

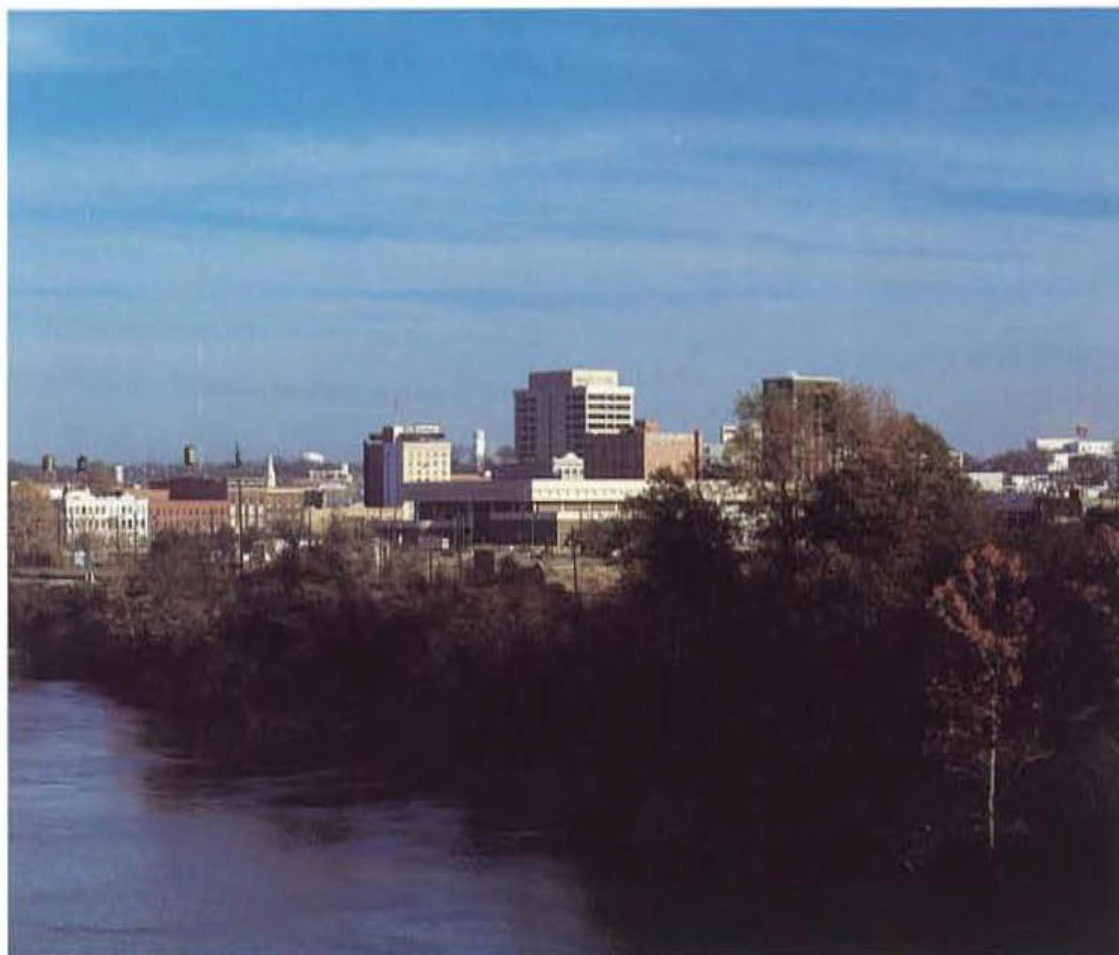
# The Alabama Lawyer

Vol. 49, No. 5

September 1988







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**Schroeder, Hoffman and Thigpen on**

# ALABAMA EVIDENCE



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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!

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Obtaining, Offering and Objecting to Evidence •  
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Relevant Evidence • Privileges • Impeachment •  
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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.

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# The Alabama Lawyer

# In Brief

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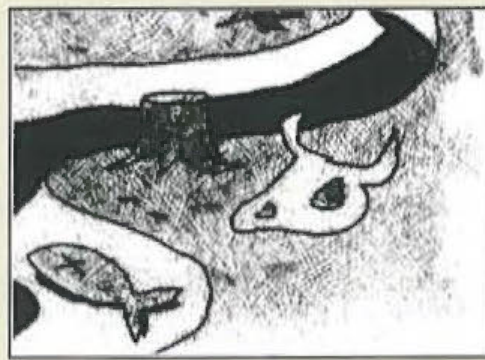
**GENERAL INFORMATION** The Alabama Lawyer, (ISSN 0002-4287), the official publication of the Alabama State Bar, is published seven times a year in the months of January, March, May, July, August (bar directory edition), September and November. Views and conclusions expressed in articles herein are those 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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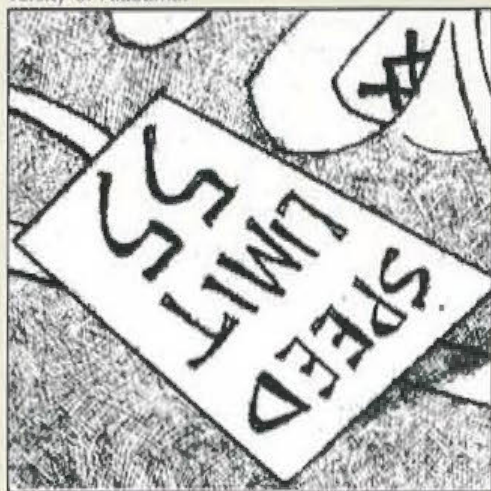
## On the cover—

Gary C. Huckaby, the newly-installed president of the Alabama State Bar, is shown with his family at their home in Huntsville. Seated is his wife, Jeanne. Pictured, left to right, back row, are sons John, Gary, Jr., and Michael. Gary, Jr., attends graduate school at the University of Mississippi, and John and Michael are students at the University of Alabama.



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# President's Page

## Address of Gary C. Huckaby Upon Installation as President of the Alabama State Bar July 23, 1988



HUCKABY

As we face a new association year, let us pause for a moment to take stock and set the course for our bar. The Alabama State Bar has a proud history and a magnificent record of achievement. It is now 110 years old, having been organized in 1879. In spite of its splendid past, there are threatening trends in our profession that surely will reach the Alabama bar.

Across the nation there is a marked decline in professionalism and a significant increase in advertising and marketing, the tools commonly associated with a trade, not a profession. Whether it is called "advertising" or "marketing" often depends only on the level of sophistication. It, at times, borders on hucksterism. Chief Justice Burger made the comment several years ago that some lawyer advertisements would make used car dealers blush.

There is a fixation in some quarters with billable hours, with profitability, with market position. The quality of young people coming to the bar exceeds that which we have ever seen before, but there seems to be a new materialism, a new cynicism, a new commercialism within our profession. Part of this, I am sure, is a result of a change in the attitude of some lawyers about law as a profession. Economic pressures appear to be causing the greater impact, however.

We are approaching 700,000 lawyers in the United States. Each year 30,000 new lawyers graduate. We have now exceeded one lawyer for every 390 people in the U.S. By the year 2000, we expect to have 1,000,000 lawyers in this country.

Alabama is not immune to these shifts and changes. Our membership now approaches 7,000. Lawyers tend to practice in greater numbers in urban settings. At this time 70 percent of our lawyers practice in five counties in this state. While the profession in Alabama often does not feel the effects of such changes until its impact has been made in larger metropolitan areas, clearly we are facing similar pressures.

The question is troubling: Is this only a way to make a living or is it still what we call a profession? There is a sad statement made by the Supreme Court in *Bates & O'Steen*, the well-known case on lawyer advertising: "The belief that lawyers are somehow above trade has become an anachronism." I trust and hope and pray that that is not true and that whatever truth is in it, we can reverse it. There are a lot of ominous signs on the horizon. Negative editorials fill our newspapers, and they do not come from wild-eyed earth changers; they often come from steady, conservative editorial writers. In California in recent years the state bar has been threatened with being defunded. In Georgia last year, a bill was introduced to abolish the organized bar. In Wisconsin, a suit successfully chal-

lenged on First Amendment grounds obligatory membership in the bar. There are several national organizations that seek to abolish the licensure of lawyers and to permit anyone to practice without demonstrated qualifications.

As a corollary, in our state we have seen a decline in the civility and common courtesy of lawyers, for years the hallmarks of our bar. So-called "hardball" is the game to be played. Should we simply say that the law is a business, like selling groceries or plumbing services, and that it is not different from such trades or businesses?

Dean Roscoe Pound said, "The term 'profession' refers to a group of people pursuing a learned art as a common calling in the spirit of *public service*—no less public service because it is incidentally a means of livelihood." Clearly, public service is the thread that makes a difference in this profession, coupled with independence.

I think that we are in a very fortunate position in the Alabama State Bar. We are not facing some of the trials of lawyers in other states. By and large what advertising has been done by lawyers in Alabama has been tasteful. The marketing efforts, in the large part, have been suitable and satisfactory to the professional aspects of lawyers.

*Continued on page 254*



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# Executive Director's Report

## *The ball is in your court!*

**M**ore of you—our members—have communicated with me concerning the availability of professional liability coverage than any other single issue during the nearly 20 years I have been privileged to serve this great bar. Many calls and letters have come from some of you who never before have asked anything of your bar.

For 15 years, a series of dedicated lawyers have given endlessly of their time and talent as members of the Insurance Programs Committee that has continuously fought to meet your insurance needs, both nationally and internationally. These have been frustrating years because of unstable markets, escalating rates and unreliable brokers. Invariably, you have urged the Alabama State Bar to form its own company.

Our board of commissioners authorized extensive research to validate the viability of such an undertaking. Your bar has expended approximately \$50,000 in this effort. In addition, almost 1,500 of you contributed \$125 each to start such a company when the results of our survey confirmed your desire and promised financial support of this undertaking. Attorneys Insurance Mutual of Alabama, Inc. is now a reality. Capitalization efforts are underway. We must raise \$2,500,000 in capital by December 31, 1988, if we are to write policies in 1989.

Each of you who resides in Alabama has received the AIM prospectus and

subscription agreement. The success of our effort is now up to YOU.

Please review your prospectus and send in your subscription agreement—the earlier, the better! You can save money by acting in advance of the earliest deadline, September 30, 1988. If you were among those nearly 1,500 who gave \$125, your contribution is \$1,125. If you did not contribute to the start-up fund, your subscription is \$1,250 before September 30.

Lawyers procrastinate when dealing with their personal affairs. Please do not leave this matter for last-minute attention. The sooner we are capitalized and break escrow, the sooner you will benefit as insureds.

Each circuit has a key person to assist the AIM directors and your bar commissioner in completing this capitalization. These people are busy volunteers who should not have to beg you to help yourself.

There is a \$100,000 line of credit available on a first-come, first-served basis for those who choose to borrow their subscription costs. Loans are repayable over an 18- or 24-month period.

The vast majority of currently insured lawyers have renewal dates between May and September. If AIM can break escrow by January 1, 1989, we would anticipate being able to offer a better policy and at a more competitive premium cost than currently available in the commercial market.



HAMNER

No state undertaking this effort has failed. None has returned to the commercial market, and all have experienced a favorable rating structure. Some already have begun paying dividends on their members' investment.

Alabama can do no less. We cannot afford to continue to place our insurance future at the mercy of the commercial market. YOU can control YOUR destiny.

Now is the time to provide the financial support which many of you earlier indicated you would do if the bar would undertake the creation of a captive. The ball is in your court—the time clock is running. We can, and we must, succeed. ■

# President's Page

Continued from page 252

However, if some of our sister states are indeed the precursors of the future, we have not seen the end. Now is the time to reinforce our dedication to keep and preserve this honorable profession.

We talk a lot about the image of lawyers, and sometimes we spend money to change it. I believe that our focus next year must be to worry less about image and more about public service. I believe that what thinking people will come to believe about lawyers will be good if we, in fact, do good. I hope this year to see us do something substantial in the area of access to justice. Needless to say, we have many people in this state who do not have access to the system, and I hope we will do something to change that. It is estimated that only 15 percent of the poor who need legal services receive them. We have been given a monopoly to practice law.

With it comes a duty to assure that legal services are not denied to the poor. Many bars are proposing voluntary goals of 50 to 75 hours per lawyer per year for *pro bono* work. Government-funded legal services cannot bridge the gap. It clearly is our duty as lawyers to solve this problem.

I have an incorrigible habit of collecting old books. I recently picked up a volume written by a lawyer here in Alabama in the 1860s. He was admitted to the bar in Rockford, Alabama, in 1832. The author was a Union sympathizer at the time of the Civil War, and he explained the difficulty he faced at that time, of terrible choices in violating the oath he took as a lawyer. He quotes that simple oath: "I will support and defend the Constitution of the United States and will never reject for any consideration personal to myself the cause of the defenseless or oppressed." That is all of it. That was in 1832. This duty was codified in our early statutes and today appears in a list of the duties of attorneys at Section 34-3-20, *Code of Alabama*. If we are still a profession, that obligation is no less pertinent today.

Another area of public service that we must address is law reform. Our selec-

tion process for judges is in my judgment in serious danger of being corrupted. It appears that it now costs a half million dollars or more to be elected as a justice to our supreme court. I believe it is time that we must look for some method which provides an element of merit selection.

Certainly this bar should address and study the problem of our appellate courts, which are overloaded with the number of opinions which must be written. The load is simply too overwhelming to assure the best exposition of dispositive law. We have to find a way to permit the supreme court to concentrate on the broad policy questions and cases of first impression.

There are two other areas of public service for our bar which on the surface may appear to be unrelated to our professional concerns. Two special task forces have been created this year—one to study the serious problem in Alabama of illiteracy, the other to consider how we as lawyers can help prevent drug abuse. Illiteracy denies access to the justice system by many of our citizens. It is an embarrassment in a civilized society, and I believe lawyers ought to be concerned about that.

The horrendous problem of drug abuse is affecting not only our own children but many of our adult citizens. Taking our traditional role as leaders, not just lawyers, we have a place in this battle, and this is why I have asked the task force to see what we can do.

I would say that as we approach the coming year, we need not feel too morbid about it because this bar is in a unique position. The future looks exciting. There were ten times the number of volunteers for bar service than I was able to appoint, simply because the positions were not there. We have a bar staff that in my judgment produces more out of their manhours than any other bar staff I have ever seen. We carry a greater weight than most state bars; we have the admission process, the disciplinary process, mandatory CLE, unauthorized practice enforcement and a myriad of other programs. I can assure you that these tasks are carried out well and that the health of this bar is good.

The distasteful methods of selling legal services have not found their way to Alabama except in rare cases. Alabama lawyers do not believe that it is an anachronism to call this a profession. Though advertising—and even some forms of solicitation—are protected by the First Amendment, we do not have to do all that we are permitted to do. Lord Moulton, the English jurist, said, "The measure of civilization is the degree of obedience to the unenforceable." While we clearly can no longer enforce rules against advertising and some types of solicitation, we most certainly can present the other side and can teach by example. We can certainly condemn that which demeans this honorable calling.

This bar has an illustrious history, and that history offers promise for our future. It not only has provided Alabama with remarkable statesmen in the past, but they have equally given dedicated service to our entire country. It is a good thing to pause to look at the past. I remind you of something that Carl Sandburg said. He said, "When a *nation* goes down or a society perishes, one condition may always be found: they forgot where they came from." I believe you could substitute "bar" for "nation" and say the same thing about ourselves as lawyers.

I would remind you of some of the great lawyers who have preceded us, and they are but examples: Seybourn Lynne of Decatur; T.B. Hill of Montgomery; Arthur Shores of Birmingham; Charles Tweedy of Jasper; Alto Lee of Dothan; Broox Garrett of Brewton; Douglas Arant of Birmingham; Hugo Black of Clay County; Howell Heflin of Tusculumbia; Eileen Wynn of Birmingham; Pi Brantley of Troy; Walter P. Gewin of Tuscaloosa; and John Caddell of Decatur. And these are not the only ones. Many are in this very room—Bill Scruggs, Hugh Nash, Henry Henzel and others.

The number of people who labor for what we believe in in this profession—without any pay, without any consideration, oftentimes without even recognition—is amazing to me. I am reminded of what Saint Luke said: "Of those to whom much is given, must is required." I look forward to next year with a great deal of anticipation and pleasure. ■



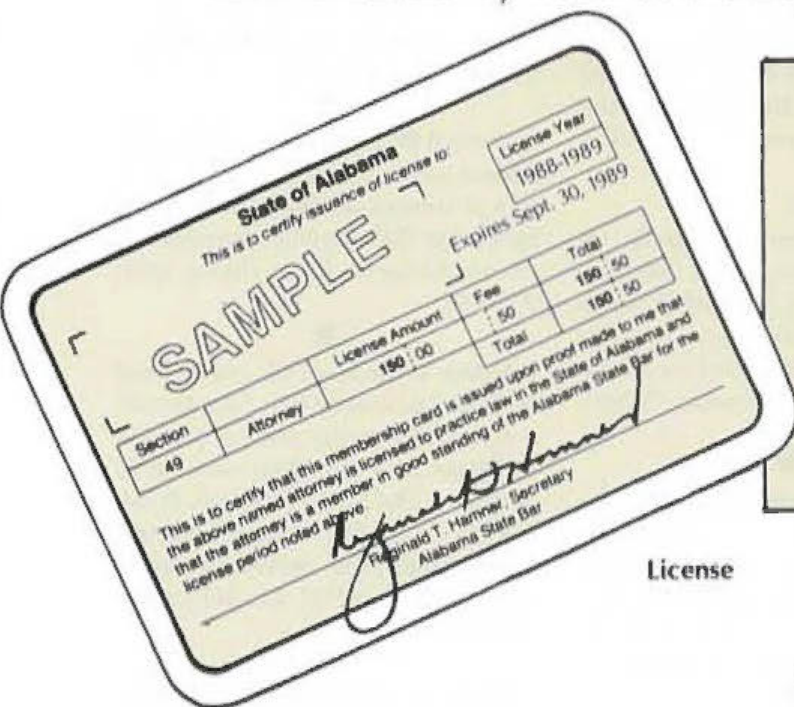
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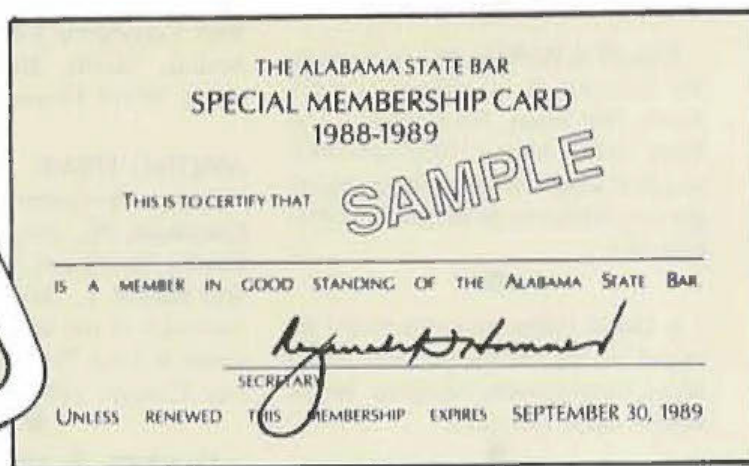
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### Annual License—Special Membership Dues

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License



Special Member

If you are admitted to the Alabama State Bar and engaged in the practice of law, you are required to purchase an annual occupational license. *Section 40-12-49, Code of Alabama (1975), as amended.* This license gives you the right to practice law in the state of Alabama through September 30, 1989. The cost of the license is \$150, plus the nominal issuance fee, and may be purchased from the probate judge or license commissioner (where applicable) in the county in which you primarily practice. In addition to the state license, all practicing attorneys should check with their municipal revenue departments to be sure that the licensing requirements of the city or town are also being met. By sending the Alabama State Bar a copy of the license when it is purchased, you will receive a wallet-size duplicate of your license (pictured above) for identification purposes during the 1988-1989 license year.

Dues include a \$15 annual subscription to *The Alabama Lawyer*.

If you have any questions regarding your proper membership status or dues payment, please contact Alice Jo Hendrix, Membership Services Director, at (205) 269-1515 or 1-800-392-5660 (in-state WATS).

Special membership status is acquired pursuant to Section 34-3-17 or Section 34-3-18, *Code of Alabama (1975)*. Federal and state judges, district attorneys, United States attorneys and other government attorneys who are prohibited from practicing privately by virtue of their positions are eligible for this membership status. Likewise, persons admitted to the bar of Alabama who are not engaged in the practice of law or are employed in a position not otherwise requiring a license are eligible to be special members. Attorneys admitted to the bar of Alabama who reside outside the state of Alabama who do not practice in the state of Alabama also are eligible for this status. With the exception of state attorneys and district attorneys, special members are exempt from mandatory continuing legal education requirements; however, this annual exemption must be claimed on the reporting form. Special membership dues are paid directly to the Alabama State Bar. Membership cards, as shown in the sample above, are issued upon receipt of the dues and good for the license year.



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## ABOUT MEMBERS

**Jeffrey F. Addicott** was promoted to major, United States Army, effective March 1988. He is a 1979 graduate of the University of Alabama School of Law and serves as the Command Judge Advocate for the 1st Special Forces Group (Airborne). His address is 1st Special Forces Group (Airborne), Fort Lewis, Washington 98433.

**Donald V. Watkins, P.C.** announces the opening of his offices at 1205 North 19th Street, Birmingham, Alabama 35234, phone (205) 323-5963, and 808 South Lawrence Street, Montgomery, Alabama 36104, phone (205) 834-3101.

