steady hum
Of autos, crickets, birds in distance;
Water on the grass glistens;
The tide has filled the water to the full;
The shadows form and darken under the trees,
Gray paint hangs upon the water of the river.
Whatever day is yet to come,
Has suddenly formed,
And is here,
In glory or regret.

Charles Reeder, Mobile

Social Security Disability Act

A two-paged article appeared in the November 1985 issue of *The Alabama Lawyer* and addressed "Recent Developments Concerning Eligibility for Social Security Disability." I would like to briefly point out a couple of areas in which this article needs a bit of explanation.

The Social Security Disability Benefits Reform Act of 1985, Pub.L. No. 98-460, 98 Stat. 1794 (1984), has changed current standards for disability evaluation in a number of areas. As mentioned in the article, Section 4 of the Act requires the Secretary to consider "the combined *effect* of all of the individual's impairments." Pub.L. No. 98-460, 98 Stat. 1794, 1800 (1984) (emphasis added). Prior to this legislation, two specific regulations governed the Secretary's evaluation of multiple impairments. 20 C.F.R. §404.1522, 404.1523 (1985) These regulations state that the effect of multiple impairments must be considered in combination unless such impairments are unrelated to each other. The case law interpreting these regulations held that the Secretary must consider the combined effect of a claimant's impairments and make specific findings reflecting this consideration. *Reeves v. Heckler,* 734 F.2d 519 (11th Cir. 1984); *Wiggins v. Schweiker,* 679 F.2d 1387 (11th Cir. 1982) In *Bowen v. Heckler,* 748 F.2d 629, 635 (11th Cir. 1984), the Court stated that prior decisions such as these were "bolstered by the recently enacted Social Security Disability Benefits Reform Act of 1984" and held that, in appropriate cases, a claimant may be found disabled on the basis of multiple impairments even though none of the individual impairments would be disabling standing alone. New regulations effectuating Section 4 of the Act have not yet been promulgated but should be available in the near future. These regulations should make it clear that it is the effect of a claimant's impairments on his ability to work, not the impairments themselves, that must be considered in combination for the purpose of disability determination.

The article is also ambiguous in its discussion of attorney's fees. The author encourages attorneys to represent claimants in disability litigation because of the availability of attorney's fees under both the Equal Access to Justice Act ("EAJA") and the Social Security Act, specifically 42 U.S.C. §406(b)(1). The Social Security Act provides that an attorney may be awarded a fee not exceeding twenty-five percent of a claimant's past-due benefits when the court renders a decision favorable to the claimant. Twenty-five percent of past-due benefits is withheld from the claimant by the Social Security Administration to be released to the attorney upon court order or administrative authorization of fees. The article states that attorney's fees awarded pursuant to EAJA are "taken on top of" any amount awarded under the Social Security Act. This statement is somewhat ambiguous. No attorney may be awarded an amount in excess of twenty-five percent of the claimant's past-due benefits. 42 U.S.C.§406(b) Therefore, the question becomes whether the claimant pays the attorney's fee from his withheld benefits or whether the government pays the fee pursuant to EAJA.

In support of his statement that EAJA fees may be taken "on top of" fees under the Social Security Act, the author cites *Love v. Heckler,* 558 F.Supp. 1346 (M.D. Ala. 1984). The *Love* case was a case where the Social Security Administration terminated the claimant's benefits without showing medical improvement. *See, Simpson v. Schweiker,* 691 F.2d 966 (11th Cir. 1982). Therefore, the *Love* court awarded attorney's fees pursuant to EAJA because it found that the Secretary's action was not substantially justified. The court did not award EAJA fees "on top of" the attorney's fee available under the Social Security Act in the sense that the attorney received both twenty-five percent of the claimant's past-due benefits plus fees under EAJA. Rather, the government paid the claimant's attorney's fee pursuant to EAJA. An amount equivalent to the EAJA fee was then released to the claimant from the benefits withheld for attorney's fees under the Social Security Act.

Additionally, the August 5, 1985 amendments to EAJA specifically addressed this issue:

> (b) Section 206(b) of the Social Security Act (42 U.S.C. 406[b][1]) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.

28 U.S.C. §2412 (amended on Aug. 5, 1985 by Pub.L. No. 99-80, 99 Stat. 183 [1985]) Thus an attorney may, in a sense, receive EAJA fees "on top of" a Social Security Act attorney's fee. However, as the amendment indicates, the attorney must refund the amount of the smaller of the two fees to the claimant.

The article also discusses the use of the "grids" to help determine disability. The "grids," or Medical-Vocational Guidelines found at 20 C.F.R. Part 404, Subpart P, Appendix 2 (1985), are tables which take a claimant's age, education, work experience, and his remaining capacity for work into consideration, all based upon

legislative facts, and direct findings of disabled or not disabled which are subject to rebuttal. 20 C.F.R. Part 404, Subpart, P, Appendix 2§200.00(a) (1985) The use of the grids has been upheld by the Supreme Court in *Heckler v. Campbell*, 461 U.S. 458, 103 S.Ct. 1952 (1983). Eleventh Circuit case law has directed that the grids should not be applied mechanically and that the claimant should be given an opportunity to rebut his age category by showing that his ability to adapt is less than that of the normal person of his age. *Reeves v. Heckler*, 734 F.2d 519 (11th Cir. 1984); Broz v. Schweiker, 677 F.2d 1351 (11th Cir. 1982); *vacated and remanded sub nom. Heckler v. Broz*, 77 L.Ed.2d 1311, *adhered to*, 711 F.2d 957, *modified*, 721 F.2d 1297 (11th Cir. 1983). The article implies that the new Act will alter the use of the age grids. However, the new Act makes no such changes.

Some of the other areas which have been added or revised by the new Act are the mental impairment guidelines, the listing of impairments in Appendix 1 of 20 C.F.R. Part 404, and the medical improvement guidelines. These revisions represent an update in the objective criteria used to evaluate disability to take diagnostic and treatment advances into consideration. The new mental impairment guidelines were published on August 28, 1985 at 50 Fed.Reg. 35,038 (1985). The regulations containing revisions to the listing of impairments were published on December 6, 1985 at 50 Fed.Reg. 50,068 (1985). The final medical improvement regulations, also published on December 6, may be found at 50 Fed.Reg. 50,118 (1985).

The foregoing substantive law materials were prepared and written by:

Ms. Jenny L. Smith
Assistant United States Attorney
Northern District of Alabama

The article appearing in the November issue of this publication is helpful to Alabama attorneys. I hope the foregoing comments will likewise be of benefit.

Frank W. Donaldson
United States Attorney
Northern District of Alabama

Young Lawyers' Section

J. Bernard Brannan, Jr.
YLS President

The 1985-86 bar year for the Young Lawyers' Section is three quarters past. Although it is not yet time to reflect upon the accomplishments of the section, it is time to determine how we are progressing toward the goals we set in July. We must evaluate our progress and make whatever adjustments necessary to insure a successful year.

At the beginning of this year, we set two far-reaching goals—for the section to be of service to the members of the profession at the first stages of their development as lawyers and to provide public service encouraging a more positive image of lawyers to the rest of the community. To accomplish this, we sought the involvement of young lawyers throughout the state who previously had not taken part in the decision-making process of the section, but had displayed an interest and desire to better our profession and, as usual, we relied on the leadership of other young lawyers active in the section for years.

This year, we have had eight new appointees to the executive committee, and they each have contributed much hard work and many great ideas. To continue to find projects to serve our fellow lawyers and the public, we encouraged the attendance of the membership of the executive committee at affiliate outreach programs and seminars sponsored by the American Bar Association YLS. Four members of our section attended the Midyear Meeting of the ABA/YLS in Baltimore in February. They were President-elect Claire Black and Ron Davis of Tuscaloosa, Keith Norman of Montgomery and Rick Kuykendall of Birmingham. They returned to us with a wealth of information designed to improve our association.

The Section's Executive Committee met February 1 at the Grande Hotel in Point Clear; since the meeting was in the off-season for the hotel, Charlie Mixon was able to arrange outstanding accommodations at a rate reasonable enough to insure an excellent turnout. The meeting gave us an opportunity to evaluate where we stood regarding our goals. We are on track toward an extremely successful year of service to our profession, as we expect participation in the three CLE seminars provided in the spring: the Bridge-the-Gap Seminar, the Conference on the Professions and the annual Sandestin seminar.

Also, plans are being made for our section to provide help and support for the bar's Committee on Lawyer Alcohol and Drug Abuse. It appears that by July we will be able to boast of a productive year providing public service. Percy Badham is laying the groundwork for a possible grant from the ABA to help administer the Youth Legislative Judicial Program which Keith Norman has chaired for the YLS. Lynn McCain and her committee are preparing for the YLS' involvement in a community education project next year celebrating the bicentennial of the United States Constitution.

Even though each committee appears to be either on or ahead of schedule, I am sure we can expect, as always, the last three months of the bar year to be busy and, at times, almost hectic, as we strive to make ours the greatest profession of all. From what I have observed, the committee chairmen of your YLS accept this hard work as a labor of love and, because of their diligence, mine has been an easy job.

We encourage your input and your suggestions, as we are here to serve you. If you have any project in which you are particularly interested or any questions about the activities of the YLS, please call me or any member of the executive committee. ■

About Members, Among Firms

ABOUT MEMBERS

Vanzetta Penn Durant is pleased to announce she is now engaged in the practice of law as **Vanzetta Penn McPherson.**

■

Brian Dowling announces the relocation of his office to 134 South Oates Street, Dothan, Alabama. Phone 793-2798.

■

J. Michael Conaway announces the relocation of his law office to 1107 North Cherokee, Dothan, Alabama, 36303. Phone 792-6752.

■

John W. Adams, Jr., PC, announces the removal of its offices to Suite 2508 First National Bank Building, Mobile, Alabama, 36602. Phone 433-8464.

■

Richard C. Bentley, formerly of Montgomery, Alabama, is board certified in personal injury trial law by the Texas Board of Legal Specialization, State Bar of Texas.

■

John Bahakel announces the opening of his offices in the Legal Arts Building, in association with **Bahakel & Bahakel Attorneys,** 2131-12th Avenue North, Birmingham, Alabama, 35234. Phone 328-9796.

■

Earl L. Dansby announces the relocation of his office to 418 Scott Street, Montgomery, Alabama, 36104. Phone 265-3493.

■

Tuskegee attorney **Ernestine Sapp** has been invited to be a member of an American Legal Team visiting China in April at the invitation of the Chinese Ministry of Justice and under the auspices of the Citizen Ambassador Program of People to People International. The leader of this legal delegation is former Chief Justice of the Florida Supreme Court, Arthur J. England, Jr.

■

Montgomery attorney **Calvin M. Whitesell** currently is serving as vice chairman of the Administrative and Government Law Committee of the General Practice Section of the American Bar Association. The General Practice Section has more than 17,000 members throughout the United States. The Administrative and Government Law Committee coordinates the bar activities of general practice attorneys with special interest in that area of the law.

AMONG FIRMS

The firm of **Gray, Espy and Nettles** is pleased to announce **Richard Merrell Nolen** and **Mark Andrew Scogin** have become associated with the firm. Offices are located at 2728 8th Street, P.O. Box 2786, Tuscaloosa, Alabama, 35403. Phone 758-5591.

■

John W. Johnson, Jr.; James H. Caldwell; and **Claud E. McCoy, Jr.,** are pleased to announce the formation of a partnership for the general practice of law. The name of the firm shall henceforth be known as **Johnson, Caldwell and McCoy, Attorneys at Law.** The firm's office shall continue to be located in the Johnson Building at 113 North Lanier Avenue, Lanett, Alabama, 36863. Phone 644-1171.

