

# The Alabama Lawyer

Vol. 46 No. 6

November 1985



***“At Union Bank,  
we work hard to  
earn your trust.”***

—Henry A. Leslie  
President and Chief Executive Officer

Union Bank works closely with many Alabama attorneys in the administration of trusts and estates.

Our investment capabilities have increased dramatically in the past year by the addition of a state-of-the-art computerized system. As Alabama's largest independent bank, we control all our investment processing within the Trust Department to assure constant attention and complete confidentiality for your clients.

We invite your questions about Union Bank's trust services. Our experienced trust officers will be glad to discuss any business, financial or administrative aspect of the services we provide.

**Union**  
**BANK & TRUST** MEMBER FDIC

60 Commerce Street  
Montgomery, Alabama 36104  
(205) 265-8201



**THE HARRISON COMPANY, PUBLISHERS**  
3110 Crossing Park • P O Box 7500 • Norcross, GA 30091-7500

# Tilley's ALABAMA EQUITY Second Edition

by Nathaniel Hansford

*The author received his B.S. and LL.B. from the University of Georgia, his LL.M. from the University of Michigan. He is a member of the American, Georgia, Alabama, and Tuscaloosa Bar Associations. Mr. Hansford is the author of numerous law review articles and he serves as a lecturer for CLE. He has also served as a faculty member for the Alabama Judicial College. He is currently Professor of Law for the University of Alabama.*

*Nathaniel Hansford's revision of Tilley's classic treatise on Alabama equity: Keeps intact the original author's superb comprehensive treatment; Brings this area up to date; Rewrites the book's treatment to correspond with the Alabama Rules of Civil Procedure; and Each equitable remedy is a separate chapter. © 1985*

*For the practitioner who needs to know about equity practice in Alabama.*

Regularly \$45.95  
**Special Introductory Offer**  
\$39.95

**Announcing . . .**

## CANCER

**Causes and Methods of Treatment  
for Trial Lawyers**

*Etiology; Diagnosis; Nutrition; Therapeutic Modalities*  
© 1985

by John R. McLaren, B.S., M.D.

This comprehensive NEW treatise was written by expert John R. McLaren, B.S., M.D.; Director of Radiation Therapy, Robert Winship Memorial Clinic for Neoplastic Disease, Emory Clinic; and Professor of Radiology, Emory University School of Medicine, Atlanta, Georgia. With contributions from numerous specialists, *CANCER* is a significant source for non-oncologists, both legal and medical.

The book covers causative factors, nutrition, pathology, imaging of cancer, surgical treatment, radiation therapy, chemotherapy, hyperthermia, immunotherapy, and pediatric oncology. It contains over 100 illustrations, graphs and tables. Glossaries appear in selected chapters and at the end of the book. Frequent cross-references are made to relevant illustrations and sections. All of these features are designed to clarify the discussion and facilitate comprehension of the subject which is very important for this quickly developing, apposite field.

With *CANCER* as a tool, you will be representing your client from the most knowledgeable, up-to-date position possible — an advantage you can't afford to pass up!

Regularly \$99.95  
**Special Introductory Offer**  
\$89.95



**For fast, efficient service call our toll-free WATS:**



**1-800-241-3561**

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

Robert A. Huffaker  
Editor

Carol Ann Smith  
Associate Editor

Margaret Dubberley  
Managing Editor

# THE NOVEMBER

## BOARD OF EDITORS

Patrick H. Graves, Jr., Huntsville • Champ Lyons, Jr., Mobile • Julia Smeds Stewart, Birmingham • Frank B. Potts, Florence • J. Mark White, Pittsburgh • C. Stephen Trimmer, Birmingham • Susan Shirock DePaola, Montgomery • Mark Fraser Ford, Tusculumbia • Phillip E. Adams, Jr., Opelika • George M. Taylor, III, Birmingham • Robert P. Denniston, Mobile • J. Michael Williams, Sr., Auburn • Arnold W. Umbach, Sr., Opelika • Carroll H. Sullivan, Mobile • Steven L. Wise, Tuscaloosa • Gregory H. Hawley, Birmingham • James N. Brown, III, Birmingham • Joe R. Whaley, Jr., Birmingham • Greg Ward, Montgomery • Lynn Robertson Jackson, Clayton • Robert R. Kracke, Birmingham • Keith B. Norman, Montgomery • Grover S. McLeod, Birmingham • Robert G. Esdale, Ex-officio, Montgomery