**J. Doyle Fuller** announces the removal of his offices to 2851 Zelda Road, Montgomery, Alabama 36106. Phone (205) 270-0020.

**Thomas H. Figures** announces the relocation of his practice to 951 Government Street, Suite 511, Mobile, Alabama 36604. Phone (205) 433-0416.

**T. Jeff Stein** announces the opening of his Baldwin County office at Jubilee Square, P.O. Box 231, Daphne, Alabama 36526, and will maintain his Mobile office at P.O. Box 1772, Mobile, Alabama 36533. Phone (205) 626-3971.

**Thomas E. Davis**, formerly of Burns, Shumaker & Davis, announces the opening of his office at 924-B Third Avenue, P.O. Box 8044, Gadsden, Alabama 35901. Phone (205) 543-2301.

**J. Langford Floyd** announces his mailing address has changed to P.O. Box 1855, Daphne, Alabama 36526, and his office location is now 28740

Highway 98, Daphne 36526. Phone (205) 626-8200.

**Darron C. Hendley** announces the relocation of his practice of law from Birmingham, Alabama, to 312 Scott Street, Montgomery, Alabama 36104. Phone (205) 262-4887.

**Clifford M. Spencer, Jr.**, announces the relocation of his practice of law to 1010 Commerce Center, 2027 First Avenue, North, Birmingham, Alabama, 35203. Phone (205) 322-4477.

## AMONG FIRMS

**Page, Scrantom, Harris & Chapman, P.C.** announces that **Kay Dooley Thompson, Michael D. Smith** and **Russell E. Hinds** have become members of the firm. Offices are located at 1043 Third Avenue, Columbus, Georgia 31994.

**Meacham & Quinlan, P.C.** announces the addition of **Richard E. Flowers** and the formation of **Meacham, Quinlan & Flowers, P.C.** The firm has relocated its offices to 5256 Armour Road, Columbus, Georgia.

**Randolph P. Reaves** announces the association of **Patricia K. Kelley** in the practice of law, with offices located at 112 Corporate Square, 555 South Perry Street, Montgomery, Alabama 36104.

The firm of **Roberts, Davidson & Wiggins** announces that **A. Courtney Crowder** has become a partner in the firm. The firm name is now **Roberts, Davidson, Wiggins & Crowder**, with offices at 2625 8th Street, P.O. Box 1939, Tuscaloosa, Alabama 35403-1939. Phone (205) 759-5771.

**Neal P. Conner** and **Polly Howell Chatham**, formerly assistant district attorney, announce the formation of a

partnership under the firm name of **Conner & Chatham**, with new offices at 303-F Second Avenue, Southeast, Decatur, Alabama 35601. Phone (205) 351-6200.

**Richard F. Pate, P.C.** announces that **J. Wesley Sowell** has become associated with the firm, with offices located at 56-58 South Conception Street, Mobile, Alabama 36602. Phone (205) 433-0300.

**Donald W. Stewart** and **Michael D. Mastin** announce the formation of the firm of **Stewart & Mastin**, with offices located at 1131 Leighton Avenue, Anniston, Alabama 36201. Phone (205) 237-9311.

**Sidney W. Jackson, III**, and **Richard H. Taylor** announce they have formed a partnership in the name of **Jackson & Taylor** and that their new office address is The SouthTrust Bank Building, 61 St. Joseph Street, Fifteenth Floor—Suite 1500, Mobile, Alabama 36602. Phone (205) 433-3131, (205) 433-6699.

**Reese & Reese** announces that **Gregory Dale Crosslin** has become a member of the firm. Offices are located at One Olde Towne Square, Daleville, Alabama 36322. Phone (205) 598-6321.

**Harold F. Herring**, Huntsville, Alabama, and **Sadler, Sullivan & Sharp, P.C.**, Birmingham, Alabama, announce their merger, effective July 1, 1988, under the name of **Sadler, Sullivan, Herring & Sharp, P.C.** They also announce that **Mac B. Greaves**, Birmingham, Alabama, has rejoined the firm as a member, **John O. Cates**, Huntsville, Alabama, became a member of the firm July 15, 1988, and **Ted L. Mann**, Birmingham, Alabama,



became associated with the firm May 1, 1988. The Birmingham office is located at 1100 First National-Southern Natural Building, Birmingham, Alabama 35203. Phone (205) 326-4166. The Huntsville office is located at 204 Gates Avenue, S.E., Huntsville, Alabama 35801. Phone (205) 534-4343.

**Vincent, Hasty, Arnold & Whaley, P.C.** announces the relocation of its offices to Suite 4400, 2090 Columbiana Road, Birmingham, Alabama 35216. Phone (205) 979-4490.

The firm of **Williams & Harmon** announces that **William B. Hardegree** has become a partner of the firm, which will continue under the name of **Williams, Harmon & Hardegree**. Offices are located at Suite 403, Quintard Tower, 1130 Quintard Avenue, Anniston, Alabama 36201. Phone (205) 238-8356.

The **bankruptcy administrator of the Northern District of Alabama** announces that **Robert E. Long, Jr.**, former managing attorney for UAW Legal Services Plan, Decatur, Alabama, has been appointed as estate analyst to head the Decatur office of the bankruptcy administrator program. Lang replaces **Chris Kern**, who will be moving to Mobile to become law clerk for the **Honorable Arthur B. Briskman**, United States Bankruptcy Judge, for the Southern District of Alabama.

The office of **D. Joseph May** announces that **Regina B. Edwards** has become associated with the firm. Offices are located at 8339 Court Avenue, Ellicott City, Maryland 21043. Phone (301) 461-4877.

**Simmons, Ford & Brunson** announces that **Lynn McCain** and **J. Gullatte Hunter, III**, have become members of the firm. Offices are located at 1411 Rainbow Drive, P.O. Box 1189, Gadsden, Alabama 35901. Phone (205) 546-9205.

**London, Yancey & Elliott** announces that **Richard W. Lewis** has become associated with the firm, located at

1230 Park Place Tower, Birmingham, Alabama 35203. Phone 251-2531.

The firm of **Foster, Wills, Bolton & Dyson, P.A.** announces that **M. Mort Swaim** became a member of the firm, effective June 1, 1988. The firm name has been changed to **Foster, Wills, Bolton, Dyson & Swaim, P.A.**, with offices located at 1715 North McKenzie Street, Foley, Alabama 36535. Phone (205) 943-4500.

**Spain, Gillon, Tate, Grooms & Blan** announces that **Eugene P. Stutts** has joined the firm as a partner. Offices are located at The Zinszer Building, 2117 Second Avenue, North, Birmingham, Alabama 35203. Phone (205) 328-4100.

**Ray F. Robbins, II**, announces the change of the firm name to **Robbins & Owsley**, that **Mark D. Owsley** has become a partner of the firm and **J. Van Wilkins** has become associated with the firm. Offices are located at 211 East North Street, Talladega, Alabama. Phone (205) 352-1650.

**Prince, McGuire & Coogler, P.C.** announces that **Paul W. Copeland** has become an associate in the firm, with offices at 2501 6th Street, Tuscaloosa, Alabama 35401. Phone (205) 345-1105.

**Burr & Forman** announces that **John F. DeBuys, Jr.**, has become a member of the firm. Offices are located at 3000 SouthTrust Tower, Birmingham, Alabama 35203. Phone (205) 251-3000.

The office of **Douglas I. Friedman, P.C.** announces that **M. Neal Reynolds** has associated with the firm, with offices at Suite 555, Bank for Savings Building, 1919 Morris Avenue, Birmingham, Alabama 35203.

**Karl W. Leo** announces the relocation of his practice from Greensboro, North Carolina, to Huntsville, Alabama, under the name **Leo & Associates**. **Jerry E. Farmer** has become associated with the firm. Offices are lo-

cated at 100 Washington Street, Huntsville, Alabama 35801. Phone (205) 539-6000.

The firm of **Wallace, Brooke & Byers** announces that **Albert L. Jordan** and **William A. Ratliff** have joined the firm, effective March 15, 1988. The firm's offices are located at Suite 626, SouthBridge Building, 2000 SouthBridge Parkway, Birmingham, Alabama 35209. Phone (205) 870-0555.

The firm of **Schoel, Ogle & Benton** announces that it has changed its name to **Schoel, Ogle, Benton, Gentle & Centeno**. The firm also announces that **Melinda L. Murphy**, formerly law clerk to the **Honorable George S. Wright**, has become associated with the firm. Offices are located at Third Floor Watts Building, 2008 Third Avenue, North, Birmingham, Alabama 35203. Phone (205) 324-4893.

The firm of **Henslee, Bradley & Robertson, P.C.** announces that **William Burton Ogletree** has become an associate of the firm effective May 2, 1988. Offices are located at 754 Chestnut Street, P.O. Box 246, Gadsden, Alabama 35902. Phone (205) 543-9790.

**David A. Ludder**, formerly general counsel for the Alabama Department of Environmental Management, announces that he has joined the **Legal Environmental Assistance Foundation** at 203 North Gadsden Street, Suite 7, Tallahassee, Florida 32301. Phone (904) 681-2591. LEAF is a public interest environmental law firm which provides legal and technical assistance to citizens and grassroots organizations in the deep South (Alabama, Florida and Georgia).

**Ann R. Richardson** and **Gene Church** announce the formation of the firm **Richardson & Church**, with offices located at 603 Oak Tree Plaza, Haleyville, Alabama 35565. Phone (205) 486-9554.

# Riding the Circuits

## Colbert County Bar Association

The Colbert County Bar Association recently elected its 1987-88 officers. They are:

President: Terry L. Mock,  
Tuscumbia

Vice-president: John M. Kenner,  
Tuscumbia

Secretary-treasurer: Bryce U. Graham,  
Jr., Tuscumbia

The bar association recently sponsored two events commemorating Law Day, USA. Mayors and various municipal leaders presented the bar association with formal proclamations regarding Law Week, at a luncheon held at the Ramada Inn, Sheffield, Alabama. Also, the bar association sponsored a mock trial entitled *The State of Mellow vs. Elston Neddy*. Numerous members of the bar association participated in the various roles. The Hon. Inge Johnson, presiding judge of the 31st Judicial Circuit, presided over the events before a capacity crowd of high school seniors.

The appointed committees have planned a busy year for members. The Law Day Committee, chaired by B.T. Gardner, successively completed all of the Law Day festivities. The continuing legal education committee, chaired by E.V. Mauldin, is setting up seminars to be held in Colbert County for CLE credit. Larry Moore, chairman of the entertainment committee, has scheduled several social functions for 1988.

—Bryce U. Graham, Jr.

## Mobile Bar Association

The Mobile Bar Association Barristers basketball team was undefeated in regular season play and named tournament champion in the Mobile Industrial League.

Pictured below, left to right, are Bernie Mathews, Coleman Meador, Luke

Coley, Skip Wilson, Pete Mackey, Jim Barter, Eddie Greene, Phil Philpot, Ben Rowe (player-coach), Ferrell Anders (player-assistant coach-general manager), Marcus McCrory, Brent Baker and Jim Rebarchak.

—Benjamin T. Rowe



## Montgomery County Bar Association

The Montgomery County Trial Lawyers, in conjunction with the Alabama Trial Lawyers Association, sponsored the second annual Sansone Peoples' Law School.

The program, which was the brainchild of the late Montgomery lawyer Al Sansone, was held in March and April, starting March 15 and running once a week for 13 weeks. It featured 15 speakers from the area's legal com-

munity who donated their time. Topics were chosen to expose attendees to a broad overview of the law and the legal system.

Attendees completing the course were awarded a certificate of completion and a class picture. Each member of the class paid \$15 toward defraying expenses. It is anticipated the Sansone Peoples' Law School will continue on an annual basis.

—Joe T. Booth, IV

**Alabama Bar Directories \$15 each (includes postage)**  
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# Bar Briefs

## Dees saluted in *Barrister Magazine*

Montgomery native and attorney Morris Dees, Jr., was included in an article honoring 20 young lawyers appearing in the special summer issue of the *Barrister*. The article named men and women of various racial, ethnic and religious groups, private practitioners, government lawyers and a judge.

Dees is a co-founder of the Southern Poverty Law Center.

*Barrister* is published quarterly by the American Bar Association Press for members of the ABA's Young Lawyers' Division.

## Gill named fellow of American Bar Foundation

Richard Hamilton Gill, partner in the law firm Copeland, Franco, Screws & Gill in Montgomery, recently was elected a fellow of the American Bar Foundation. The Fellows is an honorary organization of practicing attorneys, judges and law teachers whose professional, public and private careers have demonstrated outstanding dedication to the welfare of their communities and to the highest principles of the legal profession. Established in 1955, Fellows encourage and support the research program of the American Bar Foundation.

Gill graduated from Vanderbilt University in 1962 and the University of Virginia School of Law in 1965. He is a member of the Alabama State Bar and the American Bar Association, former member of the faculty at Jones Law School, senior associate special counsel for the United States House of Representatives Judiciary Committee on Impeachment Proceedings (1974) and a member of the Alabama State Bar Board of Bar Commissioners.

Fellows are limited to one-third of 1 percent of lawyers licensed to practice in each jurisdiction.



*Martin & Godbold*

## Godbold receives honorary degree from Auburn University

United States Circuit Judge John C. Godbold was hooded by Auburn University President James E. Martin during spring commencement ceremonies June 10. The Alabama native received an honorary doctor of laws degree from AU for his "lifelong commitment to judicial excellence." Godbold now serves as director of the Federal Judicial Center, a Washington, D.C., "think tank" that conducts research, training and teaching for the federal judiciary.

## Justice Jones chairs American Bar Association Appellate Judges conference

Justice Richard L. Jones of the Supreme Court of Alabama recently became chairman of the Appellate Judges Conference of the American Bar Association Judicial Administration Division.

The conference has about 800 members from both state and federal courts of appeals around the country. It represents their views on policy questions to the ABA and the legal profession at large, and develops educational programs and materials for its members. As chairman, Jones presides over conference sessions and oversees staff adminis-





Jones

tration of conference policies and goals. He will serve a one-year term.

Jones has been active in the conference for several years, and became an officer of the executive committee of the conference in 1982.

Jones also was a commissioner with the National Conference of Commissioners of Uniform State Laws from 1972 to 1988, and served on that conference's executive committee from 1983 to 1985.

He received his law degree from the University of Alabama in 1949.

#### Judge Pointer receives 1988 Rawle Award

The Honorable Sam C. Pointer, Jr., chief judge of the United States District Court for the Northern District of Alabama, was presented with the 1988 Francis Rawle Award for outstanding achievement in post-admission legal education. The presentation was made Sunday, August 7, in Toronto, Ontario, Canada, at the annual luncheon of The American Law Institute-American Bar Association Committee on Continuing Professional Education (ALI-ABA) for its lecturers and authors held in conjunction with the American Bar Association's Annual Meeting.

The Francis Rawle Award was established in 1983 when the Philadelphia law firm of Rawle and Henderson, as part of the commemoration of its 200th anniversary, offered to establish, and fund in the name of Francis Rawle (1846-1930), an award in recognition of outstanding contributions to the continuing education of the legal profession. The Rawle Award recipient receives the sum of \$2,500 and an appropriate memorial of the occasion.

Judge Pointer received the Rawle Award for his contributions to post-admission legal education as a lecturer or panelist in a wide variety of instructional programs for both the federal judiciary and the practicing bar and as chairman of the board of editors and



Pointer

principal author of the *Manual for Complex Litigation, Second*, which since its publication in 1981 has been the primary resource for both judges and lawyers in handling complex litigation.

A regular instructor since 1975 both at annual workshops for federal judges and seminars for newly-appointed federal district judges sponsored by the Federal Judicial Center, Judge Pointer has taught approximately 90 percent of the federal

district judges currently sitting. Practicing lawyers have benefited equally from his teaching. For the past decade he has been a regular participant in ALI-ABA courses of study on trial evidence, civil practice and effective litigation techniques, and he has been a lecturer or panelist for programs sponsored by many other organizations, as well as at numerous programs of Circuit Judicial Conferences and of various state and local bar associations.

In recommending Judge Pointer for the Award, the Award Committee noted that "the remarkable quantity of Judge Pointer's teaching has been matched by its consistently high quality. His presentations are noted for their cogency, penetration, and wit; his use of small-group, clinical sessions is characterized by innovative techniques aimed at greater student involvement in the problems presented. Of enormous practical value, his instruction is also sensitive to the ethical dimensions of the issues with which it deals."

In addition, the committee observed that, "Judge Pointer deserves much of the credit for the fulfillment of the *Manual for Complex Litigation, Second's* avowed purpose of providing assistance in resolving complex litigation in the most just, speedy and inexpensive manner practicable under the circumstances." Judge Pointer has served also as an adviser to The American Law Institute's Preliminary Study of Complex Litigation and is the author of a sophisticated computerized case-management program for federal judges.

A graduate of Vanderbilt University and the University of Alabama School of Law and recipient of a Master of Laws Degree from New York University School of Law, Judge Pointer was a practitioner for 12 years in his native Birmingham, Alabama. He has been chief judge of that court since 1981.

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**Last date to get articles, ads or letters in the  
November 1988 *Alabama Lawyer* is September 30, 1988**

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# Honor Roll of Attorneys Participating in IOLTA

(as of August 2, 1988)

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The Alabama Law Foundation, Inc. announces that the following attorneys and law firms have been added to the list of those participating in the IOLTA program. The foundation thanks those participating for their support.

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## **AUTAUGA**

Walthall, Jr., George P.

## **BALDWIN**

Murchison & Sutley

## **BARBOUR**

Jackson, Lynn Robertson

Martin, James L.

## **BIBB**

McKelvy & Floyd

## **BLOUNT**

Nash & Associates

## **BULLOCK**

Jinks, Lynn W., III

Rutland, Louis C.

## **CALHOUN**

Hughes, Patrick P.

Wilson, Pumroy, Rice & Adams

## **CHAMBERS**

Reynolds, Charles G., Jr.

## **CHEROKEE**

McWhorter, Robert D., Jr.

## **CHILTON**

Bowers & Bowers

Latham, William D.

Rogers, Joel S., III

## **CHOCTAW**

Thompson & Thompson

Utsey, McPhearson & Christopher

## **CLARKE**

Mason, Phillip E.

## **CLAY**

Warren, John Keith

## **COFFEE**

McLean, D. Bruce

Rowe, Rowe & Sawyer

## **COLBERT**

Hewlett & Black

McDonnell, William F.

## **CONECUH**

Chapman, William T., II

## **COVINGTON**

Cook, Allen Edward

Grissett, Larry R.

Rabren, Wanda M.

## **CULLMAN**

Brunner, Harry F., Jr.

Smith & Smith

## **DALE**

Brogden & Quattlebaum

Kennington, Ray T.

## **DALLAS**

Gamble, Gamble & Calame

## **DEKALB**

Noles, Steven

Watson & Watson

## **ELMORE**

Hornsby & Schmitt

Scarborough, Joseph T., Jr.

## **ESCAMBIA**

Godwin, Charles R.

Stokes, Jernigan & Stokes

## **ETOWAH**

Floyd, Keener, Cusimano & Roberts

Rhea, Boyd & Rhea

Rhea, Donald R.

Willard, William R.

## **FRANKLIN**

Porch, Jerry C.

## **GENEVA**

Lee & Fleming

## **HOUSTON**

Buntin, Cobb & Shealy

Merrill & Harrison

Ramsey, Baxley & McDougle

## **JACKSON**

Armstrong, Tommy

Drummond, Ronald A.

## **JEFFERSON**

Alexander, J. Lester

Balch & Bingham

Berkowitz, Lefkovits, Isom & Kushner

Clark & Scott

Cornelius, Walter

Dawson, William M., Jr.

Ellis & Fridlin

Gordon, Silberman, Wiggins & Childs

Heaps & Ramsey

Johnston, Barton, Proctor, Swedlaw & Naff

Kramer, James R.

Maring, Harry B.

Redden, Mills & Clark

Vincent, Hasty, Arnold & Whaley

Vowell, Meelheim & McKay

## **LAUDERDALE**

Burdine, Robert L., Jr.

Schuessler & Sandlin

Smith, Robert F.

## **LAWRENCE**

White, Don R.

## **LEE**

Thrash, James R.

Whittelsey, Ray & Tipton

## **LIMESTONE**

Croomes, E. Steven

Raley, Landy

## **MACON**

Bulls, Albert Clarence, III

## **MADISON**

Hornsby, Blankenship, Robinson & Meginniss

Stephens, Millirons, Harrison & Williams

Watson, Gammons & Fees

Willisson & Tucker

## **MARENGO**

Coplin, William T., Jr.

## **MARION**

Isom, Jackie O.

Vinson, Guyton & Wood

## **MARSHALL**

Gullahorn & Hare

Walker, James D.

## **MOBILE**

Allen & Fernandez

Ambrecht, Jackson, DeMouy, Crowe,

Holmes & Reeves

Brown, Hudgens, Richardson

Bryant, Thomas E., Jr.

Conrad, Hammond & Barlar

Delaney & Delaney

Harris, William H.

Holberg & Danley



Jackson & Taylor  
Johnstone, Adams, Bailey, Gordon &  
Harris

Loveless & Banks  
Tibbets, Edward R.

**MONTGOMERY**

McLain & Hampton  
Steiner, Crum & Baker

**MORGAN**

Cauthen & Cauthen  
Coleman, A. J.

**PERRY**

Barnes, James M., Jr.