■

H. Lewis Gillis and **Charles R. Nesbitt** are pleased to announce the formation of their firm for the general practice of law under the name of **Gillis & Nesbitt, PC.** Offices are located at 434 Sayre Street, Montgomery, Alabama, 36104, phone 262-1774, and P.O. Box 639, Hayneville, Alabama, 36040, phone 548-2714.

■

The firm of **Reid, Stein & Smith** is pleased to announce **Richard E. Bass** has become a member of the firm, and the name of the firm has been changed to **Reid, Stein, Smith & Bass.** Offices remain at 50 S. Greeno Office Park, Suite B, P.O. Box 416, Fairhope, Alabama, 36533. Phone 928-1355.

■

The State Department of Education is pleased to announce **Denise B. Azar** and **Jim R. Ippolito, Jr.,** have joined its office of general counsel. Offices are located at 609 State Office Building, Montgomery, Alabama, 36130. Phone 261-5320.

■

Hand, Arendall, Bedsole, Greaves & Johnston, 30th Floor, First National Bank Building, Mobile, Alabama, takes pleasure in announcing **Rayford L. Etherton, Jr.,** and **M. Mallory Mantiply** have become members of the firm.

■

G. Thomas Yearout takes pleasure in announcing **Brett N. Blackwood** has become associated with him, with offices at Suite 515 Brown Marx Tower, Birmingham, Alabama. Phone 328-4156.

■

Judy D. Thomas, attorney at law, and **John R. Huthnance,** formerly associate counsel for the Alabama Department of Insurance, are pleased to announce the formation of a partnership under the name of **Thomas and Huthnance.** Offices are at 1410 Second Avenue East, Oneonta, Alabama, 35121. Phone 625-3973.

The law firm of **Longshore and Longshore** is pleased to announce **Michael J. Evans** has joined the firm, and the firm's name has been changed to **Longshore, Evans and Longshore.** Offices are located at 423 Frank Nelson Building, Birmingham, Alabama, 35203. Phone 252-7661.

■

The law firm of **Mandell & Boyd** is pleased to announce **Algert S. Agricola, Jr.,** former assistant attorney general in the civil litigation section of the Alabama Attorney General's Office, has joined the firm. Offices are at 25 South Court Street, P.O. Box 4248, Montgomery, Alabama, 36103. Phone 262-1666.

■

The law firm of **Smith, White & Hynds, PA,** announces the firm name has been changed to **Smith, Hynds, Blocker & Lowther, PA.** Offices remain at 1624-2121 Building, Birmingham, Alabama, 35203. Phone 328-4444.

■

The law firm of **Pappanastos & Samford, PC,** is pleased to announce the relocation of their offices for the general practice of law to the fourth floor, Washington Court Building, 25 Washington Avenue, P.O. Box 1402, Montgomery, Alabama, 36102. Phone 262-1600.

■

Farmer, Price, Espy & Smith takes pleasure in announcing **Fred Lenton White** has become associated with the firm. Offices are located at 115 West Adams Street, Dothan, Alabama, 36302. Phone 793-2424.

■

Frank J. Tipler, Jr., and **James Harvey Tipler** announce the opening of new offices on the Gulf Coast of Florida and the admission of **James Harvey Tipler** to practice before the courts of Alabama and Florida. Offices are located at The Tipler Building, P.O. Box 1397, Andalusia, Alabama, 36420, 222-4148; The Malibu Center, Suite E-9, 23410 Civic Center Way, Malibu, California, 90265, (213) 456-1941; and Shoreline Village, Suite 102, 884 Highway 98 East, Destin, Florida, 32541, (904) 837-0555.

■

The firm of **Miller, Hamilton, Snider & Odom** is pleased to announce **Bradley R. Byrne** and **George A. LeMaistre, Jr.,** have become partners of the firm, and **Mark J. Tenhundfeld** and **Matthew C. McDonald** have become associated with the firm. Offices are at 254-256 State Street, Mobile, Alabama, 36603.

■

Eric A. Bowen, Gregory A. Carr and **Richard A. Lawrence** are pleased to announce the formation of a partnership in the name of **Bowen, Carr & Lawrence.** Offices are located at 418 Scott Street, Montgomery, Alabama, 36104. Phone 269-5900.

■

G. Randall Spear and **Dewey W. Teague** take pleasure in announcing the formation of their partnership, **Spear & Teague,** at 403-B East Magnolia Avenue, Auburn, Alabama, 36830. Phone 887-5809.

■

The law firm of **Dortch, Wright & Russell** takes pleasure in announcing **David C. Livingston** will thereafter be associated with the firm, located at 239 College Street, P.O. Box 405, Gadsden, Alabama, 35902. Phone 546-4616.

■

The law firm of **Cervera and Ralph** takes pleasure in announcing **Thomas K. Brantley, Jr.,** has become associated with the firm. Offices are located at 914 S. Brundidge Street, Troy, Alabama, 36081. Phone 566-0116.

■

The law firm of **Johnstone, Adams, Howard, Bailey and Gordon** takes pleasure in announcing **James H. Frost** has become a member of the firm, and **R. Gregory Watts, John A. Carey, C. Grantham Baldwin** and **Michael C. White** have become associated with the firm. Offices are at 104 St. Francis Street, Mobile, Alabama.

■

Thomas Reuben Bell, Attorney, PA, and **Michael W. Landers,** Attorney, announce the formation of the partnership of **Bell and Landers** for the practice of law, with offices at 223 North Norton Avenue, Sylacauga, Alabama, 35150.

■

The law firm of **St. John & St. John** is pleased to announce the association of **Frank Williams, Jr.** Offices are located at 108 3rd Street, SE, P.O. Drawer K, Cullman, Alabama, 35056. Phone 734-3542.

■

Paul Langon Sotherland has become an associate with the Birmingham firm of **Sadler, Sullivan, Sharp & Stutts, PC.** Sotherland served as law clerk with **Sadler, Sullivan, Sharp & Stutts** prior to his admittance to the Alabama State Bar.

■

Ramsey K. Reich has joined the insurance brokerage and employee benefits consulting firm of **Johnson & Higgins of Alabama, Inc.,** in the capacity of senior consultant. His office is located on the fourth floor of the First Alabama Bank Building in Birmingham, Alabama. Phone 583-3770.

■

Norman, Fitzpatrick & Wood is pleased to announce **Michael K. Wright** and **Robert L. Williams** have become partners of the firm, and the firm name is changed to **Norman, Fitzpatrick, Wood, Wright & Williams.** Offices are located at 1100 City Federal Building, Birmingham, Alabama, 35203. Phone 328-6643.

Scope and Application of the Atto

Designed to protect the confidential relationship between attorney and client, the attorney-client privilege operates to prevent compelled disclosure of communications made for the purpose of seeking legal advice. All American courts recognize and agree upon the basic elements of the privilege:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is (a) a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950) The privilege rests upon two principal policy justifications. First, by encouraging truthfulness and full disclosure in communications between an attorney and client, the privilege helps assure effective and reliable advice. *See, e.g., Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). Second, by promoting voluntary compliance with the law, the privilege is considered to facilitate the administration of justice. *Natta v. Hogan,* 392 F.2d 686, 691 (10th Cir. 1968)

Although originally held by the attorney, the privilege now is viewed as the sole prerogative of the client.[1] While only the client can raise or waive the privilege, an attorney has a professional obligation to advise a client of the existence of the privilege and assert it on the client's behalf in appropriate circumstances. *Code of Professional Responsibility of the Alabama State Bar,* EC 4-4, DR 4-101(B)

In state courts, the privilege is based upon common law or statute. For the most part, statutory formulations simply enact or clarify common law principles. *See, e.g., Ala. Code* §12-21-161 (1975). In federal courts, the privilege generally is a question of state law in diversity actions and of federal common law in federal question actions. Fed. R. Evid. 501 accordingly provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Notwithstanding the provisions of the rule, however, federal common law may apply in federal court actions in which both federal and state law claims are litigated. *See Perringnon v. Bergen Brunswig Corp.*, 77 F.R.D. 455 (N.D. Cal. 1978).

Choice of law rules generally call for application of the "law of the state which has the most significant relationship with the communication," unless the "strong public policy of the forum" calls for a different result. Section 139 of *The Restatement (Second) of Conflict of Laws* expresses the policy that the least restrictive state law should apply, a view consistent with the principle that the privilege is to be strictly construed. *See Diversified Industries, Inc. v. Meredith,* 572 F.2d 596 (8th Cir. 1978).

The Nature of the Communication

At the heart of the privilege is the existence of a communication between an attorney and client. For purposes of the

rney-Client Privilege – an Overview

by Lee H. Zell

privilege, a "communication" includes gestures or other wordless actions as well as any oral or written transfer of information. *Cooper v. Mann,* 273 Ala. 620, 143 So. 2d 63 (1963) (The privilege applies to all knowledge acquired by an attorney, even if acquired through sight alone.) *Compare In re Walsh,* 623 F.2d 489 (7th Cir.), *cert. denied,* 449 U.S. 994 (1980) (suggesting client's appearance may be observed by anyone and hence is not confidential). *See* American Bar Association ("ABA"), Section of Litigation, *The Attorney-Client Privilege And the Work Product Doctrine* 13 (1983) (criticizing *Walsh,* and noting that if a client wearing bloodstained clothes goes to his attorney for advice, this constitutes a communication that should be protected).

The privilege immunizes only the factual content of a communication. The facts themselves, if learned from another source, are not protected from disclosure. *See, e.g., Kling v. Tunstall,* 124 Ala. 268, 227 So. 420 (1900). The privilege generally operates to protect communications by an attorney to a client as well as by a client to an attorney. *In re Fischel,* 557 F.2d 209, 211 (9th Cir. 1977), "Ordinarily the compelled disclosure of an attorney's communications or advice to the client will effectively reveal the substance of the client's confidential communication to the attorney. To prevent this result, the privilege normally extends both to the substance of the client's communication as well as to the attorney's advice in . . . response thereto." *Compare SCM Corp. v. Xerox Corp.,* 70 F.R.D. 508, 518, 523 (D. Conn.), *appeal dismissed,* 534 F. 2d 1031 (2d Cir. 1976) ("[T]he attorney's opinions and legal theories, even if recorded in his own files [and not communicated to the client], are privileged under the narrow standard of [*United States v. United Shoe Machinery Corp.,* 89 F. Supp. 357 (D. Mass. 1950)] if they reveal information supplied in confidence by the client, but absent such information from the client, it is only the work product rule and not the [attorney-client] privilege that protects the attorney's uncommunicated expression of opinion.")

Communications between an attorney and client are protected by the privilege only when the client intended and expected at the time the communication was made that it would not be related to other persons. For example, in *Sovereign Camp, W.O.W. v. Pritchett,* 203 Ala. 33, 81 So. 823, 825 (1919), the contents of a letter were held not to be privileged when the letter showed on its face that it was intended to be communicated to a third party.

To be protected from disclosure, the information conveyed by the communication need not itself be confidential. All that is necessary is an intention that the information be conveyed in confidence. *In re Ampicillin Anti-Trust Litigation,* 81 F.R.D. 377, 389 (D.D.C. 1978) Lack of care or attention to preservation of the privileged nature of a communication may be found to indicate a lack of intention to maintain its confidentiality. *See Suburban Sew and Sweep, Inc. v. Swiss Bernina, Inc.,* 91 F.R.D. 254, 260 (N.D. Ill. 1981) (Lack of care was evident where allegedly "privileged" documents had been retrieved from a trash dumpster by an opposing party.)