## OFFICERS

James L. North, Birmingham • President  
William D. Scruggs, Jr., Fort Payne • President-elect  
Harold Albritton, Andalusia • Vice president  
Reginald T. Hamner, Montgomery • Secretary

## BOARD OF COMMISSIONERS

1st Circuit, Edward P. Turner, Jr., Chatoom • 2nd Circuit, Jerry L. Thornton, Hayneville • 3rd Circuit, J. Gorman Houston, Jr., Eufaula • 4th Circuit, Archie T. Reeves, Jr., Selma • 5th Circuit, Fred D. Gray, Tuskegee • 6th Circuit, Walter P. Crowover, Tuscaloosa • 7th Circuit, H. Wayne Love, Anniston • 8th Circuit, A.J. Coleman, Decatur • 9th Circuit, William D. Scruggs, Jr., Ft. Payne • 10th Circuit, Frances R. Hare, Jr., Birmingham • 11th Circuit, Robert M. Hill, Jr., Florence • 12th Circuit, Joe C. Cassidy, Enterprise • 13th Circuit, Ben H. Harris, Jr., Mobile • 14th Circuit, Robert T. Wilson, Sr., Jasper • 15th Circuit, John B. Scott, Jr., Montgomery • 16th Circuit, Ludger D. Martin, Gadsden • 17th Circuit, Richard S. Manley, Demopolis • 18th Circuit, Oliver P. Head, Columbiana • 19th Circuit, John Hallis Jackson, Jr., Clanton • 20th Circuit, Wade Baxley, Dothan • 21st Circuit, Broox G. Garrett, Brewton • 22nd Circuit, Harold Albritton, Andalusia • 23rd Circuit, Gary C. Huckaby, Huntsville • 24th Circuit, L.E. Gosa, Vernon • 25th Circuit, Nelson Vinson, Hamilton • 26th Circuit, Bowen H. Brassell, Phenix City • 27th Circuit, Charles R. Hare, Jr., Albertville • 28th Circuit, J. Don Foster, Foley • 29th Circuit, B. Greg Wood, Talladega • 30th Circuit, B.J. McPherson, Oneonta • 31st Circuit, Gorman R. Jones, Sheffield • 32nd Circuit, John David Knight, Cullman • 33rd Circuit, Edward W. Bowwell, Geneva • 34th Circuit, Roger H. Bedford, Sr., Russellville • 35th Circuit, Windell C. Owens, Munroeville • 36th Circuit, D.L. Martin, Moulton • 37th Circuit, Phillip E. Adams, Jr., Opelika • 38th Circuit, John F. Proctor, Scottsboro • 39th Circuit, Jimmy E. Alexander, Athens

## GENERAL INFORMATION

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

Subscriptions: Alabama State Bar members receive The Alabama Lawyer as part of their annual dues payment; \$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.

©Copyright 1984, The Alabama State Bar. All rights reserved. ISSN 0002-4287.

The Alabama Lawyer is published bimonthly for \$15 per year in the United States and \$20 outside the United States by the Alabama State Bar, 415 Dexter Avenue, Montgomery, AL 36104. Single issues are \$3, plus postage. Second-class postage paid at Montgomery, AL. **Postmaster:** Send address changes to The Alabama Lawyer, P.O. Box 4156, Montgomery, AL 36101.



## Solving Common Problems in Long-term Care and Medicaid Financial Eligibility — pg. 302

The elderly represent a growing segment of our society. Understanding the Medicaid requirements is essential in assisting these senior citizens.



## On the cover

Mobile attorney and amateur photographer James W. Bodiford provided this sunset scene of his pier on the eastern shore of Mobile Bay.