**PIKE**

Pelfrey, V. Lee

**RUSSELL**

Phillips & Funderburk

**SHELBY**

Causey, V. Wayne  
Griffin, Allison & May

**SUMTER**

Upchurch & Upchurch

**TALLADEGA**

Bell & Landers

**TALLAPOOSA**

Adair, Charles R., Jr.  
Myer, Perry G., Jr.

**TUSCALOOSA**

Hardin & Wise  
McElvy & Ford  
Mountain & Mountain  
**WALKER**

Robinson & Nelson  
Wilson & King

**WASHINGTON**

Odom, Harold  
Ware & Ware

**WILCOX**

Bonner, W. J., Jr.

**WINSTON**

Richardson, Ann R.

# Honor Roll of Financial Institutions

(as of August 2, 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.

Alabama Federal Savings & Loan Association  
Altus Bank  
AmSouth Bank\*  
Bank Independent, Florence  
Bank of Albertville  
Bank of Dadeville  
Bank of Mobile  
Bank of Prattville  
Camden National Bank  
Central Bank of the South\*  
Central State Bank, Calera  
Citizen's Federal Savings Bank  
Citizen's National Bank of Shawmut  
Colonial Bank\*  
Commercial Bank of Ozark  
Covington County Bank  
Farmers & Merchants Bank, Ariton  
Farmers & Merchants Bank, LaFayette  
Farmers & Merchants Bank of Russell County  
First Alabama Bank\*  
First American Bank, Decatur  
First American Bank of Pelham  
First American Federal Savings & Loan, Huntsville

First Bank & Trust, Grove Hill  
First Bank of Baldwin County  
First Commercial Bank, Birmingham  
First Community Bank, Chatom  
First Federal Savings & Loan, Gadsden  
First Federal Savings & Loan of Bessemer  
First Federal Savings & Loan of Florence  
First Federal Savings & Loan of Russell County  
First Federal Savings Bank, Decatur  
First Montgomery Bank  
First National Bank, Ashland  
First National Bank, Brewton  
First National Bank, Opelika  
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 Tuscaloosa  
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  
Robertson Banking Company, Demopolis

Southland Bank, Clayton  
Southland Bank of Dothan  
SouthTrust Bank, Auburn  
SouthTrust Bank of Alabama  
SouthTrust Bank of Andalusia  
SouthTrust Bank of Baldwin County  
SouthTrust Bank of Calhoun County  
SouthTrust Bank of Cullman  
SouthTrust Bank of Dothan  
SouthTrust Bank of Etowah County  
SouthTrust Bank of Huntsville  
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 Peoples Bank, East Tallassee  
The Peoples Bank & Trust, Greenville  
The Peoples Savings Bank, Clanton  
The Perry County Bank  
Tuskegee Federal Savings & Loan Association  
Union Bank & Trust Company  
United Security Bank, Butler  
\*Financial institutions participating statewide

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# Environmental Liability





# for Vendees and Lenders

by T. Bruce McGowin

## I. Introduction

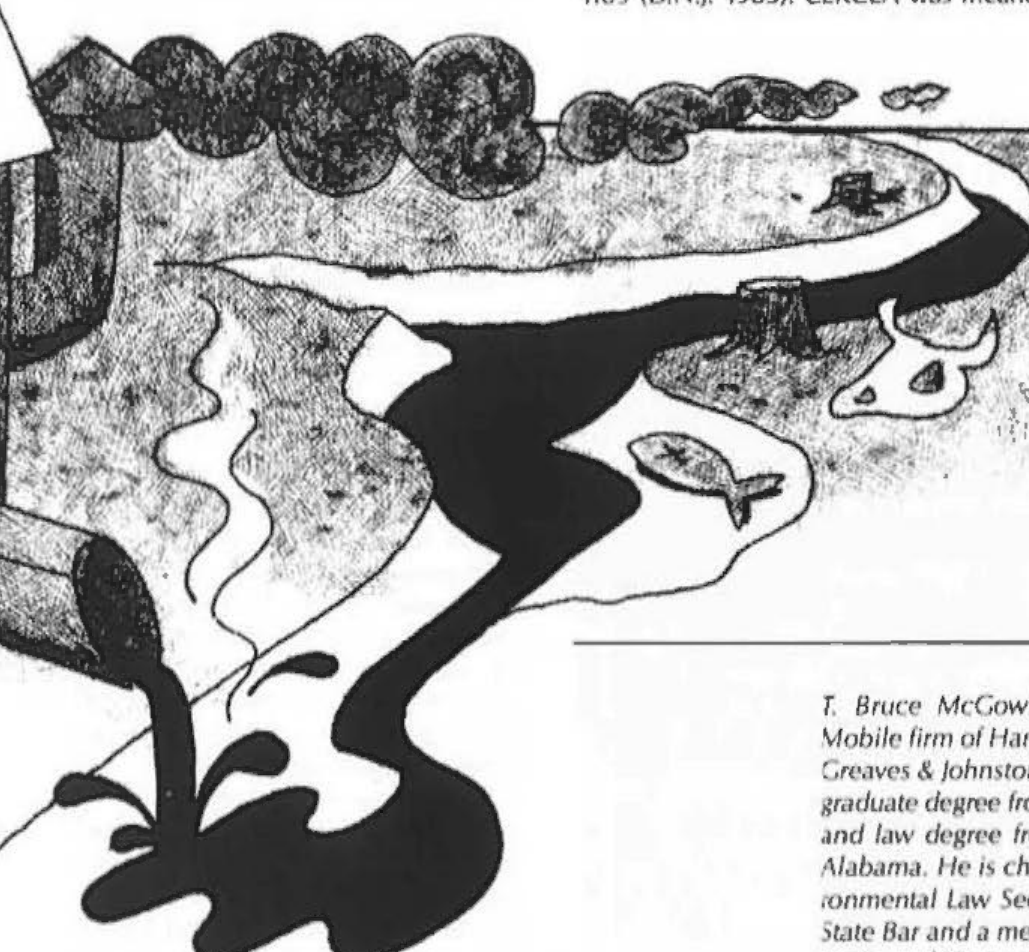
This article is intended as a primer for attorneys engaged in basic commercial real estate practice on the vast environmental liabilities that can attach to even the most mundane property acquisition.

## II. CERCLA

After years of debate, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601, et seq., in response to the environmental harm of improper disposal of hazardous waste. *United States v. Price*, 577 F.Supp. 1103, 1109 (D.N.J. 1983). CERCLA was meant

to supplement the existing Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6987, and other federal law that previously had been enacted to regulate hazardous waste disposal from "cradle to grave." *Id.* In particular, CERCLA was enacted in response to Congress's perception of the massive problem of inactive hazardous waste sites and spills of toxic materials. See H.R. Rep. No. 1016, 96th Cong. 2d Sess., pt. 1 at 18, reprinted in 1980 U.S. Code Cong. & Ad. News 6119, 6120.

To resolve these problems, the law establishes a mechanism by which the government may immediately respond to spills of hazardous materials and long-term problems associated with abandoned hazardous waste. CERCLA establishes two funds—the Hazardous Substance Response Fund and the Post-Closure Liability Fund—for the immediate removal of hazardous substances released, or threatened to be released, into the environment from a facility or vessel. The U.S. Environmental Protection



*T. Bruce McGowin, a partner in the Mobile firm of Hand, Arendall, Bedsole, Creaves & Johnston, received his undergraduate degree from Auburn University and law degree from the University of Alabama. He is chairperson of the Environmental Law Section of the Alabama State Bar and a member of the Real Property and Corporation sections of the Alabama State Bar.*

## BUSINESS VALUATIONS

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Agency (EPA) uses these funds to finance the cost of remedying releases of hazardous substances and pay claims resulting from damage to property or the environment as a result of these releases. The appropriation for these funds is derived primarily from taxes levied on the petroleum and chemical industries and the disposers of hazardous wastes.

While CERCLA allocated \$1.6 billion to the toxic waste problem during its first five years, much of that money was spent on simply identifying and assessing hazardous waste sites. The result is that there are now some 26,000 sites listed by the EPA for further investigation and/or action.

The EPA has placed more than 800 of the nation's worst sites on the National Priorities List (the so-called "Superfund List"), thereby qualifying them for federal cleanup funds and also singling them out for a particularly thorough investigation with strict EPA oversight. During the next five years, the list is expected to grow into the thousands. Estimates of the government's eventual share of the cleanup costs range into the billions.

### III. Private party liability

CERCLA authorizes the EPA, under appropriate circumstances, to order responsible parties to clean up hazardous waste dump sites, 42 U.S.C. §9606(a), or, in the EPA's discretion, to clean up the site itself. 42 U.S.C. §9604(a)(1). Initially, funding for a cleanup conducted by the EPA comes from the two funds. The EPA is then permitted to recover cleanup costs it has incurred from virtually any party involved with the waste. 42 U.S.C. §9607. Private parties who have incurred "necessary costs of response...consistent with the national contingency plan" also may sue to recover damages. 42 U.S.C. §9607(a)(4)(B). The owners and operators of the site at the time of the cleanup and those parties who owned or operated the site at the time of the disposal are among those who might be liable to the EPA for the clean-up costs. 42 U.S.C. §9607(a)(2). Generators and transporters of hazardous waste also are liable pursuant to CERCLA. *Id.*

The courts have construed CERCLA liability as strict liability, so it is not necessary for the government to prove the fault or knowledge of the responsible parties. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985). In addition, liability is considered joint and several, allowing the government to pursue any one responsible party for the whole cost of site cleanup. *United States v. Wade*, 577 F.Supp. 1326, 1337-1339 (E.D. Pa. 1985); *United States v. A&F Materials Co.*, 578 F.Supp. 1249, 1253-57, (S.D. Ill. 1984); *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D. Ohio 1983); See Note, *Environmental Law-Joint and Several Liability Under CERCLA*, 57 Temp.L.Q. 885 (1984); See also, Note, *The Right to Contribution for Response Costs Under CERCLA*, 60 Notre Dame L. Rev. 345 (1985). Because courts have interpreted CERCLA to provide strict liability and found parties jointly and severally liable, an owner who purchased the site after the waste was dumped can be saddled with the entire cost of the cleanup. Courts have made it clear that the fact that the current owners did not cause the contamination does not mean they are not liable for the cleanup. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (1985). Under the current state of the law, an owner can be held liable simply by virtue of owning the property.

## Medical Experts

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While contribution or indemnity may be available from the seller, such may well entail protracted litigation and, in the end, is only as good as the seller's pocketbook. Since insurance for such cleanups is nearly impossible to obtain, a real property purchaser may find himself with an unusable piece of property and also with an EPA order that will require the expenditure of millions.

The best protection that a prospective purchaser can have against this situation is to do his homework before the sale is consummated. With proper investigation, a purchaser can decide whether he has obtained an adequate comfort level on environmental concerns, and, in the process, lay the groundwork for escaping liability under a new amendment to CERCLA even if his analysis later should be proved faulty.

#### IV. Innocent landowner exception

Last year, CERCLA was extended another five years by the Superfund Amendments and Reauthorization Act (SARA). SARA attempted to mitigate the strict liability of the law by creating an "innocent landowner" defense. SARA attempts to shield landowners who acquire property without knowledge of pre-existing environmental conditions on that property, i.e., "innocent landowners." See SARA, Section 101 (35) codified at 42 U.S.C. §960(35). This provision requires the purchaser to demonstrate that at the time of acquisition he undertook an appropriate inquiry into the past uses of the property.

In its attempt to shield innocent purchasers, Congress codified the definition of "contractual relationship" under CERCLA to allow purchasers of real estate who acquire property without knowledge of any contamination to qualify for the statutory defense from liability. See SARA, Section 101(35)(A)(i), codified at 42 U.S.C. §9601(35)(A)(i). To establish that the purchaser had no reason to know of environmental contamination at the property, however, the amendment requires the purchaser to inquire into the previous ownership and uses of the property in an effort to minimize liability. The scope of that inquiry is subject to a test of consistency with "good commercial or customary practice," defined to include the following factors:

"...any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, this obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection."

SARA, Section 101(35)(B), codified at 42 U.S.C. §9601(35)(B). The House Conference Report expresses the view that those engaged in commercial transactions will be held to a higher standard of inquiry than those engaged in residential transactions. See H.R. Rep. No. 962, 99th Cong., 2d Sess. at 187 (1986).

The availability of this narrow defense from liability will create a substantial incentive to investigate the property for environmental problems long before closing the sale.

#### V. Suggested due diligence

To qualify for this exception, the purchaser should begin his efforts long be-

fore sitting down at the closing table. From the standpoint of the buyer's counsel, negotiation of a purchase agreement which addresses environmental concerns becomes critical. The purchase agreement should give adequate comfort and assurances on prior property uses, set forth the environmental investigations required, allocate the costs of those investigations and provide an out if the results are not satisfactory. The purchaser and his counsel should consider including the following:

1. Comprehensive representations and warranties;
2. Appropriate indemnification and release clauses;
3. Adequate time to discover breaches of representations and warranties, and sufficient survival periods for representations, warranties and indemnification clauses;
4. Clear allocation of liabilities assumed by each party;
5. Generous rights to inspect the site, review records and interview employees before closing the deal;

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6. Allocation of audit and cleanup expenses;
7. Rights to contribution for cleanup costs;
8. Assignment of insurance; and
9. Contingent reserves or adjustments in purchase price to reflect environmental liabilities uncovered during the due diligence review. Brown, J., "Confronting Environmental Liabilities in the Purchase of Industrial Property," *Chicago Bar Association Record* (Oct. 1987).

Following execution of a purchase agreement, but before closing, a purchaser can further minimize liability in property transfers by conducting a proper site investigation and assessment. He should conduct a thorough investigation of the property's compliance with environmental requirements and assess the scope and extent of any contamination that may exist at the site. This investigation could include the following:

1. Physically inspect the property and document that inspection with photographs.
2. Conduct an examination of public documents such as government agency permits and enforcement files, spill reports, agency compilations of enforcement actions and parties involved in such actions.
3. Review SEC filings and any court records and administrative proceedings involving environmental matters.
4. Contract with a reputable firm for an environmental audit of the property, possibly including soil and groundwater samples.
5. Determine whether the seller has any other properties that have been the subject of a hazardous waste cleanup.
6. Develop a detailed ownership history, including prior uses and activities.
7. Determine whether there are any ponds or other bodies of standing water on the property.
8. Determine if above or underground storage tanks are used and whether they have been tested for leaks.
9. Determine whether the property has ever been the subject of an environmental audit or assessment, and, if so, review the audit.
10. Review the owner's correspondence with federal, state and local environmental authorities, including any litigation or enforcement files.

11. Determine whether the current owner has any environmental permits from local, state or federal governments.

12. Determine whether the property has ever been the subject of either an investigation by federal, state or local officials or private litigation as a result of the handling of hazardous materials.

13. Determine whether the property is on EPA's National Priorities List or Emergency and Remedial Response Information System.

14. Determine whether a significant accident or other incident that resulted in hazardous waste contamination ever occurred on the property.

15. Determine what types of commercial enterprises now operate and have previously operated on neighboring properties.

16. Determine whether neighboring facilities have ever been the subject of an investigation by federal, state or local officials or the subject of private litigation as a result of their handling of hazardous materials.

17. Determine whether neighboring properties are on EPA's National Priorities List or Emergency and Remedial Response Information System.

18. Determine whether a significant accident or other incident resulting in hazardous waste contamination ever occurred on neighboring properties.

19. Check local newspaper records.

20. Review aerial photographs. (LANDSAT satellite photographs are taken in an annual series and allow an evaluation of the property over time for noticeable changes.)

21. Conduct interviews with employees of the current and prior owners and operators, as well as with area residents.

22. Look for obvious sources of contamination such as improper storage of drums that could leak into the ground, leaking underground fuel tanks or electrical systems that are leaking PCBs.

23. Consider requiring a lawyer's environmental opinion.

This list is by no means exhaustive, nor is every single item required for each transaction. Each property acquisition must be reviewed on an individual basis and the appropriate environmental investigation tailored for that specific site. As there are yet no court decisions to establish the parameters of the due diligence

sufficient to claim the status of "innocent landowner," an environmental investigation should encompass as much as the transaction will bear.

## VI. Lender liability

Like prospective purchasers, lenders also should be made aware of their potential environmental exposure. In the wake of federal district court decisions in *United States v. Mirabile*, *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20994 (E.D. Pa. 1985), and *United States v. Maryland Bank & Trust Co.*, 632 F.Supp. 573 (D. Md. 1986), banks and other creditors face the possibility of being liable for the costs of cleanup of hazardous waste sites created by their borrowers.

In *Mirabile*, the United States District Court for the Eastern District of Pennsylvania denied a motion for summary judgment by a bank defendant that was a secured creditor of a company which created a hazardous waste site. *United States v. Mirabile*, *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20994, 20997 (E.D. Pa. 1985). The court held that the creditor may be held liable for response costs under CERCLA if the creditor exercised control over the day-to-day operations of the site.

The bank's involvement in its borrower's operations resulting in potential CERCLA liability included frequent visits to the site, insisting on certain manufacturing changes, reassignment of personnel and day-to-day supervisions by an employee of the bank. *Id.* at 20997. Such activity resulted in the trial judge's denial of the bank's motion for summary judgment, due to his finding that significant factual issues existed on the question of whether the bank's predecessor had participated in the management of the site operator to such an extent as to "bring a secured creditor within the scope of CERCLA liability." *Id.* at 20996. The case was eventually settled, so no further opinions will be issued clarifying the type of management activity that will be required to impose CERCLA liability on a lender assisting with its debtor's management. Andresky, "Cover Your Assets," 137 *Forbes* 117 (March 24, 1986).

The other type of potential CERCLA liability for lenders requires no active participation in day-to-day operations and, hence, is even more alarming. In *Maryland Bank & Trust Co.*, 632 F.Supp. at 573 (D. Md. 1986), the United States District Court for the District of Maryland granted



a motion for summary judgment as to liability to the United States and against a bank defendant that was a secured creditor of an individual who created a hazardous waste site. The court decided that the creditor was liable for response costs under CERCLA because it had foreclosed on the waste-laden property subject to the mortgage.

*Maryland Bank & Trust* initially made an acquisition loan to a trash and garbage disposal business in the amount of \$335,000 and took back a mortgage. When default occurred, the bank instituted a foreclosure action and purchased the property at the foreclosure sale with a bid of \$381,500.

Subsequent to foreclosure, EPA was notified of environmental problems. Based on tests it conducted, EPA requested and received funding to conduct a removal action under CERCLA. EPA contacted *Maryland Bank & Trust* and gave it the opportunity to clean the site, which the bank declined. The EPA later cleaned the site itself, incurring costs of \$551,713, and instituted a cost-recovery action against the bank.

The sole issue in *Maryland Bank & Trust Co.* was whether the bank's foreclosure subjected it to liability under CERCLA. While the court ruled that mortgagees were not subject to CERCLA liability merely for holding security interests, a bank, upon foreclosure, became an owner and, therefore, was liable to EPA for clean-up costs.

In making its decision, the court relied heavily on public policy arguments. The court declared that if the bank's position prevailed, the "federal government alone would shoulder the cost of cleaning up the site following the sale, [and] the bank could sell the site at a profit." *Id.* at 580. Therefore, the bank's position would turn CERCLA "into an insurance scheme for financial institutions protecting them against possible losses due to the security of loans with polluted properties." *Id.* CERCLA, admonished the court, should not absolve financial institutions from responsibility for mistakes of judgment. *Id.*

The decisions in *Mirabile* and *Maryland Bank & Trust Co.* force lenders to take into consideration their debtor's ac-

tivities involving hazardous waste both before making the loan and after default.

As a condition of making the loan, creditors should consider requiring warranties and representations from their debtors stating that they are not improperly disposing of hazardous materials and indemnification from the debtor—and its guarantors—in the event the bank is found liable for such activity. Such warranties, representations and indemnifications, however, obviously will not protect a creditor where the debtor and its guarantors are insolvent. Also, while an indemnification agreement may be valid between the parties to the agreement, CERCLA specifically prohibits such agreements from transferring liability for cleanup costs. 42 U.S.C. §9607(e)(1).

Creditors also should consider undertaking some or all of the same inquiries as detailed above for purchasers, both before entering into the transaction and before foreclosing on the property. Without such due diligence, a lender may find itself shouldering the cost of an environmental clean-up far in excess of its bad loan. ■

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# 1988 Annual Meeting Highlights

Birmingham—The Wynfrey Hotel

July 21-23, 1988



**1** Keith Norman (left) and Diane Weldon (second from right), Alabama State Bar staff members, discuss section meeting arrangements with a Wynfrey Hotel representative.



**2** Mark White, recently back to Birmingham from Pittsburgh, entertained President Harris and over 300 attendees as the Bench and Bar luncheon speaker Thursday.



**3** Warren Lightfoot (standing left) of Birmingham received the Walter P. Gewin Award from Steven Emens (right), director of the Alabama Bar Institute for CLE in Tuscaloosa.



**4** Robert McCurley (right), director of the Alabama Law Institute in Tuscaloosa, presented Senator Rick Manley of Demopolis with a certificate of appreciation for sponsoring several pieces of legislation during the last legislative session.



**5** Alabama Supreme Court Chief Justice C.C. Torbert addresses luncheon attendees prior to presenting the Herber Harley Award to . . .



**6** . . . Judge John David Snodgrass of Huntsville.



**7** The new general counsel for the state bar, General Robert W. Norris, USAF retired, and wife Martha were introduced during the luncheon. Both are natives of Birmingham, and he is a graduate of the University of Alabama School of Law.