Communications made in the presence of third parties also may indicate the absence of an intention that the communication be or remain confidential. See *Fuller v. State,* 34 Ala. App. 211, 39 So. 2d 24 (1949). The absence of such an intention, however, will not be inferred in all circumstances. For example, the presence of an eavesdropper does not destroy the privilege unless the eavesdropping was foreseeable. *People v. Decina,* 2 N.Y.2d 133, 157 N.Y.S.2d 558, 569 (1956) The presence of parties having a commonality of interest does not render the privilege inapplicable, either. *See Baldwin v. Commissioner,* 125 F.2d 812 (9th Cir. 1942) (presence of son during communications between mother and attorney concerning a proposed transfer of property to the son did not waive the privilege in a subsequent dispute between the IRS and the mother's estate). In a dispute arising subsequent to privileged communications between or among parties sharing a common interest, however, the privilege does not immunize previous communications between the parties and their respective attorneys. *See Grand Truck Western Railroad Company v. H. W. Nelson Company,* 116 F.2d 823 (6th Cir. 1941).[2]

To be privileged, a communication must have been conveyed by or to an attorney. The attorney must have been a licensed member of the bar at the time the communication was made. 8 J. Wigmore, *supra* §2300 at 580-81 n.1. In Alabama, "[t]he privilege does not include communications made by one person to another under the erroneous supposition that the other is an attorney." *Hawes v. State,* 88 Ala. 37, 7 So. 302, 313 (1889)[3]

In order to qualify for the protection afforded by the privilege, a communication must be to or from an attorney acting in that capacity. Moreover, the communication must express or imply a request for legal assistance. *See Burlington Industries v. Exxon Corp.,* 65 F.R.D. 26, 37-39 (D. Md. 1974). The assistance requested must require or contemplate the performance of services requiring legal skill. *See, e.g., State v. Marshall,* 9 Ala. 302 (1845).

Generally, then, the privilege will apply only to services involving the "application of law to facts or the rendering of an opinion in response to the client's legal inquiries." *Puerto Rico v. SS Zoe Colocotroni,* 61 F.R.D. 653, 660 (D.P.R.

1974) Consequently, courts frequently have held that communications concerning business rather than legal advice, or those relating to buisness negotiations, are not privileged. *See, e.g., United States v. International Business Machines Corp.*, 66 F.R.D. 206 (S.D.N.Y. 1974); *J.P. Foley & Co. v. Vanderbilt*, 65 F.R.D. 523 (S.D.N.Y. 1974). Communications made in the context of tax return preparation or accounting matters may or may not be privileged, depending upon the services sought or performed by the attorney. *Compare Olender v. United States*, 210 F.2d 795 (9th Cir. 1954); *United States v. Davis*, 636 F.2d 1028 (5th Cir. 1981); and *Canaday v. United States*, 354 F.2d 849 (8th Cir. 1966), *with Henry v. Colton*, 201 F. Supp. 13 (S.D.N.Y. 1961), *aff'd.* 306 F.2d 633 (2d Cir. 1962), *cert. denied sub nom. Colton v. United States*, 371 U.S. 951 (1963); *United States v. Schmidt*, 360 F. Supp. 339 (M.D. Pa. 1973), and *United States v. Summe*, 208 F. Supp. 925 (E.D. Ky. 1962).

An attorney's performance of investigative or information-gathering functions may or may not be protected by the privilege. *Compare Bird v. Penn Central Co.*, 61 F.R.D. 43 (E.D. Pa. 1973), *with Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), *modified en banc*, 572 F.2d 606 (8th Cir. 1978). To the extent that communications concerning such functions are immunized from disclosure, however, it should be noted preexisting records or documents do not acquire protection simply by virtue of having been furnished to counsel. *See, e.g., Fisher v. United States*, 425 U.S. 391, 403-04 (1976).[4]

Communications to an attorney merely as a friend or relative are not privileged. *See Modern Woodman of America v. Witkins*, 132 F.2d 352, 354 (5th Cir. 1942). Communications with non-lawyers who in some respect are acting for the lawyer, however, may be protected. In general, protection will be afforded to communications with accountants or investigators if they are employed to assist a lawyer in the performance of legal services. *See* 2 J. Weinstein & M. Berger, *Weinstein's Evidence*, §503(a)(3)(01) at 503-25 (1981), *but see In Re Grand Jury Proceedings*, 658 F.2d 782 (10th Cir. 1981). Ala. Code§12-21-161 (1975), which codifies the privilege (at least in part), immunizes communications to an "attorney or his clerk." Communications to an attorney's agents or clerks will be protected, however, only where the client was aware of the non-lawyer's relationship with the attorney. *Hawes v. State*, 88 Ala. 37, 7 So. 302, 313 (1889), ("Communications made to a person who was in fact the agent or clerk of an attorney, but of which fact the other was not advised, could not have been confidentially imparted, or made with a view to their being repeated to an attorney, and are not privileged.")

A "client," for purposes of the privilege, includes not only a person for whom legal services actually are performed, but also a person seeking to establish an attorney-client relationship. Thus, the privilege likely will apply even if a prospective client subsequently does not retain the attorney or the attorney declines the employment. *See State v. Talley*, 102 Ala. 25, 15 So. 722, 725 (1894). Communications between an attorney and a third-party employed by or representing a client are not privileged, even though the information sought or obtained relates to the attorney's legal advice to the client. *See In re Bretto*, 231 F. Supp. 529 (D. Minn. 1964). (Communications between the client's bank and attorney, although designed to obtain information in connection with the attorney's preparation of a will, were not protected from disclosure in response to an IRS subpoena.) See *Bacalis v. State*, 204 Ala. 345, 86 So. 92 (1920) (Privilege does not apply to communications between an attorney and solicitor regarding the client's immunity from criminal prosecution.)

The Scope of the Privilege in Corporate Communications

The policy justifications upon which the privilege is premised fully support its application to corporations. Although it is well established that a corporation may assert the attorney-client privilege (*e.g., Garner v. Wolfinbarger,* 430 F.2d 1093 [5th Cir. 1970]), the courts have struggled for years to place reasonable restrictions on the scope of the privilege when asserted by a corporation. These efforts have focused principally upon identifying those individuals who truly act or speak for the corporation.

Prior to 1981, courts employed variations of the "control group" and "subject matter" tests to determine whether communications between an attorney and particular corporate employees were communications between an attorney and a "client." Under the control group test, communications were considered privileged "if the employee making the communications, of whatever rank . . . , [was] in a position to control or even to take a substantial part in a decision about any action which the corporation [took] upon the advice of the attorney, or if he [was] an authorized member of a body or group which [had] the authority." *Natta v. Hogan,* 392 F.2d 686, 692 (10th Cir. 1968) Under the subject matter test, the privilege applied if a corporate employee, "though not a member of [the corporation's] control group. . .[made] the communication at the direction of his superiors . . . and . . . the subject matter . . . dealt with in the communication was the performance by the employee of the duties of his employment." *Harper v. Row Publishers, Inc. v. Decker,* 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd. per curiam,* 400 U.S. 348 (1971), *reh'g denied,* 401 U.S. 950 (1971)

In *Upjohn Co. v. United States,* 449 U.S. 383 (1981), the supreme court faced the issue of whether, in an IRS proceeding, a corporation should be required to provide information and documents relating to its internal investigation of payments made to foreign officials. The investigation, conducted by both in-house and outside counsel, had made use of written questionnaires directed to corporate officers and employees. Upjohn argued that communications made to counsel by all such employees were privileged; the court of appeals rejected this argument, holding instead that the privilege was applicable only to corporate representatives who were part of the "control group."

The supreme court unanimously reversed, concluding that the communications at issue were immunized by the privilege. Although it expressly rejected the control group test, the court declined to articulate a precise formula for determining the availability of the privilege with respect to communications between counsel and corporate employees. The opinion nevertheless identifies a number of factors to be considered in testing the applicability of the privilege, including (1) whether the purpose of the investigation was to permit counsel "to be in a position to give legal advice to the Company"; (2) whether the information upon which such legal advice would be premised was unavailable from high ranking (or control group) employees; (3) whether the communications "concerned matters within the scope of the employees' corporate duties"; (4) whether the employees interviewed by counsel were aware that the interviews were being conducted for the corporation to obtain legal advice; and (5) whether the communications were considered "highly confidential" when made, and whether the confidential status of such communications had been maintained. Although the decision in Upjohn embraces many elements of the subject matter test, the significance of the opinion lies principally in its emphasis upon a flexible and policy-oriented approach to deciding issues of privilege.

In general, when the elements of the privilege have been satisfied, communications are absolutely immunized from disclosure. Most courts, however, have recognized two exceptions to this rule. First, a communication relating to the ongoing or future commission of a crime or fraud is not protected by the privilege. *Polloch v. United States,* 202 F.2d 281 (5th Cir. 1973) Second, in a malpractice

suit by a client against an attorney, the parties' otherwise privileged communications are not immunized.

In addition, the privilege may not be absolute when an attorney or client occupies a fiduciary relationship with the party seeking disclosure. This is particularly true where it can be shown that a corporate representative's interests are adverse to those of the corporation itself or other persons to whom a fiduciary duty is owed. *See, e.g., Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971).

Since it operates as an exception to the evidentiary policy that all relevant facts be fully disclosed, courts strictly construe the attorney-client privilege. *See generally* 8 J. Wigmore, *supra,* §2292. Where it is to be asserted, the privilege must be affirmatively, specifically and timely raised. *See, e.g., United States v. United Shoe Machinery Corp.,* 89 F. Supp. 357 (D. Mass. 1950). Moreover, the presence of each element of the privilege must be demonstrated by the party seeking its protection. *See, e.g., FTC v. Lukens Steel Co.,* 444 F. Supp. 803 (D.D.C. 1977).

Waiver of the Privilege

The privilege of course is subject to the principles of waiver. Although waiver of the privilege generally must be voluntary and intentional, some courts have held that inadvertent disclosure of privileged information during discovery constitutes a relinquishment of its protection. *See, e.g., Underwater Storage, Inc. v. United States Rubber Co.,* 314 F. Supp. 546 (D.D.C. 1970).[5]

A corporation's board of directors or board of trustees may waive the privilege for the corporation. *See United States v. DeLillo,* 448 F. Supp. 840, 842-43 (E.D.N.Y. 1978). Similarly, senior in-house counsel for a corporation has been found to have authority to waive the privilege, even though the corporation had obtained outside counsel. *See Velsicol Chemical Corp. v. Parsons,* 516 F.2d 671 (7th Cir. 1977), *cert. denied* 435 U.S. 942 (1978), *but see Stewart Equipment Co. v. Gallo,* 32 N.J. Super. 15, 107 a.2d 527 (1954) (corporate vice-president, who was also a sales manager for the corporation, had no authority to waive the privilege for the corporation).

The disclosure of an otherwise privileged communication concerning a particular subject matter constitutes a waiver of all communications with respect to that subject matter. *Hercules, Inc. v. Exxon Corp.,* 434 F. Supp. 136, 156 (D. Del. 1977); *also Weil v. Investment/Indications Research and Management, Inc.,* 647 F.2d 18, 23 (9th Cir. 1983) (Disclosure of certain information within a communication operated as a waiver with respect to the particular subject matter, but not as to the entire communication.) *City Consumer Services, Inc. v. Horne,* 571 F. Supp. 965, 975 (C.D. Utah 1983) Moreover, a waiver of the privilege operates for all time against all persons. *See United States v. Kelsey-Hayes Wheel Co.,* 15 F.R.D. 461, 464 (E.D. Mich. 1954) ("[a]fter the first publication the communication is no longer confidential").