# 1985 ISSUE IN BRIEF



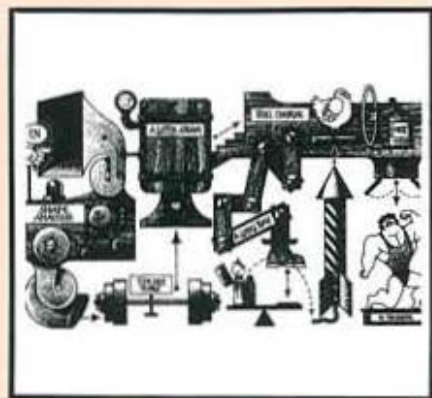
## Recent Developments Concerning Eligibility for Social Security Disability — pg. 312

Rules governing eligibility for Social Security disability payments are complex and difficult to comprehend. A working knowledge of these rules is essential if competent legal advice is to be rendered in this area.



## The Alabama Living Will Statute — pg. 316

The "right to die" is a controversial issue. Alabama has addressed a part of this controversy by promulgating the Alabama Living Will Statute.



## Copyright Law — pg. 326

Professor Harold See of the University of Alabama Law School continues his series on intellectual property law by providing a primer on copyright law.

### Inside This Issue

President's Page .....	288
Executive Director's Report ...	289
Bar Briefs .....	292
Letter to the Editor .....	295
Riding the Circuits .....	296
Administrative Office Report .....	297
About Members, Among Firms .....	298
Legislative Wrap-up .....	299
Alabama State Bar Committee on Legal Needs of the Elderly ..	300
Young Lawyers' Section .....	320
CLE News .....	321
Committee Report .....	331
Recent Decisions .....	332
Opinions of the General Counsel .....	338
In Memoriam .....	340
Disciplinary Report .....	342
Classified Notices .....	343



# President's Page



NORTH

The Alabama State Bar recently lost one of the finest members of your board of bar commissioners to high judicial office. I refer, of course, to Governor Wallace's recent appointment of J. Gorman Houston, Jr., of Eufaula to the Alabama Supreme Court. Justice Houston will be a great judge and a real friend of the bar.

In describing the approach he would bring to his judicial work, Justice Houston at his investiture referred to the foreword to a recent edition of *Yankee from Olympus*, the noted book about Justice Oliver Wendell Holmes. In that foreword the author reflected on the fact little mention was made in the book about Justice Holmes' 28 years on the highest court of the State of Massachusetts because those years would be of little general public interest. Justice Houston thoughtfully observed that many of the issues confronting the Alabama Supreme Court involve matters of little general public interest, but, as Justice Houston said, those matters which do come before the court are matters of the most pressing interest to the parties to the case. There is a message there for all of us in our daily, sometimes routine, practices. Those matters entrusted to us are perhaps of little interest to the public, but they are vital to our clients.

Justice Houston pledged to us his most prayerful consideration of all cases, of whatever kind. Further, he pledged the timely resolution of those cases, recognizing that justice delayed

indeed can be justice denied. I am sure all members of the Alabama State Bar join me in wishing Justice Houston many fruitful years in this important judicial office.

You recently heard from me regarding our legal malpractice insurance crisis and the alternatives your bar insurance committee is considering. One such alternative is a bar-related insurance company. Cathy Wright of Birmingham attended a meeting of the National Association of Bar Related Insurance Companies to obtain information on these programs. To start our own captive company would be a massive undertaking, but it apparently has succeeded elsewhere. We will continue to investigate every possibility and keep you currently informed of developments.

One of the things that has pleased me greatly this year has been the broadbased enthusiasm and commitment made by our members who give so generously of their time and talents to our many committees and task forces. I have had the opportunity to attend and participate in a significant number of the committee and task force meetings, but conflicts (usually bar-related), unfortunately, have kept me away from others. I assure you I personally appreciate the hard work and dedication of our members. I outline below only a few of the many activities presently under way.

The Task Force to Evaluate Proposed Revisions to the Constitution of

1901, currently chaired by Professor Charles Cole of the Cumberland School of Law, was originally constituted to consider revisions to the entire constitution. However, following an in-depth analysis and discussion of the various approaches to its work this year, the task force decided to concentrate its energies on the following four subjects: local government, Conrad M. Fowler, Lanett, chairman; finance and taxation, Lawrence Dumas, Jr., Birmingham, chairman; and, legislative and executive, Joe Calvin, Decatur, chairman. The legislative and executive subjects were combined because of the necessary interplay between these coordinate branches. The subcommittees plan to meet one or more times before another plenary session of the task force December 6.