**8** Taking a break from section meetings are Walter Price of Huntsville and Wanda Devereaux of Montgomery.





**9** Gathered for the formal dedication of the Hugo L. Black Federal Courthouse Thursday afternoon, among many others, were (front row, left to right) Senior U.S. District Judge Seybourn Lynne of Decatur, Chief Justice Torbert, U.S. District Judge E. B. Haltom and Congressman Ben Erdreich of Birmingham, and (back row, left to right) U.S. Circuit Judge Robert Vance and U.S. District judges Clarence Allgood and Hobart Groomes.



**10** Alabama State Bar President Ben Harris participated in the dedication of the courthouse.



**11** Congressman Erdreich sponsored legislation naming the new courthouse for Justice Hugo L. Black.



**12** Hugo Black, Jr., thanked those responsible for the honor to his father and introduced his family to those present.



**13** Cecil Whitmire, president of the Alabama Organ Society, entertained guests Thursday night on the Alabama's mighty Wurlitzer . . .



**14** . . . when almost 500 lawyers and their guests gathered for the annual membership reception.



**15** Friday morning, 11 former presidents of the state bar gathered for the traditional President's Breakfast. Front row, left to right, are Bill Hairston, Jr.; Pat Richardson; Oakley Melton; Bill Scruggs; Sonny Hornsby; and Jim North. Back row, left to right, are Frank Tipler; Judge Truman Hobbs; Senator Howell Heflin; Drew Redden; and Norborne Stone.



**16** Spouses had a choice of activities Friday morning, and then all gathered at the Vestavia Country Club for a luncheon arranged by the Birmingham Bar Association auxilliary. Left to right are Pat Durward, Birmingham; Martha Harris, Mobile; Jeanne Huckaby, Huntsville; Gail Sharp, auxilliary president, Birmingham; and Faye Clark, Birmingham.



**17** Robert Potts, left, general counsel for the University of Alabama System, and Richard Woods of Mobile (right) spoke on sports law developments during "Update '88" Friday. Moderator Steve Rowe (middle) of Birmingham seems amused by Potts' comments.





**18** Other speakers and topics during "Update" included David Crosland, Washington, D.C., "Compliance with the Immigration Reform Act". . .



**19** . . . James Wilson, U.S. Attorney, Middle District of Alabama, Montgomery, "Federal Sentencing Guidelines". . .



**20** . . . Michael Bownes, director, Office of Consumer Protection, Alabama Attorney General's Office, Montgomery, "Deceptive Trade Practices Act". . .



**21** . . . and Wendell Mitchell, state bar legislative counsel, Luverne, "Legislative Update."



**22** By Friday night, convention-goers were ready to be entertained, and entertained they were by the Chicago Bar Association's "Christmas Spirits" show, here introduced by President Harris.



**23** CBA cast members, some who performed at the 1986 annual meeting in Birmingham, included, left to right, Rainell Rains, Charles Goodnow, Frank Steponate, Julian Frazin, Len Rubin, Audrey Rubin and Mary McNichols.



**24** One of the crowd's favorites, "The Golden Rule," drew attention to the recent "plight" of evangelist Tammy Faye Bakker.



**25** Back to business Saturday morning, President Harris recognized the efforts and hours given by committee chairpersons and presented certificates to those present, including Dennis Balske of Montgomery, Indigent Defense Committee chairperson.



**26** Later that morning, Charles English, immediate past president of the Kentucky Bar Association, shared that bar's experiences in starting a captive insurance company. Seated, left to right, are Bill Moore, president, McNeary Insurance Consulting Services, Inc. of Charlotte, NC; President Harris; and Henry Henzel, chairperson of the state bar's insurance Programs Committee.





**27** Fifty-year certificates were presented to six attorneys. They are James Bradford, Birmingham; Marion H. Haygood, Greenville; David U. Patton, Athens; Richard E. Proctor, Moulton; J. Arnold Teks, Florence; and, pictured, Mary Ellen Sizemore, Tallassee.



**28** Jimmy Alexander of Athens receives a Commissioner's Medallion, as did fellow bar commissioners Ludger Martin, Wade Baxley, L. E. Gosa, Charles Hare and Greg Wood.



**29** Mary Lyn Pike accepted a state bar Award of Merit for her contributions to the MCLE program in Alabama. She now is with the Association of Trial Lawyers of America in Washington, D. C.



**30** Longtime bar commissioner Rick Manley (17th circuit) also was given an Award of Merit for his numerous contributions in effective legislative leadership.



**31** Three memorial resolutions, honoring Douglas Arant of Birmingham, John E. Adams of Grove Hill and Clopper Almon of Sheffield, were presented by Resolutions Committee Chairperson Harold Albritton of Andalusia.



**32** Incoming President Gary Huckaby is presented the ASB President's Gavel by retiring president Harris while . . .



**33** . . . now past president Harris is given the traditional retiring president's plague and is welcomed into the "Past Presidents' Club" by his predecessor, Bill Scruggs.



**34** President-elect Alva Caine of Birmingham was installed and expressed his appreciation to the membership for being elected to the office.



**35** Pictured at the conclusion of the 1988 annual meeting are, left to right, 1988-89 Alabama State Bar President-elect Alva C. Caine, President Gary C. Huckaby and past President Ben H. Harris, Jr.



# Attorneys Admitted to Bar, Spring 1988

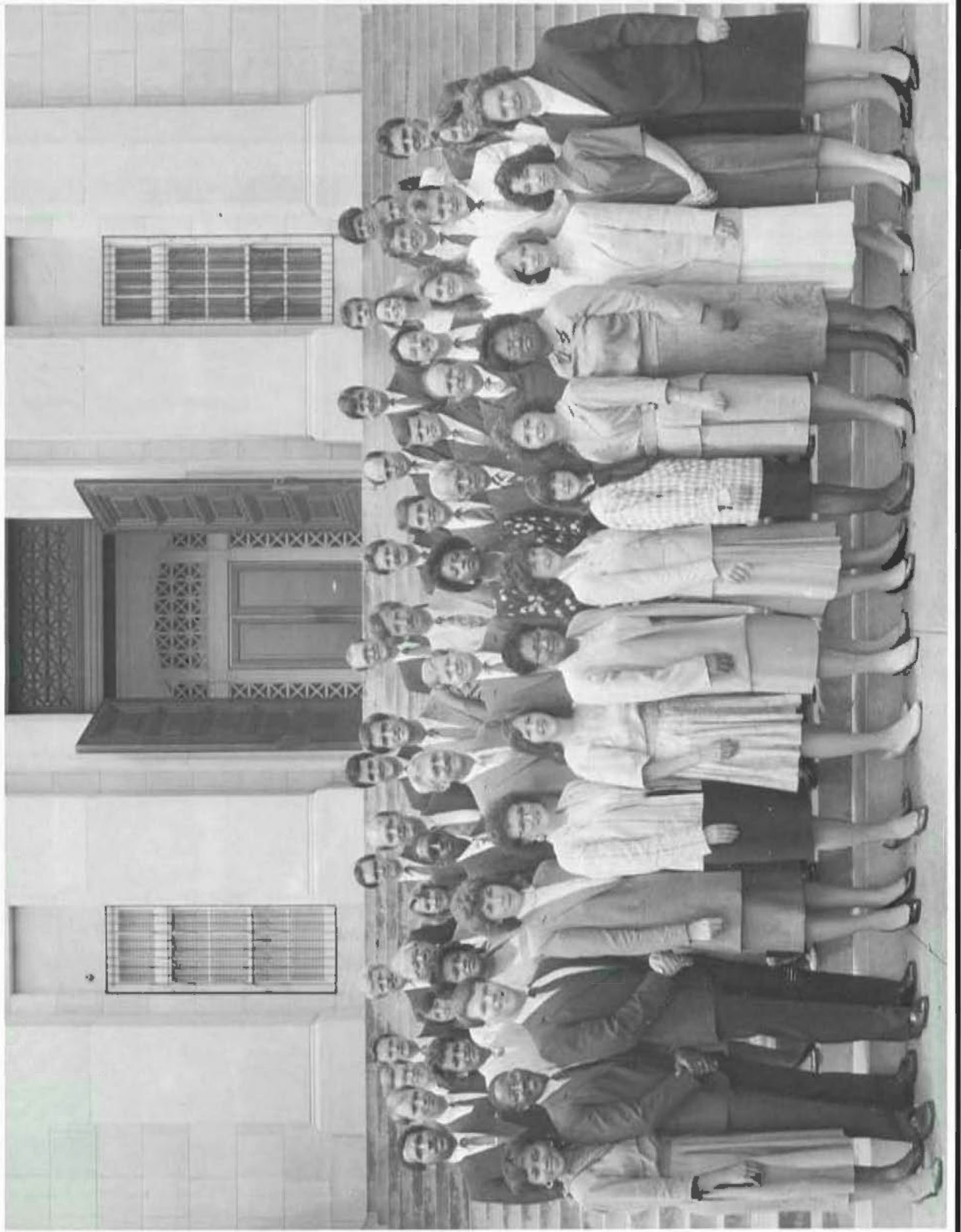
Michael Allen Akers . . . . .	Jackson, Mississippi	Albert Oscar Howard, Jr. . . . .	Montgomery, Alabama
Charles Stephen Alexander . . . . .	Birmingham, Alabama	Shirley Ann Jones . . . . .	Birmingham, Alabama
Julia McCain Lampkin Asam . . . . .	Tuscaloosa, Alabama	Willie Mays Edwards Jones . . . . .	Tuscaloosa, Alabama
Gloria Teresa Bahakel . . . . .	Birmingham, Alabama	Michael Allen King . . . . .	Jackson, Mississippi
Jerry Dewitt Baker . . . . .	Huntsville, Alabama	Helen Shores Lee . . . . .	Birmingham, Alabama
Donna Kaye Bates . . . . .	Talladega, Alabama	Linda Sanford Lehe . . . . .	Vestavia Hills, Alabama
Tracey L.F. Benedict . . . . .	Mobile, Alabama	LaVerne Davis Lewis . . . . .	Fairfield, Alabama
Britt Searcy Booth . . . . .	Montgomery, Alabama	Timothy Alan Lewis . . . . .	Montgomery, Alabama
Joel Victor Bowman . . . . .	Birmingham, Alabama	June Elaine Lynn . . . . .	Jackson's Gap, Alabama
Glenn Edward Brandon, Jr. . . . .	Birmingham, Alabama	John Wesley Manuel . . . . .	Panama City, Florida
Edward Spurgeon Brown . . . . .	Birmingham, Alabama	Barry Samuel Marks . . . . .	Birmingham, Alabama
Franklin Inzer Brown . . . . .	Montgomery, Alabama	Daniel Craig Masten . . . . .	Nashville, Tennessee
Rhonda Brownstein . . . . .	Mobile, Alabama	Daryl Lynn Masters . . . . .	Millbrook, Alabama
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Philip Joseph Carroll, III . . . . .	Birmingham, Alabama	Mark Steven Miller . . . . .	Montgomery, Alabama
Bilee Kulharek Cauley . . . . .	Wetumpka, Alabama	Thomas Andrew Minetree, II . . . . .	New Orleans, Louisiana
Wendell James Chambliss . . . . .	Alexandria, Virginia	Wesley Thomas Neill . . . . .	Birmingham, Alabama
Nancy Lynn Childress . . . . .	Huntsville, Alabama	Ricky David Norris, Jr. . . . .	Birmingham, Alabama
Scott Ellis Childs . . . . .	Dothan, Alabama	William Burton Ogletree . . . . .	Gadsden, Alabama
Shelbonnie Larnail Coleman . . . . .	Auburn, Alabama	Arlie Dale Price . . . . .	Enterprise, Alabama
Paul Whiting Copeland . . . . .	Northport, Alabama	Robert David Proctor . . . . .	Birmingham, Alabama
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Mary Elizabeth Culberson . . . . .	Wetumpka, Alabama	Maria Lazarte Reuther . . . . .	Mountain Brook, Alabama
Teresa Davidson Davenport . . . . .	Montgomery, Alabama	Mark William Roadarmel . . . . .	Macon, Georgia
Vicki Marie Davis . . . . .	Birmingham, Alabama	James Stanley Roberts, Jr. . . . .	Morris, Alabama
Judith Elaine Dolan . . . . .	Birmingham, Alabama	Patrick Lee Roberts . . . . .	Prattville, Alabama
Virgil Jackson Elmore, III . . . . .	Birmingham, Alabama	Bruce Todd Russell . . . . .	Birmingham, Alabama
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Sara-Jean Fortino . . . . .	Church Hill, Tennessee	Bryant Gordon Speed, II . . . . .	Selma, Alabama
Arne Max Foss . . . . .	Dothan, Alabama	Douglas Stanley Taylor . . . . .	Montgomery, Alabama
Louis Vinson Franklin . . . . .	Selma, Alabama	Martha Elizabeth Thomas . . . . .	Tuscaloosa, Alabama
Frederick Mott Garfield, Jr. . . . .	Birmingham, Alabama	Rhoda Ellen Tishler . . . . .	Birmingham, Alabama
Gwendolyn Bulger Garner . . . . .	Birmingham, Alabama	Daniel Carl Ware . . . . .	Millry, Alabama
John Anthony Garner . . . . .	Montgomery, Alabama	Mary Alice Wells . . . . .	Pensacola, Florida
Fred David Gray, Jr. . . . .	Tuskegee, Alabama	David Glenn White . . . . .	Washington, DC
Brenda Jo Hancock . . . . .	Tuscaloosa, Alabama	John Lamar White . . . . .	Mobile, Alabama
Marla Newbauer Hansel . . . . .	Hoover, Alabama	Jay Dayton Williams, Jr. . . . .	Pensacola, Florida
Christine Sampson Hinson . . . . .	Daphne, Alabama	Suzanne Obering Willoughby . . . . .	Birmingham, Alabama
Jeffery Van Hood . . . . .	Birmingham, Alabama	Floyd Allen Wisner . . . . .	Birmingham, Alabama

## Spring 1988 Bar Exam Statistics of Interest

Number sitting for exam . . . . .	157
Number certified to Supreme Court . . . . .	83
Certification rate . . . . .	53%
Certification percentages:	
University of Alabama . . . . .	65%
Cumberland . . . . .	64%
Alabama nonaccredited law schools . . . . .	28%



SPRING 1988 ADMITTEES



# Lawyers in the Family



*Fred D. Gray, Jr. (1988) and Fred D. Gray, Sr. (1954) (admittee and father)*



*Margaret Arrington Goldthwaite (1988) and Alfred Wither-spoon Goldthwaite (1948) (admittee and father)*



*Timothy A. Lewis (1988), Calvin Whitesell (1951), Christine W. Lewis (1981) and William Pendergast (1980) (admittee, father-in-law, wife and brother-in-law)*



*Glenn Edward Brandon, Jr. (1988) and Marianne Battaglia Brandon (1986) (admittee and wife)*



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# Letters

Dear Sirs:

I read in your "Memorials" of May 1988 where a member of the Alabama Bar Association was graduated from the University of Alabama Law School when he was 20 years old.

I thought it would be of interest to see who was the youngest graduate. My father, B.J. Dryer, Birmingham, Alabama, was born November 27, 1895, and graduated May 31, 1916. This would make him 20 years, 6 months and 4 days old at graduation.

Do any of your readers know of anyone who was younger than this when they graduated from the University of Alabama Law School?

Thanks,

**B.J. Dryer, III**

1140 So. 52nd St.

Birmingham, Alabama

July 22, 1988

To the Editor:

In the article "Status of the Causation Requirement in Medical Malpractice," the authors extensively reviewed the proximate cause issue with regard to medical malpractice, and strongly implied that the "probability of survival" test is the law of Alabama. 49 *Alabama Lawyer* 148 (May 1988). The authors also cite cases from other jurisdictions which have embraced the "probability of survival" test, which requires plaintiffs to prove

that the physician's negligence probably caused the patient's death.

In fact, Alabama does not adhere to the "probability of survival" test. This test was expressly repudiated by the Alabama Supreme Court in *Murdoch v. Thomas*, 404 So.2d 580 (Ala. 1981):

Appellants further contend that Ohio's "probability of survival" test is, or should be interpreted to be, synonymous with this state's requirement that there may be "some evidence...that such negligence probably caused the injury." *Pappa v. Bonner*. We disagree—probability of survival and probability of cause are not the same. *Id.* at 582.

Accordingly, by expressly rejecting the "probability of survival" test, the Alabama Supreme Court has at the very least implicitly adopted the "lost chance of survival" test which requires only that the plaintiff show that the decedent could have lived but for the negligence of the physician.

**Truman M. Hobbs, Jr.**

Copeland, Franco, Screws & Gill

Montgomery, Alabama

June 28, 1988

Dear Truman:

We do not believe that our recent article in *The Alabama Lawyer* strongly implies that Alabama has adopted some sort of a "probability of survival" test on the issue of proximate causation in medical malpractice cases. It is clearly stated

in our article that the current test in Alabama is whether the plaintiff has produced evidence (a scintilla or substantial evidence) that the alleged negligence of the defendant "probably caused" the injury or death complained of.

While *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 27 Ohio St.2d 242, 272 NE 2d 97 (1971) was discussed on the fourth page of the article, we did not suggest that the Alabama Supreme Court has adopted that decision. Further, the *Cooper* decision is not cited or discussed in *Murdoch v. Thomas*, 404 So.2d 580 (Ala. 1981), which admittedly rejects some form of a "probability of survival" test apparently based in Ohio law.

We also do not agree with your conclusion that the Alabama Supreme Court has "implicitly adopted" the "lost chance of survival" test in *Murdoch*. Rather, *Murdoch* was decided in accordance with the traditional test of causation in medical cases in Alabama; there was evidence that the negligence of the physician probably caused the patient's death. As stated in our article, we do not believe that the Alabama Supreme Court has directly addressed the "lost chance" of survival or recovery theory of causation.

Sincerely yours,

**A. Neil Hudgens**

**Michael S. McGlothren**

**Thomas H. Nolan, Jr.**

Brown, Hudgens, Richardson, P.C.

Mobile, Alabama

June 30, 1988

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# 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



*DeKalb County Courthouse*

## DeKalb County

DeKalb County is located in north-eastern Alabama at the foothills of the Appalachian Mountains. It was created by the Legislature on January 9, 1836, from the Cherokee lands ceded to the United States by the treaty of New Echota. DeKalb, Marshall and Cherokee counties were carved from the newly acquired Cherokee territory.

Many of the first settlers were from South Carolina. They gave the county its name in honor of Major General Baron Johann DeKalb. He was a native of Bavaria and a French army officer, and he accompanied General Lafayette to America in order to aid in the fight for our independence. General DeKalb was killed at the Battle of Camden, South Carolina, August 16, 1780.

President Andrew Jackson sought to strictly enforce the treaty with the Cherokees. Federal troops eventually were utilized to round up all of the Indians and send them to reservations in the west. Captain John Payne was dispatched to the present county seat site. He erected a stockade near a large spring, and the stronghold was named in honor of this commander. The name Fort Payne survives to this day.

The first county seat of DeKalb County was at Rawlingsville, near Crystal Lake,

about two miles northeast of Fort Payne. Soon afterwards, though, a special election was held, and the county seat was moved to Bootsville in Sand Valley, about six miles northwest of Fort Payne. During the next few years the county seat was successively moved to Camden, then to Lebanon and then to Portersville. In its first four years of existence, DeKalb County had five county seats.

Finally, the county seat was to be relocated at Lebanon on the condition that a permanent courthouse and county jail



be erected there. Thus, the first permanent county courthouse was constructed in 1842 on land donated by the Frazier and Dobbs families. This courthouse was a two-story brick structure that served the county until 1876. The building was purchased in 1960 by a descendant of the Fraziers, and it was converted into an attractive home.

After the Civil War, the presence of the railroad brought new development to DeKalb County. Most residents felt that the county seat should be located on a railroad line. Since Lebanon was not served by the railroad, an election was held and the chief rivals were Collinsville and Fort Payne.

In those days election returns were not always tallied as quickly as today. In fact, on the day following the county seat election, all ballots had not been counted. By late afternoon, Collinsville was in the lead by 25 votes. Only one box remained to be counted. It was from a rural area on Sand Mountain. Quite interestingly, this box held 28 ballots. All of these votes were cast for Fort Payne. It was not reported that the election was contested, and so Fort Payne became the county seat by the slim margin of three votes.

The first of Fort Payne's three courthouses was built in 1876 by Doctor A.B. Green, who donated the building to the county. The bricks for this structure were made on the site. The walls of the building were erected around the kiln, thus saving considerable hauling time. This building was used until 1890, when a decision was made to build a more elaborate structure.

The old courthouse building was auctioned off February 23, 1891. It is interesting to note that the highest bidder was Dr. Green, who bought the courthouse for \$205. This was the same man who had built the structure 15 years earlier.

On May 17, 1891, the cornerstone for the second Fort Payne courthouse was laid during a ceremony in which the Governor of Alabama, Thomas Goode Jones, took part. This courthouse was grander than the first. It was basically a two-story brick building with a large central clock tower that soared five stories. This structure was built on the same site

as the former courthouse, and it dominated the view on First Street. Photographs of this building reveal the Romanesque influence with rounded arches framing windows and doors.

The third Fort Payne courthouse was built in 1950, two blocks from the site of its predecessors. It was originally a four-story edifice built of white structural concrete. Sherlock, Smith and Adams of Montgomery were the architects.

Exterior and interior additions and renovations on this building took place between 1973 and 1975. A fifth floor was added, and the large courtroom was divided to form two courtrooms. The external appearance of the building was dramatically enhanced by the addition of vertical window bands. The architects for this project were Dickinson and Davis. In 1977 further modifications were made for a district judge and courtroom.