A disclosure constitutes a waiver of the attorney-client privilege even when sought to be accompanied by a reservation of the privilege. *Duplan Corp. v. Deering Milliken, Inc.,* 397 F. Supp. 1146, 1162 (D.S.C. 1975), ("[I]f a client, through his attorney, voluntarily waives certain communications, guarded with a specific written or oral assertion that it is not his intention to waive the privilege as to the remainder of all similar communications, the privilege, as to the remaining undisclosed communications, is nevertheless waived.") A waiver will not be inferred, however, from discussions between attorneys during settlement negotiations. *Jay v. Sears, Roebuck & Co.,* 340 So. 2d 456 (Ala. App. 1976) ■

(The second half of this article will appear in the May 1986 issue.)

Footnotes

1 For a brief review of the origins and evolution of the privilege, see 8 J. Wigmore, *Evidence* §2290 (McNaughton rev. 1961).

2 "When two persons employ a lawyer as their common agent, their communications to him as to strangers will be privileged but as to themselves, they stand on the same footing as to the lawyer and either can compel him to testify against the other as to their negotiations in any litigation between them . . . ." 116 F.2d at 835

3 *But see United States v. Bolla,* 513 F. Supp. 517 (D. Del. 1981). (Communications with a person genuinely and reasonably believed to be a lawyer are protected.)

4 This is true even though the fact that a client has furnished documents to an attorney for purposes of securing legal advice may be privileged. *See, e.g., United States v. Hankins,* 631 F.2d 360 (5th Cir. 1980).

5 A court nevertheless may refuse to find a waiver by inadvertent disclosure when the disclosure occurs during extensive document production. *See Transamerica Computer Co. v. International Business Machines Corp., 573 F.2d 646, 651 (9th Cir. 1978). (IBM's inadvertent disclosure of certain "privileged" documents among seventeen million pages of screened information did not constitute a waiver of the privilege as to the documents inadvertently disclosed.)*

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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

Alabama vehicular homicide statute ruled unconstitutional

Newberry v. State, 1st Div. 7 (November 12, 1985)—Newberry was indicted for homicide by vehicle, pursuant to Section 32-5A-192 *Code of Alabama* (1975). Specifically, the indictment alleged Newberry unlawfully and unintentionally caused the death of one Patricia Logan in an automobile accident by driving under the influence of intoxicating liquor, or by driving on the wrong side of the road, or both.

Newberry filed a motion to dismiss the indictment alleging that the statute upon which the indictment was predicated was unconstitutional.

The Alabama Court of Criminal Appeals reversed the conviction in an opinion authored by Judge Tyson. The court of appeals held that the homicide by vehicle statute clearly allows both a misdemeanor imprisonment of one year and also a felony imprisonment of one year and one day to five years. The statute "cannot escape the condemnation that it provides both felony and misdemeanor punishment for the named offense." Accordingly, the court ruled that the Alabama Homicide by Vehicle Statute was unconstitutional.

DUI . . . elements of the offense

Cagle v. City of Gadsden, 4th Div. 471 (December 10, 1985)—Cagle was arrested for driving under the influence of alcohol (DUI) and found guilty in municipal court. An appeal was taken to circuit court, and the defendant again was found guilty as charged. On appeal, the central issue was whether the state sufficiently proved the defendant had "actual physical control of the vehicle he was alleged to have been driving."

A Gadsden police officer was dispatched to the scene of an accident on the evening of December 5, 1984. On arrival he saw a Chevy pickup truck sitting against a power pole, and the power pole was cut in half. The officer observed the defendant in the truck. The officer obtained the "basic information" from the defendant, but did not ask him if he was the driver of the truck.

The court of criminal appeals reversed, finding the prosecution failed to prove the defendant was in actual physical control of the vehicle. In order to sustain a conviction for the offense of DUI, the prosecution was required to prove the defendant was in "actual physical control." The

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necessary elements to establish actual physical control are:

1. Active or constructive possession of the vehicle's ignition key by the person charged, or, in the alternative, proof that such a key is not required for the vehicle's operation;
2. Position of the person charged in the driver's seat, behind the steering wheel, and in such a condition that, except for the intoxication, he or she is physically capable of starting the engine and causing the vehicle to move; and
3. The vehicle is operable to some extent.

The chilling effect on a defendant's right to trial *de novo*

Richardson v. City of Trussville, 6th Div. 595 (December 10, 1985)—Richardson was convicted in municipal court of driving under the influence of alcohol and received a $700 fine and 30 days in the county jail. He appealed to the circuit court where, after a trial *de novo*, he was sentenced to ten days' imprisonment and fined $1,500.

On appeal, Richardson maintains the trial court erred to reversal in not granting a motion for mistrial and another motion requesting that the judge recuse himself. Both motions were grounded on the trial judge's statement that he would impose a stiffer sentence upon conviction in the trial de novo than the sentence imposed by the municipal court.

The record reflects the following comment made by the trial judge prior to the sentencing aspect of the trial:

> "The Court: When I call this docket on these municipalities, I said, Gentlemen, when I try these cases they are going to get more than they got below, if they are guilty. You weren't here when that occurred. He knows and everyone in this courtroom knows when they appeal up here, if you're going to appeal, then they're going to get more than they got below if they are guilty.
>
> Mr. Turberville [defense counsel]: Could we have that on the record, your honor?
>
> The Court: Put it on the record. If they're going to appeal up here and found guilty, I'm going to give more than they got below in most instances."

The court of criminal appeals held these comments evidenced the vindictive attitude condemned in *Pearce v. North Carolina*, 395 U.S. 711, 723-724, 89 S.Ct. 2072, 2080, 23 L.Ed.2nd 656 (1969).

Presiding Judge Bowen gave the following analysis:

> "It is a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. (*North Carolina v. Pearce*, supra, at page 723-724) It is no less a violation of due process when a harsher sentence is imposed upon a defendant for having successfully pursued a statutory right of appeal or collateral remedy."

In view of the attitude expressed by the trial court, this case was remanded for resentencing. The court of appeals noted that on resentencing the circuit court could impose the same sentence as before, *so long as the reasons for doing so affirmatively appear in the record and these reasons are based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.*

The right to the assistance of conflict-free counsel

Schultz v. State, 2nd Div. 498 (December 10, 1985)—Schultz appealed from the denial of her petition for writ of error coram nobis. She originally was indicted and convicted of possession of marijuana. In her writ, Schultz contended she was denied the "effective assistance of counsel" at trial. She specifically argues her trial attorney had a real and actual conflict of interest in representing both her and her co-defendant, James Beck Wilson.

The testimony, at the *coram nobis* hearing, revealed she and her co-defendant were arrested in her automobile. Schultz was driving the car and Wilson was sitting on the passenger side. Between Wilson's legs was a fruit cake tin which contained marijuana. In addition, a manila folder was lying on the front seat between Schultz and Wilson. After obtaining a search warrant, police officers found two pounds of marijuana, scales and plastic bags in the trunk of the automobile, along with papers belonging to the co-defendant, Wilson.

Schultz testified she did not know the drugs were in the car and they were not her drugs, but belonged to Wilson. More importantly, she testified that after she and Wilson were arrested, they contacted an attorney who previously had represented Wilson. After several pre-trial meetings, she testified the attorney was made aware the drugs found in the car were not hers, but Wilson's. At the hearing, the attorney acknowledged he knew the drugs found in the car were Wilson's and that the petitioner had advised him of that fact. Prior to trial, the attorney advised Schultz he was going to get her off on an "illegal search and seizure claim" and further advised her not to take the stand to testify in her own behalf.

The evidence further developed that her co-defendant was permitted to be seated in the courtroom during the Schultz trial. Schultz felt the attorney representing both of them had a close friendship which meant he had a conflict of interest in representing her.

In reversing the conviction, Judge Tyson surveyed the right of a defendant in a criminal trial to "conflict-free counsel."

The United States Supreme Court established in the decision of *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.680 (1942), "where an attorney simultaneously represents two or more co-defendants to a criminal prosecution, the Sixth Amendment demands that the attorney's loyalty to his client be undivided and unimpaired by competing or conflicting considerations or loyalties. . . ."

The court further noted where the testimony of a co-defendant is inculpatory, a conflict of interest arises from counsel's joint representation. *United States v. Alvarez*, 696 F.2d 1307 (llth Cir. 1983), cert. denied, 461 U.S. 907, 103 S.Ct. 1878, 76 L.Ed.2d. 809 (1983)

Accordingly, an actual conflict exists if counsel's introduction of probative evidence or plausible arguments significantly benefit one defendant and damage the defense of another defendant whom the same counsel is representing. *Baty v. Balcom*, 661 F.2d 391, 395 (5th Cir. 1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982)

Finally, Judge Tyson set out the test to be applied as follows:

> "The proper judicial analysis in conflict of interest cases does not focus on the actual effect of the conflict on a particular defendant's case but, rather, revolves around the judicial belief that the Sixth Amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. Further, when a conflict of interest exists on the part of the defendant's counsel, there is a denial of the right to effective representation, *even without showing*

specific prejudice. Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974); *Zuck v. Alabama*, 588 F.2d 436 (5th Cir. 1979), cert. denied, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d. 42 (1979)

Recent Decisions of the Supreme Court of Alabama—Civil

Libel . . .

a showing of actual malice by clear and convincing evidence required for purposes of trial motions, post-trial motions and appellate review

Pemberton v. The Birmingham News Company, 20 ABR 551 (November 22, 1985)—The plaintiff, the clerk of the Alabama House of Representatives, brought a libel suit against, among others, *The Birmingham News* and one of its writers in response to several articles on the parole system. The jury returned a verdict against the *News* only in an amount of $75,000. Subsequently, however, the court granted the *News'* Motion for J.N.O.V., and the plaintiff appealed asserting that the court had applied the incorrect standard of review in ruling on the Motion for J.N.O.V. and, had the correct standard been applied, there was sufficient evidence to sustain the verdict. The trial court determined, in ruling on the Motion for J.N.O.V., that the "plaintiff had not presented clear and convincing evidence of actual malice on the part of the defendants in writing and publishing the news stories or in drafting and publishing the headlines."

There was no dispute that under *New York Times* actual malice was required to find the defendants liable. Instead, the plaintiff asserted that the trial court erred as there was a *scintilla of evidence* of actual malice. The Alabama Supreme Court rejected the plaintiff's argument and embraced the directive of the United States Supreme Court: "The First Amendment requires appellate judges to decide independently of the trier of fact whether there is *clear and convincing proof* of actual malice in the record."

The Alabama Supreme Court expressly overruled *American Beneficial Life Insurance Company v. McIntyre*, 375 So.2d 239 (Ala. 1979) (involving a defamation action). Specifically, the court set forth the standard as follows: "For purposes of trial motions, post-trial motions, and appellate review in a libel case involving a public official or a public figure actual malice must be shown by clear and convincing evidence." The court then determined proof of actual malice was lacking under this standard, and the trial court's decision was affirmed. Three justices registered their dissent.