The Permanent Code Commission, under the chairmanship of Wilbur G. Silberman, has undertaken as its primary responsibility this year an analysis of the ABA Model Rules of Professional Conduct and a comparison of the ABA Rules to our current *Code of Professional Responsibility*. Your commission will be giving the ABA Rules careful consideration as there are benefits to uniformity; however, the commission will not feel bound to propose any rule it considers inappropriate for Alabama practice.

In addition to its other projects, your Committee on Professional Economics proposes to have the bar sponsor a

*(Continued on page 294)*



# Executive Director's Report



HAMNER

## 'I know you don't . . . but . . .'

The above phrase usually follows friendly greetings from numerous callers as the date approaches for the bar examination results. I want to explain our position of not giving out an examinee's results on the exam to other than the examinee — and then only in writing.

Our rules require that the examiners report their grades no later than September 15 for the July bar exam and April 15 for the February bar exam. We have one full-time and one part-time staff member to handle all the paperwork, including the posting and checking of all grade sheets for an average of 385 examinees. These results are forwarded to the national testing center for combining of essay scores and multistate scores to obtain the final results. Depending upon the workdays and the mail service, this process can take from seven to 10 days. Once the results are returned to our office, we then have to process an average of 385 letters to examinees, posting individual scores for failing candidates.

One does not lightly send out a letter affecting so significantly the life of an individual without making every effort to insure it is correct. Informing an applicant of the failure is a most unpleasant task — even in writing. Most do not believe it, and many are "sure there is a mistake."

Contrary to rumor, the bar results are made known at the earliest possible moment; we like to get these results out of our office as soon as humanly possible. I have not forgotten the anxiety I felt in 1965, and no one should endure that wait any longer than absolutely necessary.

My concern always has been, and remains, the interest of the individual examinees. I know each is anxious to begin the practice of law and obtain a license just as soon as the results can be obtained. I also am aware that *Martindale-Hubbell* closes its annual edition September 30, and for this reason, we endeavor to get the results out in order that new associates may be listed in a firm's biographical sketch in *Martindale*. We also are cognizant that a number of individuals are awaiting the results of the bar examination to begin active participation in a firm's pending case or, in some instances, obtain their commission for one of the armed forces' legal branches. In short, there are many deadlines where time is of essence, and each examinee is affected in an individual way.

It would be most pleasant if all the news was good and I could announce to one and all that each applicant who sat for the bar exam had been successful. I could stay on the telephone all day conveying this happy news. The decision not to give the results over the

telephone is to protect the applicant who is not successful. I know from rather lengthy experience that a failing applicant wants to receive the results privately. I feel these applicants are entitled to this measure of privacy. Likewise, I feel the applicant is entitled to know the good or bad news before anyone else.

The joy of opening a passing letter is a lifetime memory. I still recall that experience most pleasantly. Unfortunately, I also recall vividly the experience of one failing applicant who was thoughtlessly extended sympathy by a well-meaning friend who had seen the certified list of names after it was properly transmitted, but before the applicant had actually received his notice. This one experience was enough for me to know the personal nature of the notice — particularly for the failing candidate.

I likewise know that there is a sincere interest on the part of friends and family members who really are "afraid" to ask the question of the applicant who has taken the bar exam and who may not have made known the results. I certainly would not want to ask an applicant if he or she passed the bar exam and have that applicant tell me of a negative result. For this reason, I can appreciate the position of one who would rather ask another individual

*(Continued on page 290)*



# Executive Director's Report

(From page 289)

than the applicant, but again, I feel the personal nature of the bar exam dictates the applicant should be the person to make known the results.

Once the results have been mailed to the applicant, we allow 48 hours for the applicant's letter to be delivered. If an applicant calls after that time and has not received his or her letter, we will give the results to that applicant over the telephone. People have called the office and posed as applicants in order to obtain the results, but through our identification system we are able to screen such imposters. I have been asked to "play a joke" and send a passing applicant a failing letter. This, of course, is a ridiculous request and would never be granted.

The applicant who is a child, sibling or relative of a lawyer presents a personal dilemma. I know the joy the passing of an applicant can generate within a family. Likewise, I know the sadness family members feel when there is a negative result. Through the years, I have asked both lawyer and non-lawyer relatives if they would have preferred to know in advance that an applicant had been unsuccessful. The answer is almost universally "no." In any event, such advance notice might be a mere 24 hours.