*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.*



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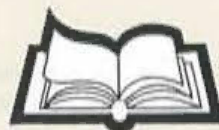
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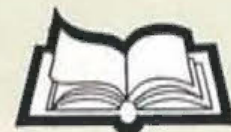
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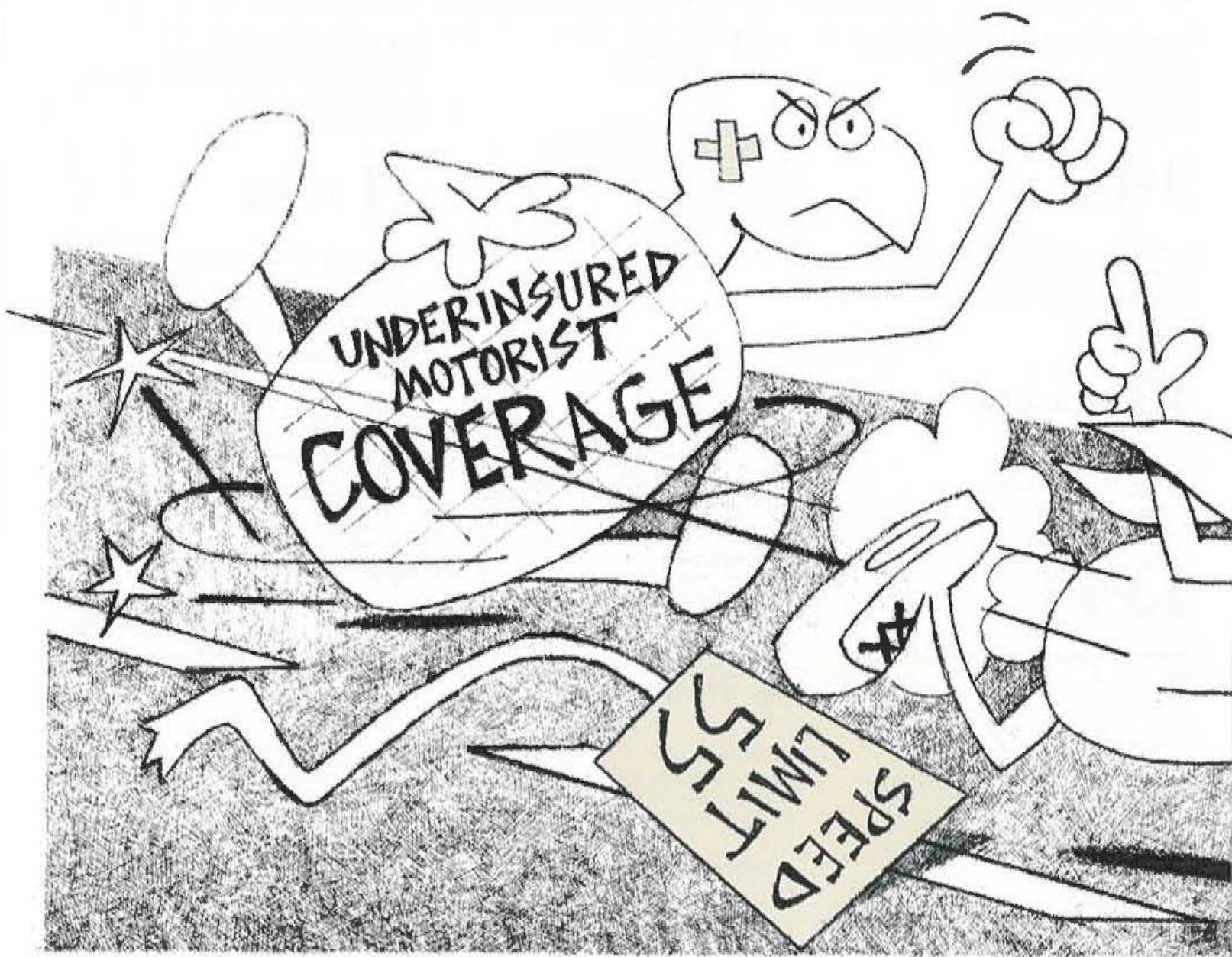
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# Underinsured Motorist Coverage Where Did it Come From? Where is it Going?

by Ronald G. Davenport





Uninsured motorist coverage has long proven to be a fertile field for litigation. Such issues as "stacking" have been raised in the judicial arena. Unfortunately, unanswered questions in this area still remain and are likely to involve judicial scrutiny in view of the advent of *underinsured* motorist coverage.

Uninsured motorist coverage is a statutory creature of relatively recent origin in Alabama, having been enacted in 1965 and becoming effective in 1966. Acts 1965, No. 866, *Higgins v. Nationwide Mut. Ins. Co.*, 50 Ala. App. 691, 282 So.2d 295, 299 (1973). The purpose of the statute as originally enacted was to:

"provide financial recompense to innocent persons who are injured and to dependents of those who are killed because of the wrongful conduct of uninsured motorists."

*Gulf American Fire & Cas. Co. v. Gowan*, 283 Ala. 480, 218 So.2d 688, 691 (1969).

The statute, both as originally enacted and recently amended, provides that no automobile liability policy shall be issued without uninsured motorist coverage unless the insured rejects such coverage in writing. § 32-7-23, *Code of Alabama*, 1975.

In 1984, the Alabama Legislature amended the Motor Vehicle Safety Responsibility Act and created underin-

sured motorist coverage, effective January 1, 1985. There is no mention of the word "underinsured" in § 6 of act no. 84-301 of the acts of the 1984 Legislature. The legislature created this new coverage simply by amending the definition of "uninsured motor vehicle" to include motor vehicles with respect to which:

"(4) the sum of the limits of liability under all bodily injury liability bonds and insurance policies available to an injured person after an accident is less than the damages which the injured person is legally entitled to recover." § 32-7-23(b)(4), *Code of Alabama*, 1975.

As the Alabama Supreme Court stated in footnote in the recent case of *Lowe v. Nationwide Ins. Co.*, 521 So.2d 1309 (Ala. 1988), "as statutorily defined, 'uninsured motorist' includes 'underinsured' motorist."

Prior to the amendment of the act in 1984, attempts were made to have the Alabama Supreme Court rule as a matter of law that a tortfeasor who was not insured for the amount of a plaintiff's actual injuries was uninsured. *Wilbourn v. Allstate Ins. Co.*, 293 Ala. 466, 305 So.2d 372 (1974). In declining to extend the definition of "uninsured" the court said:

"We cannot say that the tortfeasor was 'uninsured'—he was simply 'underinsured' in relation to Wilbourn's damages."

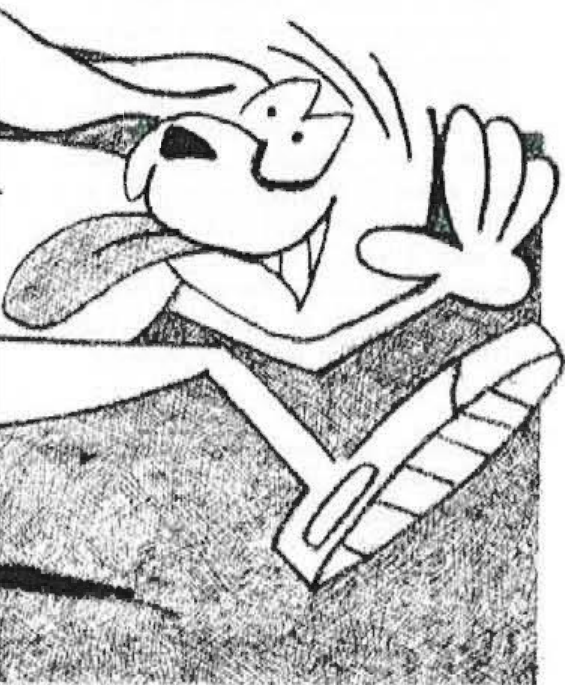
305 So.2d at 374. A similar argument was made in 1986 concerning a 1983 accident, but it was also rejected. *Jowers v.*

*State Farm Mut. Ins. Co.*, 485 So.2d 1190 (Ala. 1986). Passage of the act thus represented legislative remedy of inequities perceived in the existing legislation.

Because of the very limited nature of the statutory enactment of underinsured motorist coverage, the courts, insurance companies and lawyers have been left with many unresolved questions.

### Underinsured carrier as defendant

One of the most frequent issues which initially arose after the 1984 amendment was whether an insured was required to sue an alleged negligent motorist and obtain a judgment prior to maintaining an action against the underinsured motorist carrier. Because the statute itself was totally void of guidance, the trial courts were in conflict, and in some cases judges within circuits differed in their interpretation. Plaintiffs argued that the fact that the legislature chose to provide this coverage through amendment of the uninsured motorist statute indicated an intention that prior uninsured case law govern. Plaintiffs pointed to the case of *State Farm Ins. Co. v. Griffin*, 51 Ala.App. 426, 286 So.2d 302 (1973), in which it had been held that it was not necessary for an insured to obtain a judgment against the uninsured motorist in order to make a claim. Defendants argued that there could be no liability against the underinsured carrier until there was a judgment in excess of the total liability coverage. Defendants further argued that there was no need to have the underinsured carrier as a defendant since it



Ronald G. Davenport is a member of the firm of Rushton, Stakely, Johnston & Garrett in Montgomery. He received his undergraduate degree from Huntingdon College and law degree from the University of Alabama School of Law.





would only prejudice the defendant and the underinsured carrier.

Finally, on February 26, 1988, the Alabama Supreme Court addressed this issue in *Lowe v. Nationwide Ins. Co.*, 521 So.2d 1309 (Ala. 1988). The court said it had three primary concerns:

"1) that of protecting the right of the insurer to know of, and participate in, the suit; 2) that of protecting the right of the insured to litigate all aspects of his claim in a single suit...and 3) that of protecting the liability phase of the trial from the introduction of extraneous and corrupting influences, namely, evidence of insurance . . ."

521 So.2d at 1309.

After considering the above listed competing interests, the court concluded:

1) "A plaintiff is allowed *either* to join as a party defendant his own liability insurer in a suit against the underinsured motorist *or* merely to give it notice of the filing of the action against the motorist and of the possibility of a claim under the underinsured motorist coverage at the conclusion of the trial."

2) "If the insured is named as a party, it would have the right, within a reasonable time after service of process, to elect *either* to participate in the trial (in which case its identity and the reason for its being involved are proper information for the jury), *or* not to participate in the trial (in which case no mention of it or its potential involvement is permitted by the trial court)."

It follows from the comments of the court that whether the insurer elected (1) or (2) above, it would be bound by the factfinder's decisions on liability and damages. In addition to these two considerations, the court also set forth a third alternative course of action for the underinsured carrier.

3) "If the insurer is not joined but merely is given notice of the filing of the action, it can decide *either* to intervene *or* to stay out of the case. The results of either choice parallel those set above—where the insurer *is* joined as a party defendant."

521 So.2d at 1309.

Under *Lowe*, the question that the underinsured carrier immediately faces upon a lawsuit being filed is 1) whether to intervene if it is not a named defendant, or 2) whether to move not to partic-

ipate in the trial if it is joined as a defendant. The main considerations of the underinsured carrier should be: 1) its confidence in the defense counsel of the liability carrier, 2) the limits of the liability carrier and 3) whether the liability carrier is likely to tender its limits.

If the underinsured carrier has confidence in the liability carrier's defense counsel, ordinarily it would seem that the best course of action for the underinsured carrier would be *not* to participate in the trial but merely monitor it. This would mean the underinsured carrier's involvement would not be made known to the jury and the underinsured carrier would avoid the type of prejudice which such knowledge might create. However, it should be remembered that by electing *not* to participate in the liability trial, the underinsured carrier would be bound by the judgment and arguably would give up any standing to appeal.

The court in *Lowe* suggests that a determination of whether the election to intervene or not to participate in the trial is timely made is left to the discretion of the trial court. One could envision circumstances where such a choice would be difficult and where the underinsured carrier might need to conduct some discovery before making such a choice. In such a case a motion requesting an opportunity to conduct some discovery before making an election might be in order.

### Is jury allowed to know underinsured carrier's limits?

In the recent case of *Harvey v. Mitchell*, 22 ABR 1551, (May 6, 1988), the plaintiff brought a wrongful death action against the defendant driver and against the plaintiff's underinsured motorist carrier. The liability carrier had \$20,000 coverage and the underinsured carrier had \$220,000 coverage. Before the trial began the court granted a motion *in limine* directing that the limits of liability of the underinsured carrier not be disclosed to the jury. The plaintiffs appealed and argued that they should be allowed to disclose the limits to the jury since they had filed a count alleging a breach of contract action against the underinsured carrier. The Alabama Supreme Court, in upholding the trial court, noted that the determination of liability in a wrongful death case should be based on the de-

gree of the defendant's wrong and not the amount of insurance coverage. The court went on to say that the amount of uninsured motorist coverage available was not relevant to any issue before the court and the possible prejudice resulting from its admission into evidence was great. While the court has not been presented with the same question in the context of compensatory damages, it would logically follow that the ruling would be the same because there still would be no relevance and the possibility of prejudice would remain great.

### Permission to settle and subrogation

The single most important unresolved issue concerning underinsured motorist coverage is that of subrogation. Closely aligned with the subrogation issue is the question of when and under what circumstances an underinsured carrier can refuse permission to the plaintiff to settle with the liability carrier. The question of subrogation might arise, in the context of underinsured coverage, in a factual setting similar to the following:

B drives his automobile in a negligent manner causing a collision with a vehicle driven by A. A is injured and incurs \$15,000 in medical bills and another \$5,000 in lost wages. B has liability coverage in the amount of \$50,000. A has underinsured coverage on two vehicles totaling \$50,000. B's insurance carrier tenders its liability limits of \$50,000. A cannot reach a settlement agreement with his own insurance company but would like to go ahead and settle with B's liability carrier and accept its \$50,000 settlement offer. However, while B's carrier is willing to pay its \$50,000 limits, it has a duty to defend B and try to get B released. Therefore, B refuses to settle with A unless A releases B. A is afraid to release B for fear that he will be barred from pursuing his underinsured motorist claim.

A requests permission from his own carrier to settle with B. A's carrier refuses to consent to such a settlement because A's carrier says that if it allows A to release B, it will be deprived of its opportunity to sue B and recover any money which it might pay A under the underinsured motorist coverage.



Many underinsured policies contain clauses which prohibit the insured from settling with the tortfeasor without the express permission of the underinsured carrier. The logic behind such a prohibition is that the release of the tortfeasor would prejudice any subrogation claim of the underinsured carrier. The only Alabama case to address this issue to date is *United Services Auto. Assn. v. Allen*, 519 So.2d 506 (Ala. 1988). In that case, Allen was a passenger in a motor vehicle driven by Morris and was killed when Morris' vehicle ran off the road while travelling at a high rate of speed and hit an embankment. Morris also was killed. Morris had insurance with Rockwood Insurance Company with limits of \$20,000. Rockwood offered its limits to Allen's administrator. The plaintiff's attorney wrote USAA asking for USAA's permission to accept Rockwood's offer and asking if USAA had any special wording which it desired in the release. USAA never responded to this request.

Five months later the plaintiff filed suit seeking an injunction restraining USAA from withholding its consent for the plaintiff to receive the \$20,000 from Rockwood. The trial court granted the injunction. The Alabama Supreme Court affirmed saying:

"There is nothing in the record before us to show that USAA had a reasonable basis for withholding such consent . . . . We refuse to hold that the trial court abused its legal or judicial discretion granting the injunction and we affirm."

519 So.2d at 508.

The Alabama Supreme Court did not give any guidance for determining when an underinsured carrier could "reasonably" withhold its consent. Some would argue that the underinsured carrier has a duty to determine the assets of the tortfeasor and make a determination as to whether there is a reasonable chance for the underinsured carrier to collect any judgment it might obtain against the tortfeasor. This could be determined by running a retail credit check on the tortfeasor and taking the tortfeasor's deposition and questioning him concerning his assets.

Suppose the underinsured carrier's investigation reveals that there are no assets. Does that mean that the underinsured carrier is guilty of bad faith if it refuses the plaintiff permission to settle

with the liability carrier? Such a conclusion would seem harsh. Insurance companies have had a long practice of obtaining judgments against tortfeasors who presently have no appreciable assets. Because an individual has no assets today does not mean that he will have no assets five years from now. Every attorney who has done any subrogation work for an insurance company has had the experience of having an old recorded judgment paid by someone who wanted to purchase a house or otherwise restore his credit rating.

The question of the extent to which a right of subrogation exists in the underinsured setting and the circumstances under which an underinsured carrier may lawfully refuse its insured permission to settle with the liability carrier are

questions of paramount importance which are begging for resolution. The Alabama appellate courts have yet to address the question of the extent to which a right of subrogation exists and under what circumstances an underinsured carrier may lawfully refuse permission to settle.

### Bad faith

The question of bad faith has not been addressed in the underinsured setting. That issue was collaterally raised in *Allen, supra*, but the court said that it was hesitant to address that issue on "the meager facts before us." 519 So.2d at 508.

The question of bad faith has been raised in the uninsured setting. In *Quick v. State Farm Mut. Auto. Ins. Co.*, 429 So.2d 1033 (Ala. 1983), the Quicks noti-

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fied State Farm of their uninsured motorist claim. State Farm acknowledged that the Quicks were entitled to some payment and said that the only matter to be resolved was the amount. The Quicks sued State Farm, alleging that State Farm was guilty of bad faith by refusing to settle. The Alabama Supreme Court recognized that "there is an inherent difference in uninsured motorist coverage and first party insurance." 429 So.2d at 1035. The court, citing *State Farm Mutual Auto. Ins. Co. v. Griffin*, 51 Ala.App. 426, 286 So.2d 302 (1976), pointed out that:

"[i]n a direct action by the insured against the insurer, the insured has the

burden of proving in this regard that the other motorist was uninsured, legally liable for damage to the insured, and the amount of this liability."

429 So.2d at 1025. The court went on to hold that "there can be no breach of an uninsured motorist contract and therefore no bad faith, until the insured proves that he is legally entitled to recover." *Id* at 1035.

The court reaffirmed *Quick* in the very recent case of *Aetna Casualty and Surety, Inc. v. Beggs*, 22 ABR 1112 (April 12, 1988). In *Beggs*, the plaintiff's husband was killed in an accident with an unin-

sured motorist. At the time of the accident, the plaintiff had an automobile policy with Aetna which covered two vehicles, one being the vehicle in which the plaintiff's husband was riding at the time of the accident. There was a total of \$20,000 in uninsured motorist coverage. Approximately two months after the accident Aetna offered \$10,000 as total payment for the uninsured motorist claim. The plaintiff demanded \$20,000 and Aetna responded with an offer of \$15,000. Approximately seven months after the accident the plaintiff sued Aetna for bad faith. Two months after suit was filed Aetna decided to pay its limits of \$20,000. The trial resulted in a jury verdict against Aetna for bad faith in the amount of \$100,000. The Alabama Supreme Court reversed the case on appeal, citing *Quick*. The court noted that in the present case there was no offer of proof by the plaintiff of the amount of Aetna's liability under the uninsured motorist provision until the trial of the case. Justice Houston, in writing for the court, noted as follows:

"[i]t is doubtful that an insured could ever prove the amount of an insurer's liability under an uninsured motorist case with the specificity necessary to recover against an insurer for bad faith in failing to negotiate or pay a wrongful death claim under uninsured motorist coverage."

22 ABR at 1116.

The court seemed to leave open the question of whether there could ever be bad faith for failure to pay an uninsured claim not based on the wrongful death statute. Presumably the court will apply the same criteria to bad faith allegations in the *underinsured* setting as it has applied in the *uninsured* setting.

### Conclusion

Although underinsured motorist coverage is beginning to take shape, there remain many issues concerning its application. Insurance companies, plaintiffs' attorneys and defense attorneys will continue to agonize and joust over these issues for the next couple of years until the Alabama Supreme Court can resolve the questions involving subrogation, settlement and trial of this new area of insurance coverage. ■



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# Young Lawyers' Section



**N. Gunter Guy**  
YLS President

**A**t the Alabama State Bar annual meeting in Birmingham, Alabama, July 21-23, the Young Lawyers' Section convened its annual business meeting. The following young lawyers were elected for the coming year:

**President-elect:** James H. Anderson, Montgomery  
**Secretary:** W. Percy Badham, III, Birmingham  
**Treasurer:** Keith B. Norman, Montgomery

Charles R. Mixon, Jr., of Mobile assumes the position of immediate past president and serves in that capacity as an officer of the YLS.

The YLS once again sponsored the annual seminar, "Update '88, Recent Developments in the Law." Everyone in attendance seemed to enjoy the various topics presented, which is a credit to the outstanding speakers we recruited. My compliments go to Steve Rowe, YLS CLE chairman, and Keith Norman of the state bar for putting together this presentation.

Another note of appreciation goes to Steve Shaw and the other members of the Birmingham Young Lawyers' Section for their part in arranging and hosting the party at the Birmingham Botanical Gardens. It provided everyone with an enjoyable evening away from the serious business of committee meetings and seminars.

Everyone in our section, as well as in the senior bar, has a great challenge in making the annual bar meeting in Huntsville next year as big a success.