Civil procedure—negligent entrustment . . .

separate trials available to avoid evidentiary problems at trial

Wilder v. DiPiazza, 20 ABR 324 (November 8, 1985)—The plaintiff filed suit against father and son for injuries she sustained in an automobile collision with the son. Against the father, the plaintiff alleged he negligently entrusted the vehicle to his son; against the son, she alleged negligence and wantonness.

Prior to striking the jury, the court granted the defendant's motion for separate trials. The trial against the son was held first. A verdict was returned in his favor and the court, resultantly, entered judgment for both defendants. One of the issues raised by the plaintiff on appeal was whether the trial court had abused its discretion in separating the claims for trial. The supreme court held it had not.

Had the claims remained joined at trial, then the son may have been prejudiced by the evidence the plaintiff could introduce against the father on the negligent entrustment claim. Specifically, the plaintiff could introduce the son's bad driving record into evidence to show that the father knew his son was an incompetent driver. This evidence would have been barred on the claim against the son by the general rule that prior acts of negligence are inadmissible to show the negligence on the occasion complained. The trial court, the supreme court ruled, did not abuse its discretion in separating the claims for trial.

***In personam* jurisdiction . . .**

it does not take much for there to be sufficient contacts

Ex parte: Newco Manufacturing Company, 20 ABR 531 (November 22, 1985)—The plaintiff, a resident of Knoxville, Tennessee, filed suit against, among others, Newco Manufacturing, under the Tennessee Products Liability Act, for the

wrongful death of her husband. The death occurred in Tennessee when a multi-ton machine fell upon the plaintiff's decedent. Suit was filed in Jefferson County, and Newco asserted a lack of *in personam* jurisdiction. The products manufactured by Newco were component parts of the machine. These parts were sold in Maryland to another of the defendants. Newco does not have a registered agent in Alabama; Newco's sales in Alabama occur either by virtue of an independent manufacturer's representative or by mail and telephone orders to Kansas City.

The supreme court stated:

"We agree with Newco that, because the allegedly defective clamps were not sold in Alabama and because the decedent's fatal accident did not occur in Alabama, the instant lawsuit does not relate to or arise from Newco's contacts with Alabama; therefore, Newco is not subject to 'specific' jurisdiction in Alabama. *Helicopteros Nacionales De Columbia, S.A. v. Hall*, 466 U.S. 408, 413, 104 S.Ct. 1868, 1872, f. 8 (1984). We must determine, then, whether sufficient contacts exist between Alabama and Newco so that due process is not offended in subjecting Newco to Alabama's 'general' jurisdiction." *Helicopteros*, 466 U.S. at 413, 104 S.Ct. at 1872, f. 9

In determining whether there are sufficient contacts to subject Newco to Alabama's "general" jurisdiction, the nature of the contacts must be scrutinized to determine whether "those contacts constitute continuous and systematic general business contacts which would support a reasonable exercise of jurisdiction by the forum state."

The supreme court determined there were sufficient contacts to support a reasonable exercise of jurisdiction by the Alabama courts. Newco's annual sales in Alabama ranged from $65,000-$85,000 per year for the past five years. There was a total of 2,000 transactions. These contacts were deliberate rather than fortuitous. Further, "it was reasonably foreseeable that Newco, in purposefully doing business in Alabama, would at some point both need the protection and invoke the jurisdiction of the courts of Alabama. . . Newco avails itself of the privilege of making sales (and profits) in Alabama in a continuous and systematic course of merchandising." Thus, the court ruled Newco could not avoid being subjected to suit in Alabama merely because Newco never physically entered the state.

Venue . . .

the transferee court is powerless to retransfer a case to the transferor court

Ex parte: Tidwell Industries, Inc., etc., 20 ABR 435 (November 8, 1985)—In this case, the plaintiff filed suit in Jefferson County against several defendants for injuries sustained in a tractor-trailer accident in Mississippi. Asserting that venue was improper in Jefferson County, two of the defendants pressed the court to transfer the case to Winston County. The trial court transferred the case.

The plaintiff filed a motion for reconsideration in the Jefferson County court, and, the next day, filed a motion to remand the case to Jefferson County in the Winston County court. The Winston County court remanded the case to Jefferson County. The defendants filed a petition for *writ of mandamus* with the supreme court seeking an order to compel the Winston County judge to vacate his retransfer order.

The supreme court held that the appropriate procedure for challenging the transfer would have been to have contested the defendants' grounds for transferring the case in the beginning. Also, "[i]f the plaintiff thought that the trial court in Jefferson County prematurely granted the defendants' motion to transfer and thereby denied him a reasonable opportunity to develop facts to support his claim that venue was proper in Jefferson County, his remedy was by way of mandamus to the judge in Jefferson County. (*Ex parte: Maness*, 386 So.2d 429 [Ala. 1980]) He cannot subsequently establish those facts in the county to which the case has been transferred." The supreme court granted the *writ of mandamus*, ruling that the Winston County court erred in hearing the motion to retransfer the case to Jefferson County.

Torts . . .

no common-law cause of action for negligently dispensing alcohol

Hatter v. Nations, 20 ABR 587 (November 22, 1985)—The plaintiff was injured early one morning when her car collided with another driven by an intoxicated individual, Samply. Samply had been drinking all night and into the morning with the passenger in his car, Nations. Apparently Samply was driving Nations back to his trailer to get her purse so Nations could go home. On the way back to the trailer, Samply collided with the plaintiff.

The plaintiff asked the supreme court to find that "Nations breached a duty that she owed to the general public when she asked Samply to violate Alabama law by driving his car while he was under the influence of alcohol". Recognizing that over a century ago the supreme court determined there was no common-law cause of action for negligently dispensing alcohol, the supreme court determined the plaintiff's theory of recovery was meritless. Lacking from this case is the key element, to-wit: the sale or distribution of alcohol. Not only was the sale of alcohol by a licensed vendor lacking in the case, but also Nations did not purchase or otherwise supply Samply with any alcohol. Thus, Nations was entitled to summary judgement as a matter of law.

Recent Decisions of the Supreme Court of Alabama—Criminal

General attempt statute is not applicable to robbery offenses

Ex Parte, Wesley, 20 ABR 376 (November 8, 1985)—Wesley was tried first under an indictment charging him with first degree robbery. He pleaded guilty to attempted robbery after the indictment was amended to charge attempted robbery. Wesley was, in accordance with his plea, convicted and sentenced to a term of five years. On appeal, the court of criminal appeals reversed the conviction and remanded the case on the grounds that the general attempt statute no longer applied to robbery offenses. The appellate court reasoned the crime of attempted robbery now constitutes robbery.

On remand, the state did not reindict the defendant, but put him to trial upon the original indictment for robbery in the first degree. The supreme court reversed the conviction.

Justice Beatty, writing for a unanimous court, held the defendant pleaded guilty to a charge which at the time did not exist, and, accordingly, he could not be sentenced under a void indictment. It followed that when the state chose to try the defendant again on the void amended indictment, his conviction was erroneous and he could not be sentenced under the void indictment. The supreme court, however, noted the state was free to reindict the petitioner for the appropriate offense.

Theft by deception . . .

reliance as an element of the offense

Ex Parte, John P. Day, 20 ABR 358 (November 8, 1985)—The defendant, Day, was convicted of theft in the first degree under Section 13A-8-3, *Code of Alabama*. The court of criminal appeals affirmed the conviction and denied his application for rehearing. Subsequently, Day filed, in the supreme court, a petition for writ of certiorari.

The supreme court granted certiorari on the issue of whether "reliance" is an element of the offense of theft by deception. Their answer was "yes."

Judy Hix, an undercover FBI agent, learned that Day wanted to sell diamonds allegedly won in a poker game. Hix approached Day through a go-between, and Day eventually offered to sell Hix a 1.3-carat diamond for $3,300. Hix purchased the stone which turned out to be a zirconia stone, not a diamond. Day subsequently was arrested and charged with theft by deception.

Justice Shores, writing for the court, held, "It is clear from the discussion of authorities that the legislature did not intend to eliminate reliance as an element of theft by deception." The revision was meant only to erase the archaic distinctions among the common-law offenses allowing some to escape sanction because of improper forms of proof. Specifically, theft by deception requires that the defendant's actions must have an effect on the victim. A victim cannot be deceived by someone if he has not been influenced by the perpetrator's action or in-

action. In other words, the victim must have relied on the perpetrator's acts, so as to create or confirm an impression in the victim's mind.

Obstruction of justice

United States v. Brand, No. 84-7703 (11th Circuit November 12, 1985)—The defendants, Brand and Watts, were convicted in the United States District Court for the Middle District of Alabama of obstructing justice. The obstruction charge arose out of the defendants' conduct in attempting to obtain an affidavit from a witness relevant to a federal prosecution for rolling back automobile odometers.

The 11th Circuit reversed and rendered the conviction on the obstruction of justice charge and directed the district court to dismiss the indictment.

The 11th Circuit summarized its views in pertinent part as follows:

> . . . "At the outset, we consider this case a dangerous precedent if the convictions are upheld. It is common practice for attorneys, investigators, insurance adjusters, and law enforcement agents, both state and federal, to attempt to obtain signed statements of witnesses in criminal and civil cases. If they are to be confronted (as they frequently are), with charges of persons claiming that a statement was false, thus resulting in an obstruction of justice charge even though the statement was never submitted to a prosecutor or to the court, a new wave of cases will be filed by federal or state authorities."

Accordingly, the court of appeals concluded that the defendants' conduct in attempting to obtain an affidavit from the witness, McCullar, relevant to a separate prosecution for rolling back automobile odometers, did not constitute obstruction of justice in violation of Title 18, *United States Code,* Section 1503. The court's holding was bottomed on the fact that the affidavit or statement, which could be construed as false, was never produced in court or delivered to an assistant United States attorney.

Death penalty reversed . . . improper cross-examination by the D.A.

Berard v. State, 20 ABR 807 (December 20, 1985)—Berard was charged with the capital murder of two young boys, outside the Skatehaven skating rink in Montgomery, during April 1978. At trial, the defendant entered pleas of not guilty and not guilty by reason of insanity. In support of that defense, he presented several expert witnesses on the issue of whether he was insane at the time of the crime.

One of the witnesses, Dr. Chester Jenkins, a psychiatrist, testified the defendant was probably having a psychotic episode at the time he shot the two boys and was suffering from latent schizophrenia. On cross-examination, the district attorney questioned Dr. Jenkins as follows:

> "Is he [defendant] capable then of having another psychotic episode?
> Answer: Certainly.
> Question: Not unlike the one you say he had on April 14 and 15, of 1978?
> Mr. Dement [defendant's attorney]: Same objection.
> The Court: Overruled.
> Question: Sir?
> Answer: Do I think he's capable of having recurrent episodes?
> Answer: Yes, I do.
> Question: Recurring episodes sir, let me ask you this: Is he capable of shooting someone else?
> Mr. Wise [defendant's attorney]: Same objection, your Honor.
> The Court: Overruled."

On appeal, the defendant contended that the question of whether he would shoot somebody else was, at the least, prejudicial to his defense and meant solely to inflame the passions of the jury. In reversing the conviction, the supreme court observed:

> "We have not been cited to any case in Alabama that approves of a prosecutor's asking a question about what the defendant is capable of doing in the future. We additionally note that this Court has previously stated that, as long as a prosecutor does not comment on the possibility that the defendant will commit future illegal acts, he may legitimally argue to the jury the need for law enforcement as a deterent [sic] crime."

