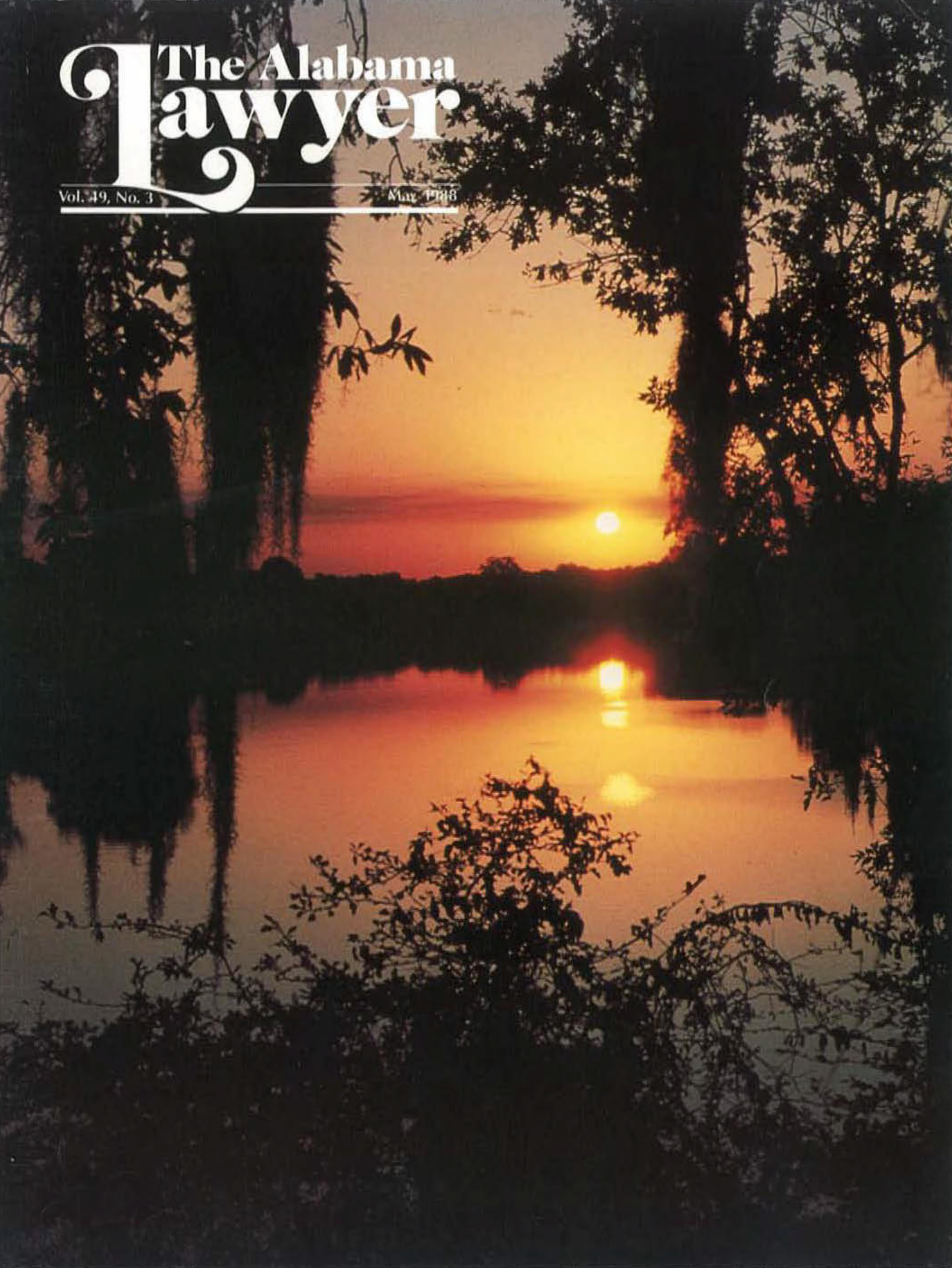
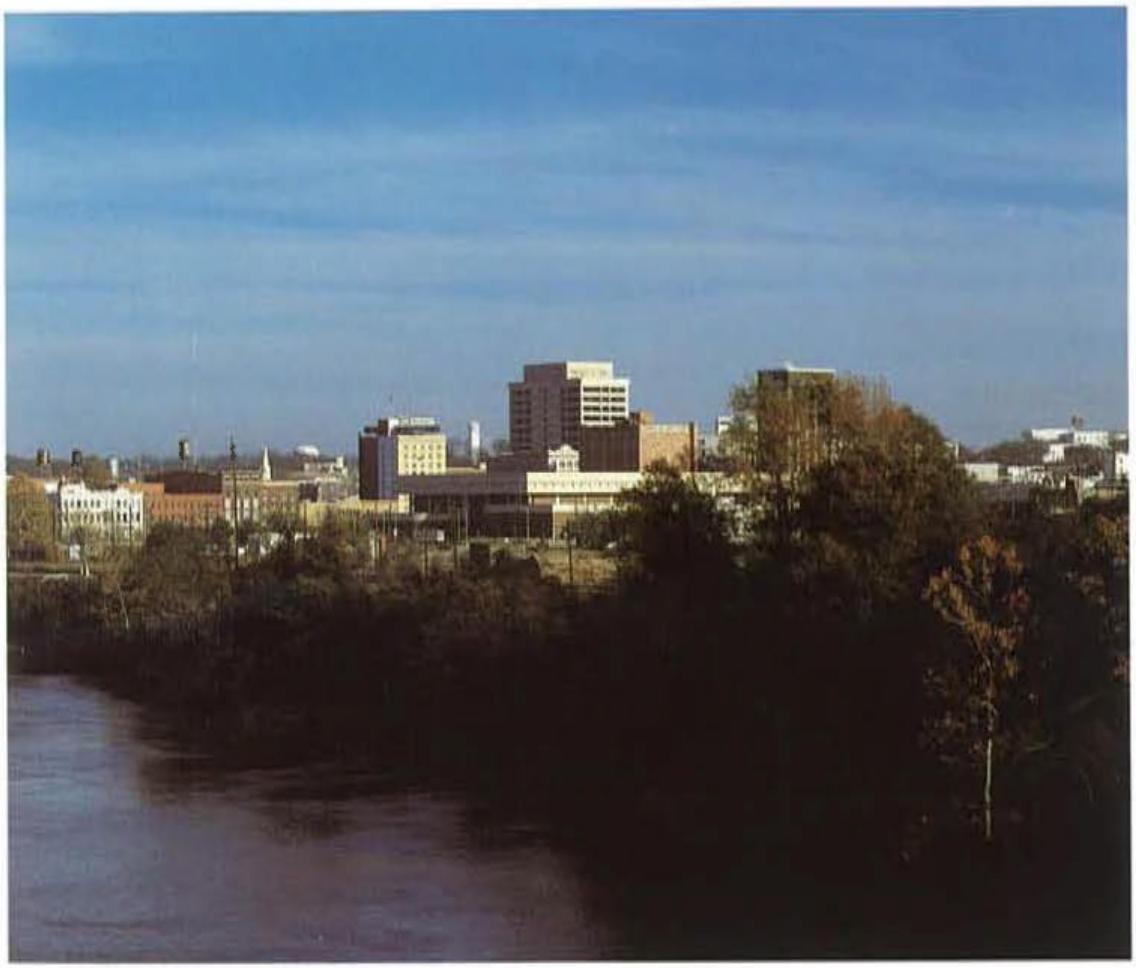
The Alabama Lawyer

Vol. 49, No. 3 May 1988





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by William A. Schroeder, Jerome A. Hoffman and Richard Thigpen

In this comprehensive examination of the rules of Alabama Evidence, the authors present an in-depth discussion of all areas of evidentiary procedures from the relatively simple ways to object to evidence through competence, privileges, relevance, impeachment, the best evidence rule and parol evidence. Many sections contain a discussion of Federal law and how it compares to its Alabama counterpart. Case law is thoroughly cited throughout the book. An excellent reference tool for both the inexperienced and veteran lawyer!

Table of Contents

Obtaining, Offering and Objecting to Evidence • Competence • Examination of Witnesses • Relevance and Limitations on the Admission of Relevant Evidence • Privileges • Impeachment • Expert Testimony • Hearsay • Authentication and Identification — Rules 901, 902, 903 • Special Rules Relating to Writings: The Best Evidence Rule and the Parol Evidence Rule • Real and Demonstrative Evidence • Judicial Notice • Presumptions • Burdens of Proof and Persuasion

About the Authors

William A. Schroeder received his B.A. and J.D. from the University of Illinois and his LL.M. from Harvard Law School. He is a member of the American Bar Association. He taught Evidence, Criminal Procedure and Trial Advocacy at the University of Alabama from 1980 to 1984. Since then he has been a Professor of Law at Southern Illinois University School of Law where he teaches Evidence and Criminal Procedure.

Jerome A. Hoffman received both his B.A. and J.D. from the University of Nebraska. He is a member of the Alabama State Bar Association and the State Bar Association of California. He has been a member of the Alabama Supreme Court's Advisory Committee on Civil Practice and Procedure since its creation in 1971. He is currently a Professor of Law at the University of Alabama School of Law where he teaches Evidence and Civil Procedure.

Richard Thigpen received his B.A. and M.A. from the University of Alabama and his J.D. from the University of Alabama School of Law. He has an LL.M. from Yale University and also an LL.D. (Honorary) from the University of Alabama. He is a member of the Alabama State Bar Association. He is currently a Professor of Law at the University of Alabama School of Law.

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In Brief

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GENERAL INFORMATION **The Alabama Lawyer, (ISSN 0002-4287),** the official publication of the Alabama State Bar, is published seven times a year in the months of January, March, May, July, August (bar directory edition), September and November. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Subscriptions: Alabama State Bar members receive **The Alabama Lawyer** as part of their annual dues payment; $15 of this goes toward subscriptions for **The Alabama Lawyer.** Advertising rates will be furnished upon request. Advertising copy is carefully reviewed, but publication herein does not necessarily imply endorsement of any product or service offered.

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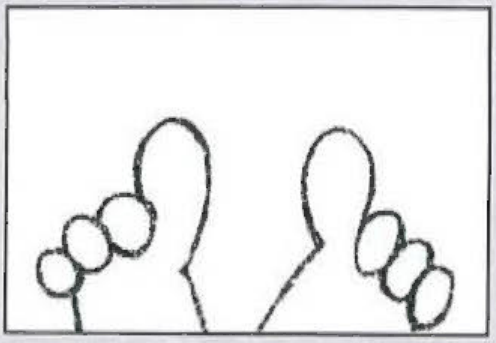
On the cover—

Pictured is a sunset on the Coosa River at Fort Toulouse/Jackson Park, a 165-acre historical park located at the confluence of the Coosa and Tallapoosa rivers near Wetumpka, Alabama. Intensively occupied since 600 A.D. with lesser occupations dating to 5000 B.C., the park was also the site of a 1717 French fort and an 1814 fort built by Andrew Jackson.

Today, both forts are recreated, and artifacts from all occupations are displayed in the Graves House Museum. Other features include nature trails, a boat launch, picnic areas, improved camping and a French Colonial Living History Program.

For more information on the fort, phone (205) 567-3002.

—photo by Lawrence Gregory, Alabama Historical Commission, Fort Toulouse/Jackson Park



INSIDE THIS ISSUE

President's Page

HARRIS

At its meeting on April 1, 1988, the board of commissioners unanimously approved the recommendation of the Insurance Programs Committee that the bar endorse and assist in the advertising and solicitation of members of the bar for funds, subscriptions, memberships or debentures related to the capitalization of a captive insurance company for professional liability insurance. The bar also will participate in other activities that may be reasonably necessary to the promotion, organization and development of the captive. The commission came to its decision following a lengthy period of careful consideration, and after obtaining two polls of the membership and consulting with McNeary Insurance Consulting Services, Inc., an insurance consulting firm which advised a number of the existing captives in other states. We are indebted to Henry Henzel and the Insurance Programs Committee for their hard work.

I urge your support of this effort which will allow the lawyers of Alabama to take their destiny in their own hands and assure the availability of insurance and stability of premiums. I pledge to you that I will give this my close attention throughout the remainder of my term in office, and the project has the support of both of my successors, Gary Huckaby and Alva Caine. I commend it to each of you.

I am delighted to welcome Major General Robert W. Norris as General Counsel of the Alabama Bar. General Norris retires July 1 from his position as Judge Advocate General of the United States Air Force. He is an Alabama lawyer and a graduate of the University of Alabama School of Law and brings not only excellent credentials but enthusiasm to this important position. I know all will lend support to General Norris.

We will miss Mary Lyn Pike who recently resigned as assistant executive director to accept a position as director of professional education with the Association of Trial Lawyers of America in Washington, D.C. Mary Lyn did a superior job for the bar in many areas, particularly developing the Mandatory CLE program from its beginning and working with our many committees. Mary Lyn carries with her our very best wishes, and she knows we expect her to visit whenever she has the chance.

I am most pleased that one of our outstanding young lawyers, Keith Norman of Montgomery, will join the bar full time about May 15 as director of programs and activities. Keith has been a dedicated worker in the Alabama State Bar, and we are most fortunate that he has agreed to come with us. I know you will enjoy working with him.

Our IOLTA program continues to gain momentum. At the time of preparation of this report, we had 293 trust accounts converted to IOLTA interest-bearing accounts which represent 901 lawyers. We are obtaining excellent cooperation from banks all over the state, and I urge those of you who have not taken the simple step of converting your trust account to an IOLTA account, take time to do so now. To date, the Alabama Law Foundation, which will administer the IOLTA grants, has received $23,146.41. The board of trustees of the foundation is determined to develop systems assuring that funding will go to projects of which the public and the bar will be proud.

By order effective March 30, 1988, the Alabama Supreme Court amended Rule VIII of the Client Security Fund rules to provide that only those persons holding an annual business license shall be assessed. At that time, we had received 1,430 contributions of $25 each from special members who now are exempt. The bar commission felt that fairness dictated that we should offer to refund to those members their 1988 assessment; however, in doing so, I have appealed to them to make their 1988 contribution a voluntary one. The amendment also exempts any person admitted to practice who has reached the age of 65 years and retired from the active practice of law.

We continue to move forward with the post-conviction capital representation project headed by former Governor Albert Brewer. The resource center to be established at the University of Alabama School of Law will be incorporated and known as the Alabama Capital Resource Center. The following persons have been asked to serve on the initial board of directors: L. Murray Alley; Dennis N. Balske; Frank S. James, III; Richard S. Manley; Richard H. Gill; W. Harold Albritton, III; Robert L. McCurley, Jr.; Frank H. McFadden; and David A. Bagwell.

I remind you to make plans for the annual meeting in Birmingham at the Wynfrey Hotel, July 21-23. We expect to have a segment of the program dedicated to explaining and promoting the captive insurance company. ■

Executive Director's Report

Hail and Farewell—The Montgomery/D.C. Switch!

Goodbye

Mary Lyn Pike has resigned as assistant executive director of the Alabama State Bar to become director of professional education for the Association of Trial Lawyers of America in the association's Washington, D.C., headquarters.

Mary Lyn began her employment with the Alabama State Bar while a law student. She worked with Professor Camille Cook in the development of the Mandatory CLE program which Alabama adopted in 1981. Following her graduation, she moved to Montgomery and, with the bar's MCLE Commission, implemented a model program that has run with near perfection. The bar's acceptance of MCLE in Alabama is a reflection of the quality and efficiency of the program. Several of our neighboring states have adopted our regulations and procedures almost verbatim. Mary Lyn's implementation and administration of the MCLE rules and commission policies, with the help of Diane Weldon, has established our program as one of the country's best.

The activity level and volunteer involvement in committee and section activity in recent years is another tribute to Mary Lyn's effective role as staff liaison with these vital association entities.

As our assistant executive director, Mary Lyn also coordinated the computerization effort of the bar. She worked closely with the vendor and programmer to insure that the needs of every association function would be met. She coordinated the phase-in of each functional area and the training program of the staff.

The Alabama State Bar has benefited from Mary Lyn's commendable talents, as have the numerous community and civic endeavors in Montgomery in which she participated.

She has coveted a professional opportunity in Washington. I am confident ATLA has chosen well in selecting her to direct its professional education efforts where she joins another Alabama State Bar member, Tom Henderson, who is ATLA's new executive director.

Welcome

Coming home to Alabama from Washington to become Alabama State Bar General Counsel is Robert W. Norris, the current Judge Advocate General of the United States Air Force. He is principal legal advisor to the Air Force Chief of Staff. General Norris will retire from the Air Force July 1, 1988.

Both General Norris and his wife, the former Martha Katherine Cummins, are natives of Birmingham. Their daughter, Lisha, is a hospital administrator and their son, Nathan, will graduate from the University of Virginia and enter law school in the fall of 1988. Norris graduated from the University of Alabama Law School in 1955 and earned an LL.M in taxation from George Washington University. He has held virtually every major position in the Air Force legal system.

HAMNER

His commendable talents and experience as a lawyer and administrator will bring strong direction to the office of general counsel.

A screening committee extended interviews to five finalists from among numerous applicants for the position which became vacant upon the retirement of William H. Morrow, Jr., the bar's general counsel since 1964.

The workload in the office of the general counsel continues to grow at an accelerated pace. The board of commissioners authorized the employment of a third assistant general counsel and appropriate support personnel; however, these actions will not take place until General Norris has an opportunity to review the entire operation at the Center for Professional Responsibility.

Requests for opinions on ethics issues continue to increase. The issues of advertising and solicitation, private referral

service and unauthorized practice of law complaints continue to present stimulating issues to the disciplinary commission. Also, the supreme court has before it for consideration the model Rules of Professional Conduct. Their adoption in Alabama and fulfilling the profession's responsibility at self-regulation will challenge General Norris and his co-workers.

Client Security Fund eye-opener

The overall response to the 1988 Client Security Fund assessment notices has been positive; however, I was shocked at the number of judges, publicly-employed attorneys and non-practicing lawyers who questioned its applicability to them. Ours is a great bar and a strong profession with the privilege of practicing in the nation's foremost judicial system, not to mention under the world's greatest Constitution—yet too many of our members think that the $150 annual business license is what makes one a member of the legal profession in Alabama. Each person admitted to practice takes the same oath to gain the privilege to practice law in Alabama. This privilege is attended with certain professional responsibilities. ■

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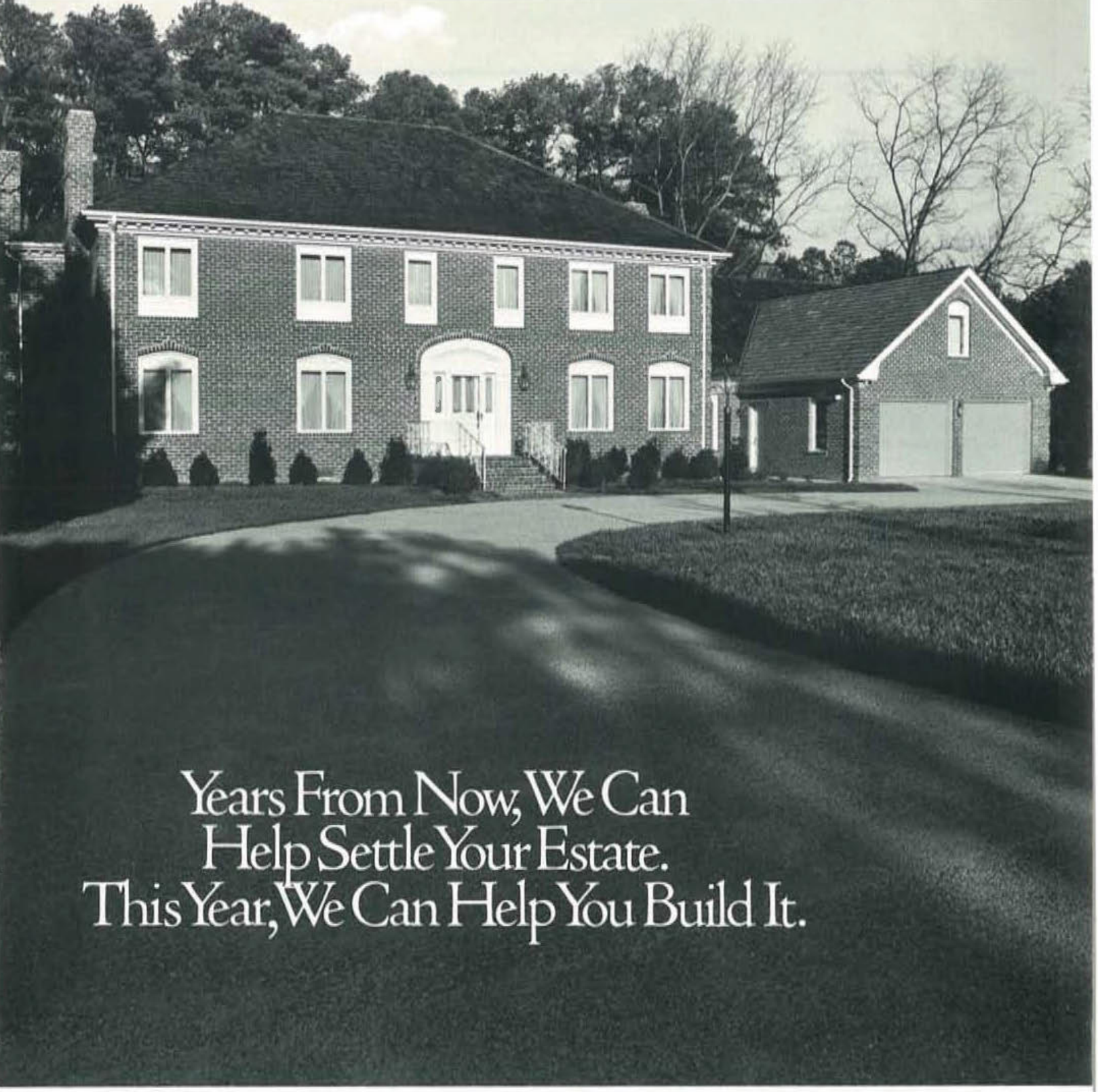

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ABOUT MEMBERS

Judy Mendel Garfinkel, vice president, human resources, **BancBoston Mortgage Corporation,** formerly Mortgage Corporation of the South, has relocated to the Florida division of BancBoston Mortgage Corporation. Her office is located at 7301 Baymeadows Way, Jacksonville, Florida 32216. Phone (904) 281-3000.

■

David A. Garfinkel, formerly a partner in the firm of Veal and Garfinkel, announces his relocation to Jacksonville, Florida. He will be employed with the firm of **Datz, Jacobson & Lembcke,** at 2902 Independent Square, Jacksonville, Florida 32202. Phone (904) 355-5467.

■

Donald Lee Heflin of Huntsville has joined the Foreign Service and been confirmed by the Senate as Vice-Consul/3rd Secretary in the U.S. Embassy in Lima, Peru, effective July 1988. His mailing address remains P.O. Box 875, Huntsville, Alabama 35804.

■

Richard E. Shields announces the relocation of his office to 63 South Royal Street, Suite 308, AmSouth Center/Riverview Plaza, Mobile, Alabama 36602. Phone (205) 432-1656.

■

Richard K. Mauk, former clerk to Bankruptcy Judge Stephen B. Coleman, announces the opening of his office at One Perimeter Park South, Suite 320, South Tower, Birmingham, Alabama 35243. Phone (205) 969-3311.

■

David L. Ratcliffe announces the relocation of his office to 1005 Dauphin Street, Mobile, Alabama 36604. Phone (205) 433-9930.

■

Robert M. Alton, Jr., announces the removal of his offices to 3000 Zelda Road, Suite E, Montgomery, Alabama 36106. Phone (205) 270-0177.

■

Steven M. Reynolds announces the opening of his office at 418 Scott Street, Montgomery, Alabama 36104. Phone (205) 265-3220.

■

Robert F. Smith announces the relocation of his office to 214 West Dr. Hicks Boulevard, P.O. Box 1707, Florence, Alabama 35631. Phone (205) 766-3663.