In connection with a long-standing tradition of Alabama State Bar presidents, Gary Huckaby has been most

gracious in allowing young lawyers to serve on his important state bar committees and having input in the future of our bar. We are indebted to Gary for allowing us these selections and giving young lawyers across the state the opportunity to become involved. I have great confidence that those appointed will take their selection to heart and serve their committees well and with great accomplishment. The following appointments were made for the coming bar year:

Laura Crum, Committee on Access to Legal Services;  
 Joanna Ellis, Task Force on Alabama Rules of Evidence;  
 James H. Anderson, Task Force on Alternative Methods of Dispute Resolution;  
 Sid Jackson, Task Force to Consider Possible Restructuring of Alabama's Appellate Courts;  
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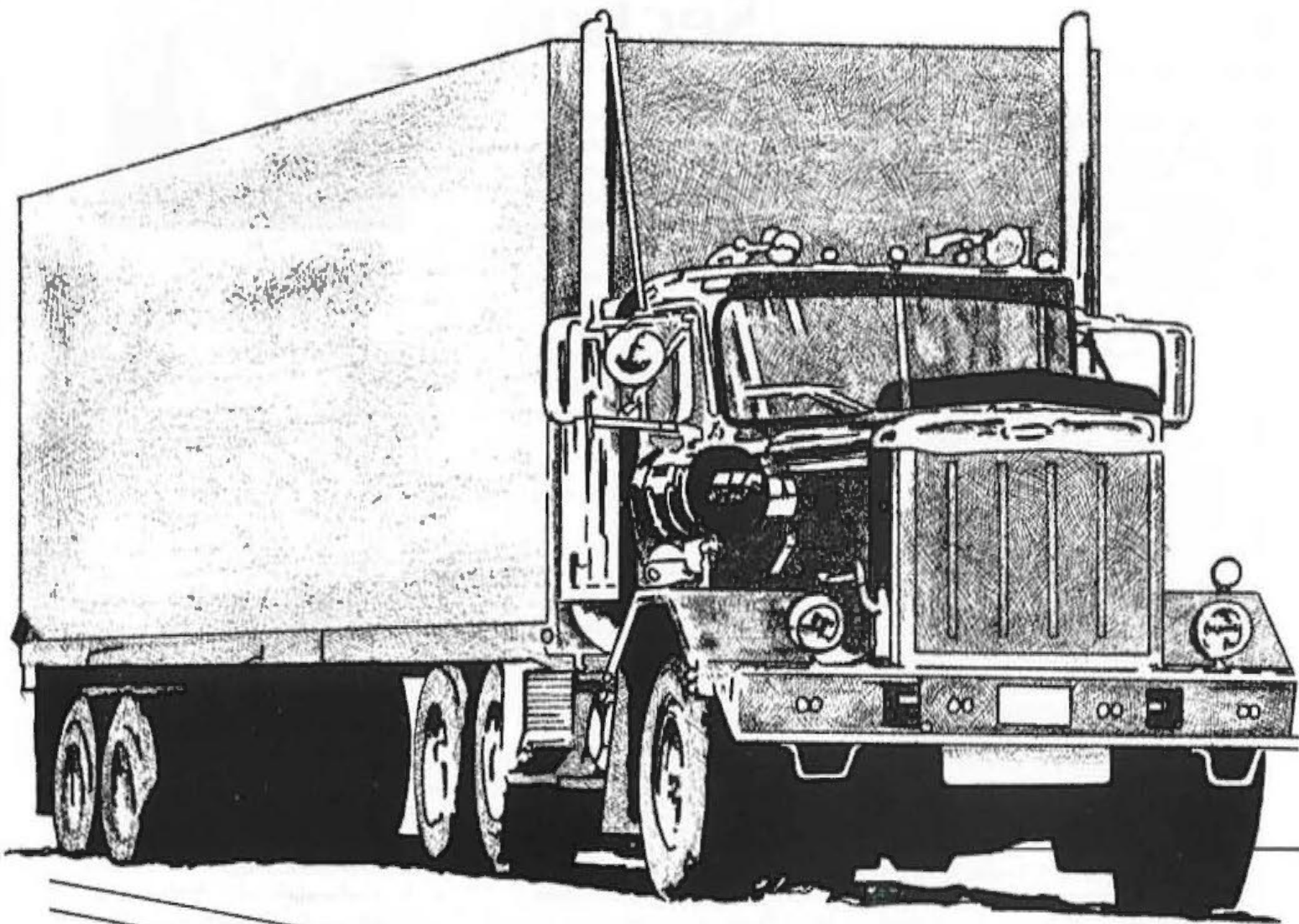
I am sure all of these well-qualified young lawyers will be happy to assist you if you have any questions concerning these various committees. ■



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# Trucking Regulation and Exempt

by Stanley W. Foy



In many instances, trucking companies and their intrastate activities in Alabama are regulated by the Alabama Public Service Commission. This article discusses the circumstances under which they are regulated. Trucking companies operating dump vehicles are highlighted, but other

operations also are addressed. The views and opinions expressed herein are those only of the writer, and do not necessarily accurately reflect the official position of the Alabama Public Service Commission.

A discussion of Alabama law in this

area requires a consideration of the decisions of the federal courts and the Interstate Commerce Commission. The Alabama Motor Carrier Act of 1939, Title 37, Chapter 3, *Code of Alabama*, 1975, is modeled after the Federal Motor Carrier Act of 1935. Therefore, the federal



# Exemptions from Regulation in Alabama

decisions are considered highly persuasive in Alabama in the absence of a decision by a state court. *Avery Freight Lines v. Alabama Public Service Commission*, 267 Ala. 646, 104 So.2d 705, 709 (1958); *Alabama Public Service Commission v. A.O.K. Motor Lines, Inc.*, 287 Ala. 182, 249 So.2d 838, 842 (1970). Federal statutory and administrative changes starting in the late 1970s, however, removed much of the similarity.

## Regulated activity

Common and contract carriers by motor vehicle are regulated by the Commission. Such carriers are persons who transport property<sup>1</sup> by motor vehicle for compensation, whether directly or by lease or any other arrangement. Section 37-3-2 (6) and (7), *Code*. Direct compensation is received, for example, when someone transports crushed stone from Guntersville to Cullman and is paid for providing that transportation. Regulated transportation also results when a person leases a vehicle with a driver to a construction company<sup>2</sup> and is paid by the ton for the materials hauled from Guntersville to Oneonta. Motor Carrier Rule 2(C); *United States v. Drum*, 368 U.S. 370 (1962).

Regulated transportation also results when a person buys materials at Guntersville, hauls the materials to Huntsville and sells them, and the real service provided is transportation. Motor Carrier Rule 2(B); *Red Ball Motor Freight v. Shannon*, 377 U.S. 311 (1964). Such a "buy-sell" operation is distinguished from exempt operations under 37-2-4(a)(1)c, *Code*, by the use of the "primary business" test in *Woitishek—Common Carrier Application*, 42 M.C.C. 193 (1943).

Under Section 37-3-4(a)(1)c, *Code*, the commission does not have jurisdiction over:

"Motor vehicles while used in the transportation of property when the owner of the vehicle is legally and regularly engaged in the business of selling such property and is the owner and has legal title to the motor vehicle involved . . . ."

This exemption covers someone who owns a gravel pit and delivers the materials he produces and covers the delivery even if a fee or charge is assessed for delivery or transportation. It also covers the owner of the gravel pit when his plant is down and he fulfills his contracts by purchasing gravel from a competitor. It would not cover the owner of a gravel pit who, in a slack period, hauled for compensation for a competitor. This hauling for a competitor is within the literal language of the exemption, but does not qualify under the primary business test. This test is:

"If the facts establish that the primary business of an operator is the supplying of transportation for compensation, then the carrier's status is established though the operator may be the owner, at the time, of the goods transported and may be transporting them for the purpose of sale . . . . If, on the other hand, the primary business of an operator is found to be manufacturing or some other non-carrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed. In our opinion, they cannot be both." *Red Ball Motor Freight v. Shannon*, 377 U.S. at 315.

The exemption in 37-3-4(a)(1)c, *Code*, is not the same as the definition of a "Private Carrier" recited at 42 M.C.C. 199. Nevertheless, other "private carriers" would not come within the definitions of common and contract carriers.<sup>3</sup> Therefore, the "primary business" test provides the appropriate standard to distinguish

exempt delivery by a producer from transportation for indirect compensation by a carrier.

## Exemptions

Once transportation of property by motor vehicle for compensation is established, the exemptions in Section 37-3-4 must be considered. Operations covered by the exemptions are not under the jurisdiction of the Commission, except to the extent enumerated in specific provisions. The exemption in Section 37-3-4(a)(1)c, *Code*, for delivery by producers and merchants is discussed above.

An exemption is also provided in Section 37-3-4(a)(1)b for:

"Motor vehicles for hire while operating wholly within the limits of a city or incorporated town or within the police jurisdiction thereof, or between two or more incorporated towns or cities whose city limits join or are contiguous or whose police jurisdictions join or are contiguous."

Police jurisdictions extend for three miles from cities having 6,000 or more inhabitants and for a mile and a half from cities having less than 6,000 inhabitants. Section 11-40-10, *Code*. The regional planning commissions have maps with the police jurisdictions shown, and the edge of police jurisdictions usually are marked by signs.

This exemption covers delivery to a destination municipality only if the police jurisdiction of the destination municipality touches the police jurisdiction of the origin municipality. To illus-

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*Stanley W. Foy received his undergraduate degree from the University of Florida and law degree from Cumberland School of Law. He is an administrative law judge on the staff of the Alabama Public Service Commission.*

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trate, assume the police jurisdiction of Guntersville touches the police jurisdiction of Albertville, which in turn touches the police jurisdiction of Boaz, but the Boaz and Guntersville police jurisdictions do not touch each other. In this situation, hauling from Guntersville to Albertville would be exempt. Hauling from Guntersville to Boaz, however, would not be exempt because their police jurisdictions do not touch each other. *Distribution Service, Inc.*, Informal Docket C-4459, October 19, 1981.

A more difficult question arises where the police jurisdictions touch, but the shortest highway route goes outside the police jurisdiction of either city involved. To illustrate, assume that the police jurisdictions of Guntersville and Arab touch, but Alabama Highway 69, the shortest route between the cities, lies in part outside of either police jurisdiction. The exemption for municipalities is analogous to the Interstate Commerce Commission's commercial zone, and the same interpretation should be used, if possible. The ICC has held that cities are

contiguous when they have a common border and there is direct communication between them by motor vehicle. *Commercial Zones and Terminal Areas—Detroit*, 96 M.C.C. 709, 713-714 (1965). Under this test, the exemption would not cover service between Guntersville and Arab since the direct route leaves the police jurisdiction. Nevertheless, the language in the Alabama statute is clear and without latent ambiguity. The Legislature has not provided jurisdiction where the police jurisdictions touch and that would be the case in this illustration. The service would be exempt.

The next exemption is in the middle of Section 37-3-4(a)(1)c, and is for:

"... motor vehicles hauling road materials and paid by the state of Alabama, or paid by any county or other political subdivision thereof, or paid by any contractor performing work for the state of Alabama, or any county or other political subdivision thereof, for a distance not exceeding fifty miles; ..."

This language clearly does not cover roads being built by the federal government or a federal instrumentality such as TVA. Of course, the U.S. highways and the interstate highways are funded mostly by the federal government, but are built by the State Highway Department.

This exemption is for road materials or materials to be used in building the roads. It does not cover ingredients of road materials and, thus, would not cover the raw materials used to make steel or concrete girders for bridges. Also, it would not cover the raw material hauled to a concrete or asphalt plant that is supplying their product for road construction. There is a qualification, however.

Hauling sand, gravel, bags of cement and bags of mortar mix to a road construction site would be exempt where these materials will be mixed on-site and used on-site. It makes no difference whether the materials are mixed by hand or a machine. Likewise, if a portable asphalt plant is set up on a road construction site and produces plant-mixed asphalt solely for the road construction project, hauling the materials or ingredients would be exempt.

Section 37-3-4(a)(1)c also contains exempt commodities. The two broadest categories are forest products (logs, lumber, poles and pulpwood), and farm pro-

duce (peanuts, potatoes or any other agricultural commodity of any kind, but not manufactured products thereof). Fertilizer is exempt and has been defined as any material applied to the soil to aid in the growth of plants.<sup>4</sup> Finally, exemptions are provided for livestock, coal and coke. There are other miscellaneous exemptions provided in Section 37-3-4, such as for United States mail and newspapers and magazines.

## Regulation

If the trucking activity is regulated, such activity is prohibited without a certificate or permit from the commission. Section 37-3-10(a) and Section 37-3-13, Code. A common carrier is one who serves the general public or anyone calling and requesting his service. For a common carrier to obtain a certificate, it must submit a written application and show, at an oral hearing, that it is properly qualified to conduct the operations and that the proposed service is required by the public convenience and necessity.<sup>5</sup> Proof of public convenience and necessity requires a showing that there is a need for the service that is not being met by existing carriers or that the proposed service somehow will be superior to existing services.<sup>6</sup> Carriers that have certificates are notified of new applications and have the right to protest them.<sup>7</sup>

Public convenience and necessity is usually established by testimony and other evidence from potential users of the proposed service.<sup>8</sup> This evidence must show some reason why the existing services will not meet the needs of the potential users. It is not enough to show an abstract desire for more competition,<sup>9</sup> occasional or isolated problems with existing service,<sup>10</sup> or that additional service on occasion would be beneficial for the potential users.<sup>11</sup>

Someone wishing to serve only one or a few firms under a special, or individual, written contract may apply for a permit as a contract carrier. A contract carrier also must come to a hearing and establish his qualifications and also must establish that the proposed service will be consistent with the public interest.<sup>12</sup> To a large degree, the public interest is decided by determining whether the proposed service would merely duplicate the service of common carriers or harm their service to the general public.<sup>13</sup>

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If a truck line is successful and is granted a certificate or permit, then it must comply with the Commission's regulations. All firms must maintain proof of insurance coverage on the required forms on file with the Commission.<sup>14</sup> Common carriers also have to maintain proof of cargo insurance coverage.<sup>15</sup> Common carriers, except for those who operate dump vehicles exclusively, must submit tariffs and charge only their tariff rates.<sup>16</sup> Contract carriers must submit schedules of minimum rates or, in some cases, contracts.<sup>17</sup> All carriers must submit annual reports<sup>18</sup> and are required to keep certain records. The records include those on qualifications of drivers,<sup>19</sup> maintenance and safety inspections of vehicles<sup>20</sup> and hours of service of drivers.<sup>21</sup> Other requirements are included in the Commission's Motor Carrier Rules.

Trucks operated by the regulated carriers are readily identifiable because they will have the required "lettering" on the sides. This includes the carrier's name and the city where its principal place of business is located. Motor Carrier Rule 3.22(a). In addition, carriers authorized

to conduct intrastate Alabama operations will have the letters "APSC" preceding a number.<sup>22</sup> Motor Carrier Rule 3.22(a) and (c).

### Conclusion

Private vehicles and other vehicles that are not "for hire" are not regulated by the Alabama Public Service Commission.<sup>23</sup>

Also, some "for hire" vehicles are within exemptions from the Commission's jurisdiction. A non-exempt trucking firm, however, is intensively regulated in its intrastate activities in Alabama. Therefore, it is important to identify non-exempt trucking activities and take appropriate steps. ■

### FOOTNOTES

<sup>1</sup> With certain exceptions, passenger carriers are also regulated.

<sup>2</sup> Leasing of vehicles to certificated common carriers and permitted contract carriers is governed by Motor Carrier Rule 12; See also *Cape Air Freight v. United States*, 586 F.2d 170 (10th Cir., 1978) concerning "Farming Out" problems.

<sup>3</sup> Section 37-3-2(6) and (7), Code.

<sup>4</sup> *State v. Flowerwood Nursery, Inc.*, 256 Ala. 426, 55 So.2d 130 (1951).

<sup>5</sup> Section 37-3-11, Code.

<sup>6</sup> *Purolator Courier Corporation v. Alabama Public Service Commission*, 514 So.2d 832, 835 (Ala. 1987).

<sup>7</sup> Section 37-3-10(b), Code.

<sup>8</sup> The use of an expert witness was approved in *Alabama Public Service Commission v. Wells Fargo Armored Services Corporation*, 495 So.2d 42 (Ala. 1986).

<sup>9</sup> *Purolator Courier*, *supra*, 514 So.2d at 835.

<sup>10</sup> *Alabama Public Service Commission v. Lane Trucking, Inc.*, 395 So.2d 14 (Ala. 1981).

<sup>11</sup> *Service Express, Inc. v. Baggett Transportation Company*, 281 Ala. 666, 207 So.2d 418, 421 (1968).

<sup>12</sup> Section 37-3-13(b), Code.

<sup>13</sup> *Ross Neely Express, Inc. v. Hornaday Truck Lines, Inc.*, 387 So.2d 782, 785 (1980).

<sup>14</sup> Section 37-3-18(a), Code; Motor Carrier Rule 4.

<sup>15</sup> *Ibid.* 16. Section 37-3-20 and Section 37-3-4(c), Code.

<sup>16</sup> Section 37-3-21, Code.

<sup>17</sup> Section 37-3-22, Code.

<sup>18</sup> Motor Carrier Rule 17.121-17.141.

<sup>19</sup> Motor Carrier Rule 17.62.

<sup>20</sup> Motor Carrier Rule 17.51, et. seq.

<sup>21</sup> Trucks operated by carriers authorized by the Interstate Commerce Commission to conduct interstate operations will display a number issued by the ICC. 49 C.F.R. 1058.2

<sup>22</sup> The Department of Public Safety enforces federal safety regulations on large commercial vehicles. Department of Public Safety Rule 760-X-16, *Alabama Administrative Code*. Other departments of the state have regulations that apply to specific activities of vehicles.

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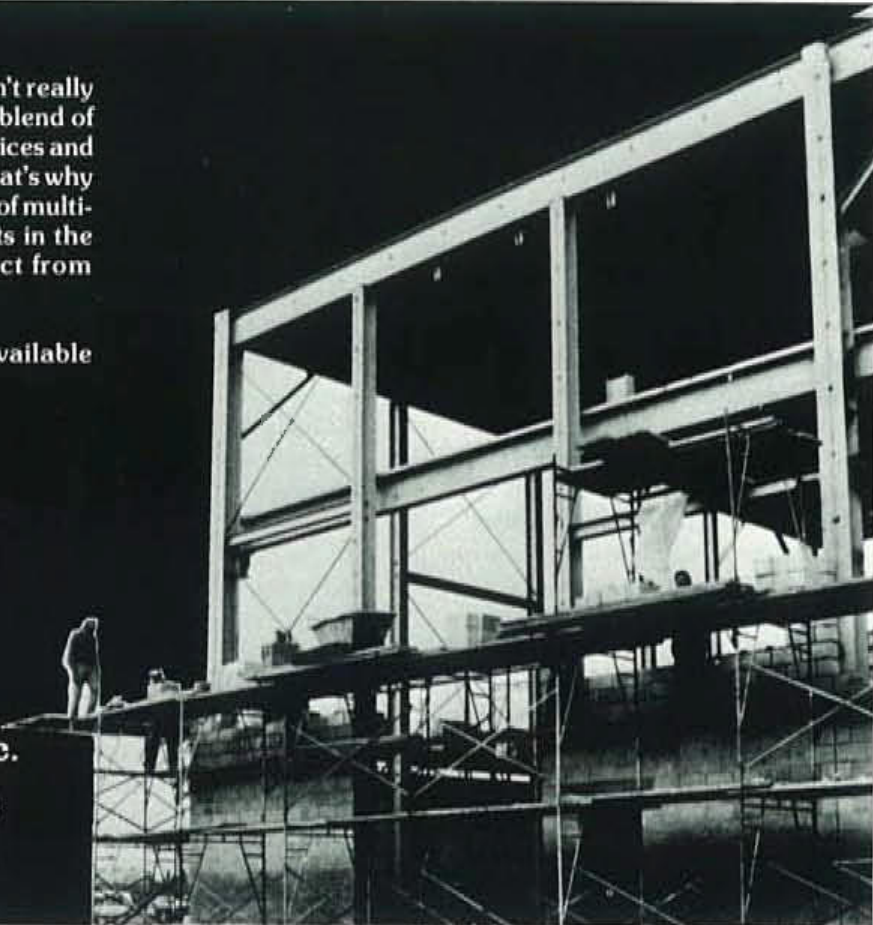
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# Committees and Task Forces of the Alabama State Bar 1988-89

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Alabama State Bar President Gary C. Huckaby has designated 30 committees and 12 task forces, a number of which are new, for 1988-89. President Huckaby's appointments to the committees and task forces for 1988-89 are:

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# Legislative Wrap-up

by Robert L. McCurley, Jr.

The Alabama Law Institute re-elected the following officers and executive committee at its annual meeting: President, Oakley Melton, Montgomery; Vice president, Jim Campbell, Anniston; Secretary, Bob McCurley; and executive committee, George Maynard, Birmingham; Rick Manley, Demopolis; Yetta Samford, Opelika; Ryan DeGrafenried, Tuscaloosa; and C.C. Torbert, Jr., Montgomery.

The Institute was created by statute as a legislative agency in 1967 and began operations in October 1969. The key purpose of the Institute is stated succinctly in *Ala. Code* § 29-8-4 as follows: "to promote and encourage the clarification and simplification of the law of Alabama to secure the better administration of justice and to carry on scholarly legal research and scientific legal work."