In concluding there was no proper basis for the district attorney to ask such a question, the supreme court reasoned . . . "The central issue in the guilt phase of a capital murder trial is whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of the crime charged. (Beck, 396 So.2d at 662) This kind of question could have easily shifted the focus of the jury's attention to the issue of punishment which is an improper consideration at the guilt phase of the trial."

Recent Decisions of the Supreme Court of the United States

Double jeopardy . . . separate sovereigns

Heath v. Alabama, 84-5555 (December 11, 1985)—Heath hired two men to kidnap and murder his wife. The kidnapping occurred in Russell County, Alabama; thereafter, Mrs. Heath was carried into Troup County, Georgia, and murdered. The defendant pleaded guilty to malice murder in Georgia in exchange for a life sentence. He then was tried in Alabama under the "felony murder doctrine" and sentenced to death.

The Supreme Court of the United States granted certiorari on the question of whether two states could try a defendant for the same crime without violating the constitutional ban on double jeopardy. The court in a seven to two opinion said "yes" and affirmed the Alabama conviction.

Justice O'Connor, writing for the majority, held that "states are each separate sovereigns, and violations of the 'peace and dignity' of two separate sovereigns constitutes two separate offenses." The court reasoned that under the separate sovereign theory the defendant was not being tried twice for the same offense. Hence, the double jeopardy ban of the Fifth Amendment does not apply. ■

Opinions of the General Counsel

by William H. Morrow, Jr.

QUESTION:

"When an attorney represents a client against a corporate entity, private or public, or a governmental unit, who of its officers, directors or employees is deemed a 'party' within the contemplation of DR 7-104(A)(1), thus precluding the attorney's communication with such officer, director or employee without consent of opposing counsel?"

ANSWER:

If the officer, director or employee has the power to commit or bind the opposing party with respect to the subject matter in question, the attorney may not communicate with such officer, director or employee on the subject of the representation without the consent of the attorney representing the adverse party.

DISCUSSION:

Ethical Consideration 7-18 in part provides:

> "The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person."

* * *

Disciplinary Rule 7-104(A)(1) provides:

> "(A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized to do so." (emphasis added)

The American Bar Association Committee on Ethics and Professional Responsibility in Informal Opinion 1410 (1978) made the following observation:

> "The right of the corporation to representation by counsel must prevail over opposing counsel's unrestricted access to officers and employees of the corporation. Where an officer or employee can *commit* the corporation, opposing counsel must view the officer or employee as an integral component of the corporation itself and therefore within the concept of a 'party' for purposes of the Code." (emphasis added)

The American Bar Association Committee on Ethics and Professional Responsibility in Informal Opinion 1377 (1977) dealt with a situation where a city was named as a defendant in a lawsuit for property damage arising from the alleged defective construction of a sewer system. The issue involved the propriety of the plaintiffs' attorney's questioning the city building marshal who had complete authority, including police power, to inspect, require correction and enforce the building code. In the opinion the committee stated:

* * *

> "According to your facts, the sewer construction is regulated by a building code and enforced by the Metropolitan Government's Building Marshal, who has complete authority, including police power, to inspect, require correction and enforce the Building Code.
>
> * * *
>
> Generally, a lawyer may properly interview witnesses or prospective witnesses for opposing sides in any civil or criminal action without the prior consent of opposing counsel—unless such person is a party. *If the Building Marshal in the hypothetical case presented would be in a position to commit the municipal corporation in the particular situation because of his authority as a corporate officer or because for some other reason the law cloaks him with authority, then he, as the alter ego of the corporation, is a party for purposes of DR 7-104(A)(1).* The right of the municipal corporation to representation by counsel must prevail over opposing counsel's unrestricted access to officers and employees of the municipal corporation. Where an officer or employee can *commit* the corporation, opposing counsel must view the officer or employee as an integral component of the municipal corporation itself and therefore within the concept of a 'party' for the purposes of the Code.
>
> It is the opinion of this Committee that no communication with an employee of a municipal corporation *with power to commit the municipal corporation in the particular situation* may be made by opposing counsel unless he has the prior consent of the designated counsel of the municipal corporation, or unless he is authorized by law to do so." (emphasis added)

Although the Ethics Committee of the District of Columbia Bar had recommended a modification of DR 7-104(A)(1) so as to narrow its scope of operation, we agree with the following comments of that committee concerning the present Rule as applied to officers or employees of a municipal corporation or other governmental unit:

> "The officials who are deemed to be governmental parties with whom communications under the rule are restricted are quite limited, including only those persons who have the power to *commit or bind* the government *with respect to the subject matter question*, whether it be the initiation of or termination of litigation, execution or approval of a contract, issuance of a license, award of a government grant, or a rulemaking function; . . .
>
> * * *
>
> The critical question in this connection is, which governmen-

tal official or officials should be considered to be the 'party,' within the meaning of DR 7-104(A)(1), with whom communications by opposing counsel are restricted? The government itself, or an agency of government, may be the named party in litigation, or a prospective 'party' to a contract's being negotiated, in a technical sense, but of course one cannot communicate with such an abstract entity, any more than with a corporation or other legal creature, except through some individual person. The problem is to identify the governmental officers who, for purposes of the rule, are deemed to stand for the governmental party.

* * *

The line of limitation cannot be described in perfectly precise terms, for it will necessari ly depend in part on the facts of each particular situation where DR 7-104(A)(1) may be called into play, and the possible factual variables are too numerous to be encompassed in any concise formula. The guiding principles can nonetheless be easily enough stated in general terms. *The persons who stand in the stead of a government party for purposes of the rule should be those, and only those, who have power to commit or bind the government with respect to the subject matter in question: . . . .* " *(emphasis added)*

* * *

As stated by the Ethics Committee of the District of Columbia Bar in Ethics Opinion 80, "The line of limitation cannot be described in perfectly precise terms, for it will necessarily depend in part on the facts of each particular situation where DR 7-104(A)(1) may be called into play, and the possible factual variables are too numerous to be encompassed in any concise formula." The foregoing, however, may be helpful as guidelines to bar members when situations arise involving DR 7-104(A)(1). ■

Disciplinary Report

Disbarment

● On December 11, 1985, the Supreme Court of the State of Alabama entered an Order of Disbarment By Consent in the matter of **Harold 0. McDonald, Jr.** Mr. McDonald was disbarred and excluded from the practice of law effective 12:01 a.m. November 29, 1985, after having previously been temporarily suspended May 13, 1985. (ASB Nos. 85-89 & 85-208)

Suspension

● Pelham lawyer **Earl W. Hall** was suspended, effective December 31, 1985, for failure to comply with the Mandatory Continuing Legal Education requirement of the Alabama State Bar.

Private Reprimands

● January 10, 1986, an Alabama lawyer received a private reprimand for filing a lawsuit against a former client when he knew, or when it was obvious, there was no basis for the lawsuit and he knew, or it was obvious, such action would serve merely to harass or maliciously injure another. The attorney was found to have violated Disciplinary Rule 7-102(A)(1). (ASB 84-575)

● Friday, January 10, 1986, an Alabama attorney received a private reprimand for violation of Disciplinary Rules 1-102(A)(4), 7-102(A)(3) and 7-102(A)(5). The Disciplinary Commission determined the attorney had been appointed to represent an indigent defendant, had billed the state for services rendered to that defendant, and also had accepted money from the defendant's family, without advising the court of that fact and without adjusting his indigent fee declaration claim. The commission determined the attorney misrepresented to the State of Alabama that his fee declaration form was true and correct and the amount claimed was due and owing, the attorney failed to disclose that which he was required by law to reveal and the attorney made a false statement of fact. (ASB 85-535)

● Friday, January 10, 1986, a lawyer was privately reprimanded for having been guilty of "misrepresentation," in violation of DR 1-102(A)(4), by having lied both to a client and an individual visiting him on behalf of the client, by stating to both of them that he had filed suit for the client, when, in fact, he had not. (ASB 85-115)

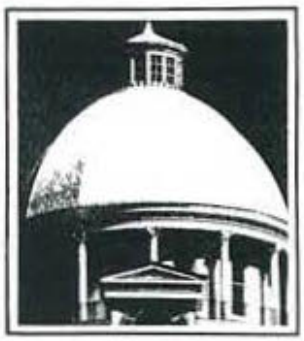
● Friday, January 10, 1986, an Alabama lawyer was privately reprimanded for having violated DR 2-103(A)(1), by having solicited his employment by a hospital to represent the hospital in a Certificate of Need application before the State Health Planning and Development Agency. (ASB 84-68)

● Friday, January 10, 1986, two Alabama lawyers were privately reprimanded for violation of Disciplinary Rules 5-101(C) and 5-101(A) of the *Code of Professional Responsibility.* The Disciplinary Commission determined the attorneys had engaged in a conflict of interest by rendering legal advice to two parties with adverse interests on the same subject matter, and the attorneys also had entered into representation of a client in a matter in which the attorneys had a substantial financial interest. The commission determined that a private reprimand should be administered for these violations. (ASB 80-24)

● January 10, 1986, an Alabama lawyer received a private reprimand for violation of Disciplinary Rule 9-101(C). The lawyer attempted to pressure certain witnesses in a criminal case into dropping charges against the lawyer's client, by stating or implying he could influence a public official improperly or upon irrelevant grounds. (ASB 85-424)

Disability Inactive

● On December 6, 1985, Jasper lawyer **Carl Elliott, Sr.,** was transferred to disability inactive status, based upon incapacity by reason of physical infirmity or illness. (ASB 85-303)■



Legislative Wrap-up

by Robert L. McCurley, Jr.

1986 Regular Session

The 1986 regular session of the Alabama Legislature convened January 14, 1986, in the new Alabama State House. This facility is the result of a $17 million renovation of the old Highway Building on South Union Street behind the Capitol. The governor's office, along with the other constitutional offices which were formerly on the first floor of the Capitol, have moved to the ground floor of the State House.

The Legislature is located on the fifth, sixth, seventh and eighth floors. Each House member has now a private office and telephone on the fifth floor. The new House chamber is also located on this level. The Legislative Reference Service, Legislative Fiscal Office, committee rooms and the House Gallery are on the sixth floor. The seventh floor houses senators' private offices and the Senate Chamber. The eighth floor has additional committee rooms and the Senate Gallery.

With this move, the Legislature has taken very positive steps to modernize its facilities and to professionalize itself with access to computerized bill tracking of pending legislation, and a computerized *Code of Alabama*. Also the House of Representatives has passed new rules of decorum.

On the first day of the session, 170 Senate bills and 220 House bills were introduced. It is expected that over 1,000 bills will be introduced in each house before they adjourn in April.

Included among those introduced are bills covering such topics as:

1. The establishment of a course of action for frivolous civil law suits;
2. The abolishment of the scintilla rule;
3. The establishment of seat belt laws;
4. The establishment of specific crime theft laws;
5. The enhancement of punishment of certain crimes;
6. The limiting of the statute of limitation for civil action against architects and engineers; and
7. The limiting of medical malpractice recoveries.

Other bills bar members might be interested in include:

1. The requirement that punitive damages must be proved beyond a reasonable doubt;
2. The limiting of punitive damages awards to $100,000;
3. The further enforcement of the collection of alimony; and
4. The permitting of divorced spouses of military personnel to reopen divorce decrees.

Former Legislators John Casey and Wendell Mitchell have been retained by the bar to monitor legislation affecting it.

The Alabama Law Institute presented two bills to the Legislature; these were a revision of the Redemption of Real Property and the Uniform Transfers to Minors Act. (See the January 1986 *Alabama Lawyer.*) ■

Robert L. McCurley, Jr., is the director of the Alabama Law Institute at the University of Alabama. He received his undergraduate and law degrees from the University.