■

Raymond P. Fitzpatrick, Jr., announces the relocation of his office to 2032 Valleydale Road, Birmingham, Alabama 35244. Phone (205) 988-5048.

■

Ronald A. Davidson announces the removal of his office to 2200 City Federal Building, Birmingham, Alabama 35203. Phone (205) 251-0285.

■

Leon F. Stamp, Jr., announces the relocation of his office to 1005 Dauphin Street, Mobile, Alabama 36604. Phone (205) 433-9930.

■

S. Alec Spoon, formerly deputy district attorney for the 15th Judicial Circuit, announces the opening of his offices at 22 Scott Street, Montgomery, Alabama 36104. Phone (205) 265-6741.

■

Al Pennington announces his withdrawal from the firm of Pennington, McCleave & Patterson, and his continuance in the practice of law at 113 South Dearborn Street, P.O. Box 342, Mobile, Alabama 36601. Phone (205) 432-1661.

AMONG FIRMS

George L. Beck, Jr., announces that **Dennis R. Pierson** has become an associate with the firm of **George L. Beck, Jr.** Offices are located at 22 Scott Street, Montgomery, Alabama 36104. Phone (205) 832-4878.

■

R. Michael Booker and **Byron A. Lassiter** announce the formation of **Booker & Lassiter,** with offices located at 205 Fairhope Avenue, Fairhope, Alabama 36532. Phone (205) 928-2658.

■

A. James Carson and **F. Wade Steed** announce the combination of their practices under the name of **Carson & Steed.** Offices are located at Vestavia Commerce Centre, 2090 Columbiana Road, Suite 4600, Birmingham, Alabama 35216. Phone (205) 822-7000.

■

Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves announces that **David E. Hudgens** and **Ray M. Thompson** have become members of the firm, and **James R. Hinson, Jr., Coleman F. Meador, Aaron E. Bradshaw, Broox G. Holmes, Jr., Charles E. Harrison** and **Bernard P. Matthews, Jr.,** have become associated with the firm. Offices are located at 1300 AmSouth Center, P.O. Box 290, Mobile, Alabama 36601.

■

Stephen D. Heninger and **S. Greg Burge,** formerly of Hare, Wynn, Newell & Newton, and **Stuart F. Vargo,** formerly of Hardin & Associates, announce the formation of a partnership in the name of **Heninger, Burge & Vargo.** Offices are located at 2021 3rd Avenue, North, Suite 300, Birmingham, Alabama 35203.

■

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Heyward C. Hosch, III,** and **R. Carlton Smyly** have become members of the firm, and **C. Ellis Brazeal, III, Anita S. Gifford, Christopher G. Outlaw** and

David B. Walston have become associates of the firm. The firm also announces the relocation of its Mobile offices to 700 AmSouth Center, Mobile, Alabama 36602. Phone (205) 433-6961. Birmingham offices are still at 1900 First National-Southern Natural Building, Birmingham, Alabama 35203. Phone (205) 252-8800.

■

David W. Crosland, Jim Tom Haynes, David N. Strand and Dale C. Freeman announce their partnership under the firm name of **Crosland, Haynes, Strand & Freeman.** Offices are located at 818 Connecticut Avenue, N.W., Suite 1000, Washington, D.C. 20006. Phone (202) 331-8274. They also have an office in San Francisco.

■

Phelps, Dunbar, Marks, Claverie & Sims announces that **Mary Campbell Hubbard** has become a member of the firm. Offices are located at Texaco Center, 400 Poydras Street, New Orleans, Louisiana 70130-3245.

■

Capouano, Wampold, Prestwood & Sansone, P.A. announces that the practices of **Ingalls & Warren** and **Frank Caskey** have combined with the firm. The firm name shall remain **Capouano, Wampold, Prestwood & Sansone, P.A.** Offices are located at 350 Adams Avenue, P.O. Box 1910, Montgomery, Alabama 36102. Phone (205) 264-6401.

■

Herman D. Padgett and **Paul M. Foerster, Jr.,** announce the removal of their offices to 1 North Royal Street, Mobile, Alabama 36602. Phone (205) 433-3741.

■

The firm of **Laird and Wiley, P.C.,** announces the association of **J. Kenneth Guin, Jr.,** with offices at 1816 Third Avenue, Suite C, Bankhead Byars Building, P.O. Box 498, Jasper, Alabama 35502-0498. Phone (205) 221-5601.

■

Maynard, Cooper, Frierson & Gale, P.C. announces that **William S. Dodson, Jr.,** and **Walker Percy Badham, III,** have become members of the firm, and **Gregory H. Hawley, John N. Bolus, Virginia G. Carruthers** and **J. Kris Lowry** have joined the firm as associates. Offices are located at 12th Floor, Watts Building, Birmingham, Alabama 35203. Phone (205) 252-2889.

■

Joe G. Burns, Jr., David B. Ellis, Eugene C. Copeland and **Philip N. Lisenby** announce the formation of a firm in the name of **Burns, Ellis, Copeland & Lisenby.** Offices are located at 2319 8th Street, Tuscaloosa, Alabama 35401. Phone (205) 758-6530.

■

Webb, Crumpton, McGregor, Sasser, Davis & Alley announces that **Kendrick E. Webb** and **William B. Alverson, Jr.,** have become associated with the firm. Offices are located at One Commerce Street, Suite 700, P.O. Box 238, Montgomery, Alabama 36101. Phone (205) 834-3176.

■

Jerry R. Barksdale announces that **Thomas H. Guthrie, Jr.,** is now associated with him at 121 South Marion Street, Athens, Alabama 35611. Phone (205) 233-0525.

■

James D. Pruett has become senior vice president and associate general counsel of **AmSouth Bank N.A.,** and of counsel to **Pruett, Turnbach & Warren, P.C.,** in Gadsden, Alabama. His office address is P.O. Box 11007, Birmingham, Alabama 35288. Phone (205) 326-7607.

■

The firm of **Lewis, Martin, Burnett & Dunkle** announces that **Martin G. Woosley,** formerly assistant counsel and Alabama state counsel, Lawyers Title Insurance Corporation, has become associated with the firm. Offices are located at 1900 SouthTrust Tower, Birmingham, Alabama 35203. Phone (205) 322-8000.

■

The firm of **Johnston, Johnston & Moore** announces the association of **Josh O. Kelly, III,** and **David Vance Lucas.** The firm has relocated to Regency Center, 400 Meridian Street, Suite 301, Huntsville, Alabama 35801. Phone (205) 533-5770.

■

Stan Brown and **Tommie Wilson** announce the formation of the firm of **Brown & Wilson,** with offices located at 1902 Cogswell Avenue, Pell City, Alabama 35125. Phone (205) 884-1877.

■

The firm of **Buntin & Cobb, P.A.,** announces that **Steadman S. Shealy, Jr.,** has become a member of the firm, **Joey Hornsby** has become associated with the firm and the firm name has changed to **Buntin, Cobb & Shealy, P.A.** Offices are located at 206 N. Lena Street, Dothan, Alabama 36303. Phone (205) 794-8526.

■

Donald M. Briskman and **Mack B. Binion** announce the formation of **Briskman & Binion, P.C.,** with offices located at 205 Church Street, P.O. Box 43, Mobile, Alabama 36601. Phone (205) 433-7600.

■

Robert C. Barnett, G. William Noble, Thomas B. Hanes, James P. O'Neal and **Gregory D. Cotton** announce they have formed the firm of **Barnett, Noble, Hanes, O'Neal & Cotton,** and that **Daniel D. Sparks** is an associate of the firm. Offices are located at 1600 City Federal Building, 2026 Second Avenue, North, Birmingham, Alabama 35203. Phone (205) 322-0471.

Alabama State Bar Annual Meeting
Birmingham — July 21-23

The firm of **McCorquodale and McCorquodale** announces that **Jacqualyn M. Sheffield** has become associated with the firm. Offices are located at 226 Commerce Street, P.O. Drawer 1137, Jackson, Alabama 36545. Phone (205) 246-9015.

■

The firm of **Munsey & Ford** announces that **H. Thomas Heflin, Jr.,** has become a partner in the firm and will practice under the firm name of **Munsey, Ford & Heflin.** Offices are located at 110 East Fifth Street, P.O. Box 409, Tuscumbia, Alabama 35674. Phone (205) 383-5953.

■

Gary K. Grace announces the association of **L. Ann Grace** and the relocation of his office to 100 Jefferson Street, South, Suite 300, Huntsville, Alabama 35801. Phone (205) 534-0491.

■

Johnston, Barton, Proctor, Swedlow & Naff announces that **Hollinger F. Barnard** has become a member of the firm, with offices at 1100 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 322-0616.

■

Mountain & Mountain announces that **Harry M. Renfroe, Jr.,** has become associated with the firm, effective March 7, 1988. Offices are located at 2618 7th Street, P.O. Box 2285, Tuscaloosa, Alabama 35403. Phone (205) 349-1740.

■

Clifford Foster, III, announces the relocation of his office to One Maison Building, 3800 Airport Boulevard, Mobile, Alabama 36608, and the association of **Clinton M. Tarkoe.** Phone (205) 344-3300.

■

Pelzer Homes, Inc., announces that **Gordon Thames** has been employed as general counsel. He formerly practiced in Fort Lauderdale, Florida, and will continue to handle a limited number of criminal and civil matters in both Alabama and Florida. His office address is 2600 Spruce Street, Suite A, Montgomery, Alabama 36107. Phone (205) 262-2505.

■

Nettles, Barker, Janecky & Copeland announces that **Forrest S. Latta** has become a member of the firm. Offices are located at 3300 First National Bank Building, P.O. Box 2987, Mobile, Alabama 36652. Phone (205) 432-8786.

■

John A. Nichols and **Mark T. Smyth** announce the dissolution of the firm of Lightfoot, Nichols & Smyth. **John A. Nichols** will continue his law practice as a sole practitioner under the firm name of **Lightfoot & Nichols,** Bricken Building, Luverne, Alabama 36049. **Mark T. Smyth** will continue his law practice as a sole practitioner under the firm name of **Mark T. Smyth,** Bricken Building, Luverne, Alabama 36049.

■

Fred B. Simpson announces the association of **Elena A. Lovoy,** with offices located at 105 North Side Square, Huntsville, Alabama 35801. Phone (205) 539-9333.

■

Gordon, Silberman, Wiggins & Childs announces that **Richard Ebbinghouse, James Mendelsohn** and **Claudia Pearson** have joined the firm as associates in the Birmingham office, and **Eric Adams** has joined as an associate in the Huntsville office. Birmingham offices are located at 15th Floor, Colonial Bank Building, Birmingham, Alabama 35203. Phone (205) 328-0640. The Huntsville office is located at 100 Washington Street, Suite 107, Huntsville, Alabama 35801. Phone (205) 551-0974.

■

Hogan, Smith, Alspaugh, Samples & Pratt, P.C., announces that **Richard D. Stratton** has joined the firm as of March 21, 1988, and **James P. Rea** has been made a member as of January 1, 1988. The firm has moved to its new offices at 2323 2nd Avenue, North, Birmingham Alabama 35203. Phone (205) 324-5635.

■

Kenneth B. Kaplan announces that his firm, **Cohen & Kaplan,** has merged with the 100-year-old Seattle firm of **Lane, Powell, Moss & Miller.** Offices are located at 3800 Rainier Bank Tower, Seattle, Washington 98101.

■

The firm of **Tanner, Guin, Ely, Lary & Neiswender, P.C.,** announces that **Duane A. Wilson** has become an associate of the firm. Offices are located at 2711 University Boulevard, Suite 700, Capitol Park Center, Tuscaloosa, Alabama 35401. Phone (205) 349-4300.

■

The office of **Slade Watson** announces the relocation of their offices from 100 South Dearborn Street to 113 South Dearborn Street, Mobile, Alabama 36602. Phone (205) 432-3230.

■

The firm of **Barrett, Ainsworth & Haynes** announces the relocation of its offices to the SouthBridge Building, 2100-A SouthBridge Parkway, Suite 570, Birmingham, Alabama 35209. Phone (205) 879-0377.

■

The firm of **Watson, Gammons & Fees, P.C.,** announces that **Stuart Edwin Smith** has become associated with the firm. Offices are located at 107 North Side Square, Huntsville, Alabama 35801. Phone (205) 536-7423.

■

Walter P. Crownover, Mark A. Stephens, Dennis W. Shields, Sanford E. Gunter and **Charles M. Coleman** announce the formation of a firm in the name of **Crownover, Stephens, Shields, Gunter & Coleman, P.C.** Offices are located at 2703 7th Street, Tuscaloosa, Alabama 35401. Phone (205) 345-1400.

■

The firm of **Veal & Garfinkel** announces that **Valrey W. Early, III,** has joined the firm, and the firm name has changed to **Veal & Early.** Offices are located at 2112 11th Avenue, South, Birmingham, Alabama 35205. Phone (205) 326-4146. ■

Riding the Circuits

Dale County Bar Association

The Dale County Bar Association elected 1987-88 officers. They are:

President: Alicia Jo Reese, Daleville
Vice-president: Ray Kennington, Ariton
Secretary: Anthony R. Livingston, Newton
Treasurer: William H. Filmore, Ozark

—Alicia Jo Reese

Elmore County Bar Association

The Elmore County Bar Association met recently at Mr. G's Restaurant in Montgomery. Thanks were extended to outgoing President Lynne Riddle-Thrower for a job well done. The new officers for 1988-89 were installed. Michael S. Harper of Tallassee was elected president, and Blake A. Green of Wetumpka was elected secretary. The Honorable Richard Dorrough, circuit judge of the Family Court Division of Montgomery County, Alabama, spoke to the members of the association on Rule 32 and the recommended child support guidelines. Other matters relating to the practice of family law were discussed. Frederick T. Enslen, Jr., a candidate for the Alabama Court of Criminal Appeals, also was present and spoke briefly to the members.

—Blake A. Green

Lee County Bar Association

In November 1987, the Lee County Bar Association began a continuing legal education seminar program which will become an annual event. The seminar was held at the Lee County Justice Center and provided 6.0 hours of CLE credit. Approximately 50 lawyers attended and about half of those were from counties other than Lee. The topics and speakers were:

—an update on criminal law by Ron Myers, district attorney, 37th Circuit;
—appellate practice by Hon. Richard L. Holmes, Alabama Court of Civil Appeals;
—tort reform-the defendant's perspective by Richard B. Garrett, of Rushton, Stakely, Johnston and Garrett;
—Alabama State Bar report, by Ben H. Harris, Jr., president, Alabama State Bar;
—civil procedure-relation back of amendments, by Jerome Hoffman, University of Alabama School of Law; and
—punitive damages and tort reform-the plaintiff's perspective, by Lloyd Gathings, of Gathings and Tucker.

The Lee County Bar Association meets monthly. A special social event was held in January with a cocktail reception hosted by Colonial Bank followed by a seated dinner at Aubie's restaurant in Magnolia Plaza, Auburn. The 1988 officers are:

President: Guy Gunter, Opelika
Vice-president: Bob Petty, Opelika
Secretary/treasurer: Arnold Umbach, Opelika

—Michael Williams

Montgomery County Bar Association

The Montgomery County Bar Association elected new officers and directors of the board for 1988:

President: Wanda D. Devereaux, Montgomery
Vice-president: Robert D. Segall, Montgomery
Secretary/treasurer: J. Floyd Minor, Montgomery
Board members: J. Cliff Heard
John N. Pappanastos
H. E. Nix, Jr.
J. Paul Lowery
Dorothy Norwood
James E. Williams
Edwin K. Livingston, ex officio

The appointed committees are planning a busy year for members. The Law Day Committee, chaired by Robert H. Harris, has planned a full week of activities, including the Law Day luncheon with guest speaker U.S. Senator Richard Shelby. The Continuing Legal Education Committee, chaired by Anthony McLain, is setting up at least 25 hours of CLE credit. Jimmy Pool, chairman of the Entertainment Committee, has scheduled several social functions for 1988, including the MCBA Annual Barbecue and a golf and tennis tournament followed by a party.

—Dot Wilson, Executive Secretary, MCBA

Riding the Circuits

Walker County Bar Association

On March 3, 1988, after finishing a three-week program, 13 attendees of the "Peoples' Law School" were presented with certificates of completion. The school is sponsored by the Walker County Bar Association in conjunction with the Walker College Adult Continuing Education program. The program has run for two years and been adopted as an annual project.

—G. Warren Laird, Jr.

Recent graduates of Walker County Bar Association's "Peoples' Law School"

■

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Bar Briefs

Heflin speaks at ABA Mid-winter Meeting

The American Judicature Society and the National Conference of Bar Presidents co-hosted the annual luncheon at the mid-winter meeting of the American Bar Association in Philadelphia. Senator Howell T. Heflin was the luncheon speaker, and his address dealt with the "cumbersome process for judicial impeachment." Pictured at right are Alabama State Bar President-elect Gary C. Huckaby; Jeanne Huckaby; Birmingham Bar Association President Gerard J. Durward; Senator Heflin; Madison County Circuit Judge John David Snodgrass; ASB Executive Director Reginald T. Hamner; Birmingham Bar Association Executive Director Beth Carmichael; and ASB 1987-88 President Ben H. Harris, Jr.

—photo courtesy of *ABA Journal*

Heflin with several attendees of the ABA Mid-Winter Meeting

Law Week across the country

The 1988 Law Day U.S.A. theme is "Legal Literacy."

Law Day U.S.A. was established by United States Presidential Proclamation in 1958 and reaffirmed by a joint resolution of Congress in 1961. The purpose of Law Day U.S.A., celebrated annually on May 1, is to reserve a "special day of celebration by the American people in appreciation of their liberties and to provide an occasion for rededication to the ideals of equality and justice under laws."

The 1988 theme, "Legal Literacy," encourages Law Day programs and events to urge all citizens to increase their knowledge and understanding of the law.

State and local bar associations, libraries, community organizations, schools, churches, law enforcement agencies, service clubs, legal auxiliaries and scouting organizations are among the many groups which sponsor Law Day U.S.A. programs and events.

The events are numerous and varied, ranging from mock-trials conducted in schools, court ceremonies and poster and essay contests to television and radio call-in programs.

Recent innovative programs have included tie-ins with child fingerprinting to aid in locating missing children, coordination with sponsors of local campaigns against drunk driving, outreach programs to senior citizens and community particpation in dispute resolution programs.

Law Week in Alabama

Alabama's judges and lawyers hit the classrooms the week of May 1-7, to participate in the statewide legal "teach-in" on law and justice.

The program is sponsored by state courts and the Alabama State Bar to celebrate Law and Court Observance Week and carries the theme for this year's Law Day, "Legal Literacy—The ABCs of American Law and Justice."

Alabama Chief Justice C.C. Torbert, Jr., Superintendent of Education Dr. Wayne Teague and State Bar President Ben Harris of Mobile have endorsed the program. Torbert said he will participate in a school forum during the week.

The chief justice said all members of the judiciary and all lawyers are requested to participate in the program, visiting with students in every elementary and secondary school in the state.

Torbert said committees of judges and lawyers are established in every judicial circuit and county and will coordinate these activities with school administrators and teachers.

—Administrative Office of Courts

West-Central Alabama Young Lawyers' Affiliate Division established

On Friday, February 12, 1988, in Jasper, Alabama, young lawyers from a five-county area, including Cullman, Fayette, Marion, Walker and Winston counties, met to determine the feasibility of establishing a regional young lawyers' affiliate division of the Young Lawyers' Section of the Alabama State Bar. The West-Central Alabama Young Lawyers' Affiliate Division emerged.

Young lawyers from the five-county area were encouraged to attend. Approximately one-half of the young lawyers from the region were present to take part in the formation of this new organization. Many others who could not attend expressed their desire to become a part of this concept.

After a seminar on "Rule 32-Child Support Guidelines," conducted by the Honorable Wadell C. Zanaty, Jr., of the Tenth Judicial Circuit, the young lawyers reconvened into a general business session. Interests in the formation of a young lawyers' affiliate division for the geographic area were discussed, and all in attendance voted unanimously to carry on with the organization's formation.

Warren Laird of Jasper was elected president of the affiliate division. Kim Chaney of Cullman was elected vice-president. Margaret Dabbs, also of Jasper, was elected secretary/treasurer.

The West-Central Alabama Young Lawyers will hold its next meeting in early summer.

Gadsden, Tuscaloosa LSCA offices get new managing attorneys

The close of 1987 saw the appointment of new managing attorneys for the Gadsden and Tuscaloosa Regional Offices of Legal Services Corp. of Alabama.

Named manager in Tuscaloosa is Sue Thompson, who has served as the managing attorney in Gadsden since that office opened in February 1978. Replacing her is David Webster, who was promoted from a senior staff position in the Gadsden Region's Talladega office. Thompson replaces Jeff Sacher, who resigned in mid-October to take a job in Washington, D.C.

Born in Greene County, Thompson was reared in Tuscaloosa. She finished the University of Alabama Law School in January 1974 and was in private practice in Tuscaloosa for three years before joining LSCA. Her undergraduate degree was from the University, but she also attended Stillman College, a Presbyterian school in Tuscaloosa. Thompson currently is vice-chairperson of that school's board of trustees and has served on its board since 1981.

Formerly active on the national board of the Girl Scouts of the U.S.A., Thompson has focused her community efforts locally in recent years. She served as a bar examiner from 1983 to 1986 and still is president of the board of directors of the Etowah Quality of Life Council, a nonprofit agency which receives federal grants to operate three community health centers in the Gadsden area.

Webster came to LSCA in September 1980 as a staff attorney operating a special migrant project funded by LSC. He spent a few months in Gadsden before working out of Pell City where he ran the statewide migrant program for about two years. A decision was made to close the migrant program, funding costs closed the Pell City office and Webster transferred as a staff attorney to the Talladega office. He has been a senior staff attorney since February 1984.

Webster is a 1974 graduate of Cumberland School of Law. He was a political science major at Auburn University. Before joining LSCA, he was in private practice in Birmingham for five years.

—*Legal Services Bulletin*, winter 1987-88 edition

Rice named "Boss of the Year"

Benjamin R. Rice, a Huntsville attorney recently was named "Boss of the Year" by the Huntsville Legal Secretaries Association at its Boss of the Year Banquet.

Rice is a 1972 graduate of Cumberland School of Law and practices with the firm of Williams, Spurrier.

Samford named counsel to Auburn University

Thomas D. Samford, III, longtime legal adviser to Auburn University, has been named university general counsel, Auburn University President James E. Martin announced.

The appointment is effective in late summer for Samford, who has served as

Samford

an attorney for AU since 1961 and the university's general counsel since 1965.

The full-time legal counsel position was recommended by a study committee that assisted in an overall university organizational restructuring that began with the start of the Martin administration in 1984.

Besides rendering service to the university through his Opelika practice for 27 years, Samford also has served on a number of university boards and committees at the direction of the AU president.

A native of Opelika who attended public schools there, Samford earned his undergraduate degree in politics at Princeton, where he graduated *magna cum laude* and was a member of Phi

Beta Kappa. He earned his law degree from the University of Alabama, where he graduated first in his class and served as editor of the law review.

Samford, 53, is a member of the American, Alabama State and Lee County bar associations, and his professional admissions include the U.S. Supreme Court, as well as the Alabama Supreme Court and subordinate courts.

Committee looking for intellectual property law papers

The Intellectual Property Committee of the American Corporate Counsel Association has embarked on a project to act as a clearing house for all nonpublished papers dealing with intellectual property law. The committee plans to make an abstract of those papers and circulate the abstracts among its members.

For more information, contact Lynn Smelkinson, senior counsel, U.S. Chamber of Commerce, 1615 H Street, N.W., Washington, D.C. 20062. Phone (202) 463-5337.

Avis adds new features

Avis announces that the special, low rates offered in the Alabama State Bar's Avis Member Benefit Agreement have been extended with two additional program benefits. Effective March 1, 1988, Avis now includes the following important features:

—Unlimited, free mileage applying to Association Daily Rates for rentals returned to the same city.

—Special daily rate pricing applying in the New York City area for local rentals.

Car Group	A	B	C	D	E
Daily Rate	40	43	45	46	47

—All other rates, discounts and benefits remain in full effect.