The only light moments we experience near results time are provided by the increasing ingenuity of those seeking to learn in advance if an applicant has passed. It seems no one ever wants to know if a person has failed the bar exam. These different attitudes best exemplify our dilemma. The pressure exerted as the announcement approaches has increased as the number of examinees has increased and as friendships and working relationships have grown. I am uncomfortable and, candidly, do not like being placed in the position of having to tell assorted bar leaders, bar members and dear friends that I cannot give them a "sneak preview." I would appreciate your considering the facts noted above and not placing us in a position of having to tell you no. The

procedure we follow is reviewed by our bar examiners and, in the past, it has proven to be in the best interest of all concerned.

Know that we will continue to do

everything in our power to insure the results are properly reached and made known to applicants at the earliest possible moment. □

— Reginald T. Hamner

---

---

## Alabama State Bar SECTION OFFICERS 1985-86

Administrative Law	Al L. Vreeland, chairman John H. Burgess, chairman-elect Philip C. Davis, vice chairman Roland L. Buffington, secretary-treasurer
Bankruptcy and Commercial Law	George W. Finkbohner, Jr., chairman Charles N. Parnell, chairman-elect Jerry W. Schoel, secretary Lawrence B. Voit, treasurer
Business Torts and Antitrust Law	Michael L. Edwards, chairman William H. Hardy, Jr., vice chairman George C. Lynn, secretary-treasurer
Corporation, Banking and Business Law	Jacob Walker, Jr., chairman Ralph F. MacDonald, III, vice chairman Curtis W. Jones, secretary-treasurer
Criminal Law	J. Mark McDaniel, chairman A. Charles Freeman, vice chairman James W. Fuhrmeister, secretary G. Douglas Jones, treasurer
Environmental Law	Robert R. Reid, Jr., chairman Kathryn E. Errington, vice chairman Russell C. Stoddard, treasurer
Family Law	Vanzetta Penn Durant, chairman Stephen R. Arnold, chairman-elect Jerrilee P. Sutherlin, secretary James S. Witcher, Jr., treasurer
Labor Law	D. Frank Davis, chairman William C. Tidwell, III, vice chairman Edward G. Hawkins, chairman
Oil, Gas and Mineral Law	Victor H. Lott, Jr., vice chairman Harold D. Rice, Jr., vice chairman Mary R. McKay, secretary-treasurer
Practice and Procedure	W. Stancil Starnes, chairman Richard H. Gill, vice chairman D. Leon Ashford, secretary
Real Property, Probate and Trust Law	Ralph A. Franco, chairman Harold D. Parkman, vice chairman Joseph T. Carpenter, secretary-treasurer
Taxation	Norman W. Harris, Jr., chairman Robert C. Walthall, vice chairman David M. Wooldridge, secretary-treasurer
Young Lawyers	J. Bernard Brannan, president Claire A. Black, president-elect Charles R. Mixon, Jr., secretary N. Gunter Guy, treasurer Robert T. Meadows, III, immediate past president