The Legislature chose to establish an institute comprised of a small staff but one which would draw from the legal expertise of the law schools and the volunteer assistance of practicing lawyers and judges. This legislative agency, although located in the state-supported law school, would be responsive to the Legislature rather than to the state university, as it is in many other states. The Legislature delegated the governance of the Institute to a council comprised of representatives from each branch of government, law schools and elected practicing attorneys. There is a broad base of support and legal expertise represented in its membership of 150 lawyers and judges who serve for six-year terms. In the two decades that have followed, the Legislature has enacted the following major code revisions drafted by the Institute:

1. Redemption of Real Property
2. Uniform Guardianship and Protective Proceedings Act
3. Deed In Lieu of Foreclosure
4. Trade Secrets
5. Uniform Transfer to Minors
6. Uniform Endorsement of Foreign Judgments Act
7. Eminent Domain Code
8. Nonprofit Corporation Act
9. Revised Limited Partnership Act
10. Professional Corporation Act
11. Probate Code
12. Administrative Procedure Act
13. Revised Article 9, Uniform Commercial Code

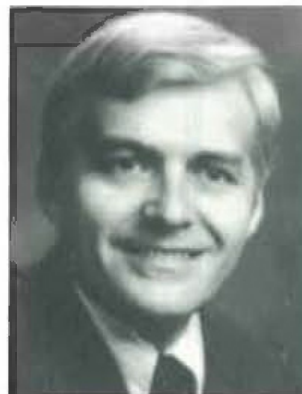
14. Business Corporation Act
15. Banking Code
16. Rules of the Road
17. Criminal Code

Presently under consideration by Institute committees are the following revisions: adoptions, probate procedure, securities, condominium law, fraudulent transfers, trust powers, criminal procedure and evidence.

During a legislative session the Institute provides the Senate and House Judiciary committees with legal assistance to review pending legislation.

The Alabama Law Institute generally studies major areas of law for a comprehensive revision of a subject and leaves to the Legislative Reference Service the other thousands of bills that are reviewed annually dealing with budgeting concerns, local legislation, etc.

Before adopting a subject for review the Institute must: (1) determine the matter to be of sufficient legal importance; (2) secure a legal scholar who is available to undertake the chief drafting responsibility; and (3) select a committee of experts to review the drafts. The Institute is hesitant to allow itself to become involved in decisive policy issues that, although may need legal expertise, often are caught up in emotional fervor. Furthermore, the Institute, which operates with volunteers, is not constructed to handle "instant" issues but refers them to the Legislative Reference Service which employs a full-time legal staff. ■



*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.*





# Recent Decisions

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

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

### Civil procedure . . .

#### rule 32(a)(3) does not provide for discovery depositions

*Ex Parte: Coots, etc. (In Re: Coots v. Coots, 22 ABR 2378 (June 17, 1988))*—In this medical malpractice action, plaintiff alleged that defendant negligently treated Sheila Coots. During discovery, defendants noticed the deposition of one of the plaintiffs' expert medical witnesses. Just prior to the deposition, the defendants announced that this was a *discovery* deposition. Plaintiffs' attorney disagreed, and over defendants' objection, the deposition was taken and the plaintiffs' attorney elicited substantive evidence to be used at trial. Defendants' attorney maintained that he was denied the opportunity to discover the witness's qualifications and opinions; that he was denied information needed to cross-examine the doctor; and, that plaintiffs' attorney had failed to notify him in advance that he intended to take a trial deposition. The court granted defendants' motion to prohibit the plaintiffs' use of the deposition at trial. Plaintiffs appealed.

In a case of first impression in Alabama, the supreme court held that Rule 32(a)(3), A.R.Civ.P. does not provide for discovery depositions, and that if the party offering the deposition for use at trial can meet one of the conditions enumerated in the rule, the deposition is freely admissible and may be used by any party for any purpose. The supreme court also stated that Rule 26(b), A.R.Civ.P., entitled a party to use interrogatories to identify expert witnesses and their opinions to adequately prepare for cross-examination. The court also stated that there is no rule requiring an opposing party to provide the party who noticed the deposition of the scope of his examination at deposition.

### Civil procedure . . .

#### trial court has discretion to consider new legal arguments in post-judgment motions

*Green Tree Acceptance, Inc. v. Blalock, 22 ABR 1991 (April 29, 1988)*—Blalock, an Alabama resident, entered into a contract in Alabama to purchase a mobile home from Furr Mobile Home Sales, Inc., a foreign corporation, not qualified to do business in Alabama. The home needed extensive repairs, and Furr also agreed to do the repair work. Green Tree, the financing company, qualified in Alabama, purchased the agreement. Furr delivered the house to Blalock and started repairs. Blalock began making payments. Furr ceased repairs, and



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Blalock stopped making payments. Green Tree sued to recover the mobile home. Blalock filed a motion for summary judgment arguing that Furr was not qualified to do business in Alabama, and, therefore, could not sue because of §10-2A-247(a), *Ala. Code* 1975, and that Green Tree, its assignee, was subject to the same defense. Green Tree filed a motion for summary judgment and argued that it was a holder in due course and not subject to that defense. The trial court granted Blalock's motion and denied Green Tree's motion. Green Tree filed a post-judgment motion for reconsideration and rehearing and argued for the first time that Furr was engaged in *interstate*, rather than *intrastate*, commerce, and therefore exempt from the qualification statute. Green Tree's motion was denied.

In a case of first impression in Alabama, the supreme court was asked to determine whether a new legal argument in a post-judgment motion is timely. The court concluded that a trial court has discretion to consider a new legal argument in a post-judgment motion, but it is not required to do so. The supreme court will reverse only if the trial court abuses that discretion. Green Tree offered no reason for its failure to raise the argument prior to the post-judgment motion. The supreme court also stated that the evidence indicated that the Furr contract was intrastate commerce and Green Tree's complaint was premised on the existence of the contract, and, therefore, §10-2A-247(a) precluded recovery.

### Contracts . . .

#### **doctrine of anticipatory breach applicable in unilateral or installment contracts**

*Rosenfeld v. City Paper*, 22 ABR 2107 (May 13, 1988)—Rosenfeld signed a promissory note which provided for five annual installments. He failed to make the first two installments, and the trial court granted City Paper Company a judgment in the full amount of the note, plus interest and attorney's fees. The note did not contain an acceleration clause. City Paper asked the supreme court to apply the doctrine of anticipatory breach as an exception to the general rule of non-acceleration when there is no acceleration clause. The court refused City Paper Company's request because the

contract was a unilateral contract involving the payment of money.

The supreme court noted that the majority of jurisdictions have not applied the "anticipatory breach doctrine" to unilateral or installment payment contracts for payment of money. The rationale is that in a bilateral contract "anticipatory breach" has a field of operation because the non-defaulting party remains liable for certain obligations notwithstanding the other party's breach. To require the non-defaulting party to continue the discharge of his contractual obligations when there is an unequivocal repudiation of the contract by the defaulting party is senseless. However, in a unilateral contract, once the promisee has completed his part of the contract and the promisor's obligation is confined to payment by installments, the doctrine of anticipatory breach has no field of operation and a court will not intercede to rescue the promisee in the absence of an acceleration clause.

### Torts . . .

#### **visitor does not attain invitee status merely by being an economic benefit to landowner**

*Raney v. Downs Ins. Agency*, 22 ABR 2040 (June 5, 1988)—The plaintiffs, a minor and her mother, sued defendants for an injury to Raney which occurred when she ingested some lye which she found on the bottom shelf of defendants' bathroom cabinet. Plaintiff found the open container of lye and mistook it for sugar. Defendants had hired the mother to clean their offices on weekends while the office was closed, and plaintiff often accompanied her mother and occasionally would help. Defendants did not know Raney went with her mother when she cleaned their offices. Plaintiffs sued on theories of negligence, wantonness and dangerous instrumentality.

Summary judgment was entered in favor of defendants, and plaintiffs appealed.

The supreme court was asked to determine whether plaintiff was an "invitee" by being on the premises helping her mother who was doing work for the landowner or occupier. The court held that she was not an invitee because the defendants did not know that she was in

their offices. The court acknowledged that Alabama applies the "economic interest" test in determining whether an injured plaintiff is an invitee and recognizes that the defendants may have received some economic benefit from her help.

However, the court noted that the nature of the invitee's status is also based upon knowledge, either actual or constructive, on the part of the occupier of the premises that the visitor is on the premises. Because Raney is the licensee or trespasser, defendants only owe the duty not to wantonly or intentionally injure her. The court found no evidence of wantonness because defendants did not know plaintiff was in their offices.

The court also concluded that defendants were not liable under the dangerous instrumentality doctrine because plaintiff did not enter the premises in response to her attraction to the lye, and defendants could not reasonably foresee that a small child would get into their bathroom when their offices were closed and locked.

### Torts . . .

#### **E.I. du Pont de Nemours and Company doctrine rejected**

*McFadden v. Ten-T Corp.*, 22 ABR 2231 (May 27, 1988)—The question before the court was whether to follow the 30-year-old rule announced in *E.I. du Pont de Nemours and Company v. Kissinger*, 259 F2d 411 (5th Cir. 1958) That case construed Alabama law, and the federal court held that under Alabama law a contractor is insulated from liability to third persons if the owner has accepted the contractors' completed construction prior to the plaintiff's accident. The supreme court declined to follow *duPont* and agreed with the reasoning of appellate courts in Illinois and New Jersey.

The Illinois court stated that a contractor is justified in relying upon plans and specifications unless they are so apparently defective or obviously dangerous that no competent contractor would follow them. Therefore, Alabama follows the majority of jurisdictions which have adopted the rules extending liability to the contractors following acceptance of their work by the owner when a third party is injured by the contractor's negligence.



U.C.C. . . .

**section 7-9-310(1) construed**

*Beverly Bank of Chicago v. Little*, 22 ABR 2188 (May 20, 1988)—In 1983, Beverly Bank loaned Little money and took a security interest in Little's airplane. In 1984, Little leased his airplane to Condor and the lease required Condor to maintain and repair the airplane for which Condor would be reimbursed at a set rate. Condor subcontracted the repair work to a third party. Eventually, Little defaulted on the loan, and Beverly Bank instituted seizure procedures. After a hearing, the court found that Condor had a mechanic's lien on the airplane and dissolved the writ of seizure. Beverly Bank appealed, contending that Condor only had a common law possessory mechanic's lien for work that Condor's own maintenance personnel actually performed and not for subcontracted work.

The supreme court recognized that §7-9-310(1), *Ala. Code* 1975, affords a common law possessory lien which has priority over a prior perfected security interest. In a case of initial impression in Alabama, the court also held that in instances where one is required to maintain a vehicle, pursuant to a pre-existing lease agreement, a common law possessory lien extends to work subcontracted to others in furtherance of that repair obligation.

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

**Enhanced punishment subsequent to  
successful appeal**

*Smith v. State*, 22 ABR 1807 (April 8, 1988)—The Alabama Supreme Court granted Smith's petition for cert in order to review the court of criminal appeals' judgment affirming a sentence which enhanced Smith's sentence for burglary from 30 years to life imprisonment. Justice Jones, writing for a six-to-three majority, reversed and remanded as to the enhanced sentence for burglary.

Justice Jones stated, "It is clear that the trial judge increased the petitioner's sentence because of his subjective observations and not because of any objective evidence of events subsequent to the petitioner's first conviction. We adopt the language from *Rice v. Simpson*, 274 F.Supp. 116 (M.D.Ala. 1967), affirmed, 396 F.2d 499 (5th Cir. 1968), as the applicable rule in Alabama: 'There can be no increase in a sentence in a criminal case after the sentence is imposed . . . To deny such protection to convicted criminals who elect to exercise their post-conviction remedies and do so successfully is unfair discrimination and does nothing except to serve to limit the use of post-conviction proceedings in the

Alabama State Courts by prisoners. It denies the prisoner the protection of his original sentence as a condition to the right of his appealing his conviction or exercising his post-convictions remedies.'"

**Any statement made to police re-  
quires disclosure under temporary  
rule 18.8**

*Motley v. State*, 22 ABR 1829 (April 8, 1988)—Motley was charged with killing Quinton McCaster. At trial, he asserted self-defense, claiming that he had to kill McCaster because McCaster had attacked him with a knife. A few months before the confrontation that resulted in McCaster's death, McCaster had stabbed Motley with a knife. Following the incident, Motley signed the following statement:

"Having been advised by Cpl. Hamner, an investigator(s) of the Montgomery Police Department, that evidence indicates that Quinton McCaster committed the offense noted on the original report, I do hereby advise officers of the Montgomery Police Department that I do not wish to pursue the prosecution of Quinton McCaster for this offense."

Prior to trial, Motley, through his attorney, made a discovery motion asking for any written statements that the defendant had made to the police and of which the district attorney was aware.

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The trial court granted the defendant's motion based on Rule 18.1, Alabama Rules of Criminal Procedure. The district attorney failed, however, to comply with the discovery order and did not provide Motley with the statement given subsequent to the first incident. At trial, the district attorney attempted to introduce the statement into evidence apparently for impeachment purposes. The defense objected unsuccessfully and the trial court permitted the petitioner's statement into evidence.

The supreme court reversed in a *per curiam opinion*. The court noted that Rule 18.1 explicitly mandates that such a statement be disclosed to the defendant upon his motion; because the statement was not disclosed, its admission was in violation of the rule and required reversal.

The supreme court rejected the state's argument that the district attorney was not required to disclose the statement because it was not made to the police in connection with the offense with which the accused was charged. The court rejected the argument stating, ". . . However, the rule does not require that the statements have been made to the police in connection with the offense charged. The district attorney was under a continuing duty to disclose the information requested by the petitioner, Rule 18.3, Alabama Rules of Criminal Procedure, and the statement in question should have been provided to the petitioner so that defense counsel could consider it in the preparation of his defense."

### **Promise to contact district attorney constitutes unlawful inducement to confess**

*State v. Weeks*, 22 ABR 1872 (April 15, 1988)—On February 28, 1985, investigators from the Baldwin County Sheriff's Department went to Weeks' home to execute a search warrant. During the course of the search, one of the officers uncovered a small amount of marijuana in a Smith & Wesson stainless steel .38 revolver. The serial number had been ground off the gun, and the detectives suspected that it had been stolen.

Detective Monley took Weeks to the front of his residence and read him his *Miranda* rights. Monley told Weeks that he was not under arrest but that he wanted to ask him some questions about

the gun. During the advisement of the rights, Monley told Weeks that, "[He] wanted his cooperation in this matter and that if he confessed to his part in the burglary, he [Monley] would make it known to the district attorney."

After the detective read the *Miranda* card and encouraged Weeks' cooperation, Weeks explained how he acquired the gun. He advised the officer that he had not stolen it but had purchased it from a friend. Weeks further admitted that he knew the serial number had been ground off when he bought the gun. After this discussion, the detective encouraged Weeks to make a written statement again promising him that he would contact the district attorney on his behalf if Weeks would provide such information.

The supreme court granted *cert* to determine whether the officer's promise to contact the district attorney negated the voluntariness of the inculpatory statement. The supreme court, speaking through Justice Almon, reversed. "Extra-judicial confessions are *prima facie* involuntary and inadmissible, and the burden is on the State to prove that the confession was made voluntarily."

The supreme court's decision turned on the fact that the arresting officer had offered to "give something favorable to him if he [Weeks] would help," just prior to eliciting the inculpatory statement. The court reasoned that where a suspect is subjected to custodial questioning regarding alleged criminal activity, such an express promise would necessarily engender a hope of favor in the suspect's mind. Because the statement was not voluntarily given, it should have been excluded from the consideration of the jury. Accordingly, the state failed to carry its burden to prove voluntariness.

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

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#### **No expectation of privacy in garbage can**

*California v. Greenwood*, Case No. 86-684, 56 US LW 4409 (May 16, 1988)—Do police need a search warrant before searching the garbage someone leaves at curbside for collection? The Supreme Court, in a six-to-two decision,

said no. Acting on information indicating that Greenwood might be engaged in narcotics trafficking, the Laguna Beach Police Department, on two occasions, examined Greenwood's garbage bags left on the curb in front of his house. A search of the trash bags contents indicated narcotic use. The police obtained warrants to search Greenwood's house and discovered controlled substances during the search. On motion to suppress, the state trial judge held that the warrantless search of Greenwood's trash violated the Fourth Amendment and the California Constitution. The California Appellate Courts affirmed.

On *cert*, the Supreme Court reversed and held that the Fourth Amendment did not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of a home. Justice White, writing for the majority, said people have no reasonable expectation of privacy in discarded trash. "It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops and other members of the public," he wrote. "The police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."

Justices Brennan and Marshall joined in a stinging dissent as follows:

"Scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior. I suspect, therefore, that members of our society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public.

" . . . A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health and personal hygiene [as well as] financial and professional status, political affiliations and inclination, private thoughts, personal relationships and romantic interests . . . ."

#### **Closely held corporation's compelled production of business records does not violate fifth amendment**

*Braswell v. United States*, No. 87-3, 56 US LW 4681 (June 22, 1988)—May the custodian of corporate records resist a subpoena for such records on the ground



that the act of production violates his Fifth Amendment right against self-incrimination? The Supreme Court, in a close five-to-four decision, said no.

In *United States v. Doe*, 465 U.S. 605 (1984), the Supreme Court agreed with a sole proprietor that the compelled production of business records would violate his Fifth Amendment privilege against self-incrimination. In *Doe*, the focus rested on the fact that the proprietor's act of producing the documents would involve testimonial self-incrimination.

Chief Justice Rehnquist, in distinguishing *Doe*, wrote for the Court that representatives of a collective entity act as agents. The official records of the corporation held by them in a representative capacity, rather than a personal capacity, cannot be the subject of their personal privilege against self-incrimination. The Chief Justice explained, "Because the custodian acts as a representative, the act is deemed one of the corporation and not the individual. Had petitioner conducted his business as a sole proprietorship . . . *Doe* would require that he be provided the opportunity to show that his

act of production would entail testimonial self-incrimination as to admissions that the records existed, were in his possession, and were authentic." Because he operated his business through corporate form, the petitioner was bound by the "collective entity rule."

#### ***Miranda* warnings adequate to protect sixth amendment rights of indicted defendant**

*Patterson v. Illinois*, No. 86-7059, 56 US LW 4733 (June 28, 1988)—Are *Miranda* warnings adequate to protect the rights of criminal defendants questioned by police after they are indicted or otherwise formally charged? The Supreme Court, in a five-to-four decision, said yes.

Police may initiate questioning of a criminal defendant who has been indicted but has not yet asked for a lawyer, even though his Sixth Amendment right to counsel has attached. Justice White, writing for the majority, ruled that an indicted defendant must invoke the right to counsel in order to cut off questioning. He reasoned that, "[P]reserving the integrity of an accused's choice to communicate with police only through coun-

sel is the essence of *Edwards* and its progeny—not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." Significantly, Justice White rejected the contention that an indicted defendant must be given more detailed advisements concerning the right to counsel than are contained in the traditional *Miranda* warnings, as follows:

"Whatever warnings suffice for *Miranda*'s purposes will also be sufficient in the context of post-indictment questioning."

Dissenting, Justice Blackmun contended that, "The Sixth Amendment does not allow the prosecution to take undue advantage of any gap between the commencement of the adversary process and the time at which counsel is appointed for a defendant." Also dissenting, Justice Stevens, joined by Justices Brennan and Marshall, argued that the formal commencement of adversarial proceedings should constitute a "firm and unequivocal line" beyond which the state cannot conduct private interviews with a defendant.

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## Doctrine of *Edwards v. Arizona* extends to reinterrogation concerning same or different offenses

*Arizona v. Roberson*, No. 87-354, 56 US LW 4590 (June 15, 1988)—May police question a suspect who already has invoked his right to a lawyer's help if the officers' questions focus on a separate crime and the officers did not know about the suspect's request? The Supreme Court, in a six-to-two decision, said no. The Justices refused to narrow criminal suspects' rights under the Court's landmark *Miranda* ruling and its decision in *Edwards v. Arizona*, 451 U.S. 477, 485-85.

*Edwards v. Arizona*, *supra*, held that a suspect who has expressed his desire to deal with police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication. The Supreme Court held that the "bright line" rule of *Edwards* applies to bar police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation.

"Whether a contemplated reinterrogation concerns the same or a different of-

fense, or whether the same or different law enforcement authorities are involved in the second investigation, the same need to determine whether the suspect has requested counsel exists," stated Justice Stevens. The Justice added, "The police department's failure to honor that request (for three days) cannot be justified by the lack of diligence of a particular officer."

## Confrontation clause means what it says

*Coy v. Iowa*, Case No. 86-6757, 56 US LW 4931 (June 29, 1988)—Does a one-way screening device used at trial to keep the criminal defendant from the view of child witnesses testifying against him violate the defendant's Sixth Amendment right to confront his accusers? The Supreme Court, in a six-to-two decision, said yes.

Coy was charged with sexually assaulting two 13-year-old girls. At the defendant's trial, the Court granted the state's motion, pursuant to a 1985 state statute intended to protect child victims of sexual abuse, to place a screen between the

defendant and the girls during their testimony, which blocked him from their sight, but allowed him to see them dimly and hear them. The trial court rejected the defendant's argument that this procedure violated the confrontation clause of the Sixth Amendment; the Iowa Supreme Court affirmed.

Justice Scalia, writing for the majority, reversed, stating that the confrontation clause guarantees the defendant a "face-to-face meeting" with witnesses appearing before the trier of fact, even if that meeting upsets the truthful rape victim or abused child. The Court reasoned that the "core guarantee" serves the general perception that confrontation is essential to fairness, and helps insure the integrity of the fact-finding process by making it more difficult for witnesses to lie.