Wilson appointed U.S. Attorney—Middle District of Alabama

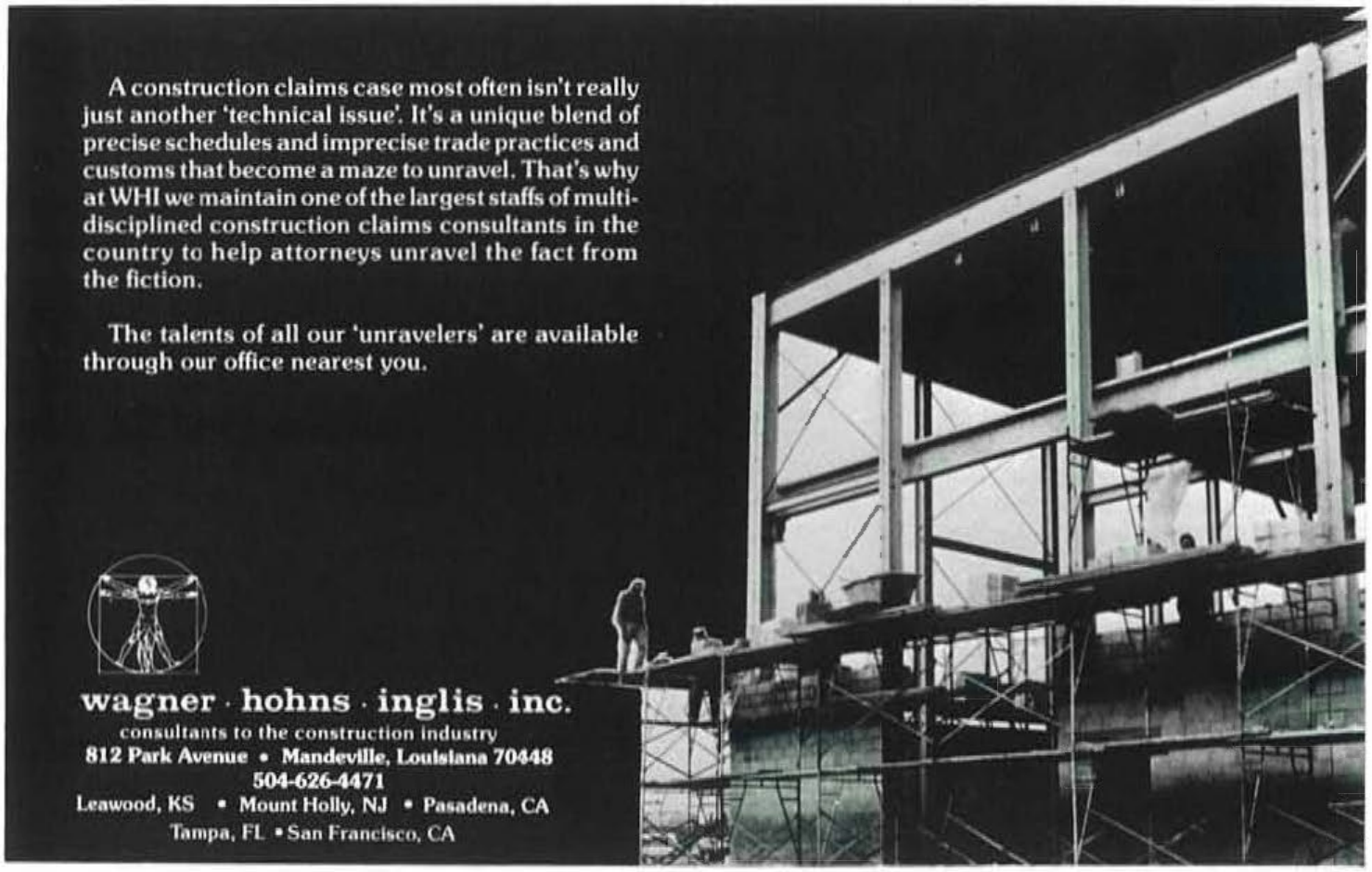
James Eldon Wilson, a Montgomery attorney, recently was appointed as the United States Attorney for the Middle District of Alabama.

Wilson graduated from the University of Alabama in 1969 and the University's School of Law in 1972.

Prior professional experience includes serving as an assistant staff judge advocate from 1972-1976, and as an assistant U.S. attorney for the Western District of Louisiana from 1976-1978. In early 1978, he transferred to Montgomery, employed as an assistant U.S. Attorney.

Last June, Wilson was appointed as the interim U.S. attorney, and the Senate confirmed it February 19.

Wilson also serves as the staff judge advocate for the 198th Tactical Fighter Group, Dannelly Field. ■



If you aren't in Birmingham July 21-23, here's a look at what you'll be missing—

Thursday, July 21

— Section meetings begin Thursday morning, with the Bench and Bar luncheon at noon.

— In the late afternoon, there will be a short ceremony in downtown Birmingham dedicating the Hugo L. Black Federal Courthouse, followed by the traditional membership reception . . .

— . . . This year's reception will be held in Alabama's only true "movie palace," the Alabama Theater. During the reception, members will be entertained with a performance on the theater's mighty Wurlitzer organ. (There is ample parking near the theater, which is a short walk from the courthouse.)

— There's still more! The ASB Young Lawyers' Section, in conjunction with the Birmingham YLS, will host their annual get-together tentatively scheduled for the Birmingham Botanical Gardens.

Still more . . .

Friday, July 22

— All day—Update '88—information, education, handouts and cle credit.

— Traditional alumni luncheons at noon.

— That night, back by very popular demand, is the Chicago Bar Association's "Christmas Spirits" revue! The 1987 production, "Lex Miserables," features many of original cast from the 1986 show during the last Birmingham convention, which was considered by all to be great entertainment.

Not over yet . . .

Saturday, July 23

— In the morning will be the annual business meeting and Grande Convocation, as well as committee breakfasts.

— If the state bar's efforts to form a captive insurance company are successful, this will be the major topic of interest during the general session.

***RESERVATIONS** for the Wynfrey will be handled through the state bar; convention brochures and registration forms will be mailed to members by early June. ■

BACK TO BIRMINGHAM IN JULY!

Alva Caswell Caine
President-elect, Alabama State Bar, 1988-89

Pursuant to the Alabama State Bar's rules governing the election of the president-elect, the following biographical sketch is provided of Alva Caswell Caine of Birmingham, Alabama. Caine is the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 1988-89 term.

Education and early career years

Caine, a native of Safford, Alabama, is a partner with the firm of Hare, Wynn, Newell & Newton. He received his undergraduate degrees from the Marion Military Institute (A.A., 1961) and University of Alabama (B.S., 1964). Following undergraduate school, he entered active duty with the United States Army as a captain in the Airborn Infantry. He concluded his tour of duty as a helicopter instructor pilot in the Army Aviation School at Fort Rucker, Alabama. Following discharge from the army, he entered Cumberland School of Law and graduated with a J.D. degree in 1970. After graduation, he clerked for the chief judge of the Northern District of Alabama until he entered Harvard Law School, where he graduated with a LL.M. degree in 1971.

Caine

Local bar service

He has served on the Grievance Committee of the Birmingham Bar Association, 1974-1975.

State bar activities

Caine has served on the State Grievance Committee, 1976-1979, the Presidential Advisory Committee, 1987, and presently is serving on the Law Day Committee.

American Bar Association work

Caine was elected national 2nd vice-president of the Law Student Division of the American Bar Association, 1968-1969. He has served as president of the Alabama Trial Lawyers Association, 1984-1985, and as a member of the house of delegates of the Association of Trial Lawyers of America, 1986.

Other professional and civic activities

Caine is a trustee of Marion Military Institute and a member of Trinity United Methodist Church.

He is the father of three children: Alva C. Caine, Jr., Eleanor Caine and William Henry Caine. ■

Building Alabama's Courthouses

by Samuel A. Rumore, Jr.

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. *The Alabama Lawyer* plans to run one county's story in each issue of the magazine. If you have any photographs of early or present courthouses, please forward them to:

Samuel A. Rumore, Jr.
Miglionico & Rumore
1007 Colonial Bank Building
Birmingham, Alabama 35203-4054

Lauderdale County Courthouse

Lauderdale County

Lauderdale County was established by the Alabama Territorial Legislature on February 12, 1818. It was named for Lt. Col. James Lauderdale, a native of Virginia, who later moved to Tennessee and served under General John Coffee and General Andrew Jackson in battles against the Indians, and in the War of 1812. Col. Lauderdale died December 23, 1814, from wounds received in battle.

In the act creating Lauderdale County, the legislature decreed that, temporarily, courts would be held at Colonel Puler's place, east of Cypress, or at some other convenient place.

Like Lauderdale County, the city of Florence was established in 1818. It was founded by a group of land speculators calling themselves the Cypress Land Company. The investors of this company believed that Florence would be a great commercial center because of its location at the head of navigation on the Tennessee River. The town was surveyed by an Italian engineer, Ferdinand Sannoner, who reportedly named the town after his native Florence, Italy. Florence was selected as the permanent county seat in an election held in 1822.

To ensure the continued success of Florence, the Cypress investors built a county courthouse at company expense. This courthouse served the county from 1822 to 1899. It was a two-story building in the modified classical style, fronted with eight massive Doric columns. The hipped roof was topped by a square-based tower, with a clock face on each side, and mounted with a classical dome.

The second Lauderdale County courthouse was built on the site of the first. This 1901 structure was built of brick, stone and cement in the classical style. Its architects were Coluche and Stewart, and Arthur Marshall was the contractor.

This building was 150 feet long, 85 feet wide and 50 feet high. On the first floor it had two broad corridors intersecting in the center of the building. On the second floor was the large courtroom which measured 50 by 70 feet, the witness rooms and the offices of the court clerk and register. The north and east facades of this building had Corinthian columns. Its impressive dome housed clock faces for the four sides of the building and was mounted by a bell tower. This building was razed in 1965.

Ground was broken for the third and present Lauderdale County Courthouse on September 9, 1963. An entire city block was acquired for the building and its adjacent parking. The building is of modern design and contains five floors and a basement. The architects were Northington, Smith and Kranert. The general contractor was J.M. Massey, Jr. Total cost of this project was $2,189,400. ■

Samuel A. Rumore, Jr., is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairman of the Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore.

NOTICE

In the last few years the eastern states office of the Bureau of Land Management has noticed an increase in the number of title problems involving federal lands located within its jurisdiction.

The bureau is charged with administering and managing public domain lands, that is, lands which never left federal ownership. Traditionally, these holdings in the east have been smaller, isolated tracts. Consequently, most people are unaware of the federal interest. This federal interest may be a result of uncompleted claims under the various Homestead or Credit Acts or clerical errors resulting from the vagaries of 19th century transportation or communication systems.

Attorneys certifying title to property in Alabama need to be aware that a federal title issue may exist. Ordinarily, in the absence of legislation providing otherwise, title to public lands cannot be acquired by adverse possession as against the United States. *United States v. California*, 332 U.S. 19 (1947); *Marine R. & Coal Co. v. United States*, 168 U.S. 208 (1921); 239 (1889) Therefore, Alabama's adverse possession statute may not be sufficient to warrant title in some cases. Attorneys should be cognizant of the fact that they may need to establish severance of the federal title.

If you have any questions regarding this issue, please call (703) 274-0093.

David R. Simpson
Chief, Branch of Lands
United States Department of the Interior
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Alabama State Bar Board of Bar Commissioners' Actions

February 19, 1988, Montgomery, Alabama

Present: Commissioners Reeves, Hamner, Crownover, Owens, Love, A.J. Coleman, F. Hare, Edwards, Lloyd, T. Coleman, Dillard, Higginbotham, Hill, Cassady, Lott, Holmes, Engel, Laird, Gill, Seale, Manley, Head, Bowles, Baxley, Garrett, Royer, Rowe, Vinson, Brassell, C. Hare, Chason, Wood, Hereford, Knight, Bouldin, Melton, Adams and Proctor; Secretary Hamner; staff members Pike and Jackson; YLS President Mixon; Chairman, Insurance Programs Committee, Henzel; Chairman, Action Group on Post-Conviction Representation, Brewer; Chairman, Future of the Profession Committee, Morgan.

Absent: Commissioners Turner, Thornton, Jackson, Scruggs, Blan, Davis, James, Crook, Martin, Albritton, Gosa, Jones, Matthews, White and Alexander.

The board:

- approved as written the minutes of its December 18, 1987, meeting;
- administered seven private reprimands and two public censures;
- authorized the incorporation of a resource center to handle post-conviction capital representation in Alabama;
- endorsed legislation providing for the appointment, reimbursement and payment of attorneys in capital cases;
- authorized the Executive Committee to name persons to serve as directors of the resource center and make recommendations regarding the naming of the resource center;
- received a report on Senate Bill 33, establishing a Uniform Arbitration Act and, by voice vote, authorized the substitution of the bar-approved bill if it appeared likely an Arbitration Act would be enacted;
- received a report on the Alabama Legal Services Liability Act;
- received a report on the "Client's Bill of Rights and Responsibilities," and decided by voice vote that the "Client's Bill of Rights and Responsibilities" be referred to the Action Group on Professionalism for study;
- received a report from the Insurance Programs Committee on the progress of the formation of a captive company and decided to extend the deadline to March 25, 1988, for receiving start-up contributions, and send another letter to each bar member advising them of the status of the start-up effort and seeking their support;
- received a report from the office of the general counsel noting that 118 requests-for-opinion files had been closed since August 1, 1987, and that as of January 22, 1988, those files were current, with the exception of opinions regarding for-profit lawyer referral services; and further that 175 UPL files had been closed;
- received a report from the secretary that the part-time acting assistant general counsel had accepted a permanent position and no longer was employed by the state bar;
- received a report from the president regarding the employment of the new general counsel, Major General Robert W. Norris;
- received the resignation of Mary Lyn Pike, assistant executive director of the state bar;
- received a status report that, as of February 19, 1988, 1,663 attorneys had paid into the Client Security Fund, 138 lawyers or law firms had opened IOLTA accounts in the state and the Alabama Law Foundation had received approximately $2,300 in interest income;
- approved a request from the state bar's Law Day Committee for $6,000 for Law Day 1988;
- received the secretary's report that first-quarter revenues were approximately $3,500 over projections and that disbursements were $66,000 under budget;
- accepted a resolution memorializing Grove Hill lawyer and former state bar president John Edmund Adams. ■

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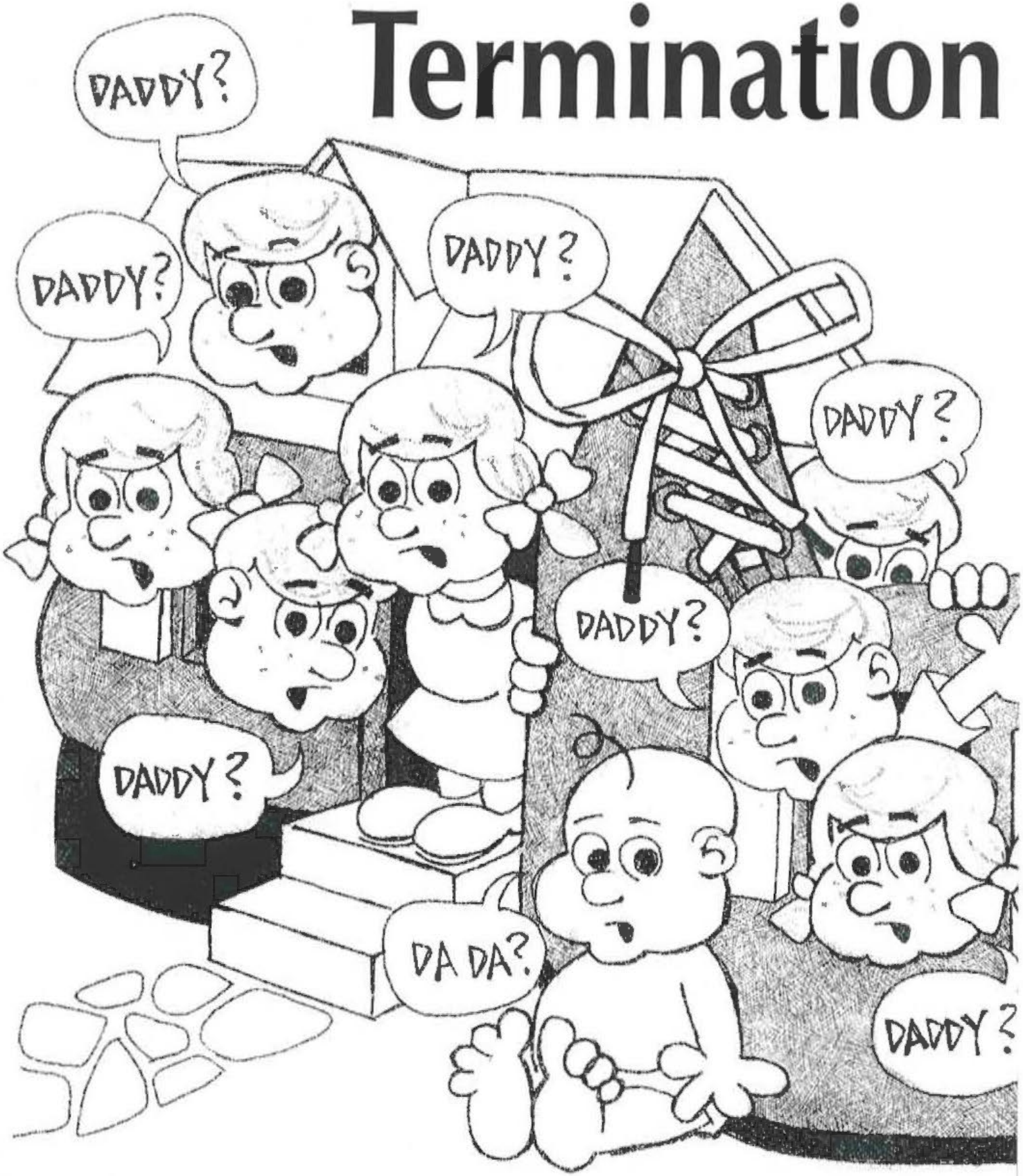
Termination



# of Parental Rights

by Greg Ward

I. Introduction

Termination of parental rights cases generally arises through one of several relatively fixed fact patterns. Probably the most usual scenario is that the county department of human resources receives complaints of abuse or neglect of children, obtains a pick-up order and the children are subsequently adjudicated dependent. The parents are given a contract containing conditions to follow to regain the children, they do not comply and the department of human resources wishes to place the children for adoption. Another often-repeated scenario is that after a divorce the noncustodial parent leaves the state, neither contacts nor supports the children for a protracted period of time and the custodial spouse remarries with the new spouse wishing to adopt the children.

In both of these situations, and in countless variations that arise, there is an uncooperative party who will not or cannot care for the children and who will not leave the picture to allow others to do so.

However, the law does not leave the children helpless. There is a process whereby the parental rights of the uncooperative party can be terminated, and the child can be cared for and permanently placed. This is generally done through the interplay of the 1984 Child Protection Act, *Ala. Code* sections 26-18-1 through 10 (1975), statutory juvenile court Procedure, *Ala. Code* Sections 12-15-1 to 120 (1975) and the Alabama Rules of Juvenile Procedure. Each references the others, and an understanding of all three is necessary in handling a case involving the termination of parental rights. As will be shown, these sections generally are considered to be guidelines to be used, allowing great freedom for the juvenile court judge and creative opportunities for counsel.

II. Who can file?

When the 1984 Child Protection Act, *Ala. Code* section 26-18-1 to 10 (1975), was first implemented, there was confusion about who could file to terminate parental rights. The act states that, "A petition may be filed by any public or private licensed child placing agency or parent, with permission of the Court, or any interested party." *Ala. Code* section 26-18-5 (1975).

In an appeal filed not long after the act was implemented, and on a case that actually preceded the act, the court of civil appeals held that termination of parental rights proceedings are "in the nature of an action by the state," and the process is typically that a petition was filed seeking removal of the child and placing the child with the state or others. *Abney v. Johnson*, 474 So.2d 712 (Ala.Civ.App. 1984). Judge Wright concluded for a unanimous court that "the proceedings are not designed to allow one parent who already has custody of the child, following a divorce, to terminate the parental rights of the other parent." *Abney*, 474 So.2d 714.

The Alabama Supreme Court quickly reversed the court of appeals by taking

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a broader view of the act and holding that section 26-18-5 "clearly evidences the legislature's intent to allow parents to initiate" termination petitions. *Ex Parte Johnson*, 474 So.2d 715 (Ala. 1985).

The court reasoned that since the new act outlines procedures in a termination case, and the legislators did not proscribe filing by parents, it can be inferred that the legislature intended to allow parents to file. Additionally, parents have direct knowledge of the situation, and it is illogical to require them to go to the state seeking a petition involving facts about which they know more. No compelling reasons could be found to hold that the state has exclusive authority to begin termination cases.

The court considered 12-15-50 et. seq. and the new act *in pari materia, even though the new act was not in effect when the case was originally filed.*

III. Which court has jurisdiction?

It is clear that the juvenile court is statutorily vested with exclusive original jurisdiction when the child is alleged to be dependent, *Ala. Code* section 12-15-30(a)(1)(1975), as well as in termination of parental rights cases, *Ala. Code* section 12-15-30(b)(6)(1975). *Wright v. Montgomery County Department of Pensions*, 423 So.2d 256 (Ala.Civ.App. 1982).

What happens when more than one juvenile court is forced to deal with a child at the same time? When this occurs, both courts are generally said to have equal and concurrent jurisdiction, and the court which exercised its jurisdiction first has the preference and should be allowed to act legitimately without obstruction by the second court. *Ex parte Department of Mental Health*, 491 So.2d 956 (Ala.Civ.App. 1986). The Alabama Supreme Court states that this general rule is founded on the primary concern being the juvenile's best interests and that courts should cooperate in that spirit. *Ex Parte Department of Mental Health*, 511 So.2d 181 (Ala. 1987). This effectively prevents juvenile courts in different counties from acting as *de facto* appellate courts. This is not to say that the first juvenile court to act on a child retains primary place for all possibilities. The supreme court hinted as such when it said that the two matters at hand in that case were sufficiently related to allow the principal of concurrent jurisdiction to apply. The rule does not apply, however, when the issues before the two courts are unrelated, or when the issues are between the same parties. *Ex Parte Department*, 511 So.2d at 184.

In several cases parents have attempted to convince the appellate courts that the circuit court which granted the parents' divorce and awarded custody retains continuing jurisdiction of all custody issues involving the child for all purposes. The court of civil appeals has held that when the issue is not a custody dispute between parents but, looking at the facts, is a case involving a child in need of supervision or a case of dependency, the juvenile court has original jurisdiction, *Anonymous v. Anonymous, 504 So.2d 289 (Ala.Civ. App. 1986); Carter v. Jefferson County Department of Pensions and Security*, 496 So.2d 66 (Ala.Civ.App. 1986) and as well as later when the issue becomes termination of parental rights, *Ala. Code* section 12-15-30(b)(6)(1975). See, *Wright v. Montgomery County Department of Pensions*, 423 So.2d 256 (Ala.Civ.App. 1982). This is bolstered in termination cases by section 12-15-71(a)(6) which lists termination of parental rights among the possible dispositions which the juvenile court can make after a finding of dependency.

Whether the juvenile court is in the district court or the circuit court is not as obvious as it might appear. That decision is left to the discretion of the presiding judge of each circuit.

The district judge serves as the juvenile court judge, "unless otherwise ordered by the presiding circuit judge." Rule 2(A), Alabama Rules of Juvenile Procedure. The presiding circuit judge has broad administrative powers and must designate a combination of circuit and district judges as he deems necessary if the case load requires it or the district encompasses more than one county. Rule 2(C), A.R.J.P. The designations are subjected to approval of the Alabama Supreme Court. Rule 2(E), A.R.J.P.

IV. The complaint—special requirements

Certain special rules are applicable to complaints in termination cases. It is specifically provided that:

> "No complaint or petition shall be filed by any party unless it alleges that the party filing the same or a public or private licensed child-placing agency is able and willing to assume custody of said child, and no such petition shall be granted except upon proof of such allegations."