---

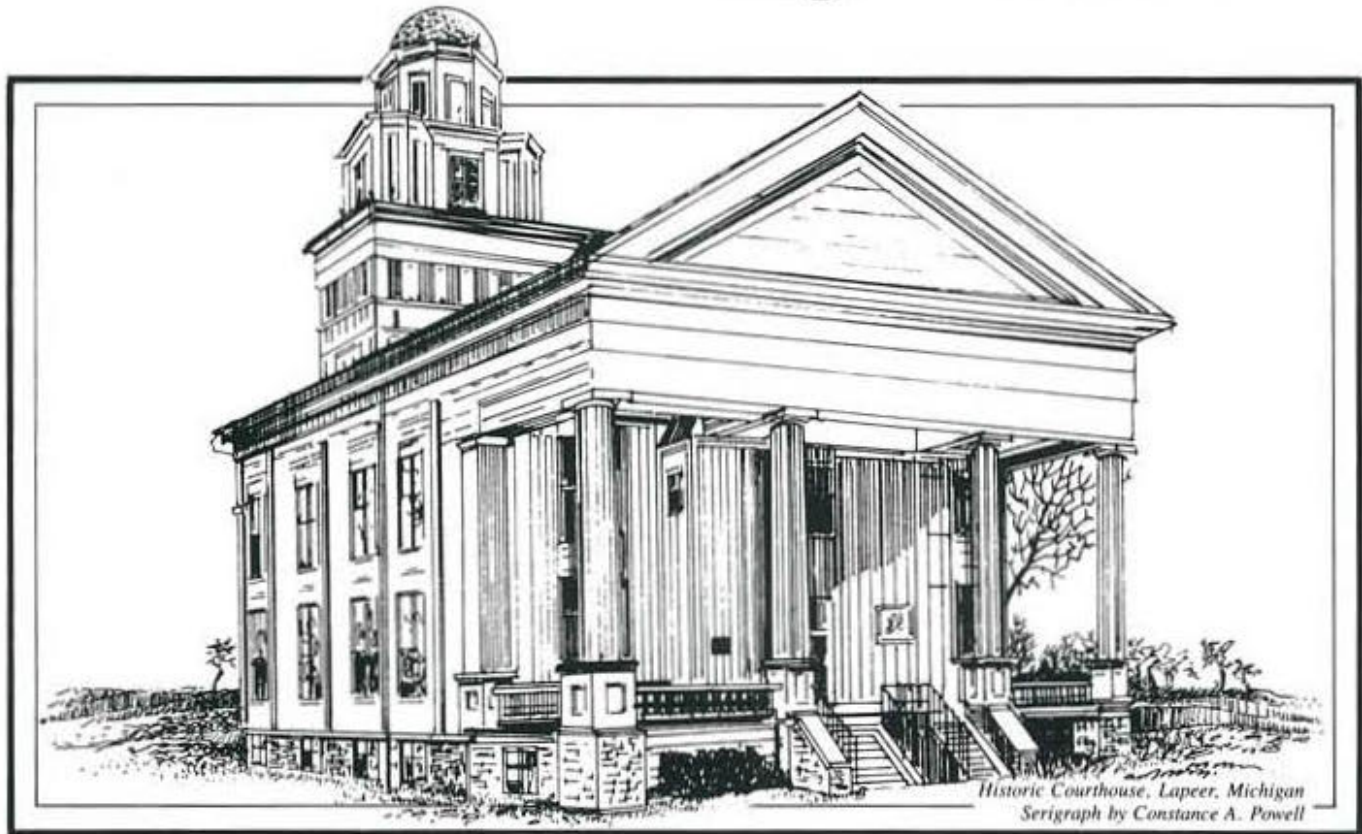
---



*The First American*

# Spirit

**Serving the Nation's  
Legal Profession**



*Historic Courthouse, Lapeer, Michigan  
Serigraph by Constance A. Powell*

**T**he historic courthouse at Lapeer, Michigan was already fifty years old when the company that was to become First American Title was founded back in 1889.

Today, First American is the nation's third largest and services the legal profession of Michigan and the nation with the same spirit, the same dedication to accuracy and

promptness that has earned the firm a nearly century old reputation of excellence.

If your title needs are in Lapeer . . . reach nationwide or far off places like Guam, Puerto Rico or the United Kingdom, call the office near you . . . get the First American Spirit!



***First American Title Insurance Company***

**STATE OFFICE: 1529 FOURTH ST., NEW ORLEANS, LA 70115 • (504) 895-9911**

**NATIONAL HEADQUARTERS: 114 E. FIFTH ST., SANTA ANA, CA 92701 • (714) 558-3211**

**SERVING TITLE INSURANCE NEEDS THROUGHOUT THE UNITED STATES**

*Affiliated with The First American Financial Corporation*



# Bar Briefs

## New appellate handbook presented

Alabama Supreme Court Justice Richard Jones presented a copy of the new Alabama Appellate Handbook to officials at Cumberland School of Law, Samford University, before traveling to Washington, D.C., to present a copy to members of the United States Supreme Court. As a member of the executive committee of the American Bar Association's Appellate Judges' Conference, Judge Jones had been responsible for developing the Alabama handbook. He was assisted in the effort by Cumberland faculty and students. In ceremonies July 5, Jones and representatives from the other 49 states presented copies of their respective handbooks to the nation's highest court. The book will be available to Alabama lawyers through Cumberland's Office of Continuing Legal Education.