MCLE News

by Mary Lyn Pike
Assistant Executive Director

Proposed MCLE rule and regulation changes

At its January 10, 1986, meeting, the MCLE commission adopted proposed changes in the rules and regulations governing mandatory CLE in Alabama. All will be presented to the board of bar comissioners at its March 19 meeting. Because the MCLE rules are *Rules of Court*, rule changes approved by the board will be sent to the Supreme Court of Alabama for its consideration.

Proposed changes are listed here so that bar members wishing to comment on them will have the opportunity to do so. Please address your comments to MCLE Commission, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.

As proposed:

Rule 2 . . . amended to make it clear that, with the exceptions of assistant attorneys general, district attorneys and assistant district attorneys, special, nonpracticing members of the bar are not subject to the 12-hour CLE requirement. Such members pay an annual membership fee of $75, do not purchase an occupational license and cannot perform acts constituting the private practice of law;

Regulations 3.2 and **3.4** . . . amended to include the commission's policy of requiring a physician's statement to support requests for permanent substitute programs, waivers or other exemptions, based on physical problems or limitations;

Regulation 3.5 (paragraph 1) . . . amended to include the commission's policy of requiring panelists to divide among themselves the time spent teaching, rather than each claiming credit for the full length of the panel presentation;

Regulation 3.5 (paragraph 2) . . . amended to state clearly that in order to be accredited, an activity must not be designed primarily for nonlawyers;

Regulation 4.1.3 . . . amended to provide that activities approved for credit must deal primarily with substantive legal issues, practice management (subject to Regulation 4.1.12), professional responsibility or ethical obligations of attorneys. Regulation 4.1.12 provides half credit for activities dealing with law office automation and management but no credit for activities designed to sell services or equipment or to enhance law office profits;

Regulation 4.1.8 . . . amended to require telephone hookups to instructors or an instructor present at the receiving site for satellite and teleconference programs;

Regulation 4.1.14 . . . added to provide for approval of courses sponsored by law firms and corporations, if the usual standards for accreditation are met and certain additional requirements are met, i.e. applications submitted no less than 30 days in advance, half the instruction provided by persons from outside the firm or corporation and a qualified instructor from outside for showing tapes of approved programs;

Regulations 3.4 and **4.5** . . . amended to include the commission's policy that no programs submitted more than 60 days after December 31 of the compliance year will be accredited;

Regulation 4.7 . . . added to require sponsors of approved programs to submit to the commission a list of Alabama State Bar members attending each program, so the commission can generate individual CLE transcripts and relieve attorneys and their secretaries of the burden of CLE recordkeeping (This would not go into effect until 1987.);

Rule 5 and **Regulation 5.1** . . . amended to extend to January 31 the deadline for filing annual CLE reports. The deadline for earning credits would remain December 31;

Regulation 5.2 . . . added to require a fifty dollar ($50) late filing fee from any attorney filing the annual report after the proposed January grace period;

Rule 6 . . . amended to provide for making up CLE deficiencies between January 1 and March 1, provided a deficiency plan for attending accredited courses is submitted by January 31 and a fifty dollar ($50) late compliance fee is paid.

Approved sponsors for 1986

Also at the January 10 meeting, the commission decided 1986 activities sponsored by the following organizations are presumptively approved, if all the standards for course accreditation (Regulations 4.1.1—4.1.14) are met.

All other courses must be submitted individually to the commission by the sponsoring organizations.

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 Bar Association, committees and sections
American College of Trial Lawyers
American Law Institute—American Bar Association Committee on Continuing Professional Education
Association of Trial Lawyers of America
Bar associations of the sister states, the District of Columbia, Puerto Rico and the trust territories
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
Legal sections, agency programs—U.S. and state governments
Library of Congress—Congressional Research Service
Mobile Bar Association
Montgomery County Bar Association
Montgomery County Trial Lawyers Association
National Association of Bond Lawyers
National Bar Association
National College of Juvenile Justice
National Health Lawyers Association
National Institute for Trial Advocacy
National Judicial College
National Legal Aid and Defenders Association
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
Tuscaloosa County Bar Association
Tuscaloosa Trial Lawyers Association

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.

SPEAKER'S BUREAU APPLICATION

Name _____

Firm Name (if applicable) _____

Address _____

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

Telephone _____

Please list subjects on which you are willing to speak:

1) _____

2) _____

3) _____

In Memoriam

Beaird, Thomas Leon—Jasper
Admitted: 1950 Died: November 3, 1985

Crawford, Vernon Zionchek—Mobile
Admitted: 1956 Died: January 12, 1986

Hicks, Hazel Diana—New Orleans, Louisiana
Admitted: 1976 Died: January 15, 1986

Koonce, Merwin—Florence
Admitted: 1921 Died: October 13, 1985

Osborn, Prime Francis, III—Jacksonville, Florida
Admitted: 1939 Died: January 4, 1986

Perdue, Harry Harbin, Jr.—Montgomery
Admitted: 1950 Died: December 27, 1985

Rogers, Charles McPherson Aduston, III—Mobile
Admitted: 1959 Died: December 4, 1985

Smith, James Edward, III—Athens
Admitted: 1962 Died: December 8, 1985

Wallace, Wales Wellington, Jr.—Columbiana
Admitted: 1947 Died: January 9, 1986

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.*

THOMAS LEON BEAIRD

Former Walker County Circuit Judge Thomas Leon Beaird led a long and productive life before his death Sunday at Brookwood Medical Center in Birmingham. During his 67 years, he was a coal miner, a war hero, a teacher, a district attorney and a circuit judge.

Thomas Leon Beaird was born April 23, 1918, and he spent his boyhood days at Calumet, Ala., where he attended school and later worked in the coal mine there.

When our country entered World War II, he entered the United States Army and served under Gen. George S. Patton with the Seventh Armored Division. As a soldier, he was decorated with a variety of medals, including the Bronze Star and Silver Star.

After the war, Beaird worked for the Veterans Administration, later taught school for war veterans and then attended the University of Alabama and received his law degree.

He practiced law for several years, then was elected district attorney of our county, where he served honorably from January 1959 to January 1965. He then was elected circuit judge and served the bench and bar as circuit judge until he retired because of ill health in 1982.

As a judge—as he had throughout his life—Beaird served with honor, integrity and with humility. But above all these accomplishments, he was a Christian who practiced his faith daily at work, at home or wherever he was. His splendid example of Christian living will forever live in our memories. He loved the Lord and taught Sunday School at the First Baptist Church for many years until his health declined.

Throughout Judge Beaird's entire life, he always had time for everyone and especially those who were less fortunate than he and those who could never repay him nor hope to repay him for what he had done for them.

Thomas Leon Beaird was a valuable leader to our community. He will be greatly missed.—Reprinted with permission from the *Daily Mountain Eagle*, November 5, 1985

C.M.A. ROGERS, III

C.M.A. Rogers, III, a member of the Mobile and Alabama State bars, died December 4, 1985.

Rogers was born in Mobile, Alabama, November 10, 1932, the son of the late C.M.A. Rogers, a member of the Mobile Bar, and the late Elizabeth Benson Rogers. Max, as he was known to everyone, graduated from Episcopal High School in Alexandria, Virginia; Williams College in Williamstown, Massachusetts; the University of Alabama School of Law; and the School of Banking of the South. While in school, he served as editor in chief of the *Alabama Law Review* and was a member of the Farrah Order of Jurisprudence, Omicron Delta Kappa and Phi Delta Phi.

He served as a captain in the United States Air Force. Afterwards, he commenced the practice of law at Mobile with the law firm of McCorvey, Turner, Johnstone, Adams & May in 1959, during which time he served as a member of the Alabama State Legislature. From 1967 to 1983, he worked with the American National Bank and Trust Company, rising to the office of chairman of the board and chief executive officer. At the time of his death, he was vice chairman of the board—Southern Region of AMSOUTH Bank, N.A.

He served the Boy Scouts, first as an Eagle Scout, and later as president of the Southeast Region of the Boy Scouts of America. He served as chairman for the United Way; as a member of the Board of Regents of Spring Hill College; as a vestryman and trustee of St. Paul's Episcopal Church; as chairman of Mobile United; as chairman of Mobile Community Foundation; as vice president of the Mobile Area Chamber of Commerce; and as a member of various other major boards and commissions.

His career also included 15 years' service as the Honorary Consul of Belgium, for which he was knighted in 1982 by the King of Belgium.

Max was married to the former Gail Whitehurst of Troy, New York. They have three children: Mrs. Anne Rogers Gallant; Lt. C.M.A. Rogers, IV, U.S. Marine Corps; and Mr. Bradshaw A. Rogers of Mobile.

The commitment of C.M.A. Rogers, III, to his community, the legal profession and the fields of education and charity was in every respect outstanding. ■

Classified Notices

RATES: Members: No Charge; Nonmembers: $35 per insertion of (50) words or less, $.50 per additional word. Classified copy and payment must be received no later than the 1st day of the month prior to publication. (No exceptions). Send classified copy and payment, made out to *The Alabama Lawyer* to: Alabama Lawyer Classifieds, c/o Margaret Dubberley, P.O. Box 4156, Montgomery, AL 36101.

SERVICES

EXAMINATION OF QUESTIONED Documents: Handwriting, typewriting and related examinations. Internationally court-qualified expert witness. Diplomate, American Board of Forensic Document Examiners. Member: American Society of Questioned Document Examiners, the International Association for Identification, the British Forensic Science Society and the National Association of Criminal Defense Lawyers. Retired Chief Document Examiner, USA CI Laboratories. **Hans Mayer Gidion, 218 Merrymont Drive, Augusta, Georgia, 30907, (404) 860-4267**

IBM COMPATIBLE MICROS, Peripherals and Software are available by mail order at large discounts over local prices: Complete IBM Compatible $895, Canon or HP laser $2,195; 20 Meg hard disk $469; Multimate $259. Electrical Engineer will aid in acquisition, install and support any hardware or software you want for a small percentage of the purchase price. **Contact: Robert Stewart, P.O. Box 22, Birmingham, Alabama, 35201, (205) 939-0378.**

REAL ESTATE EXPERT Testimony: Tort liability of real estate brokers, agents, closing attorneys and mortgage lenders. Licensed attorney and real estate broker. Author of *Home Buyers: Lambs to the Slaughter?* **Sloan Bashinsky, Suite 100, 6 Office Park Circle, Birmingham, Alabama, 35223. Phone 870-3500.** *No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services.*

LAMAR MILLER, Examiner of Questioned Documents: Qualified in most Alabama courts. American Society of Questioned Document Examiners, American Academy of Forensic Sciences, certified by American Board of Forensic Document Examiners. Handwriting, forgery, typewriting, alteration of medical and other records. Miscellaneous document authentication problems. **P.O. Box 55405, Birmingham, Alabama, 35255, (205) 979-1472**

LEGAL RESEARCH HELP: Attorney with seven years' experience in legal research/writing. Access to University of Alabama and Cumberland libraries, Westlaw available. Prompt deadline service. $35/hour. **Sarah Kathryn Farnell, 112 Moore Building, Montgomery, Alabama, 36101, phone 277-7937.** *No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services.*

LEGAL RESEARCH AND writing services: Licensed attorney, B.A. in English, *Law Review* associate editor, former federal district court clerk, former Alabama Supreme Court clerk. Four years' experience. Prompt deadline service. Westlaw available. Rate $35/hour. **Irene Grubbs, 205-988-8521 (local call for greater Birmingham).** *No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services.*