Ala. Code section 26-18-4 (1975). The rationale behind this rule is that whomever wishes to file a termination petition also must show what is to happen to the child should the petition be granted.

This is a simple matter when the local department of human resources is the movant. The rule is less vital when a custodial parent files to terminate the parental rights of a non-custodial parent, but it is still a statutory requirement and therefore should be followed. Proof of the allegation also is required, and furnishing that proof can be handled at the hearing.

However, it was recently held that failure to make this allegation did not render the petition ineffective where DHR has already invoked the juvenile court's jurisdiction by the filing of the original petition alleging dependency and a subse-

quent finding of dependency, and where the court knew that DHR had the child and was willing to retain custody. *Valero v. State Department of Human Resources*, 511 So.2d 200 (Ala.Civ.App. 1987). The court reasoned that once jurisdiction is invoked, it continues under section 12-15-32 until the child is discharged by the court or obtains the age of 21, *Valero*, 511 So.2d 203. (Ala.Civ.App. 1987).

There is also a special provision involving service of process. Generally, service by publication is not allowed in juvenile proceedings. However, termination cases are an exception, and notice by publication is specifically allowed. Rule 13(B), A.R.J.P. The committee comments to rule 13 state that the reason behind this is that "effectiveness of this notice must be balanced against the necessity for immediacy of the hearing and the requirement of confidentiality of juvenile court proceedings." Otherwise, service of process is to be perfected pursuant to Alabama Rules of Civil Procedure. *Ala. Code* section 26-18-6 (1975).

V. The hearing—right to counsel and transcript

It is of primary importance that the juvenile court immediately and adequately inform the necessary parties of their right to counsel. The statutes distinguish who has the right to counsel and when that right accrues based on whether the child is alleged to be delinquent, in need of supervision or dependent. It is statutorily mandated in cases involving alleged *delinquency* or need of supervision that the juvenile court inform the child, his parents, custodian or guardian of the child's right to counsel at all stages of the proceeding. *Ala. Code* section 12-15-63(a)(1975). In cases involving alleged dependency, the parents, guardian or custodian of the child must be informed by the juvenile court that they have a right to counsel; and, if they so request, and are financially unable to afford counsel of their own, the court is under a duty to appoint counsel for them. *Ala. Code* section 12-15-63(b)(1975). If counsel is not independently obtained for the child in a proceeding in which there is a reasonable likelihood that he could be committed to an institution which curtails his freedom, counsel shall be provided. *Ala. Code* section 12-15-63(a) (1975). Counsel for the child is also mandatory in dependency cases where there is an adverse interest between the parent and child, the parent is a minor or the parent is statutorily relieved of minority by marital status but still younger than age 18. *Ala. Code* section 12-15-63(b)(1975). The right to counsel extends to termination cases. *Kelly v. Licensed Foster Parents*, 410 So.2d 896 (Ala. 1981). It has been held that the right to counsel is a fundamental right at all stages in dependency hearings, and the duty is on the court to inform indigent parents, guardians or custodians of their right to counsel. *Smoke v. State Department of Pensions and Security*, 378 So.2d 1149 (Ala.Civ.App. 1979).

These rights can be waived, however, and they are evidently not revived when the parent subsequently files a petition seeking information as to visitation rights. *Turley v. Marshall County Department of Pensions and Security*, 481 So.2d 406 (Ala.Civ.App. 1985).

The right to counsel and a free transcript on appeal for indigents in termination cases has been squarely established. Early on, the appellate courts reviewed the law surrounding the rights of indigent parents to a free transcript and counsel on appeal and decided that it should be granted, though under state law, not on constitutional grounds. *Matter of Ward*, 351 So.2d 571 (Ala.Civ.App. 1977).

VI. Grounds justifying termination

The point of beginning in termination cases is that the maintenance of family integrity is considered to be a fundamental constitutional right, clothed with the requirements of due process, *Matter of Moore*, 470 So.2d 1269 (Ala.Civ.App. 1985). Flowing from this is the principal that parents have a *prima facie* right to their children, *Moore*, 470 So.2d at 1270.

For parental rights to be removed, the court must adhere to a strict set of requirements, applying a two-part litmus test by determining first that the child is dependent and next that no less drastic alternatives are sufficient. *See Wallace v.*

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Jefferson County Department of Pensions and Security, 501 So.2d 473 (Ala.Civ.App. 1986).

The evidence must be clear and convincing that it is not in the child's best interests to remain with the parents. *In Re Brand*, 479 So.2d 66 (Ala.Civ.App. 1985). The evidence must be such that it overcomes the *prima facie* right of parents to their children. *Matter of Burnett*, 469 So.2d 627 (Ala.Civ.App. 1985). The overriding principal to be considered always is the best interests of the child. *McConathy v. Dept. of Human Resources*, 510 So.2d 269 (Ala.Civ.App. 1987). In determining the child's best interests, the court is to consider all relevant factors including whether the parent is physically, mentally and financially capable of caring for the child. *Kelley v. Dept. of Human Resources*, 515 So.2d 713 (Ala.Civ.App. 1987).

A factor to be considered, and one which often is overlooked, is whether the parents have abandoned the child for the six-month period preceding the filing of the petition to terminate the parent's rights. If the parents have so abandoned the child, there arises a rebuttable presumption "that the parents are unable or unwilling to act as parents." *Ala. Code* section 26-18-7(c)(1975). Abandonment is defined as the "voluntary and intentional relinquishment of the custody of the child; unjustified withholding of the parent's presence, care, love, protection, maintenance or the opportunity for filial affection" or the failure to exercise the rights and duties of a parent. *Ala. Code* section 26-18-3(1)(1975).

All of these factors are to be used in determining whether the movant has met the ultimate test in termination cases: are the parents unable or unwilling to discharge their duties toward their offspring, and is this likely to change in the foreseeable future? *Ala. Code* section 26-18-7(a)(1975). If so, the court is empowered to remove from them their rights as parents.

A. Dependency

It often is said that the first step in termination cases is the finding that the child is dependent. *See Ex Parte Ogle*, 516 So.2d 243 (Ala. 1987). The legislature has clearly established this to be Alabama's statutory scheme. *Ala. Code* section 12-15-71(a)(b)(1975). Dependency is broadly defined to allow the juvenile court judge to terminate parental rights based on facts which are egregious, though they might not fit into a particular cubbyhole. *Ala. Code* section 12-15-1(10)(1975).

The act also lists categories of parental incompetence to justify termination. *Ala. Code* section 26-18-7(1975). Though the legislature has attempted an exhaustive list of considerations, it is by no means exclusive. *Matter of Colbert*, 474 So.2d 1143 (Ala.Civ.App. 1985). The court may look directly to the definition of dependency, it may consider the list of factors in section 26-18-7 or it may consider other relevant factors in making its decision. *Colbert*, 474 So.2d at 1144-1145. In fact, the appellate courts recently have expanded the language used in defining what the trial court can consider to allow the trial court to use a totality of the circumstances test to determine if the child is in need of care and protection. *Campbell v. State Department of Human Resources*, 507 So.2d 535 (Ala.Civ.App. 1987); *Anonymous v. Anonymous*, 504 So.2d 289 (Ala.Civ.App. 1986). Thus, the trial court has the broadest possible latitude in amassing facts upon which to base its decision, subject still, of course, to the appropriate rules of evidence.

The standard of proof is "clear and convincing," and the evidence must be "competent, material and relevant in nature." *Ala. Code* section 12-15-65(e)(1975). In any event, a finding of dependency is not a finding that cannot be changed. It has been held to not be *res judicata*, allowing the door to be left open for the family to work out any difficulties and to be rejoined. *Anonymous*, 504 So.2d at 295. Issues are only final at the next stage, terminating the parents' rights.

B. Less drastic alternatives

The second prong is satisfied when evidence is clear and convincing that less drastic measures are insufficient or when less drastic measures would not serve the child's best interests. *Clemons v. Alabama Department of Pensions and Security*, 474 So.2d 1143 (Ala.Civ.App. 1985). This requirement is to be met by viewing the facts of each case, and it is peculiarly dependent upon the facts as they have arisen.

When the mother of a dependent child repeatedly refused child care classes when she was in obvious need of help with parenting skills; refused counseling; did not exercise her best efforts to obtain a stable home environment; refused homemaker services and failed to pay a reasonable portion for the child's support though able to do so; and no other family member could take the child, the Department of Pensions and Security and the state attempted to exercise less drastic alternatives, but to no avail. *Matter of Colbert*, 474 So.2d 1143 (Ala.Civ.App. 1985).

Rehabilitation of the parent is an alternative which should be explored. *Ala. Code* section 26-18-7(a)(6)(1975). However, when the children were adjudicated dependent and the mother failed to comply with two service agreements with DPS whereby she could regain her children; later pled guilty to armed robbery and shooting a woman in the head; refused to see her children while she was jailed; and was diagnosed as schizophrenic and hospitalized for five years, all steps necessary to attempt rehabilitation had been followed and had failed. *Wallace*, 501 So.2d at 475.

When the parent made little effort toward self-rehabilitation to regain custody of her children who had been in foster care intermittently for one and one-half years; failed to meet the mutually agreed-upon goals between the mother and DHR; and underwent two failed returns of the children to her during which she would regress to her alcoholic condition, rendering her unable to care for her children, rehabilitation had failed, justifying the second prong of the test. *McConathy v. Department of Human Resources*, 510 So.2d 169 (Ala.Civ.App. 1987).

It is at this stage that the court most often will consider the history of the parent; history is relevant for the trial court to consider. *Wallace v. Jefferson County Department of Pensions & Security*, 501 So.2d 473 (Ala.Civ.App. 1986). The court can consider the history of the parents' mental illness, mental instability, refusal to cooperate with DPS and their inability to care for the child. *Fitzgerald v. Fitzgerald*, 490 So.2d 4 (Ala. Civ.App. 1986). Past abuse of the child is a factor for the court to consider, *Haag v. Cherokee County Department of Pensions & Security*, 489 So.2d 586 (Ala.Civ.App. 1986), as is a history of neglect and inadequate housing, *Johnson*

v. *State*, 485 So.2d 1185 (Ala.Civ.App. 1986).

VII. Appeals

Prior to March 21, 1982, appeals from the juvenile court were taken directly to the circuit court for trial *de novo*. *Ala. Code* section 12-15-120(a)(1975). However, the rules of juvenile procedure have been held to supersede the *Code* in altering the appellate route for juvenile court cases. *Wright*, 423 So.2d 257. Appellate procedures now generally are found in rules 20 and 28, A.R.J.P.

Appeals from termination cases now generally are taken directly to the court of civil appeals. Rule 28(a)(2) A.R.J.P. There is, however, a caveat to this. If no adequate record is made at the juvenile court level, the appeal is to the trial court for trial *de novo* to be heard by a judge who did not originally hear the case. Rule 28(b), A.R.J.P. Juvenile court appeals directly to the Alabama Court of Civil Appeals are available in three situations: when the juvenile court judge certifies the trial record as adequate, rule 28(A)(1)(a), A.R.J.P; when the parties stipulate to all necessary facts, rule 28(A)(1)(a), A.R.J.P; or when the parties will stipulate that only questions of law are involved and the question is certified by the juvenile court judge, rule 28(A)(1)(b), A.R.J.P.

An adequate record is often a problem in juvenile proceedings. The juvenile court proceedings are to be recorded by any of several means, including the use of a stenographer or an electronic device. Rule 20(a) A.R.J.P. This allows the juvenile court to use a simple tape recorder to record the proceeding for later transcription. While this appears to be an inexpensive and quick way to record the proceedings, it is filled with problems. The transcriber generally is not present at the juvenile court proceedings and may have difficulty in determining who made certain statements or in understanding what was said. If the speaker is mistakenly not identified on the record—and this happens—the transcriber will have no way to determine to whom to attribute the words. The use of less than adequate machinery also heightens the difficulty.

If counsel desires a trial *de novo* before the circuit judge, then these problems work to his advantage. However, if counsel wants to appeal directly to the appellate court, he might consider requesting the judge to have a stenographer present, and, failing that, have one there himself.

As stated above, when the state files to remove the parental rights of an indigent parent, that parent has a right to a transcript on appeal as a matter of right. *Matter of Ward*, 351 So.2d 571 (Ala.Civ.App. 1977).

The committee comments state that a record made as allowed by the rules will be "adequate and substantially complete as a record made in a case tried in the circuit court." Rule 20, Committee Comments. However, practice shows that nothing takes the place of a stenographer at the proceeding.

Notice of appeal to either the appellate court or the circuit court must be written and must be filed within 14 days after entry of the order from which the appeal was taken. Rule 28(C), A.R.J.P.

There is no requirement that the juvenile court explain to a parent who is represented by retained counsel at trial that she has 14 days in which to file an appeal. *Fuller v. State*, 477 So.2d 1267 (Ala.Civ.App. 1985).

When a case reaches the appellate courts, the *ore tenus* rule applies and the trial court's judgment is presumed correct, to be set aside only if it is so unsupported by the evidence to be plainly and palpably wrong. *See Wallace*, 501 So.2d at 474. Such a burden is extremely difficult for the appellant to meet.

VIII. Conclusion

Judicial removal of the rights of parents to their children is an unusual though not uncommon procedure which is appropriate only in severe cases of parental inadequacy evidenced by parental unwillingness or inability to care for their offspring. It is appropriate when the situation is such that the children, for their best interests, must be removed from the presence of their parents and placed in a different environment. Once completed, the action is absolute, and, the parents have no more rights to their children than does a total stranger. Thus, the procedure is best used sparingly, only when all else fails. ■

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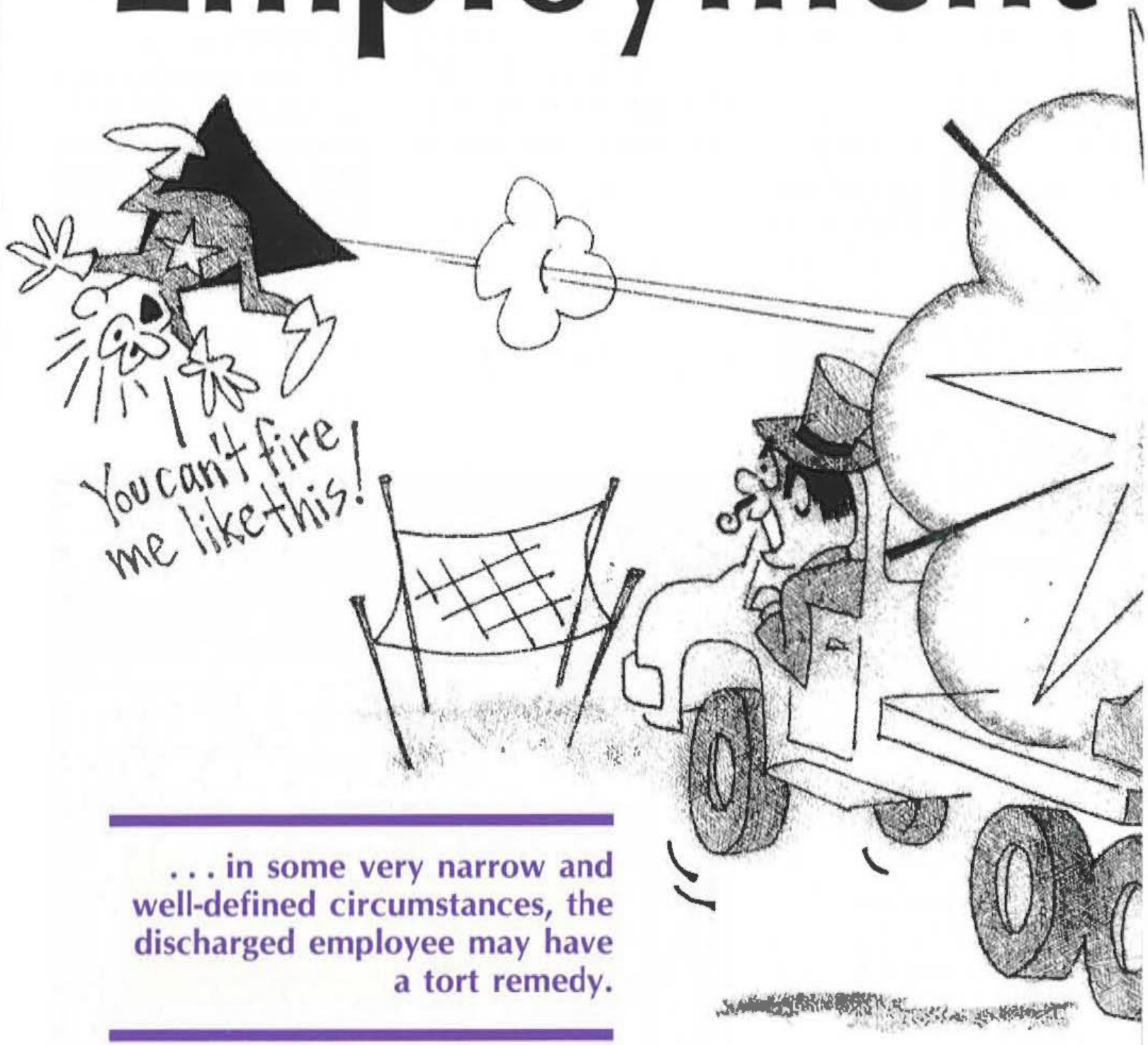
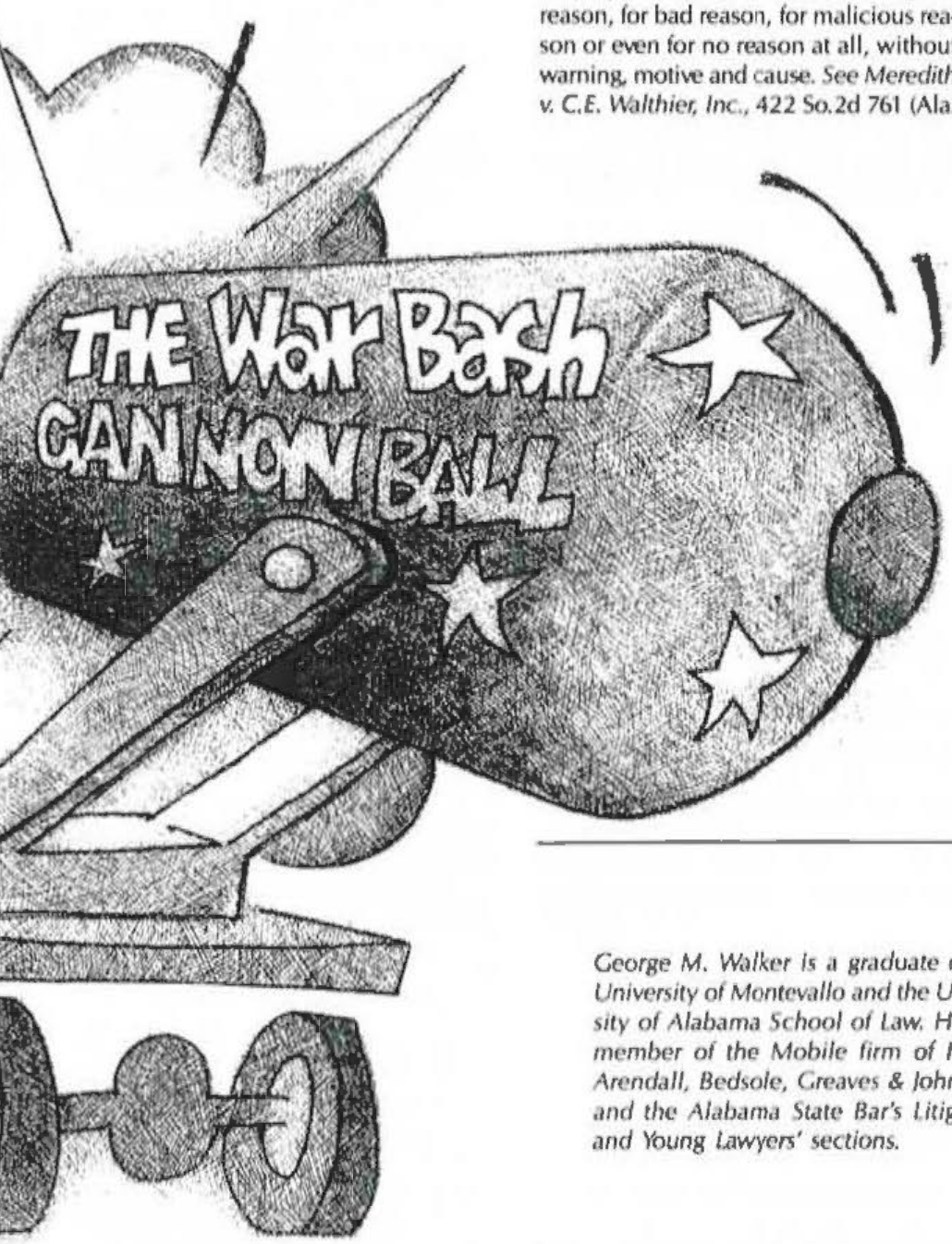


. . . in some very narrow and well-defined circumstances, the discharged employee may have a tort remedy.

Torts

by George M. Walker

The Alabama Supreme Court has repeatedly reaffirmed its commitment to the employment-at-will doctrine, precluding suits by discharged or otherwise disaffected employees against their employers for breach of the employment contract. Under the doctrine, an at-will employee may be terminated for good reason, for bad reason, for malicious reason or even for no reason at all, without warning, motive and cause. *See Meredith v. C.E. Walthier, Inc.*, 422 So.2d 761 (Ala. 1982); *Bender Ship Repair, Inc. v. Stevens*, 379 So.2d 594 (1980); *Martin v. Tapley*, 360 So.2d 708 (Ala. 1978); *Hinrichs v. Tranquilaire Hospital*, 351 So.2d 1130 (Ala. 1977). Despite ingenious efforts to cloak the claim as something else, where the injury suffered is loss of employment and the plaintiff is an at-will employee, the doctrine has precluded recovery.



In recent years inventive counsel, recognizing the futility of the contract claim, increasingly have turned to tort law in an effort to obtain a remedy for the discharged employee. While employers have succeeded, for the most part, in defending these claims, cracks exist in the foundation of the employer/employee legal relationship and, in some very narrow and well-defined circumstances, the discharged employee may have a tort remedy. So far, employment tort cases have reached the Alabama Supreme Court under five separate and distinct theories, and the court has set very narrow and specific liability guidelines for each.

I. Emotional distress/tort of outrage

While the at-will doctrine insulates the employer from liability for the act of discharging an at-will employee, if the discharge or other employment decision is accompanied by sufficiently outrageous conduct, an independent basis for tort liability exists. While technically de-

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scribed as an "intentional infliction of emotional distress," *Restatement (Second) of Torts*, §46, it is more commonly identified as the "tort of outrage." *See American Road Service v. Inmon*, 394 So.2d 361 (Ala. 1981); Prosser, *The Law of Torts*, §12, at 55-60 (4th ed. 1971).

In *Inmon*, the Alabama Supreme Court recognized the tort of outrage but, at the same time, concluded that the plaintiff's evidence fell short of establishing the necessary elements. To prove such a claim, the court required the plaintiff to establish: (a) that the defendant either intended to cause severe emotional distress or acted in reckless disregard of a "high degree of probability" that severe emotional distress could or would result; (b) that the defendant's conduct was so extreme as to be outrageous; and (c) that the plaintiff, in fact, suffered severe emotional distress. *Inmon*, 394 So.2d at 365. In identifying the tort, the court limited it quite sharply:

> "The emotional distress thereunder must be so severe that no reasonable person could be expected to endure it. Any recovery must be reasonable and justified under the circumstances, liability ensuing only when the conduct is extreme . . . . By extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society."

Id., citing *Restatement (Second) of Torts*, §46 Comment (d), at 72. The *Inmon* court made it quite clear that its decision was intended to reach only the most egregious conduct, and subsequent cases have demonstrated that truly outrageous conduct must be present.