In *Coy*, the defendant's right to face-to-face confrontation was violated since the screen enabled the complaining witnesses to avoid viewing the defendant as they gave their testimony. The Court rejected as meritless the state's assertion that its statute created a presumption of trauma to victims of sexual abuse that outweighs the defendant's right to confrontation. ■

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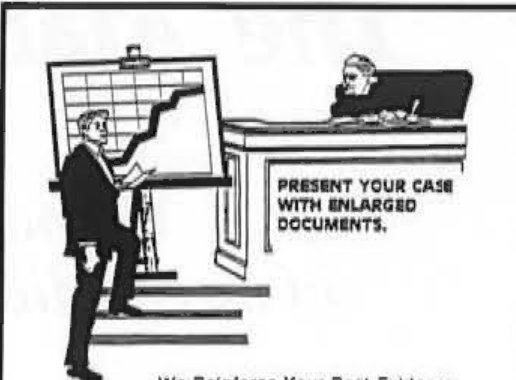
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by Keith B. Norman  
Director of Programs,  
Alabama State Bar

Smith, Jr., of Houston County succeed Wade H. Baxley whose term as a member of the MCLE Commission expired July 1, 1988;

(2) Recommended to the nominating committee of the board of bar commissioners and the president that Phillip E. Adams be reappointed as chairman of the MCLE Commission;

(3) Approved the reprinting of the MCLE Rules and Regulations for distribution to all members prior to the mailing of the 1988 CLE transcripts;

(4) Approved a mixed-audience seminar on head injuries for one CLE credit;

(5) Declined to approve an application for CLE accreditation based on the sponsor's failure to supply course materials for the Commission's review;

(6) Granted the MCLE director authority to approve a seminar on financial planning for up to a maximum of four CLE credit hours upon the director's receipt, review and approval of course materials;

(7) Declined to approve for credit a seminar on communication skills based on the fact that the seminar failed to meet the requirements for in-house seminars;

(8) Approved for six CLE credits a mixed-audience seminar on labor and

employment law that had been tabled from the last meeting pending receipt of evaluation summary;

(9) Approved for six CLE credits a mixed-audience seminar on construction law which had been tabled from the last meeting pending the receipt of the evaluation summary;

(10) Approved, retroactively, an application submitted by a sponsor for an antitrust seminar held in February 1988, and waived, on a one-time basis, the requirement that the sponsor submit an evaluation summary;

(11) On appeal by the sponsor upheld the director's decision denying accreditation to a mixed-audience seminar involving the elementary aspects of accounting which was not designed primarily for attorneys and taught by certified public accountants;

(12) On appeal by the sponsor upheld the director's decision denying accreditation to a seminar concerning the kinesic technique of witness interviewing and cross-examination on the grounds that the program was not designed primarily for attorneys and that the program and its materials failed to focus on substantive legal issues. ■

The Mandatory CLE Commission held its July 21, 1988, meeting during the state bar meeting at the Wynfrey Hotel in Birmingham. At this meeting the Commission:

(1) Recommended to the nominating committee of the board of bar commissioners and the president that Rufus R.

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—October 1, 1988—  
Delinquent After October 31, 1988

# Supreme Court of Alabama Office of the Clerk

## NOTICE

### **Briefs—number of copies, color of covers, etc.**

**Regular appeals**—an original and four copies (if additional copies are required after submission, your office will be notified). Rule 32, ARAP, provides for the following color of covers to be used on briefs, if available—appellant/blue, appellee/red, intervenor or amicus curiae/green, reply/gray. (The rules do not indicate a color for the cover of rehearing briefs, but white is suggested.) (Certificate of service should contain name, address, phone number and party represented for all served.)

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**Petition for writ of mandamus**—an original and nine copies of the petition and supporting brief. (Certificate of service should contain name, address, phone number and party represented for all served.)

**Petition for permission to appeal**—an original and nine copies of the petition and support-

ing brief. (Certificate of service should contain name, address, phone number and party represented for all served.)

### **Docket fees**

\$100—Regular appeal

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\$50—Petition for permission to appeal (If petition for permission to appeal is granted, an additional \$50 is due.)

### **Extension of time for filing briefs on appeal**

One seven-day extension of time, as provided by Rule 31(d), ARAP, may be granted for the appellant's brief, the appellee's brief and the appellant's reply brief. Request for extension will be granted over the telephone; however, the extension *must be confirmed* in writing to this office, stating the exact date your brief is due, and a copy of the confirmation letter sent to opposing counsel. For extensions, call Sharon McLain, Rebecca Norris, Diane Dennis or Louise Livingston.

### **Filing**

Papers shall be deemed filed on the day of mailing if certified, registered or express mail of the United States Postal Service is used. Rule 25(a), ARAP.

### **Notice to the trial clerk when appellee brief is filed**

Rule 31(a), ARAP, requires that the appellee give notice of the filing of appellee's brief to the clerk of the trial court. Compliance with this rule is necessary for the trial clerk to know when to forward the record on appeal to the appellate court.

### **Second copy of record on appeal or appendix**

Rule 30, ARAP, requires that the parties file either an appendix or a second copy of the record on appeal. This rule *must be* complied with before a case can be submitted to the court for a decision. *If you plan to use the second copy of the record on appeal, you should make arrangements with the clerk of the circuit court to photocopy the record for you before the original record on appeal is sent to this office.* ■



# Memorials

**Allwin Thomas Agee—Chickasaw**

Admitted: 1938

Died: April 18, 1988

**Donald William Davis—Birmingham**

Admitted: 1967

Died: July 25, 1988

**William Edward Guilian—Huntsville**

Admitted: 1979

Died: July 16, 1988

**Herbert Douglas Jones, Jr.—Anniston**

Admitted: 1970

Died: June 11, 1988

**William Bryan McAfee—Decatur**

Admitted: 1927

Died: November 21, 1987

**William Bailey Reneau—Wetumpka**

Admitted: 1948

Died: August 5, 1988

**Leo Arthur Smith, Jr.—Mobile**

Admitted: 1958

Died: June 9, 1988

**Thomas Jefferson West, Jr.—Birmingham**

Admitted: 1949

Died: February 23, 1988

## ALLWIN T. AGEE

WHEREAS, Allwin T. Agee was born in Mobile, Alabama, May 21, 1916, and lived his life in service to his community and to his profession;

WHEREAS, the Mobile Bar Association desires to remember his name and to recognize his contributions to our profession and to this community; and

WHEREAS, the Mobile Bar Association desires to remember his name and to recognize his contributions to our profession and to this community; and

WHEREAS, at the time of his death this association was preparing to honor Mr. Agee for 50 years of dedicated service to the Mobile Bar;

NOW, THEREFORE, BE IT KNOWN, that Allwin T. Agee departed this life April 18, 1988, and had been a lifelong resident of this city. He received his elementary education in its public schools, graduating from Murphy High School. He attended the University of Alabama, where he earned a bachelors degree in 1936 and an L.L.B. degree in 1938. In that same year he entered the private practice of law in Mobile as a sole practitioner and continued in that posture until the start of World War II. He served his country during that conflict in the United States Army in the Counter Intelligence Corps of the Military Intelligence Division in the European theater of operation.

At the conclusion of the war he returned to his practice in Prichard until

1956, at which time he went into partnership with Jim Meriwether where he practiced actively until 1981, when he semi-retired.

For more than 40 years, Agee was active in the civic and cultural affairs of this community. He served for many years as chairman of the Salvation Army Advisory Board and for 20 years as chairman of the local Selective Service Board. He was the Municipal Court Judge for the City of Prichard from 1972-1975. In 1968 his participation was recognized publicly when he received the then-equivalent of the M.O. Beale Scroll of Merit and in 1972 when he received the United Fund award.

Singing was both a hobby as well as an avocation for Agee. He was proud of his active membership in the Mobile Opera Guild where for more than three decades his voice was heard in numerous productions as a member of both cast and chorus. He also sang frequently in many local churches and synagogues at weddings and other services.

He is survived by his wife, Constance Shaedler Agee; two children, Capt. Robert Allwin Agee, who lives in Tuscaloosa, Alabama; and Mrs. Don Faile, who resides in Mobile; and three grandchildren. Until his death, he and his wife enjoyed the peace and quiet of their summer home at Magnolia Springs.

—Samuel L. Stockman,  
President, Mobile Bar Association

## HARRY YOUNG DEMPSEY, III

On May 21, 1988, H. Young Dempsey, III, of Daphne, Alabama, died after an extended illness. The bench and bar of the 28th Judicial Circuit mourn the loss of this outstanding attorney, citizen and friend.

Young graduated in May 1975 from the University of Alabama School of Law. He served as an assistant attorney general from that time until 1979 when he moved to Daphne, Alabama, and set up a private practice in Baldwin County where he worked until his death.

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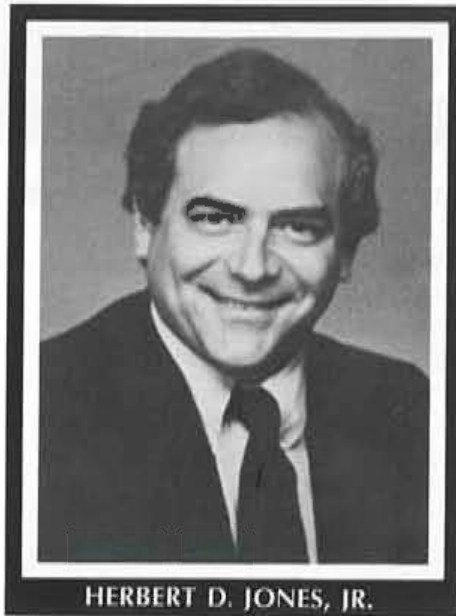
On May 13, 1988, Young was elected president of the Baldwin County Bar Association. No one was more proud of or honored by this achievement than Young. Obviously, this selection as president spoke highly of how the Baldwin County Bar Association felt of his abilities as a lawyer. Young was a member of the Baldwin and Mobile County bar associations and the Alabama Trial Lawyers Association. He also was a member of the Eastern Shore Sertoma Club.

Those who knew Young knew how hard he always tried to make things better for the people around him. He was a man with a brilliant mind and the ability to communicate with people of all walks of life, who always was willing to help no matter how big or how small a person's problem might be. Young was most concerned with the community in which he lived and rarely missed a meeting where the welfare of the community, friends, clients or colleagues were concerned. Young faced his illness with great courage, determination, strength and dignity.

Born in Jacksonville, Alabama, on January 27, 1950, he is survived by his wife, Becky Dempsey; a daughter, Katie Finch Dempsey; two step daughters, Cissy and Jenny Bedgood; his mother, Anne Cary Jacob, and step father, Clyde H. Jacob, of Norfolk, Virginia; and his grandmother, Mrs. Walter Lee of Jacksonville, Alabama.

The writer had the honor and privilege of practicing law with Young since February 1986 and became his law partner in May 1987. The writer saw, on a daily basis, his love for the law and his fellow man, and to the life of H. Young Dempsey, I say "job well done."

—W. Beatty Pearson,  
Spanish Fort, Alabama



HERBERT D. JONES, JR.

Herbert D. Jones, Jr., of Anniston died June 11, 1988. He was 42 years old.

Bert was born in Clay County, Florida, and earned his undergraduate degree from the University of Arkansas and law degree from the University of Alabama.

After receiving his law degree, he clerked for United States District Judge Virgil Pittman. In 1972, he moved to Anniston to join the firm now known as Burnham, Klinefelter, Halsey, Jones & Cater.

In his career, Bert earned the respect of the bench and bar as one of the most respected and brilliant of the lawyers in the area. Specializing in the defense and governmental practice of law, Bert was known for his honesty and sincerity and knowledge of the law.

Bert also was a devoted family man. His wife, Gail, a member of the Alabama State Bar and professor of business law at Jacksonville State University, and their son, Graham, were the center of his life.

Bert's family, many friends and the legal profession have suffered a great loss with the all-too-early passing of this kind and sensitive man.

—H. Wayne Love,  
Anniston, Alabama

## WILLIAM BRYAN MCAFEE

The bench and bar of the 8th Judicial Circuit mourn the loss of a distinguished senior member, Judge William Bryan McAfee. Judge McAfee was born on the 8th day of October 1900 and passed away the 21st day of November 1987.

He was the son of Jordan Walker McAfee and Mary Frances Martin McAfee of Cullman, Cullman County, Alabama.

McAfee graduated from Albany High School and attended the University of Alabama Law School, receiving an L.L.B. degree in 1927.

After graduation he practiced law in Decatur, Alabama, with Wade Wright, and served as an officer of Mutual Savings Life Insurance Company.

Following active service during World War II, he served as register in chancery for 22 years and later was appointed probate judge by Governor Albert P. Brewer, to fill the unexpired term of Judge T.C. Almon. In 1972 he was elected and served a total of six years as judge of probate of Morgan County.

He was a Mason and a Shriner. His long record of public service was recognized by President Ronald Reagan for devoted and selfless service in the service of his country.



## 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.



He and Martha Priebe were married in Decatur, Alabama, on the 8th day of October 1946. He was a member of Central Methodist Church, Decatur, Alabama, and served on the board of stewards for many years. He is survived by his wife, two sisters and a brother.

—**B. Allison Blackburn,**  
Secretary,  
Morgan County Bar Association



**JAMES L. MAY, JR.**

WHEREAS, James L. May, Jr., died on the 12th day of March 1988, just six days before he was to have been honored by the Mobile Bar Association for his 50 years of service to our profession; and WHEREAS, the Mobile Bar Association

desires to remember his name and to recognize his service to our profession and to his community; and WHEREAS, Jimmy had prepared a resumé to be used in conjunction with the honor to have been bestowed upon him by this association, and the accomplishments about which he was most proud should best be told by Jimmy;

NOW, THEREFORE, BE IT KNOWN, that James Little May, Jr., was born in Mobile in 1914 and educated in the public schools here. He attended the University of Alabama, where he earned a bachelor of science degree in commerce and business administration and a L.L.B. degree in 1938. While at the University of Alabama he worked six-hour shifts at the old Druid City Hospital shovelling coal in the boiler room for two years, then as assistant to the bookkeeper, earning \$20 per month, room and board. In 1938 he entered the private practice of law for two years, then became associated with the law firm of McCorvey, McLeod, Turner and Rogers until February 1942, when he was invited to enter the United States Army. After training, he was assigned to the Counter Intelligence Corps of the Military Intelligence Division and served as special agent in charge of the Counter Intelligence Corps in Casablanca, French Morocco, after serving as special agent in North Africa, Iraq, Iran and the nearby countries.

Upon getting out of the Army November 9, 1945, he resumed his position with

McCorvey, Turner and Rogers, and became a partner several years later. He married Patricia Booker exactly one year after the date of his discharge from the Army so he would never forget their wedding anniversary, and he didn't. He leaves surviving him not only his wife, Pat, but also a son, James L. May, III, living in Mobile, a daughter, Patricia M. Sayre, who lives in Marietta, Georgia, and three grandchildren.

For 40 years he was active in civic work, and served as president of the Mobile Junior Chamber of Commerce, the Civitan Club of Mobile, two PTA organizations, Goodwill Industries of the Mobile Area, Inc., which he helped organize in 1957, a Mardi Gras organization and the Athelstan Club.

He served several years ago as national chancellor of his college fraternity, Pi Kappa Phi. He was a member of Dauphin Way United Methodist Church and served on its board of stewards, was a 32 degree Mason and served as a trustee of West Mobile Masonic Temple Association. He was most proud of having been allowed to serve a few years ago as president of the Mobile Bar Association.

At the time of his death, May was almost completely retired from the active practice of law and was of counsel to Johnstone, Adams, Bailey, Gordon and Harris. Until his death he led an active life and enjoyed some traveling with his wife, playing golf, fishing, doing a little

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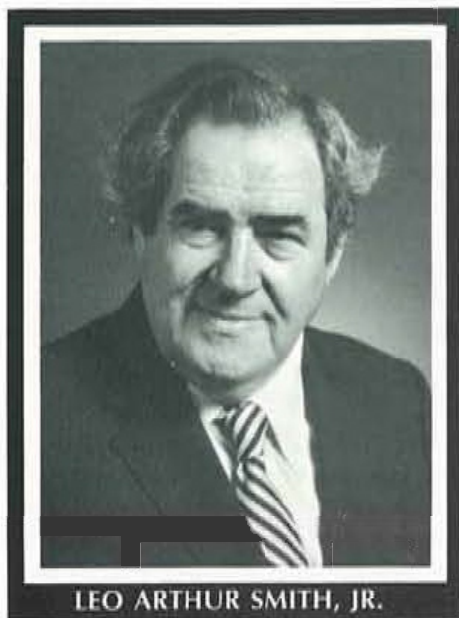
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church work, a little yard work and being with friends.

NOW, THEREFORE, BE IT RESOLVED, by the Mobile Bar Association, in regular meeting duly assembled, that the life of James L. May, Jr., was that of a kind-hearted, warm-spirited, compassionate person, as well as lawyer; that Jimmy was a friend to more people than most of us ever know; that he enjoyed being with people and people enjoyed being with him; that he was a good citizen as well as a good lawyer; and that all who knew him were better people for it.

—Samuel L. Stockman,  
President, Mobile Bar Association



It is fitting at this time that we pause in honor to the memory of the late Leo Arthur Smith, Jr., who departed this life in Mobile, Alabama, on the 9th day of June 1988.

Smith was born in Birmingham, Alabama, March 31, 1920. He attended the public schools in Jefferson County, graduating in 1938 as class valedictorian from the West End High School. He graduated from the University of Alabama in 1948, attended Howard College (now Samford University) in Birmingham, and graduated from the Birmingham School of Law class of 1956, as class valedictorian; and, as outstanding graduate of the 1956 class, he was the recipient of the "Congressman George Huddleston" Award.

As a member of the United States Armed Forces, he served honorably in the United States Army, holding the rank of second lieutenant, and commanded an infantry unit for the 4th Infantry Division during World War II, during which he participated in the Normandy Invasion "D" Day. He was awarded five Bronze Stars for his participation in the Normandy, Northern France, Ardennes, Rhineland and Central Europe Campaigns. Additionally, he was awarded the American Theater Medal, the Victory Medal and Belgium's Fourragere Medal.

Following his honorable discharge from the Army in 1946, he was employed by the Army in Frankfurt, Germany, as a civilian administrative assistant. From 1948 to 1962 he was employed by the U.S. Steel Corporation in Birmingham.

Smith practiced law in Birmingham from 1956 to 1962 and thereafter joined the law firm of Engel & Smith in Mobile, where he continued in the practice of law until his retirement in 1983. He was a member of the American, Alabama State and Mobile bar associations,

American Legion, VFW, Civitan Club of Ensley and Rotary Club of Mobile.

Smith was an able lawyer possessed of a quiet dignity, sincerity and integrity which were outstanding. In his own quiet, gentle way, he pursued his client's objectives, yet always strived to meticulously stay within the bounds of ethical considerations. He was a Christian gentleman, a compassionate, devoted husband and father who will be greatly missed by his widow, Nicole; his son, Dr. Conrad Leo Smith; his sisters, Sue Smith Glass, Margaret Smith McRee and Gladys Smith Spain; by other relatives and by his many friends, to all of whom we extend our sincere and deepest sympathy.

—Samuel L. Stockman,  
President, Mobile Bar Association



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*.

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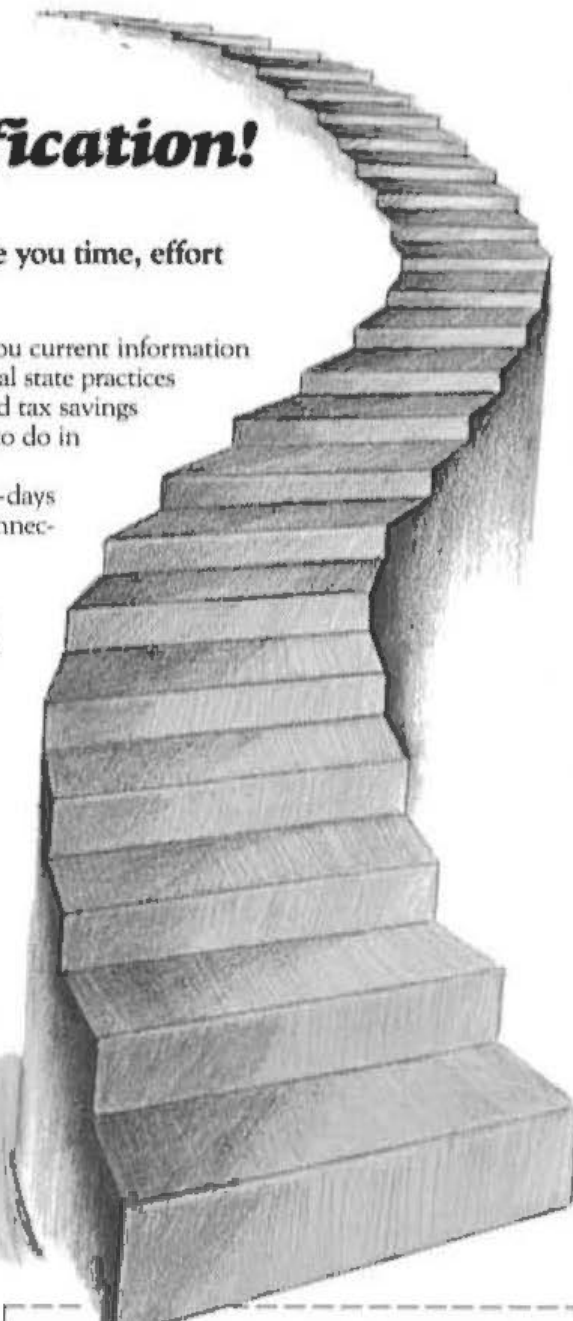
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