FOR SALE

INVESTMENT PROPERTY 1,040 acres, all or part—Blount County, Alabama. Forty-five miles north of Birmingham. Private and secluded, no through road, approximately 400 acres in pasture, balance in timber. Three ponds, two older farm homes. **For more information call after 6 p.m. (205) 429-3760.**

FOR SALE: *Alabama Reports,* volumes 81-295 and *Alabama Appellate Court Reports,* volumes 1-57. **Call or write Frances Campbell, Colorado Supreme Court Library, B112 State Judicial Building, 2 E. 14th Ave., Denver, Colorado, 80203. (303) 861-1111, x171**

FOR SALE: Almost new Gatlinburg ski chalet with loft condominium located in the Gatlinburg Summit complex developed by U.S. Capital Corporation. Gatlinburg Summit is located atop Mt. Harrison approximately 5.5 miles from downtown Gatlinburg and about 1.5 miles from Ober Gatlinburg ski complex. This is a third floor condo with a magnificent view of the Great Smokies, completely furnished and fully carpeted with all utensils, china, glasses, silver and linen. Sleeps six. Loft area has queen-size bed with closet. Downstairs area includes kitchen, bath with shower, closet, living room with fireplace and sleeping alcove with queen-size bed and queen-size sleeper sofa. Decor is maroon and grey. All electric, cable TV installed and small balcony with awning overlooking mountains. Gatlinburg Summit complex has a complete "Amenities Center" with indoor pool, two jacuzzi's, sauna, meeting rooms, weight complex and washer/dryer facilities. Price: $70,000. **Contact: John C. Watkins, Jr., at 2324 Trenton Drive, Tuscaloosa, Alabama, 35406, or call (205) 752-4377. For on-site inspection, contact Barbara Stevens, Barbara's Real Estate Co., P.O. Box 214, Gatlinburg, Tennessee, 37738, or call (615) 436-7040.**

POSITIONS OFFERED

POSITION AVAILABLE in medium-sized Birmingham firm for lawyer with interest (and preferably experience) in real estate, banking and/or commercial law. **Please send résumé or call (in confidence): Hiring Partner, 800 First National-Southern Natural Building, Birmingham, Alabama, 35203, (205) 251-1000.**

ATTORNEY JOBS: National and Federal Legal Employment Report: A monthly detailed listing of hundreds of attorney and law-related jobs with the U.S. Government and other public/private employers in Washington, D.C., throughout the U.S., and abroad. $30-3 months; $50-6 months; $90-12 months. **Send check to Federal Reports, 1010 Vermont Ave., N.W., #408, Washington, DC, 20005. Attn: AB. (202)393-3311 Visa/MC**

All requests for classifieds placement must be submitted typewritten and are subject to approval. Alabama State Bar members are not charged for classified notices up to two insertions per calendar year, except for "position wanted" or "position offered" listings, which are at the regular rate. Nonmember advertisers must pay in advance and will receive a complimentary copy of The Alabama Lawyer *in which their advertisement is published. Additional copies are $3.00 plus postage.*

MISCELLANEOUS

ANTIQUE MAPS, Alabama 1859, Colton (no Birmingham shown!), full color, 18 1/2" x 15", $100; Alabama 1887, Rand McNally (only 66 counties!), full color, 20 1/2" x 14", with atlas listing of counties, cities, population, history on reverse, $80; Tennessee & Kentucky, Johnson, c. 1870, approx. 25" x 14", museum matte, $60; Tennessee & Kentucky, Mitchell, 1875, approx. 22" x 14", museum matte, $60. Authenticity guaranteed. **Sol Miller, P.O. Box 1207, Huntsville, Alabama, 35807, 205-536-1521**

POSITION WANTED

PARALEGAL/CLERK: Jones student with 54 hours seeking position in Montgomery area. BA, MBA, several years highly successful work experience. Dean's list 1984/85, three Am Jurs awards, sec./treas. SBA, vice chancellor SDK legal fraternity. **David W. Glanzer, 5770 Carriage Barn Lane, Montgomery, Alabama, 36116. Home: (205) 279-9236, work: 293-5209**

Et Cetera

ALD reports

Bill Thompson, chief administrative law judge for the State of Alabama Department of Revenue, is compiling a booklet of Revenue Department Administrative Law reports.

The reports contain a summary of every decision issued in the past 30 months by the Administrative Law Division. Decisions will be divided into monthly reports, compiled in a permanent binder volume and subsequent reports issued each month. In addition, a key-word digest and statutory index will be included, with periodic updates added approximately every three months.

To place an order, please contact:

Administrative Law Division
427 Administrative Building
Montgomery, Alabama 36130

Bankruptcy

The Southeastern Bankruptcy Law Institute's 12th Annual Seminar on Bankruptcy Law and Rules will be held April 3, 4 and 5 at the Marriott Marquis Hotel in Atlanta. The seminar will deal with the operation of a business under Chapter 11 and focus on bankruptcy litigation, ethics and professional responsibility and relief for individual debtors. Satellite programs will be conducted on the subjects of farm bankruptcy and preservation of the net operating loss carry forward. Registrants are encouraged to bring their spouses for whom special programs are planned on April 3 and April 4. For more information write Southeastern Bankruptcy Law Institute, Inc., Dept. #264, P.O. Box 105515, Atlanta, Georgia, 30348.

Software

The American Bar Association's Legal Technology Advisory Council, created to help lawyers in small and medium-sized firms use new technology and computerize their practices, has completed its first software reviews.

LTAC conducted its reviews of microcomputer systems over a four-to-five week period and of multiuser systems over a six-to-eight-week period. The process is controlled by LTAC-developed guidelines after the contribution of extensive comments from lawyers and manufacturers and in conjunction with software review experts and the latest industry concepts.

Copies cost $10 (ABA members) and $25 (non-members), plus a $2 handling charge per order.

For a copy, write:

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Order Fulfillment 219
750 North Lake Shore Drive
Chicago, Illinois 60611

—Calbar View

Etc.

California

Effective January 1, 1986, for state bar purposes, all California bar members must notify that state bar of their current office or other address. Also, they must notify the bar within 10 days of any change in that address.

The address requirement is part of the omnibus discipline bill signed into law August 31 by Governor George Deukmejian and contained in Section 6002.1 of the Business and Professions Code.

—Calbar View

Abortion

According to a recent survey conducted for the *ABA Journal*, 53 percent of lawyers questioned feel the United States Supreme Court should not change the landmark decision *Roe v. Wade*. This decision recognizes a woman's right to an abortion.

Women (71 percent), litigators (64 percent) and lawyers 21-24 years old (61 percent) provided the most support for the ruling. These results indicate lawyers are at odds with the Reagan administration, which is urging the supreme court to modify or overrule *Roe v. Wade*.

Complete survey results are in the January issue of the *ABA Journal*.

Abuse

For judges hearing child neglect, abuse and termination of parental rights cases, help is now available from the American Bar Association's National Legal Resource Center for Child Advocacy and Protection. A new book, *Court Rules to Achieve Permanency for Foster Children: Sample Court Rules and Commentary*, deals with improvement of court procedures in cases involving alleged maltreatment of children.

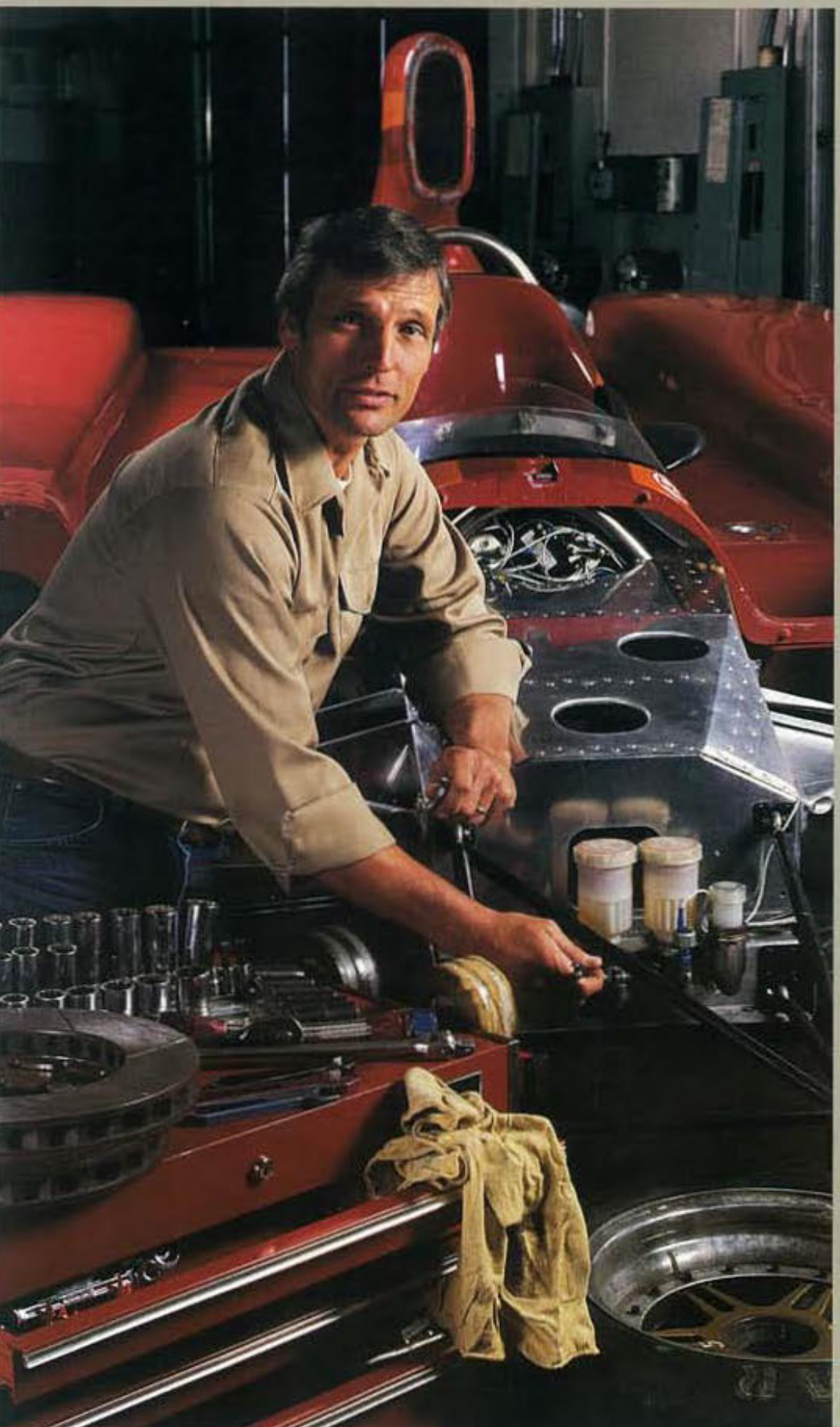
Free copies can be obtained by any committee of the judiciary or bar dealing with court rules in child maltreatment cases, as well as by appellate courts working on these issues. Write to:

Mark Hardin
ABA Foster Care Project
National Legal Resource Center
for Child Advocacy and Protection
1800 M Street, N.W.
Suite 200
Washington, DC 20036
Phone (202) 331-2250

For others interested, copies are available for $10, plus $2 handling charge, from:

The American Bar Association
Order Fulfillment 549
750 North Lake Shore Drive
Chicago, Illinois 60611 ■

The Master's Tools



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