To protect against what was suggested would be a flood of litigation, the *Inmon* court concluded that the trial court should determine in the first instance whether the alleged misconduct is sufficiently outrageous to sustain a claim. *Inmon*, 394 So.2d at 365; *see also Logan v. Sears, Roebuck & Co.*, 466 So.2d 121, 123 (Ala. 1985); *Restatement (Second) of Torts*, §46, Comment (h) ("It is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery.") Case law reflects that Alabama trial judges and the Alabama Supreme Court have adhered to this principle by dismissing, short of trial, tort of outrage claims where the facts were deemed not sufficiently outrageous to support the tort. *See, e.g., Harrell v. Reynolds Metal Co.*, 495 So.2d 1381 (Ala. 1986) (discharge of an employee); *Logan v. Sears, Roebuck & Co., supra*, (defendant's employee called plaintiff "queer as a three-dollar bill"); *Bearden v. Equifax Services*, 455 So.2d 836 (Ala. 1984) (adjustment of workers' compensation claim); *Barrett v. Farmers & Merchants Bank of Piedmont*, 451 So.2d 257 (Ala. 1984) (defendant bank demanded payment on note out of proceeds it held); *Inmon, supra*, (discharge of employee).

In the employment context, the tort of outrage analysis permits an embittered employee to litigate relative to his discharge or other employment decision if he can demonstrate a sufficient level of outrageous misconduct accompanying the decision. However, it is important to note that the propriety of the discharge or other decision is not an issue; rather, the only thing plaintiff may challenge is the conduct accompanying the decision. This is so because the tort of outrage does not apply where the employer "has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." *Inmon*, 394 So.2d at 368, quoting from *Restatement (Second) of Torts*, §46, Comment (g). While a tort of outrage claim does not in any way vitiate the at-will doctrine with respect to a claim by a discharged employee, its importance in the employment context should not be underestimated.

True to its at-will roots, only once has the Alabama Supreme Court found a viable tort of outrage claim arising out of an at-will employment relationship. In *Rice v. United Insurance Co. of America*, 465 So.2d 1100 (Ala. 1984), the evidence demonstrated that plaintiff reported to her employer that she was pregnant, that the employer thereafter attempted to force her to take disability leave rather than to work through the pregnancy, that he falsely accused her of incompetence, that he ridiculed her in the presence of co-employees, that she was thereafter terminated and that she suffered a miscarriage one week after the termination. The court found four distinctions in this evidence from the facts in *Inmon:*

> "First, Rice alleges a *pattern* of activity, encompassing a period of several months. Second, defendant's alleged behavior involved a great many persons (Rice's coworkers, clients, and husband) in addition to Rice and the defendants. Third, defendant's alleged pattern of outrageous acts were directed toward plaintiff when Giannini [defendant] was likely to know that severe emotional distress could have serious physical repercussions. Fourth, the outrageous actions alleged by Rice were directed toward an illegal purpose, discrimination against an employee because of sex."

Id. at 1102 (emphasis by the court). On these facts, the supreme court concluded that it was "conceivable" that Rice could prove a set of facts in support of her outrage claim and, thus, that it was error for the trial court to dismiss that claim.

The *Rice* decision is significant because of the standards it adopts for an employee's tort of outrage claim against the employer. If an employee can prove that he or she has been subjected to a pattern of outrageous acts that were or should have been known to the employer likely to cause severe emotional distress,

over a period of time in the presence of a number of persons, and that the acts were for an illegal purpose, then a tort of outrage claim exists. It is difficult to imagine an employment situation where these circumstances would likely exist, but certainly the fact that the tort exists and has been defined increases the probability that facts will occur to fit the theory.

Federal courts in Alabama on two occasions have found that facts presented were sufficient to present an actionable employment-related tort of outrage claim. In *Collins v. General Tire Corp.*, 549 F.Supp. 770 (N.D. Ala. 1982), defendant's personnel manager went uninvited to plaintiff's home, where she was recovering from an on-the-job injury, and "demanded that she come back to work, implied that she was a malingerer, and threatened to fire her in order to force her back to work." *Id.* at 771. In denying defendant's motion for summary judgment on the outrage claim, District Judge Acker concluded that a jury could, based on these facts, form a belief that defendant intended to cause severe emotional distress. The decision is hard to reconcile with the guidelines set down in *Rice, supra,* since here there was no pattern of activity, but only a single visit, and because the only persons involved here were the personnel manager and the plaintiff, instead of a number of co-employees. In view of the *Rice* decision and the guidelines it set down, it is unlikely that *Collins* affords any substantial precedent for future decisions.

In *Holmes v. Oxford Chemicals, Inc.*, 510 F.Supp. 915 (M.D. Ala. 1981), plaintiff suffered a permanently disabling heart attack and, as a result, he was entitled to collect monthly disability benefits equal to 60 percent of his predisability income. Plaintiff calculated the monthly disability benefit amount to be $780 per month. Defendant calculated it to be $500 per month. The court ultimately concluded that the appropriate amount was $730.40 per month. After making the $500 payment for several months, defendant unilaterally reduced the payment to $49.10 per month and advised plaintiff to seek the remainder from Social Security. Defendant had no right under the disability plan to do so. The court concluded that the jury could reasonably infer that defendant's intentional and wrongful act of reducing the benefits of the permanently disabled heart attack victim was outrageous. This analysis also departs from the *Rice* guidelines in terms of pattern of activity and number of persons involved, but the analysis is consistent with the *Restatement* guidelines.

In a post-*Rice* decision, the Alabama Supreme Court again considered the tort of outrage in an employment setting. In *McIsaac v. WZEW-FM Corp.*, 495 So.2d 649 (Ala. 1986), plaintiff claimed that she was the victim of outrageous conduct because her employer made sexual advances to her, tried to kiss her, made suggestive "lurks" or innuendos" and ultimately fired her. Despite testimony that her supervisor had been pressured to dismiss plaintiff because of her refusal to succumb to the employer's sexual advances, the Alabama Supreme Court concluded that summary judgment was proper on the tort of outrage claim. The court felt the evidence fell short of demonstrating severe emotional distress and found the employer's behavior to be nothing more than mere insults, indignities, threats or annoyances, for which the law will not hold one liable in tort. *Id.* at 651.

It is likely that the Alabama Supreme Court in the future will further define the tort of outrage in relation to the employment environment and that the *Rice* guidelines will be modified to deal with other situations. While the future evolution of the tort will probably reach some conduct not presently thought to be cov-

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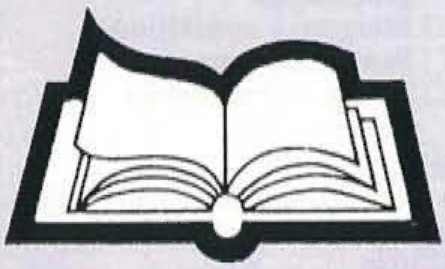

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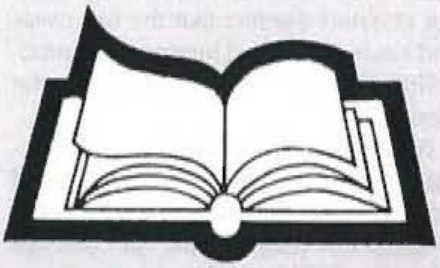

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ered, it will continue to be only the most outrageous conduct that is actionable under this theory. As long as an employer is engaging in conduct that it has a right to engage in, and as long as there is no intent to inflict severe emotional distress, there is no reason to believe that the tort of outrage will be construed to reach that conduct.

II. Defamation

An increasingly common allegation in suits by discharged employees is that the employer has defamed the employee, usually in the course of comments made about the employee during disciplinary or discharge proceedings or in an employment reference made to subsequent prospective employers. A defamation consists of a false and derogatory statement. Prosser, *Law of Torts*, §§111-116 (4th ed. 1971). Where a defamation claim is made by a discharged or otherwise embittered employee three legal issues receive prominent attention—publication, privilege and vicarious liability.

A. Publication

Alabama has long enforced a "special publication" rule whereby communications among a corporation's managerial personnel, concerning matters related to the company's business, including communications concerning employee misconduct and discharge, do not constitute publication. *K-Mart Corp. v. Pendergrass*, 494 So.2d 600 (Ala. 1986); *Dixon v. Economy Co.*, 477 So.2d 353 (Ala. 1985); *Burney v. Southern Railway Co.*, 276 Ala. 637, 165 So.2d 726 (1964); *McDaniel v. Crescent Motors, Inc.*, 249 Ala. 330, 31 So.2d 343 (1947). If there is no publication, there is no defamation.

B. Privilege

Whether a particular communication is privileged is a question of law for the court. *Fulton v. Advertisor Co.*, 388 So.2d 533, 537 (Ala. 1980), *cert. denied*, 449 U.S. 1131 (1981) If a privilege is found to exist, the court also must determine whether it is "absolute" or "qualified," as absolutely privileged statements are not actionable while qualifiedly privileged statements are, given proof of actual malice.

1. *Absolute privilege*—Most communications made by an employer in respect to legislative, judicial or quasi-judicial proceedings are absolutely privileged. *Webster v. Byrd*, 494 So.2d 31 (Ala. 1986) (letter of termination to teacher absolutely privileged); *Cole v. Cooper*, 437 So.2d 1237 (Ala. 1983) (statutorially privileged communication by employer to the Department of Industrial Relations regarding reasons for plaintiff's termination); *Surrency v. Harbison*, 489 So.2d 1097 (Ala. 1986) (communications made during grievance proceedings under a collective bargaining agreement). The absolute privilege will be lost if the communication is published beyond the group of those having a need to know, but there still may be a conditional privilege under those circumstances. *Webster*, 494 So.2d at 35-36.

2. *Qualified privilege*—If the communication is among persons with a common interest in the subject matter, then it may well be conditionally or qualifiedly privileged. An inter-business communication about employee's conduct, discipline and/or discharge is subject to the qualified privilege. *Montgomery v. Big B, Inc.*, 460 So.2d 1286 (Ala. 1984)(communications to polygraph operator regarding plaintiff's alleged misconduct); *Phillips v. Bradshaw*, 167 Ala. 199, 52 So.2d 662 (1910) (communications by employer to property superintendent regarding care and protection of the property). Where such qualified or conditional privilege exists, plaintiff can overcome the privilege only by proof that the communication was accompanied by actual malice. *Willis v. Demopolis Nursing Home, Inc.*, 336 So.2d 117 (Ala. 1976). To prove actual malice such as to overcome the privilege there must be evidence of "previous ill-will, hostility, threats, rivalry, other actions, former libels or slander, and the like . . . or by the violence of the defendant's language, the mode and extent of the publication, and the like." *Webster v. Byrd*, 494 So.2d at 36 quoting from *Kenney v. Gurley, 208 Ala. 623, 626, 95 So. 34 (1923)*. There will be very few occasions when an employer's statement or communications about its employee will not be absolutely or qualifiedly privileged under these decisions.

C. Vicarious liability

Perhaps the most important question in the defamation area is the extent to which the employer may be held liable

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for defamatory communications by one employee about another. There is no publication where the defamatory communication, by one employee to another, is relative to the company business, and it is probably also privileged, but where an extra-corporate communication exists the analysis is different. In *K-Mart Corp., Inc. v. Pendergrass*, 494 So.2d 600 (Ala. 1986), where an employee allegedly told an outsider that plaintiff had been fired for stealing, the court found that such a communication was outside of the line and scope of employment, and thus not binding on the employer, because K-Mart had a corporate policy that allowed its personnel managers to release only "neutral" information in response to an inquiry about an employee's employment and discharge. *Id* at 604. This analysis is questionable and at odds with traditional agency law, but it is the law today. An employer who adopts a neutral response policy probably can thereby immunize itself from virtually any type of defamation claim by a discharged employee.

Employers generally have little to fear with respect to defamation claims by discharged or otherwise disaffected employees, but a careless employer who permits publication of unprivileged and untrue or unsupportable information about an employee could face liability. Employers should have employee information and reference policies in place to prevent this possibility, but most do not. Some of those who do not can look forward to trying to prove in court the truthfulness of information they maintain concerning their employees. While under the settled law most employers will prevail in these actions, the threat and cost of litigation over time should result in widespread employer reference policy implementation.

III. Tortious interference

Alabama long has recognized a cause of action in tort for wrongful interference by a third party with contractual employment rights, including rights of an at-will employee. *Byars v. Baptist Medical Centers, Inc.*, 361 So.2d 350, 353-54 (Ala. 1978); *Tennessee Coal, Iron & Ry. Co. v. Kelly*, 163 Ala. 348, 50 So. 1008 (1909); *Sparks v. McCreary, 156 Ala. 382, 47* So.2d 332 (1908). This is logical because one not a party to the employment contract should obtain no benefit from the fact that it is at-will.

In Gross v. Lowder Realty Better Homes & Gardens, 494 So.2d 590 (Ala. 1986), the court adopted *Restatement (Second) of Torts*, §767 (1979) and more clearly defined the elements to be proven, although the case arose outside of the employment context. Under the *Gross* analysis, to establish an intentional interference, plaintiff must prove:

1. the existence of a contract or business relation;
2. defendant's knowledge of the contract or business relation;
3. intentional interference by the defendant with the contract or business relation;
4. absence of justification for the defendant's interference; and
5. damage to the plaintiff as a result of defendant's interference.

Gross, 494 So.2d at 597 (footnote omitted). There have been cases in which an employee sued on a tortious interference theory and claimed that the interference was occasioned by the employer itself or its management personnel. This claim is not actionable because a contracting party cannot tortiously interfere with its own contract. *United States Fidelity & Guaranty v. Millonas*, 206 Ala. 147, 89 So. 732

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(1921). The same analysis holds where plaintiff sues a co-employee for tortious interference with the employment contract, *Martin v. Tapley*, 360 So.2d 708 (Ala. 1968), at least when the co-employee is acting within the line and scope of his employment. *Harrell v. Reynolds Metals Co.*, 495 So.2d 1381, 1398 (Ala. 1986). It is unlikely that the tortious interference theory will prove to be a useful tool for discharged employees, since it is likely that anyone taking deliberate steps to convince an employer to terminate an employee would "cover his tracks," however, in the existing merger and acquisitious business climate it certainly is a consideration for a discharged employee.

IV. Privacy

The tort of invasion of privacy was acknowledged by the Alabama Supreme Court in *Phillips v. Smalley Maintenance Services*, 435 So.2d 705 (Ala. 1983), wherein the court adopted the *Restatement (Second) of Torts*, §652B. Plaintiff had been verbally sexually harassed by her employer, who locked her in his office, questioned her about her sex life, insisted that she engage in oral sex with him or lose her job and once actually hit her "across the bottom." She became quite upset and could not work, and the harassing employer subsequently discharged her.

The court found that these facts were sufficient to establish an invasion of privacy, which requires four elements:

1. the intrusion upon the plaintiff's physical solitude or seclusion;
2. publicity which violates the ordinary decencies;
3. putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; and
4. the appropriation of some element of the plaintiff's personality for a commercial use.

Phillips, 435 So.2d at 708 (footnote omitted). Despite the facts that defendant had not actually acquired information about plaintiff's sex life, that no such information was actually communicated to anyone else, that no effort was made to obtain information surreptitiously and that there was no physical trespass, the court found the facts supported a "wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *Id.* at 711. The facts of the case seem to suggest a tort-of-outrage theory more than an invasion of privacy.

It is likely that the *Phillips* result was ordained more by the outrageousness of the facts than by the conformity of those facts to the *Restatement* or other guidelines. A sexual proposition alone is insufficient, because it does not amount to an intrusion into plaintiff's private concerns. *Id.* at 708; *McIsaac v. WZEW-FM Corp.*, 495 So.2d 649 (Ala. 1986). And it is likely the court will require that the intrusion be quite outrageous or humiliating, although there is no requirement that plaintiff, in fact, suffer "severe emotional distress" such as is required for a tort of outrage claim. The misconduct in this type of case is the intrusion, not the infliction, of emotional distress. It is likely, however, that a set of facts sufficient for an invasion of privacy claim also would sustain the tort of outrage claim, given severe emotional distress on the part of the plaintiff.

V. Assault/battery

Increasingly, employers are being sued for assault and/or battery committed by one employee upon another, especially related to sexual harassment situations where there has been nonconsensual touching or fondling. A battery requires an act intended to cause harmful or offensive bodily contact coupled with actual bodily contact, and such contact is "offensive if it offends a reasonable sense of personal dignity." *Restatement of (Second) of Torts*, §18-21.

The Alabama Supreme Court has not yet considered whether, or the extent to which, an employer may be liable for battery via sexually motivated touching by one employee of another, but if the issue is analyzed in accordance with traditional agency principles, then the employer may escape liability if the evidence shows that the offensive act was committed for personal reasons and, thus, was not motivated by an intent to perform the employer's business. *Joyner v. AAA Cooper Transportation*, 477 So.2d 364 (Ala. 1985); *Restatement (Second) of Agency*, §228-229, 231,235; *cf. Tollett v. Montgomery Real Estate & Ins. Co.*, 238 Ala. 617, 193 So. 127 (1940). It is unlikely that an employee engaged in sexual touching has the employer's interests in mind. It is important to remember that such sexually motivated touching might well amount to a violation of Title VII of the Civil Rights Act of 1969, even though not a violation of Alabama law. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

Present Alabama law does not provide a tort remedy for sexual harassment in the work place, short of outrageous misconduct or an invasion of privacy. As employees become aware of their rights in this regard, it is likely that the point will see increased litigation and, perhaps, an expansion of the existing remedies or the creation of a new one.

VI. Conclusion

Employees traditionally have been stymied by the at-will doctrine in seeking to recover on an employment contract theory from their employers for discharge or other employment decisions. So far, they also have been largely unsuccessful in obtaining tort relief for on-the-job disputes, but the framework now is in place for several narrowly defined theories. While the law of torts is not threat to eviscerate the employment-at-will doctrine, it will provide a remedy to some employees in some very egregious cases, and counsel for both employers and employees should be prepared to address these issues in such situations. ■

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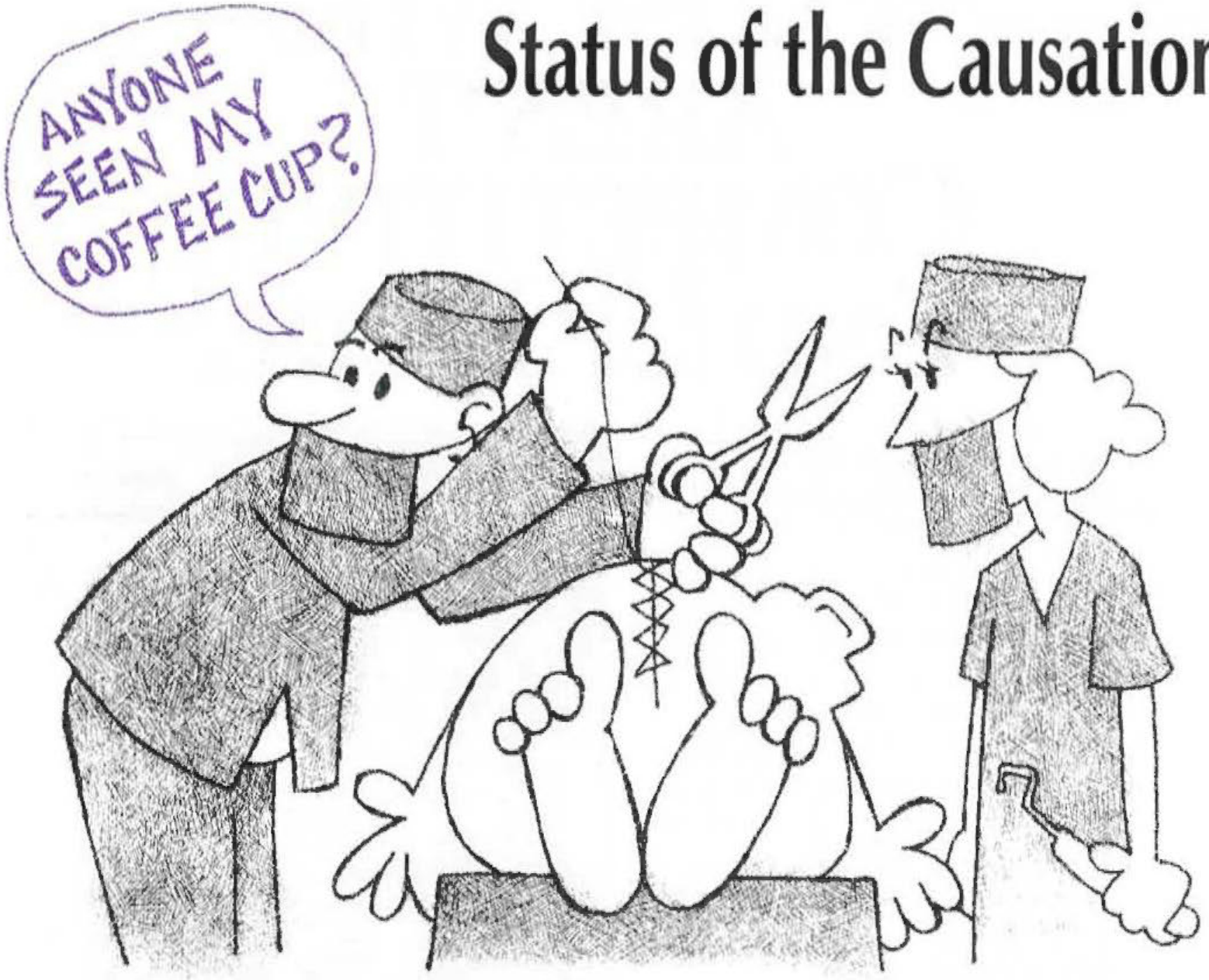

It is a fundamental principle of tort law that, in negligence actions, there must be evidence the alleged breach of duty proximately caused the plaintiff's injury.[1] However, the causation requirement in medical malpractice cases has been the source of considerable controversy and debate.[2] Traditional proximate cause standards in this context require evidence that the result (injury or death) complained of "probably" was caused by the negligence of the defendant medical care provider.[3] While some states have lessened this standard of proof in medical malpractice cases,[4] Alabama has adhered to the traditional rule.[5]

The adherence by the Alabama courts to the traditional causation requirement appears to preclude application of the "lost chance" of survival or improvement theory which would allow recovery where there is evidence that the alleged negligence reduced the patient's chance of survival or recovery. The "lost chance" of survival theory has been expressly rejected in recent decisions in several jurisdictions and is incompatible with the traditional doctrine of proximate causation in medical cases.[6]

Current standard in medical malpractice cases in Alabama

In medical malpractice actions in Alabama, the plaintiff must produce evidence that the alleged negligence of the defendant *"probably caused"* the injury or death complained of:

> "The rule in medical malpractice cases is that to find liability, there must be more than a mere possibility or one possibility among others that the negligence complained of caused the injury; there must be evidence that the negligence probably caused the injury."

Williams v. Bhoopathi, 474 So.2d 691 (Ala. 1985).

Where the evidence produced after discovery establishes only a "possibility" that the alleged negligent medical care caused the patient's death, a trial court may properly grant summary judgment in favor of the defendant because the plaintiff has failed to create a jury question under the preceding standard. *Howard v. Mitchell*, 492 So.2d 1018 (Ala.

Requirement in Medical Malpractice

1986).[7] "There must be some evidence that the alleged negligence *probably* caused the injury." *Id.* at 1020. (emphasis added).

The *Howard* case provides a good example of how the traditional standard has been applied in Alabama. The plaintiff in that case first visited the defendants, obstetrician/gynecologists, in 1971. The defendants determined that the plaintiff had been six to eight weeks pregnant, and that she had suffered a spontaneous abortion. The plaintiff's blood was typed as having an Rh negative factor. The only medical care provided by the defendants to the plaintiff was on the occasion of the plaintiff's pregnancy in 1971, and they did not provide any care during her subsequent pregnancies. The defendants failed to treat the plaintiff, when she was under their care in 1971, with an available medication which would have prevented the development of Rh positive antibodies in her blood.

The plaintiff became pregnant in 1972 and subsequently delivered a healthy girl in December of that year. This child's blood was incorrectly typed at that time as containing the Rh negative factor, but testing done 12 years later established that this child actually had the Rh positive factor. The plaintiff became pregnant again in 1974. The 1974 pregnancy was spontaneously aborted and her then-treating physician discovered, at that time, that the plaintiff tested Rh positive. The plaintiff became pregnant once again in 1980 and delivered a child through cesarean section in 1981. This child died several days after birth from a condition caused by the crossing of the mother's antibodies to the Rh positive factor into the fetus's blood stream, where it destroyed the fetus's red blood cells. The plaintiff brought suit against the doctors who treated her in 1971 for the death of the child born in 1981.

The plaintiff alleged that the negligence of the defendants in failing to treat her in 1971, with the medication which would have prevented the formation of antibodies to the Rh positive factor, caused the death of her child born in 1981. The plaintiff's expert testified, in deposition, that the failure of the defendants to treat the plaintiff with the medication was a breach of the accepted standard of medical practice in 1971. However, the plaintiff's expert also testified that there was only a 3 to 5 percent chance that the plaintiff developed the Rh positive antibodies after her spontaneous abortion in 1971; and he testified that it was "more likely" (i.e., at least a 20 percent chance) that the Rh positive antibodies developed after the plaintiff's full-term pregnancy in 1972. The trial court granted a summary judgment to the defendants.

The supreme court reviewed the evidence and found that the testimony of the plaintiff's medical expert did not present a scintilla of evidence that the defendants' alleged negligence *probably* caused the death of the child. *Id.* at 1020. The court observed that the plaintiff's evidence indicated only that there was a *possibility* that the alleged negligence caused the child's death, and that this was insufficient evidence of causation to create a jury question:

"We believe that the testimony of the plaintiff's medical expert does not present a scintilla of evidence that the defendants' alleged negligence probably caused the death of her child. What was said in *McClinton v. McClinton*, 258 Ala. 542, 544-45, 63 So.2d 594, 597 (1952), is appropriate in this case:

> " 'Proof which goes no further than to show an injury could have occurred in an alleged way, does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause.'

"But a nice discrimination must be exercised in the application of this principle. As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. *There may be two or more plausible explanations as to how an event happened or what*

by A. Neil Hudgens, Michael S. McGlothren and Thomas H. Nolan, Jr.

A. Neil Hudgens received his undergraduate degree from Tulane University and law degree from the University of Alabama School of Law. He is a member of the American Bar Association, the Alabama State Bar and the Mobile County Bar Association. He is chairman of the Resolutions and Memorials Committee and a member of the Professional Relations Committee of the Mobile County Bar Association, and is a member of the Military Law Committee of the Alabama State Bar. He also is a member of the Alabama Defense Lawyers Association, the American Academy of Hospital Attorneys, the American Board of Trial Advocates, the American Society of Law and Medicine and the Defense Research Institute. Hudgens is a partner in the Mobile firm of Brown, Hudgens, Richardson, P.C.

Michael S. McGlothren graduated magna cum laude with a bachelor of arts degree from the University of South Alabama and received his law degree, cum laude, from Cumberland School of Law. He is a member of the Alabama State Bar, the American Bar Association, the Mobile County Bar Association and the Baldwin County Bar Association. McGlothren is a member of the Alabama Defense Lawyers Association and the Defense Research Institute. He is a partner with the firm of Brown, Hudgens, Richardson, P.C.

Thomas H. Nolan, Jr., received his undergraduate degree from Spring Hill College and law degree from the University of Alabama School of Law. He is a member of the Alabama State Bar, the American Bar Association and the Mobile County Bar Association. Nolan is a member of the Alabama Defense Lawyers Association and is an associate with the firm of Brown, Hudgens, Richardson, P.C.

produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. [emphasis added]"

(Quoting *Southern Ry. Co. v. Dickson*, 211 Ala. 481, 486, 100 So. 665, 669 (1924). See, e.g., *McKinnon v. Polk*, 219 Ala. 167, 168, 121 So. 539, 540 (1929) (a case involving a suit for personal injuries allegedly caused by the negligence of the plaintiff's physician).

"According to the deposition of the plaintiff's own expert, it would admittedly be pure conjecture of speculation as to when the plaintiff developed the Rh positive antibodies. Although there was a three to five percent chance she developed them after the spontaneous abortion, there was more than an 'equal probability,' specifically, there was a twenty percent chance, that the development could be attributed to another cause, i.e., the full-term pregnancy in 1972. In effect, the evidence produced by the plaintiff was without 'selective application' to any one theory of causation. Thus, any conclusion that the defendants' alleged negligence led to the development of the Rh positive antibodies would be based on pure speculation or conjecture, which is an improper basis for a jury verdict. See, *Thompson v. Lee*, 439 So.2d 113, 115 (Ala. 1983); *Alabama Power Co. v. Smith*, 409 So.2d 76, 763 (Ala. 1982).

"Furthermore, Dr. Krane's deposition testimony indicated that there was only a mere possibility that the alleged negligence of the decedents caused the death of the plaintiff's child. Under the standard set forth in medical malpractice cases, this was not enough to present a jury question. There must be some evidence that the alleged negligence probably caused the injury. *Williams v. Bhoopathi, supra; Orange v. Shannon, supra.* In the absence of any evidence that the defendants' negligence probably caused the death of the plaintiff's child, the trial court properly granted the summary judgment."

Id.

As discussed above, in cases not governed by the provisions of the "Alabama Medical Liability Act of 1987,"[8] a jury question is created "[i]f there is a *scintilla* of evidence in a malpractice case that the negligence complained of *probably* caused the injury . . . ." *Bhoopathi, supra* at 691. (emphasis added).[9] It remains to be seen how the proximate causation standard will be formulated in cases where the Alabama Medical Liability Act of 1987 is applied.

Effect of substantial evidence rule in medical malpractice cases

By virtue of newly enacted section 6-5-549 of the *Alabama Code*, the minimum standard of proof required to support any issue of fact in medical malpractice cases, whether in contract or in tort, "shall be proof by substantial evidence." "Substantial evidence," in medical malpractice cases, is defined as "that character or admissible evidence which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." Section 6-5-542(5) of the *Alabama Code* (1975). Applying this new standard of proof to the traditional causation formula in medical malpractice cases produces the following result: the plaintiff must produce *that character of admissible evidence which would convince an unprejudiced thinking mind that the alleged negligence of the defendant probably caused the injury or death of which is complained.* It is suggested that this formula will be applied despite a somewhat misplaced reference to causation found in the definition of "standard of care" as provided in section 6-5-542(2) of the *Code*.

Although the definition of substantial evidence in medical malpractice cases is different from that provided in section 12-21-12 of the *Code* for civil actions generally, the application of the new proof requirement to the traditional causation standard should not be problematic. Such a standard may be only slightly more difficult to satisfy than that applied in those jurisdictions which do not follow the scintilla evidence rule and which have adhered to the traditional causation standard in medical malpractice cases.

Traditional standard in jurisdictions where scintilla rule is not applied

Several different formulations of the proof requirement have been applied in those jurisdictions which generally follow the traditional proximate cause standard in medical malpractice cases and do not adhere to the scintilla evidence rule: evidence that would give rise to a reasonable inference that with proper medical treatment "the patient probably would have survived";[10] evidence from which a jury could reasonably find that the patient's injury or death "more likely than not" resulted from the defendant's negligence;[11] "a plaintiff must introduce expert medical testimony that it was more probable than not that the death resulted from the doctor's negligence";[12] evidence from which the jury could reasonably infer that "but for" the defendant's negligence the patient's death could have been avoided;[13] substantial evidence that a favorable result was probable if proper medical treatment had been provided;[14] evidence (apparently a preponderance) that the doctor's negligence more likely than not caused the patient's injury or death.[15]

As previously observed, a number of jurisdictions have relaxed the traditional causation standard in medical malpractice cases,[16] however, other jurisdictions have rejected this attempt to lessen the burden of proof in medical malpractice cases despite their recognition that the plaintiff rarely is able to prove to a certainty what result would have occurred if proper medical treatment had been provided.[17] Some jurisdictions have simply retained the traditional requirement that the plaintiff produce evidence that it was more probable than not that the patient's death or injury resulted from the physician's negligence without specifically ruling on the "lost chance" theory.[18]

In *Gooding v. University Hospital Bldg., Inc.*, the Florida Supreme Court expressly rejected the "lost chance of survival" theory of causation and stated its reason for adhering to the traditional standard as follows:

"Relaxing the causation requirement might correct a perceived unfairness to some plaintiffs who could prove the possibility that the medical malpractice caused an injury but could not prove the probability of causation, but at the same time could create an injustice. Health care providers could find themselves defending cases simply because a patient failed to improve or where serious disease processes are not arrested because another course of action could possibly bring a better result. No other professional malpractice defendant carries this burden of liability without the requirement that plaintiffs prove the alleged negligence probably

rather than possibly caused the injury. *See, e.g. Freeman v. Rubin*, 318 So.2d 540 (Fla. 3d D.C.A. 1975)(plaintiff in legal malpractice action must show that, but for the attorney's negligence, the plaintiff had a good cause of action in the underlying suit). We cannot approve the substitution of such an obvious inequity for a perceived one."

445 So. 2d 1015, 1019-20 (Fla. 1984).

In *Cooper v. Sisters of Charity of Cincinnati, Inc.*, the leading and most often cited case adhering to the traditional causation requirement, the Supreme Court of Ohio rejected any causation standard which would not require proof that the physician's negligence probably caused the patient's injury or death, and stated:

"We consider the better rule to be that in order to comport with the standard of proof of proximate cause, plaintiff in a malpractice case must prove that defendant's negligence, *in probability*, proximately caused the death.

* * *

"In an action for wrongful death, where medical malpractice is alleged as the proximate cause of death, and a plaintiff's evidence indicates that a failure to diagnose the injury prevented the patient from an opportunity to be operated on, which failure eliminated any chance of the patient's survival, the issue of proximate cause can be submitted to a jury only if there is sufficient evidence showing that with proper diagnosis, treatment and surgery *the patient probably would have survived.*"

27 Ohio St. 2d 242, 272 N.E.2d 97, 103-104 (1971)(emphasis added).

In *Cooper*, the court defined "probable" as "more than 50% of actual . . ." and stated that "[p]robability is most often defined as that which is more likely than not." *Id.* at 272 N.E.2d 104. The court decided to retain the "probably" or "more likely than not" standard of establishing causation in malpractice cases because it perceived that a lesser standard of proof likely would create more injustice than it would alleviate:

"Lesser standards of proof are understandably attractive in malpractice cases where physical well-being, and life itself, are the subject of litigation. The strong intuitive sense of humanity tends to emotionally direct us toward a conclusion that in an action for wrongful death an injured person should be compensated for the loss of any chance for survival, regardless of its remoteness. However, we have trepidations that such a rule would be so loose that it would produce more injustice than justice."

Id. at 272 N.E.2d 103.

The Alabama Supreme Court has not directly addressed the "lost chance" of recovery theory of causation; however, the court clearly has retained the traditional standard which requires evidence that the physician's negligence probably caused the patient's injury or death. *Bhoopathi, supra; Mitchell, supra.* The court also retained the "but for" standard of proving causation in legal malpractice cases. *Johnson v. Horne*, 500 So.2d 1024 (Ala. 1986); *Hines v. Davidson*, 489 So.2d 572 (Ala. 1986). It is suggested that court's adherence to the traditional causation standard in legal and medical malpractice cases simply precludes application of the "lost chance" of recovery theory. It also is clear that the Alabama legislature has manifested its intent to limit the liability of health care providers by requiring "substantial evidence" of all the required elements of a negligence cause of action, including proximate cause.

Conclusion

Alabama has adhered to the traditional proximate cause standard in medical malpractice cases requiring evidence that the patient's injury or death "probably" was caused by the negligence of the defendant medical care provider. Prior to the passage of the Medical Liability Act of 1987, the plaintiff could create a jury question on the issue of causation by producing a "scintilla" of evidence that the defendant's negligence probably caused the patient's injury or death. By virtue of section 6-5-549 of the *Alabama Code* (1975), the plaintiff must produce "substantial evidence" that the defendant's negligence *probably* caused the patient's injury or death in cases governed by the Medical Liability Act of 1987. This standard is consistent with those applied in other jurisdictions which adhere to the traditional proximate cause standard in such cases and do not follow the scintilla evidence rule. Applying the new substantial evidence rule to the causation requirement in medical malpractice cases should not cause a problem for the Alabama courts. ■

BUSINESS VALUATIONS

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FOOTNOTES

[1]*Vines v. Plantation Motor Lodge*, 316 So.2d 1338 (Ala. 1986); Prosser, *The Law of Torts* §§41-42 (4th Ed. 1971).

[2]*See Thompson v. Sun City Community Hospital, Inc.*, 688 P.2d 605, 613-616 (Ariz. 1984).

[3]*Cooper v. Sisters of Charity of Cincinnati, Inc.*, 27 Ohio St.2d 242, 272 N.E.2d 97 (1971).

[4]*See, e.g., Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966); *Hunkovits v. Group Health Cooperative of Puget Sound*, 99 Wash.2d 609, 664 P.2d 474 (1983); *Hamil v. Bashline (Bashline II)*, 481 Pa. 256, 392 A.2d 1280 (1978).

[5]*Howard v. Mitchell*, 492 So.2d 1018 (Ala. 1986).

[6]*Pillsbury—Flood v. Portsmouth Hospital*, 512 A.2d 1126 (N.H. 1986); *Curry v. Sommer*, 136 Ill.App.3d 468, 91 Ill.Dec. 368, 483 N.E.2d 711 (4 Dist. 1985); *Clayton v. Thompson*, 475 So.2d 439 (Ms. 1985); *Gooding v. University Hospital Building, Inc.*, 445 So.2d 1015 (Fla. 1984); *Morgenroth v. Pacific Medical Center, Inc.*, 54 Cal.App.3d 521, 126 Cal. Rptr. 681 (1 Dist. 1976); *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 27 Ohio St.2d 242, 272 N.E.2d 97 (1971).

[7]*See McClinton v. McClinton*, 258 Ala. 542, 63 So.2d 584 (1952).

[8]Section 6-5-540 through Section 6-5-552 of the *Alabama Code* (1975) (1987 Cum. Supp.).

[9]*Orange v. Shannon*, 284 Ala. 202, 224 So.2d 236 (1969).

[10]*Cooper v. Sisters of Charity of Cincinnati, Inc.*, 27 Ohio St.2d 242, 272 N.E.2d 97 (1971).

[11]*Gooding v. University Hospital Building, Inc.*, 445 So.2d 1015 (Fla. 1984).

[12]*Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 (Minn. 1980).

[13]*Hanselmann v. McCardle*, 267 S.E.2d 511, 513 (S.C. 1980).

[14]*Walden v. Jones*, 439 S.W.2d 571 (Ky. App. 1968).

[15]*Curry v. Sommer*, 136 Ill. App.3d 468, 91 Ill. Dec. 368, 483 N.E.2d 711 (4 Dist. 1985).

[16]*See generally* cases cited note 4 *supra*.

[17]*See generally* cases cited note 6 *supra*.

[18]*Howard v. Mitchell*, 492 So.2d 1018 (Ala. 1986); *Cornfeldt v. Tongen*, 295 N.W.2d 638 (Minn. 1980); *Hanselmann v. McCardle*, 267 S.E.2d 511, 513 (S.C. 1980); *Walden v. Jones*, 439 S.W.2d 571 (Ky. App. 1968).

Legislative Wrap-up

by Robert L. McCurley, Jr.

Law Institute bills

The following Law Institute bills are before the Legislature, and at the time of the submission of this article, had passed one house and were pending final passage by the other legislative body:

1. *Redemption of Real Property*—House Bill 114 sponsored by Representative Jim Campbell; Senate Bill 131 sponsored by Senator Rick Manley

It clarifies the law of redemption of real property by codifying the case law and basically does two things: (1) clarifies who may redeem and their priority, and (2) what are allowable charges to be added to the foreclosure sale price. *See Alabama Lawyer,* January 1986.

2. *Power in Mortgages*—House Bill 116 sponsored by Representative Jim Campbell; Senate Bill 130 sponsored by Senator Rick Manley

This bill revises but keeps the present law substantially the same as it relates to powers of sale which may be placed in mortgage agreements. Present mortgages will be unaffected. The basic change is to require one to foreclose through court proceedings where mortgages are silent as to how foreclosure will be conducted. This change is recommended because in analogous situations statutes have been held unconstitutional for lack of notice. *See Alabama Lawyer,* January 1987.

3. *Trade Names*—House Bill 323 sponsored by Representative Mike Box; Senate Bill 252 sponsored by Senator Earl Hilliard

This bill revises Alabama's trademark law to make the classifications identical to the federal law, and further allows for the registration of trade names. Presently there are no effective means for a business to put others on notice of its claim to a business name. This is purely a notice statute which now permits registration of both trade names and trademarks.

4. *Guardianship and Protective Proceedings* act—House Bill 338 sponsored by Representative Mike Box; Senate Bill 116 sponsored by Senator Ryan deGraffenried

This bill makes clarifying amendments to the "Uniform Guardianship and Protective Proceedings" bill passed last year. These amendments were requested by the Department of Human Resources and are technical changes except that pre-1988 guardianships continue in effect as they existed prior to the effective date of the act, until a petition is filed to have the powers under the new act. *See Alabama Lawyer,* March 1988.

5. *Probate Estate defined*—House Bill 117 sponsored by Representative Jim Campbell; Senate Bill 129 sponsored by Senator Rick Manley

This bill defines probate estate in sections 43-8-40 and 43-8-70.

Amendments to the Eminent Domain Code were not filed until mid-March due to last-minute clarifications requested by the State Highway Department. The amendments were filed as Senate bill 533 by Senator Frank Ellis. *See Alabama Lawyer,* March 1988.

Arbitration

Senator Bill Cabaniss is sponsoring Senate bill 33 to permit arbitration agreements in commercial contracts. This bill, entitled "The Alabama Uniform Arbitration Act," amends section 8-1-41, *Code of Alabama* 1975 to provide for the enforcement of arbitration provisions and repeals sections 6-6-1 through 6-6-16 of the *Code of Alabama.* The act does not apply to: 1) collective bargaining agreements, 2) insurance contracts, 3) any consumer transaction, 4) any contract for the sale or lease of purchaser's or lessee's pri-

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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.

Committees' Reports

1987-88 committees detail accomplishments

During the months of February and March, committee and action group chairmen reported to Alabama State Bar President Ben Harris, regarding their accomplishments at this mid-year point and their goals for the remainder of the bar year. Highlights of some follow.

Albert Brewer, chairman of the Action Group on Post-conviction Capital Appeals, presents status report at March commissioners' meeting.

—**The Committee on a Client Security Fund** drafted an amendment to the fund's rules, adding an enforcement provision dealing with lawyers who do not pay their assessments. Also, a proposed amendment to rule 8 of the fund's rules was submitted to the supreme court for consideration (the amendment deals with the responsibility of various categories of lawyers to pay the assessment). The court rejected the amendment March 30 and exempted all but holders of annual business licenses.

—***The Alabama Bar Directory* Committee** is considering the signing of a contract to sell advertising for the directory, in an attempt to raise all the revenue required for the book.

—**The Law Day Committee,** in an attempt to reach schools, churches, civic organizations and senior citizens, is working with the American Bar Association for suggestions for local bar association activities, trying to visit every primary and secondary school in the state (distributing information) and producing and broadcasting public service announcements for television and radio.

—**The Professional Economics Committee** is anticipating the development of the committee into a section and drafted a "Purpose Statement and Invitation to Join" which ran in the March 1988 issue of the *Lawyer.*

—**The Committee on Substance Abuse** made several presentations to the professional responsibility classes at Cumberland and the University of Alabama schools of law, and provided information to many bar auxiliaries and the circuit judges of one circuit. The committee is considering splitting, with one part handling information, dissemination and education, and the other working with two other committees in the area of chemical dependency.

—***The Alabama Lawyer*** remains fiscally sound, with six issues published annually. The *Lawyer* incorporated several new features during the past year, including one on office automation and one on the courthouses of Alabama, with other continuing features being considered.

—**The Permanent Code Commission** prepared and submitted to the board of commissioners a new set of rules, the Rules of Professional Conduct of the Alabama State Bar; now, the supreme court is considering the adoption of the rules. Also, the commission drafted guidelines for implementing the Howell Rule (DR 2-111). The commission plans to review all the Rules of Disciplinary Enforcement.

—**The Insurance Programs Committee** reports that 1,243 attorneys have contributed to the captive start-up fund. The committee is considering two courses of action for the formation of the captive and is publicizing the captive efforts through speaking engagements and newspaper articles.

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Legislative Wrap-Up

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mary or recreational residence, or 5) any claim for bodily injury or wrongful death. After an arbitration award is made, either party may apply to the court for an order confirming the award and enforcing as any other order or judgment. *See "Arbitration of Commercial Disputes," Alabama Lawyer,* January 1987.

Another bill of interest to lawyers is the legal malpractice bill introduced by Senators deGraffenried and Manley, S. 256. This bill passed the senate February 25 and was placed on the calendar of the house the last week of March. This bill needs only a favorable vote of the House of Representatives and the Governor's signature to become law. It is endorsed by the state bar and places a two-year statute of limitations on causes of action against lawyers with a four-year rule of repose. It further defines the standard of care applicable to lawyers and provides for the settlement of disputes by voluntary arbitration. ■

CIRCLE

July 21-23

1988 Alabama State Bar Annual Meeting

Wynfrey Hotel
Riverchase Galleria
Birmingham, Alabama

Committees' Reports

continued from page 163

—**The Indigent Defense Committee** reports a rather frustrating year, with much of the committee's suggestions not being implemented. However, the committee is developing special guidelines for representation in capital cases, as well as guidelines for the appointment of capital lawyers. Also, the committee is screening candidates for receipt of the Clarence Darrow Award.

—**The Unauthorized Practice of Law Committee** has handled complaints as submitted and obtained several "cease and desist" affidavits and filed one quo warranto. The committee recommends the formation of a small committee of lawyers to review complaints involving clients who feel they have been mistreated by lawyers, with a grievance sub-committee to dispose of the complaints.

—**The Character and Fitness Committee** will have a joint meeting in July with the Committee on Substance Abuse to decide how to deal with applicants who are interviewed because of a substance abuse problem.

—**The Action Group on Post-Conviction Capital Appeals** made an interim recommendation to the board of commissioners to support legislation providing mandatory appointment of counsel in post-conviction capital appeals. The action group also recommended that the bar sponsor a resource center to track and monitor capital cases, recruit counsel and assist counsel.

—**The Committee on the Future of the Profession** devised a "Client's Bill of Rights" to help clients better understand both the duties of their attorney and their own responsibilities in the attorney/client relationship. The board of commissioners approved the bill, and the committee hopes to publish it in pamphlet or poster form.

—**The Action Group on the Proposed Judicial Building** reports that approximately one-half of the land needed for the site has been obtained or contracted for, and the site has been determined to be on Dexter Avenue between Lawrence and McDonough streets. The next step is selecting architects, engineers and designers.

—**The Action Group on Citizenship Education** is working on several programs to further law-related education in the elementary and secondary school levels. The group also is interested in working with the state bar toward a program of citizenship education for immigration applicants; for both programs, the action group is preparing funding proposals.

—**The Action Group on Professional Discipline** reports it is recommending to the board of commissioners certain changes in the Rules of Disciplinary Procedure and hopes to have them ready by the end of the bar year.

—**The Action Group on Alternative Methods of Dispute Resolution** worked to create the Uniform Arbitration Act. The substance of the act has been presented by Senator Cabaniss to the legislature as S.B. 33. With certain modifications, this bill has been approved by the board of commissioners.

—**The Alabama Law Foundation** took over the role of the Action Group for the Establishment of IOLTA and sent brochures in January to all members of the bar explaining IOLTA's purpose. Since then, 226 trust accounts have been converted, with 775 attorneys opting-out of the program (the majority of those before the program was operational). Approximately 4,500 lawyers had not responded by the end of March. The foundation is developing an application process for making grants using funds generated from the IOLTA program. ■

ALABAMA STATE BAR 1988-89 COMMITTEE PREFERENCE FORM

Dear Fellow Lawyer:

Committees and task forces are the backbone of our association, developing projects and addressing problems for both the public and the membership. Volunteering for them means a commitment of time and may require travel; however, the rewards are many.

If you are willing to serve, please use the space below to inform the state bar of your preferred assignment. Because the bar year begins July 21, 1988, we need to hear from you no later than **June 1.**

With your help, the Alabama State Bar will have another productive year.

Sincerely yours,

Gary C. Huckaby

Gary C. Huckaby
President-elect

The number in parentheses represents the number of available positions or presidential appointments during the 1988-89 bar year.

PUBLIC SERVICE

Task Force on Alternative Methods of Dispute Resolution (8)
Committee on Correctional Institutions and Procedures (6)
Task Force on Citizenship Education
Committee on a Client Security Fund
Committee on Access to Legal Services (12)
Committee on Indigent Defense (6)
Lawyer Referral Service Board of Trustees (9)
Law Day Committee (7)
Committee on Prepaid Legal Services (3)
Joint Task Force on Solutions to Illiteracy
Committee on the Unauthorized Practice of Law (6)
Task Force on Post-Conviction Appeals

BENCH AND BAR

Task Force to Consider Possible Restructuring of Alabama's Appellate Courts
Task Force on the Proposed Judicial Building
Task Force on Judicial Selection Process

FOCUS ON THE PROFESSION

Committee on Lawyer Advertising and Solicitation (7)
Committee on Substance Abuse (6)
Character and Fitness Committee (3)
Ethics Education Committee (5)
Committee on the Future of the Profession (5)
Permanent Commission on the Code of Professional Responsibility (5)
Committee on Professional Economics (4)
Committee on Lawyer Public Relations, Information and Media Relations (6)
Task Force on Professionalism

BAR SERVICES, MANAGEMENT AND INTEREST GROUPS

Task Force on Facilities for the Alabama State Bar
Military Law Committee (8)
Federal Tax Clinic (5)
Board of Editors, *The Alabama Lawyer* (5)
The Alabama Lawyer Bar Directory Committee (5)
Finance Committee (3)
Insurance Programs Committee (7)
Legislative Liaison Committee (6)
Local Bar Activities And Services Committee (8)
Committee on Continuity, Programs and Priorities (4)

PLEASE RETURN BY JUNE 1, 1988

Name: _____
Firm, agency or other employer: _____
Office mailing address: _____
City: _____ State: _____ Zip Code: _____
Office telephone number: _____
Year of admission to bar: _____
Yes, I would like to serve. My preferences are:
1. _____
2. _____
3. _____
I am currently a member of the following state bar committee or task force: _____
_____
Comments or suggestions: _____
_____
_____
_____

MAIL TO: Gary C. Huckaby, President-elect
Alabama State Bar P.O. Box 671 Montgomery, AL 36101

Opinions of the General Counsel

by John A. Yung, IV, and Alex W. Jackson
Office of Professional Responsibility

QUESTION:

"This confirms our telephone conversation of this date where I inquired as to the propriety of including a defendant on the certificate of service on a pleading where the plaintiff moves the Court for a default or sanctions for failure to respond in a timely fashion to discovery.

"I would appreciate your forwarding to me a formal opinion on this issue."

ANSWER:

You may not ethically serve a copy of a pleading upon an opposing party who is represented by counsel without permission of the trial court pursuant to ARCP 5(b).

DISCUSSION:

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

> (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 by law to do so.

Although this prohibition appears absolute, the American Bar Association has held in Informal Opinion C-426 that the rule does not prohibit an attorney from serving legal notices on an opposing party although that party is represented by an attorney who is also served. The opinion notes, "Many statutes or court rules provide for service of legal notices on the opposite party either with alternate provision for service on the attorney or with a general provision that service upon the attorney shall constitute notice to the adverse party."

However, this opinion appears to conflict with the express provisions of Rule 5(b) of the Alabama Rules of Civil Procedure which provide that:

> "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney *the service shall be made upon the attorney unless service upon the party himself is ordered by* the court." (emphasis added)

* * *

As this rule accords with our DR 7-104(A)(1), we therefore hold that an attorney may not serve pleadings and other court documents directly upon an opposing party where the opposing party is known to be represented by counsel. Where, as here, the attorney has reason to believe that opposing counsel is not communicating with his client, we suggest that counsel apply to the court for permission to serve pleadings and notices directly upon the opposing party pursuant to ARCP 5(b). ■

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Disciplinary Report

Surrenders of License

● Decatur lawyer **Jasper Newton Powell, Jr.,** surrendered his license to practice law in the state of Alabama on January 13, 1988.

● Effective April 6, 1988, at 12:01 a.m., **Allen B. Edwards, Jr.,** voluntarily relinquished and surrendered his license to practice law in the state of Alabama. Accordingly his name was stricken from the roll of attorneys in all of the courts of the state of Alabama.

Public Censures

● On February 19, 1988, Birmingham lawyer **Harold P. Knight** was publicly censured for two separate violations of Disciplinary Rule 1-102(A)(5) of the *Code of Professional Responsibility* of the Alabama State Bar, which prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice. In one matter, Knight received $125 in insurance proceeds that were due to be paid to a certain individual, or her attorney, but failed to pay over the funds for some ten months, despite several requests that he do so, and not until a complaint had been filed against him with the bar. In the second matter, Knight accompanied a client to the office of the clerk of a court, at which time the client accepted a significant sum of money from the clerk, though Knight knew that his client's entitlement to these funds had been formally questioned, and that the court would hold further proceedings to determine the entitlement to the funds. [ASB Nos. 86-592 & 86-642(A)]

● On Friday, February 19, 1988, Dadeville attorney **Charles R. Adair, Jr.,** was publicly censured for violation of Disciplinary Rules 1-102(A)(4), 1-102(A)(5), 1-102(A)(6), 7-102(A)(3), 7-102(A)(5) and 7-102(A)(7) of the *Code of Professional Responsibility.* It was determined that the lawyer had furnished a false certificate of title to a lending institution on a piece of real estate in which the lawyer had a personal business interest. The lawyer paid the lending institution for its financial loss, and in view of his restitution, it was determined that he should receive a public censure. [ASB No. 87-325]

Private Reprimands

● On Friday, February 19, 1988, an Alabama lawyer received a private reprimand for violation of Disciplinary Rule 3-101(A). It was determined that this attorney had aided a lawyer not licensed to practice law in Alabama in the unauthorized practice of law by sharing office space and secretarial help with the unlicensed lawyer and by otherwise furthering actions which constituted the unauthorized practice of law. [ASB No. 87-562]

● On February 19, 1988, a lawyer was privately reprimanded for willful neglect and intentional failure to carry out a contract of employment. The lawyer filed an appearance on behalf of a client in a criminal matter, and subsequently filed a number of motions on behalf of the client. However, when the motions were set for hearing, the lawyer failed to appear on two separate occasions and did not file a motion to withdraw until weeks later. [ASB No. 86-686]

● On February 19, 1988, a lawyer was privately reprimanded for conduct adversely reflecting on his fitness to practice law. The lawyer failed to provide the Disciplinary Commission with a response to the complaints of two separate clients, despite numerous requests that he respond to the complaints. [ASB Nos. 85-631 and 86-268]

● On February 19, 1988, a lawyer was privately reprimanded for having engaged in conduct adversely reflecting on his fitness to practice law, having willfully neglected a legal matter entrusted to him and having intentionally failed to seek the lawful objectives of his clients through reasonably available means. The lawyer represented the plaintiffs in a civil suit and failed to provide the court with expert testimony to support the claim, within the time specified by the court. The suit was then dismissed, but the lawyer failed to notify his clients of the dismissal. The clients filed a complaint with the bar, and the bar requested the lawyer to respond to it, but the lawyer failed to provide any response to the complaint. [ASB No. 86-232(B)]

● On Friday, February 19, 1988, an Alabama lawyer received a private reprimand for violation of Disciplinary Rules 6-101(A) and 7-101(A)(2). It was determined that the attorney, who was retained to represent a party to a divorce, failed to file responsive pleadings in a timely fashion resulting in the entry of a default against his client and further that the attorney failed to make timely inquiry of the court as to the status of the case. [ASB No. 87-248]

● On Friday, February 19, 1988, an Alabama lawyer received a private reprimand for violation of Disciplinary Rule 7-102(A)(5). The Disciplinary Commission determined that the lawyer had made a false statement of fact to a probate court by representing, in a petition for letters of administration, that the attorney's client was the widow of the decedent when in fact the client had been divorced from the decedent several months previously. The Disciplinary Commission determined that while there existed a good faith argument that the decree of divorce was voidable, the lawyer violated DR 7-102(A)(5) by not fully advising the probate court of all of the circumstances surrounding the matter. [ASB No. 86-40(B)]

● On February 19, 1988, a lawyer was privately reprimanded for conduct adversely reflecting on his fitness to practice law, in violation of DR 1-102(A)(6). The lawyer failed to file a timely brief on behalf of his client with the Alabama Court of Criminal Appeals, and ignored three written requests that he provide the Disciplinary Commission with an explanation of his failure to file a timely brief. [ASB No. 86-575] ■

MCLE News

by Mary Lyn Pike
Assistant Executive Director

Commission decisions

At its meeting in Montgomery February 19, 1988, the Mandatory CLE Commission:

(1) Granted two attorneys' partial waivers of the 1987 CLE requirement;

(2) Ruled that a full-time juvenile court referee is eligible for a Rule 2.C.1. exemption, as long as there is no part-time practice of law;

(3) Granted two extensions of the deficiency plan deadline, requested on the basis of absence from the country and hospitalization, respectively;

(4) Denied an extension of the deficiency plan deadline, requested on the basis of a busy schedule;

(5) Ruled that suspended members presently are not subject to the CLE requirement and voted to request a rule change requiring such attorneys to earn 12 hours' credit for each year of suspension, prior to reinstatement;

(6) Granted a waiver of the late compliance fee, on the basis of medical and financial problems;

(7) Declined to waive the late filing fee for three attorneys whose 1987 CLE reports were received after Monday, February 1, 1988;

(8) Voted to amend Regulation 5.1, so that reports (a) postmarked by January 31 and (b) sent by certified mail will be accepted without the late filing fee;

(9) Approved a deficiency plan for an attorney who was misled by a sponsor;

(10) Affirmed the administrator's decision to award partial credit for a chronic pain seminar;

(11) Approved 16.5 credits for Cumberland Law School's comparative law seminar, London, July 14-31;

(12) Approved for half-credit a writing seminar sponsored by the Wisconsin State Bar;

(13) Declined to approve a time management seminar offered by the same sponsor; and

(14) Acknowledged suggestions for (a) increased teaching credit and (b) requiring special members practicing outside Alabama to meet the CLE requirements but declined both.

A point of personal privilege

Mr. Chairman, members of the MCLE Commission and members of the Alabama State Bar: By the time you read this, I no longer will be serving as administrator for the Commission, and assistant executive director of the bar association, but rather will have assumed a new position, director of professional education for the Association of Trial Lawyers of America in Washington, D.C.

Mandatory CLE was adopted by the Supreme Court of Alabama in March 1981. Eight months later, I was chosen the MCLE Commission's administrator. Seven and one-half years later, I offer this opinion: MCLE is good for the Alabama State Bar.

The number of CLE opportunities available to bar members is greater than any of us imagined it might be: last year over 1,500 programs were approved; over 300 of those occurred in Alabama.

Most gratifying is the fact that many in-state programs are conducted by local bar associations for local lawyers. Special needs are met by specialty bars. The Cumberland and Alabama institutes for CLE continue their 20-year tradition of offering both "meat and potatoes" and more esoteric programs, taking many programs on the road to two, three and four cities. Lawyers are helping fellow lawyers by serving as instructors for courses. Providers from outside the state are striving to identify educational needs and meet them.

In short, opportunities for enhancing and continuing competence abound.

Thank you, Chairmen Bill Scruggs, Richard Hartley, John Scott, Gary Huckaby and Phil Adams, for the guidance, support and encouragement you have given me.

Thank you, Commission members past and present, for the opportunity you gave a brand new lawyer, to take on a challenge and grow with it.

Thank you, members of our great bar, for your cooperation and participation, and for understanding on occasions when I delivered news you did not want to hear.

Finally, thank you, Diane Weldon, MCLE Commission secretary, and now administrative assistant, 1982-1988. You have made this a team effort and, truth be known, you have run the show very well. The MCLE program is in your capable hands. ■

Recent Decisions

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

Recent Decisions of the Alabama Court of Criminal Appeals

Anders' mandate on appellate counsel represents minimum standard for counsel effectiveness

Moore v. State, 8 Div. 954 (February 18, 1988)—Moore was indicted on a charge of robbery in the first degree and was represented by appointed counsel. After pleading not guilty, Moore was tried and convicted.

Notice of appeal was filed with the court of criminal appeals on September 25, 1987. On October 20, 1987, defense counsel filed a motion to withdraw as counsel which was overruled by the circuit court, who directed that counsel continue to represent Moore on appeal.

After the record had been certified and transmitted to the court of appeals, counsel filed a late brief stating *inter alia*, "the undersigned has reviewed the record in this case and is of the opinion that it is free of reversible error and this appeal is without merit."

The court of criminal appeals, through Judge Patterson, remanded for appointment of counsel and found that trial defense counsel's efforts were insufficient under the guidelines established in *Anders v. California*, 386 U.S. at 743.

The mandate of *Anders* is:

> "If counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous."

Judge Patterson found counsel's brief to fall below those standards and remanded the case to circuit court with the instructions that the present appellate counsel be removed and new counsel be appointed.

Sequel to *Moore*—effectiveness of counsel

Boutwell v. City of Bay Minette, 1 Div. 580 (February 18, 1988)—In *Boutwell*, Judge Patterson issued the sequel to the court's holding in *Moore, infra*.

Counsel for Boutwell filed a notice of appeal, but failed to file a brief, even after the court directed counsel's attention to *Mylar v. Alabama*, 671 F.2d 1299 (11th Cir. 1982); *cert. denied*, 463 U.S. 1229 (1983). The mandate of *Mylar v. Alabama* is clear to any defense counsel:

John M. Milling, Jr., is a member of the firm of Hill, Hill, Carter, Franco, Cole & Black in Montgomery. He is a graduate of Spring Hill College and the University of Alabama School of Law. Milling covers the civil portion of the decisions.

David B. Byrne, Jr., is a graduate of the University of Alabama, where he received both his undergraduate and law degrees. He is a member of the Montgomery firm of Robison & Belser and covers the criminal portion of the decisions.

". . . The failure to file a brief in a nonfrivolous appeal falls below the standard of competence expected and required of counsel in criminal cases and, therefore, constitutes ineffective assistance."

Singleton instructional lapse constitutes plain error

Bush v. State, 3 Div. 46 (January 26, 1988)—In *Bush*, the trial court instructed the jury that he had found the confession "was not improperly induced" and that the jury could not disregard its admission.

Judge Patterson, writing for a unanimous court, held that the trial judge's instruction constituted reversible error based upon *Ex parte Singleton*, 465 So.2d at 446. Judge Patterson held that it was improper for a trial judge to disclose to the jury that he had made a preliminary determination that a confession was voluntary, and, therefore, admissible.

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In *Singleton, supra*, the Alabama Supreme Court stated the rule applicable to the determination of voluntariness and the weight to be given a confession as follows:

"Correctly stated, whether a confession was voluntary rests *initially* with the trial court; once the trial judge makes the preliminary determination that the confession was voluntary, it then becomes admissible into evidence. Thereafter, the jury makes a determination of voluntariness as affecting the weight and credibility to be given the confession."

Recent Decisions of the Supreme Court of Alabama—Civil

Civil procedure . . . general scope of appellate review of directed verdict has exception

Hamer v. Nelson, 22 ABR 141 (January 15, 1988)—Hamer suffered injuries in a motor vehicle accident and filed suit based on theories of negligence and wantonness. At trial, following the close of Hamer's case, defendant moved for a directed verdict on the issue of wantonness, and the motion was granted. Nelson subsequently put on his case as to the negligence claim and then moved for a directed verdict on negligence. The motion was denied, and the jury returned a verdict in favor of Nelson.

A key issue presented to the supreme court was the applicable standard of appellate review where there is a directed verdict in favor of the defendant, granted at the close of the plaintiff's proof, which does not dispose of the entire case.

The supreme court recognized that it has generally stated that "the function of an appellate court in reviewing a motion for directed verdict is to view the entire evidence . . . ." The court, however, also recognized that the peculiar facts of this case presented an exception to that general rule.

Therefore, where a partial directed verdict is granted to the defendant, at the close of the plaintiff's evidence, which disposes of a particular issue but not the entire case, the scope of appellate review is necessarily restricted to the evidence in the record at the time the verdict was directed. To hold otherwise would allow additional evidence that was not before the trial court at the time the motion was considered to "come in behind" the ruling on the motion and thereby influence the reviewing appellate court.

Civil procedure . . . rule 41(a)(1) dismissal effective automatically without court approval

Hammond v. Brooks, 22 ABR 1 (January 15, 1988)—This appeal is from a voluntary dismissal made pursuant to Rule 41(a)(1)(ii), Ala.R.Civ.P. On December 1, the trial court called the case for trial, and the attorneys for the parties told the court they had tentatively settled the case subject to approval by the insurance company. The attorneys requested a continuance, which the court denied. The case was called for trial on December 3. Prior to that time all parties filed a stipulation with the clerk for dismissal *without prejudice*. When the case was called for trial, the attorneys informed the court of the prior stipulation for dismissal and told the court they were not prepared to try the case. The court entered an order dismissing the case *with prejudice*.

In a case of first impression in Alabama, the supreme court was asked to consider whether a trial court can disregard a stipulation for dismissal without prejudice, signed by all parties and filed with the clerk, and enter an order dismissing the case with prejudice. The court answered the question in the negative, and recognized that the federal courts interpreting Rule 41(a) have stated that voluntary dismissals automatically terminate the action upon the filing of the stipulation with the clerk. No order of the court is required.

The court also noted that dismissal without prejudice is consistent with Rule 41 which provides that "unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice." Here, because the parties specifically provided that the dismissal was "without prejudice," the court was without authority to change the stipulation to make the dismissal with prejudice.

Civil procedure . . . rules of relation back of counterclaims clarified

Sharp Electronics Corp. v. Shaw, 22 ABR 150 (January 15, 1988)—In December 1980, Sharp filed suit against Shaw

in district court to collect a debt due on copy machines sold to Shaw. The district court entered judgment in favor of Sharp, and Shaw appealed the case to circuit court and also filed a counterclaim alleging fraud and misrepresentation in the sale of some of the Sharp copiers. Some of the copiers mentioned in Sharp's suit had been the subject of representations made in 1975. The issue presented for appellate review was whether Shaw's claim related back to the time Sharp's claim arose.

The supreme court conceded that the appellate courts in Alabama have not clearly explained the rules of relation back of counterclaims. Therefore, the court took the opportunity to enunciate the applicable general principles. The rules of relation back of counterclaims are:

(1) Relation back is invoked only when the counterclaim would be time-barred judged from the date the counterclaim was filed.

(2) All counterclaims, compulsory and permissive, relate back. *Code of Alabama* 1975, §6-8-84; Rule 13(c)

(3) Omitted counterclaims allowed by the court pursuant to Rule 13(f) also relate back. Rules 13(c) and 15(c)

(4) Counterclaims relate back to the date the plaintiff's action accrued. Because the statute requires the counterclaim to be "a legal subsisting claim" on the date the plaintiff's action accrued, a counterclaim that accrues after the date the plaintiff's action accrues, but becomes time-barred before suit is filed, cannot be used offensively, that is, to exceed the amount of plaintiff's recovery, if any.

(5) Permissive counterclaims that were not legally subsisting claims on the date the plaintiff's action accrued (e.g., claims that became time-barred earlier) are subject to a statute of limitations defense.

(6) Compulsory counterclaims that were not legally subsisting claims on the date the plaintiff's action accrued (e.g., claims that became time-barred earlier) cannot be used offensively. Such compulsory counterclaims that are still untimely under the relation back rules can be used defensively, that is, to cancel out the amount won by the plaintiff.

Therefore, Shaw's compulsory counterclaim may be used offensively if it was not time-barred on the date Sharp's cause of action accrued. There was evidence that Shaw reasonably should have discovered the fraud no longer than one year prior to the accrual of Sharp's cause of action for breach of contract. Therefore, Shaw's claim was not time-barred, and Shaw may use the counterclaim offensively.

Insurance . . .

insurer's attorney defending under reservation of rights does not have presumptive conflict of interest

L&S Roofing Supply Co., Inc. v. St. Paul's Fire & Marine Ins. Co., 22 ABR 562 (February 1988)—L&S Roofing was sued in state court for breach of warranty and fraud. St. Paul insured L&S Roofing and defended the company under a reservation of rights claiming that fraud was not covered and the demand was in excess of the policy limits. L&S Roofing filed a declaratory judgment action in state court alleging that counsel selected by St. Paul had an inherent conflict of interest, St. Paul should provide L&S Roofing with independent counsel of its choosing and independent counsel should control the litigation. St. Paul removed the case to federal court and denied any presumptive conflict of interest. The federal court certified this question to the supreme court, and the supreme court answered the question in the negative.

The court stated that due to potential conflicts of interest inherent in an insurer's conducting a defense of its insured under a reservation of rights, the insurer has an *enhanced obligation of good faith* toward its insured in conducting such a defense. The court adopted the view taken by the Washington State Court in *Tank v. St. Farm Fire & Cas. Co.*, 715 P.2d 1113 (1986) and quoted extensively from that opinion. For example, an "enhanced obligation" requires the insurer to: (1) thoroughly investigate the cause; (2) retain competent counsel; (3) fully inform the insured of the reservation of rights and all developments relevant to the policy coverage and progress of the suit, including all settlement offers; and (4) refrain from any action which shows greater concern for the insurer's interest than for the insured's financial risk. In short, the insurance counsel represents only the insured, not the insurance company.

Releases . . .

section 12-21-109 applied

Daugherty v. M-Earth of Alabama, Inc., 22 ABR 531 (February 1988)—Daugherty's wife was injured in a collision with a dump truck owned by Munkus and driven by Thompson, an employee. Munkus was under contract to deliver sand for M-Earth. Prior to trial, Daugherty settled the case with the driver and the owner of the truck and executed a *pro tanto* release expressly limiting the operation of the release to Thompson and Munkus and expressly reserving all rights against any other entities. M-Earth filed a motion for summary judgment and argued that Daugherty cannot release an agent or employee and still seek to impose liability on the principal. The trial court agreed and granted summary judgment.

In a case of first impression in Alabama, the supreme court disagreed with M-Earth and reversed the trial court. The court first noted that courts in other states faced with this issue have held that the release of an employee or agent does not

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foreclose a right of action against the employer or principal under a theory of vicarious liability. Indeed, Section 12-21-109, *Ala. Code* 1975, provides:

> "All . . . releases . . . must have effect according to their terms and the intentions of the parties thereto."

By reserving his rights against M-Earth in the *pro tanto* release, Daugherty intended to reserve his right to bring this action. Therefore, where a release expressly reserves rights against a joint tortfeasor, whether he is a principal, agent or joint venturer, it will be given effect according to its terms.

Recent Decisions of the Supreme Court of Alabama—Criminal

Proof of venue essential element of offense

Jones v. City of Daphne, 22 ABR 194 (December 6, 1987)—The Circuit Court of Baldwin County, sitting without a jury, adjudged Jones guilty of driving under the influence of alcohol. The defendant appealed his judgment of conviction to the court of criminal appeals and obtained a reversal. The supreme court affirmed the intermediate appellate court's judgment to reverse, but went further and rendered judgment for the defendant.

Justice Almon, writing for a unanimous court, found that the city had failed to prove venue and the element of the time of the offense.

Justice Almon noted:

> "We have read the entire record of the trial proceedings and find no evidence whatsoever tending to establish when the offense was committed.
>
> " 'If the evidence fails to disclose that the offense was committed within the statute, the state fails to make out a case.' *Harris v. State*, 54 Ala.App. 10, 12, 304 So.2d 252, 253 (1974) . . .
>
> "Neither do we find sufficient evidence to establish that the offense occurred within the city limits or police jurisdiction of the City of Daphne. Failure to prove venue is grounds for reversal." *Wilcutt v. State*, 284 Ala. 547, 550, 226 So.2d 328, 330 (1969)

Legal standard utilized in circumstantial evidence cases

Mauricio v. State of Alabama, 22 ABR 474 (December 11, 1987)—The Supreme Court of Alabama, in a *per curiam* opinion, reversed and rendered the conviction of Mauricio which was based upon circumstantial evidence.

The supreme court reiterated the long-standing rule to be applied in circumstantial evidence cases as follows:

> "In reviewing a conviction based upon circumstantial evidence, this Court must view that evidence in the light most favorable to the prosecution. The test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude . . . Our obligation, therefore, is to examine the record to determine whether there is any theory of the evidence from which the jury might have excluded every hypothesis except guilt beyond a reasonable doubt."

Recent Decisions of the Supreme Court of the United States

Comment on defendant's failure to testify permissible where defense counsel "opened door"

United States v. Robinson, No. 86-937, 56 USLW 4174 (February 24, 1988)—May a prosecutor comment upon a criminal defendant's failure to testify at trial in response to a defense lawyer's closing argument comment that the defendant was not given an opportunity to explain his actions? The Supreme Court, in a five-to-three decision, answered in the affirmative.

Writing for the court's majority, Chief Justice Rehnquist said there are exceptions to the general ban on prosecutors commenting on a defendant's silence at trial. In *Griffin v. California*, 380 U.S. 609 (1965), the court declared that the Fifth Amendment forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. Since *Griffin*, courts have been extremely reluctant to allow any reference to a defendant's right to testify or failure to take the stand. In Robinson, the Sixth Circuit reasoned that the prosecutor's statements, although responsive to defense counsel's remarks, still violated the Fifth Amendment prohibition as interpreted by *Griffin* because they directly referred to his failure to testify.

In reversing the Sixth Circuit, Chief Justice Rehnquist found that the Court of Appeals' interpretation of *Griffin* was too broad. Justice Rehnquist reasoned that, in *Griffin*, the prosecutor "on his own initiative" asked the jury to draw adverse inferences from the defendant's failure to testify. In *Robinson*, the prosecutor's statements were a "fair response to a claim made by the defendant through counsel that the defendant was not given an opportunity to explain his actions."

Sixth amendment's confrontation clause does not prohibit testimony regarding prior out-of-court identification when identifying witness is unable, because of memory loss, to explain basis for identification

United States v. Owens, No. 86-877, 56 USLW 4160 (February 23, 1988)—Will the Sixth Amendment's confrontation clause or the Federal Rules of Evidence bar testimony about a prior, out-of-court identification when the identifying witness is unable, because of memory loss, to explain the basis for the identification? The Supreme Court, in a six-to-two decision, answered in the negative.

Justice Scalia, speaking for the majority, stated that the confrontation clause

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guarantees only an opportunity for effective cross-examination. That guarantee is satisfied, he explained, "when, as here, the defendant has a full and fair opportunity to bring out the witness's bad memory and other facts tending to discredit his testimony."

As a result of injuries suffered in an attack at a federal prison, John Foster's memory was severely impaired. Nevertheless, in an interview with the investigating FBI agent, Foster described the attack, named the defendant as his attacker and identified the defendant from photographs. At trial, the accused was charged with assault with intent to commit murder. Foster testified that he clearly remembered identifying the defendant. On cross-examination, however, he admitted that he could not remember seeing his assailant, seeing any of his numerous hospital visitors except the FBI agent or whether any visitor had suggested that the defendant was, in fact, his assailant. Defense counsel unsuccessfully sought to refresh Foster's recollection with hospital records, including one that indicated that he attributed the assault to someone other than the respondent.

Following his conviction, the Court of Appeals reversed, upholding the defendant's challenges based on the confrontation clause of the Sixth Amendment and rule 802, Federal Rules of Evidence, which generally excludes hearsay.

In reversing the Court of Appeals, the Supreme Court held that "the Confrontation Clause guarantees only an opportunity for effective cross-examination, not successful cross-examination . . . [t]he Confrontation Clause is satisfied where, as here, the defendant has a full and fair opportunity to bring out the witness's bad memory and other facts tending to discredit his testimony." Justice Scalia reasoned that this analysis was not altered by the fact that Foster's testimony involved an out-of-court identification that traditionally would have been categorized as hearsay since the confrontation clause's requirements are satisfied when a hearsay declarant is present at trial, takes the oath and is subjected to unrestricted cross-examination. The Court further held that the lower court erred in holding that rule 801(d)(1)(C) did not apply to the identification statement either because of the witness's memory loss.

Fifth amendment prohibits compelling criminal defendant to admit any element of offense

Matthews v. United States, No. 86-6109, 56 USLW 4183 (February 24, 1988)—The sole question presented in *Matthews* was whether a defendant may be required to admit all the elements of a crime, including *mens rea*, before being allowed to present an entrapment defense.

Although the entrapment defense has no constitutional basis, constitutional implications are triggered when, as in *Matthews*, the district court restricts the defense's use of the defense to those cases where the defendant admits all the elements of the crime charged, including the requisite mental intent. Thus, to require any defendant to admit guilt before he may raise the entrapment defense infringes upon the defendant's constitutional right to require the government to prove every element of its case beyond a reasonable doubt.

In this case, the district court denied Matthews' pretrial motion seeking to raise the entrapment defense and ruled that entrapment was not available because the petitioner would not admit all of the elements, including the requisite mental state. At trial, the petitioner testified in his own defense that although he had accepted the loan, he believed it was a personal loan unrelated to his SBA duties. The district court refused to instruct the jury as to entrapment.

In an opinion by Chief Justice Rehnquist, the Court held that even if the defendant in a federal criminal case denied one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonably minded jury could find entrapment. The Court rejected as meritless the government's contention that because entrapment presupposes the commission of the crime, a defendant should not be allowed to deny the offense or an element thereof and rely on the inconsistent, affirmative defense of entrapment.

Right to present defense may be limited by discovery sanctions

Taylor v. Illinois, No. 86-5963, 56 USLW 4118 (January 26, 1988)—The compulsory process clause of the Sixth Amendment, in an appropriate case, may be violated by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness. However, the clause is not merely a guarantee that the accused shall have the power to subpoena witnesses, but confers on the accused the fundamental right to present witnesses in his own defense.

Justice Stevens, in a five-to-three decision, upheld Taylor's conviction. As a sanction for failing to identify a defense witness in response to a pretrial discovery request made by the prosecutor, an Illinois trial judge refused to allow the undisclosed witness to testify. The question presented to the Supreme Court was whether that refusal violated the defendant's constitutional right to obtain the testimony of favorable witnesses. The Supreme Court held that the trial judge's discovery sanction was not absolutely prohibited by the compulsory process clause of the Sixth Amendment. The Court found no constitutional error on the specific facts of this case. However, it is the opinion of this writer that this decision is limited to a great extent by the specific facts set forth in the case.■

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Ritchie & Rediker
Scalici, Matt
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Stone, Patton, Kierce & Kincaid
Stuckenschneider, Ted
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Honor Roll of Financial Institutions

(as of March 15, 1988)

The Alabama Law Foundation, Inc. announces that the following financial institutions are participating in the IOLTA program. The foundation thanks these institutions for their participation.

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AmSouth Bank
Bank of Dadeville
Bank of Mobile
Central Bank of the South
Colonial Bank
Commercial Bank of Ozark
Covington County Bank
Farmers & Merchants Bank, LaFayette
First Alabama Bank
First American Bank, Decatur
First American Bank of Pelham
First American Federal Savings & Loan, Huntsville
First Bank of Baldwin County
First Commercial Bank, Birmingham
First Community Bank, Chatom
First Federal Savings & Loan of Bessemer
First Federal Savings & Loan of Russell County
First Federal Savings Bank, Decatur
First National Bank, Ashland
First National Bank, Brewton
First National Bank of Atmore
First National Bank of Columbiana
First National Bank of Florence
First National Bank of Hamilton
First National Bank of Jasper
First National Bank of Tuskaloosa
First National Bank of Union Springs
First State Bank of Bibb County
First State Bank of Tuscaloosa
Jacobs Bank, Scottsboro
National Bank of Commerce, Birmingham
Peoples Bank & Trust, Selma
Pike County Bank
Southland Bank of Dothan
SouthTrust Bank of Alabama
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SouthTrust Bank of Calhoun County
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SouthTrust Bank of Huntsville
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SouthTrust Bank of Mobile
SouthTrust Bank of Montgomery
SouthTrust Bank of Ozark
SouthTrust Bank of the Quad Cities
SouthTrust Bank of Tuscaloosa County
Sweet Water State Bank
The American Bank, Geneva
The Bank of Tallassee
The Choctaw Bank of Butler
The Citizens Bank, Enterprise
The Citizens Bank of Valley Head
The First Bank of Grove Hill
The Peoples Bank, East Tallassee
The Peoples Bank & Trust, Greenville
The Perry County Bank
Tuskegee Federal Savings & Loan Association
Union Bank & Trust Company
United Security Bank, Butler ■

DEADLINE!

Get in your committee preference forms *before* June 1 to serve on the committee of your choice.
Gary C. Huckaby, President-elect
P.O. Box 671
Montgomery, Alabama 36101

Young Lawyers' Section

Charles R. Mixon, Jr.
YLS President

Seminar on the Gulf

May 20 through 21, 1988, the annual Alabama State Bar's Young Lawyers' Seminar-on-the-Gulf will be held at Sandestin, Florida. The committee, chaired by Sid Jackson and Preston Bolt, has an outstanding program for this weekend. You already should have received brochures regarding the seminar, and I hope you make plans to attend. Seminar topics include practice under the Alabama Administrative Procedures Act, a judicial view of lawyers, the role of corporate counsel, the use of demonstrative evidence and the handling of DUI cases. On the social agenda, Commonwealth Land Title of Mobile is the sponsor of a golf tournament Friday afternoon, and the Birmingham firm of Pittman, Hooks, Marsh & Dutton is the host of the Friday evening social hour. The Friday night party again features the all-lawyer band, "The Soul Practitioners." Saturday afternoon, Foshee & Turner Court Reporters are providing refreshments on the beach, and Emond & Vines is hosting a social hour that evening.

ABA Affiliate Outreach meeting

May 12 through 14, the American Bar Association-Young Lawyers' Division will hold its spring AOP Leadership Skills Conference at Hilton Head Island, South Carolina. Your YLS will send several representatives to consider such topics as how to obtain employer support for public service/pro bono work, providing legal assistance to victims of natural disasters, delivery of legal services to the elderly and leadership skills for new bar leaders. We believe participation in programs like this are extremely beneficial to the continued success of your YLS.

Youth Judicial Program

Once again, I must mention the outstanding job performed each year by Keith Norman of Montgomery handling the Youth Judicial Program. At this time, I also extend thanks to the following young lawyers who coordinated the programs in their cities:

Trip Walton—Auburn
Percy Badham—Birmingham
Lynn Schuppert—Decatur
Robert Baugh—Decatur
Lexa Dowling—Dothan
Frank Potts—Florence
Celia Collins—Mobile
Charlie Anderson—Montgomery
Jake Walker—Opelika
Louis Colley—Prattville
Joel Williams—Troy

Bar admissions ceremony

On May 16, the YLS hosts another bar admissions ceremony, officially inducting into our membership those individuals who have taken and passed the bar examination administered in February of this year. Laura Crum of Montgomery once again has done an outstanding job on this program, and we are pleased to have as our main speaker for the day Major General Robert W. Norris, new general counsel of the Alabama State Bar.

New local sections

Warren Laird of Jasper has organized the West Central Alabama Young Lawyers' Association, comprised of young lawyers in Cullman, Fayette, Marion, Walker and Winston counties. The initial organizational meeting was held February 12, 1988. In addition to informal luncheon meetings, the group will have an outing at Smith Lake June 3. Efforts are underway to affiliate this local section with the ABA-YLD. The officers of the association are:

President: Warren Laird, Jasper
Vice-president: Kim Chaney, Cullman
Secretary/treasurer: Margaret Dabbs, Jasper

Also, Robert Baugh of Decatur is preparing to officially affiliate the Decatur Young Lawyers with the ABA-YLD. We are hopeful that additional local sections will be created or reactivated within the coming months.

Annual bar convention

The 1988 Alabama State Bar Annual Meeting will be held in Birmingham July 21-23. Under the leadership of Steve Rowe, the YLS again is the sponsor of the "Update '88" seminar to be held in conjunction with the convention, and we encourage all lawyers throughout the state to attend. Additionally, Steve Shaw, a YLS Executive Committee member and president of the Birmingham Young Lawyers' Section, is working hard on the YLS party to be held Thursday evening at the Birmingham Botanical Gardens.

During the bar convention, Gunter Guy, YLS president-elect, will assume the presidency. I know Gunter would appreciate hearing from anyone who is interested in working with the YLS. If you would like to become active, contact him at P.O. Box 307, Montgomery, Alabama 36101, or phone (205) 264-8118. ■

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Alabama Bar Directory

The 1987-88 directory contains current addresses and telephone numbers of bar members, and state and federal courts; state bar committees, policies and procedures; the **Code of Professional Responsibility**; and sections of the judicial, executive and legislative branches of government.

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Address_____

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Telephone #( )_____

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NOTICE

Alabama State Bar Membership

Change Of Address:

Due to changes in the statute governing election of bar commissioners, we now are required to use members' **office** addresses, unless none is available or a member is prohibited from receiving state bar mail at the office. Additionally, the *Alabama Bar Directory* is compiled from our mailing list, and it is important to use business addresses for that reason.

Please make sure that your business address is listed on our records when making any change of address and that we are notified **IMMEDIATELY** of any change in address or telephone number.

_____–_____–_____
Member Identification
(Social Security) Number

(Circle One)
Mr. Miss
Mrs. Ms.
Hon. Other:_____

Full Name: _____

Business Phone Number ( ) _____ Race: _____ Sex: _____

Firm or Organization: _____

Birthdate: _____–_____–_____ Year of Admission: _____

Office Mailing Address

City: _____ County: _____ State: _____ Zip Code: _____

Office Street Address (if different)

City: _____ County: _____ State: _____ Zip Code: _____

Memorials

Dan Portis Barber—Birmingham
Admitted: 1928
Died: February 22, 1988

Edward Ward Boswell—Geneva
Admitted: 1947
Died: December 4, 1987

Walter McQueen Cook, Sr.—Mobile
Admitted: 1948
Died: February 18, 1988

James Alvia Green, Sr.—Birmingham
Admitted: 1949
Died: February 29, 1988

James William Harris—Tuscaloosa
Admitted: 1950
Died: November 18, 1987

Benjamin Heustis Kilborn—Mobile
Admitted: 1954
Died: February 28, 1988

Robert Luther Ingalls—Montgomery
Admitted: 1934
Died: March 1, 1988

Manuel Levine—Birmingham
Admitted: 1936
Died: January 31, 1988

James Little May, Jr.—Mobile
Admitted: 1938
Died: March 12, 1988

John Frank Russell—Homosassa Springs, Florida
Admitted: 1972
Died: February 18, 1988

Henry Valentine Salemi—Birmingham
Admitted: 1948
Died: February 22, 1988

George Earl Trawick—Ariton
Admitted: 1946
Died: September 3, 1987

William Robert Windsor, Jr.—Augusta, Maine
Admitted: 1984
Died: January 7, 1988

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 to 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.*

ABNER RILEY POWELL, JR.

Abner Riley Powell, Jr., a great lawyer, the son of a great lawyer and the father of a great lawyer, died in Andalusia, Alabama, October 30, 1987.

"Big Ab" graduated in January 1937 from the University of Alabama School of Law at age 20, the youngest graduate in the school's history, and practiced law in Andalusia from that time until his death, except for two years active duty with the Navy during World War II.

During his career, Ab served as bar commissioner from his judicial circuit, director of the Alabama Defense Lawyers Association and member of the Federation of Insurance Counselors. He served as president of the Covington County Bar Association, was a member of the American Bar Association and served as a delegate to the Democratic National Convention in 1972. He was a lifelong member of the First Baptist Church of Andalusia, where he taught the adult men's class for 15 years.

He is survived by his wife, Jean Powell, of Andalusia; a daughter, Patricia Powell

Cassady, of Evergreen, Alabama, who won the 1987 Presidential Award for excellence in mathematical teaching; a daughter, Annette Powell Cotter, of Decatur, Georgia, who is a country music songwriter and entertainer; and a son, Abner R. "Little Ab" Powell, III, a practicing lawyer in Andalusia.

Ab's father was one of the top trial lawyers in south Alabama for many years; Ab and his son have added to this, so that the name "Ab Powell" has become synonymous with south Alabama courtrooms.

In his younger years, he was an outstanding golfer and fisherman, but more than anything he enjoyed the company of other lawyers, whether in or out of court.

The only thing that appeared to rival his love of the law was his dedication and constant attention to his wife, Jean. Since their marriage in school days, it was difficult to find one outside the presence of the other.

Ab was an outstanding lawyer in the courtroom no matter the type case, but he was at his best (even though it brought him less money) in the defense of criminal cases. This writer believes that he gained more acquittals of difficult criminal cases than any lawyer in this state. This was especially true in his younger trial days.

The writer first knew Ab and Jean in college. He was a good friend, and I miss him.

—Frank J. Tipler, Jr., Andalusia

JAMES L. MAY, JR.

James L. May, Jr., a member of the American Bar Association, Alabama State Bar and Mobile Bar Association died in Mobile March 12, 1988, less than a week prior to the monthly meeting at which he was to have been honored for having practiced law in Mobile for 50 years.

Affectionately known as Jimmy by his countless friends, he was born in Mobile April 8, 1914, and received his law degree in 1938 from the University of Alabama School of Law, after having received a B.S. in commerce and business administration at Alabama in 1937. He served his fraternity, Pi Kappa Phi, as national chancellor. At the time of his death, he was "of counsel" to Johnstone, Adams, Bailey, Gordon and Harris, following many years as a partner in Johnstone, Adams, May, Howard and Hill and its predecessor firms.

During World War II he served in military intelligence and became special agent in charge of the counter-intelligence corps in Casablanca, North Africa.

A leader in Mobile's legal, church, school, civic and social circles, Jimmy May gave liberally of his time and talents to a wide spectrum of good causes, as evidenced by the fact he served as president of the Mobile Bar Association, the Civitan Club, the Athelstan Club, Goodwill Industries, Junior Chamber of Commerce and Mardi Gras societies, as well as a steward in his church and a director of many organizations, and of one of Mobile's largest industries. He was an avid hunter, fisherman and golfer.

Primarily a defense attorney, he had the respect of the plaintiffs' bar as well, and was considered by many as the best in Mobile in his ability to bring the opposing sides into agreement on settlements.

While he will be remembered as a leader in many aspects of life in Mobile, he will be remembered principally as a friend who seemed as happy to speak to the janitor as to the company president, and as one who had the happy faculty of making those he spoke to or visited with feel better than they felt before they saw him.

He is survived by his wife Pat; his son, James L. May, III, both of Mobile; his daughter, Patricia Sayre of Marietta, Georgia; grandchildren; and other relatives. ■

Please Help Us!

We have no way of knowing when one of our membership is deceased unless we are notified. Do not wait for someone else to do it; if you know of the death of one of our members, please let us know.

Memorial information **must be in writing** with name, return address and telephone number.

Key Legislative Issues

by Wendell Mitchell
Legislative Counsel
Alabama State Bar

The Alabama Legislature has entered the final days of the 1988 regular session, and there are several bills pending of interest to the legal profession.

Outlined below are the most important of these bills. This listing includes information about the status of the legislation, as well as a brief synopsis, the bill numbers and the primary sponsors.

S. 256 by Sen. deGraffenried and Sen. Manley and H. 654 by Rep. Carothers—These bills establish the "The Alabama Legal Services Liability Act." Among other things, they would reduce the statute of limitations for lawyers, establish the standards of care applicable to a legal service provider in a legal service liability action and require that the plaintiff shall have the burden of proof that the legal service provider violated the applicable standard of care. Both bills are in a position to pass. The Senate bill is pending for final passage on the House calendar.

H. 114 by Rep. Campbell and S. 131 by Sen. Manley—These bills would revise the law on redemption of real estate. This act applies only to mortgages foreclosed on or after the effective date of the act, January 1, 1989. The bill further repeals *Alabama Code* sec. 6-5-230 through 6-5-246. The House version passed the lower chamber and is out of committee in the Senate, awaiting final passage.

H. 116 by Rep. Campbell and S. 130 by Sen. Manley—These bills revise the law on powers contained in mortgages on real estate. This act applies only to mortgages executed on or after the effective date of the act, January 1, 1989. The House bill has passed and is pending in the Senate for final passage.

H. 338 by Rep. Box and S. 116 by Sen. deGraffenried—These bills further revise the guardianship laws by amending the Alabama Uniform Guardianship and Protective Proceedings Act (act no. 87-590) passed by the Alabama Legislature last session. The senate version passed and is out of committee in the House, awaiting final passage.

H. 323 by Rep. Hettinger and S. 252 by Sen. Hilliard—These bills amend the Alabama Trademark Act to include the registrability of business trade names, thereby creating an "Alabama Trademark and Trade Name Act." It further provides for transition provisions for existing trademarks and an effective date of January 1, 1989. The Senate version is awaiting final passage in the House of Representatives.

H. 470 by Rep. Cosby, et al.—This bill amends sec. 40-6-3 and 40-6-4 to provide a surviving spouse benefit. This bill is out of committee and pending on the House calendar.

H. 118 by Rep. Campbell and S. 139 by Sen. Manley—These bills adopt and incorporate into the *Code of Alabama* the general and permanent laws of the state enacted during the 1987 regular session of the Legislature. The Senate version passed and is pending in the House Judiciary Committee.

S. 33 by Sen. Cabaniss—This bill, known as the Alabama Uniform Arbitration Act, establishes uniform arbitration procedures in Alabama. It repeals sec. 6-6-1 through 6-6-16 of the *Code of Alabama* relating to arbitration. The bill was substituted in the Senate Judiciary Committee with a version approved by the board of bar commissioners. The sponsor has agreed to push for passage of the substitute bill. It presently is pending on the Senate calendar.

H. 538 by Rep. Haynes and S. 363 by Sen. Holmes—These bills increase the small claims court jurisdiction to $2,500. Both bills are out of committee and pending on their respective calendars. The board of commissioners took a position in opposition to this proposed legislation.

H. 710 by Rep. Hettinger—This bill provides for appointment, reimbursement and payment of attorneys in capital cases. This proposed legislation is a work product of former Gov. Brewer's Action Group on Post-conviction Appeals. The bill is pending in the house Judiciary Committee.

The last day of this regular legislative session will be Monday, May 16. Unless the budget problems are resolved, a special session of the Legislature is anticipated. ■

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The State Of Alabama Judicial Department
In The Supreme Court Of Alabama
October 1, 1984

The Honorable William H. Morrow, General Counsel for the Alabama State Bar, has presented to the Supreme Court a request for an interpretation of Disciplinary Rule 2-11 (A)(2) of the Code of Professional Responsibility of the Alabama State Bar as to whether on termination of an attorney-client relationship, a court-appointed attorney should upon request by an indigent crimina defendant, return to that defendant the copy of the transcript furnished at the expense of the State pursuant to Section 12-22-197, Code 1975.

It is considered and determined by the Court that it is appropriate for an attorney in this situation to return the transcript to the defendant.

Torbert, C. J., Maddox, Faulkner, Jones Shores, and Camads, JJ., concur. / Almon, Embry, and Beatty, JJ., not sitting.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears(s) of record in said Court.

Witness my hand this 10th day of Oct. 1984.

Robert G. Esdale

Clerk, Supreme Court of Alabama

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