Chief Justice C. C. Torbert

## Torbert elected vice president

Alabama Supreme Court Chief Justice C.C. Torbert, Jr., has been elected first vice president of the National Conference of Chief Justices.

The conference is composed of the highest judicial officer of each state of the United States, the Dis-

trict of Columbia, the Commonwealth of Puerto Rico and the U.S. Territories.

Torbert has been a member of the conference since he became chief justice in 1977.

Massachusetts Chief Justice Edward F. Hennessey was elected president of the conference and Maryland Chief Judge Robert C. Murphy was elected president-elect. Washington Chief Justice James M. Dolliver was elected second vice-president.

Torbert has served on the conference's board of directors since 1980. The election of officers was held at the conference's annual meeting in August in Lexington, Kentucky.

## Birmingham lawyer selected chairman ABA Litigation Section

N. Lee Cooper, a partner in the Birmingham law firm of Maynard, Cooper, Frierson & Gale, P.C., recently became chairman of the American Bar Association Section of Litigation.

With nearly 45,000 members, the section is among the largest components of the 315,000-member



N. Lee Cooper

ABA. It is comprised of lawyers who try both civil and criminal cases in court, representing either plaintiffs or defendants. As chairman for a one-year term, Cooper will lead the section in creating new educational programs and materials for its members, and in developing or commenting on policies proposed for the association at-large of particular interest to section members.



Cumberland Dean Parham Williams, former Dean Brad Bishop, continuing legal education director Patsy Thomley and Supreme Court Justice Richard Jones



Cooper served on the section governing council from 1975 to 1982 and also is a member of the association's policy-making House of Delegates, heading the Alabama delegation to the 422-member house since 1980.

Cooper is a past president of the Young Lawyers' Section of the Alabama Bar Association and a past secretary-treasurer of the Birmingham Bar Association. He also serves as a trustee of the Alabama Law School Foundation. The Alabama Bar Association presented him with its Award of Merit for 1976.



Gorman Houston

### Houston appointed to Alabama Supreme Court

The newest justice of the Alabama Supreme Court is James Gorman Houston, Jr., who was sworn in October 7 in Montgomery. Houston was chosen by Gov. Wallace to succeed Justice Eric Embry, who retired due to health problems.

Houston is a native of Eufaula, Alabama, and a graduate of Auburn University. He also graduated from the University of Alabama School of Law and has been in private practice since 1960.

Justice Houston is a member of the American, Alabama and Barbour County Bar Associations; was past president of the Barbour County Bar Association; was a state bar examiner; and is a member of the board of bar commissioners, third circuit. In addition, Houston is a member of the Law Institute Committee on Recordation of Conveyances.

He is married to the former Marthur Martin of Clayton, Alabama, and they have two children.

### Alabama native chosen Judge Advocate General, USAF

An Alabama native was appointed recently judge advocate general of the United States Air Force. Maj. Gen. Robert W. Norris, originally from Birmingham, supervises a staff of 130 Air Force attorneys in the Pentagon and as the senior military lawyer in the USAF, he has over 1,300 military lawyers and almost 200 civilian lawyers under him.

Norris grew up in Birmingham and received his undergraduate degree in business administration from the University of Alabama. There he also received his law degree.

Upon graduation from law school, Norris began his career in the Air Force. After a brief stint working with his father (1957-59) he began his rise to his present position. In November 1983, he assumed the duties of Deputy Judge Advocate General, USAF.

Norris is married to the former Martha Katherine Cummins of Woodlawn, Alabama, and they have two children.



Judge Advocate General  
Robert W. Norris

### Faulkner graduates first paralegals

Faulkner University, formerly Alabama Christian College, graduated its first paralegal class September 20. This class consisted of nine financially disadvantaged individuals whose training was paid for under the federal Job Training Partnership Act.

Lawyers interested in interviewing one of these paralegals are urged to call Wayne Harvell, director of career development, at 272-5820, extension 145, Montgomery.

## Top Medical Experts Free Case Evaluation

The odds against you winning your medical malpractice action unaided, are almost 3 to 1.

The odds are better than 5 to 1 that you will win any case deemed meritorious by JD.MD.

Whatever your needs, JD.MD has the experts, back-up services, and payment options to suit you and your client. Our compensation is directly related to our success in helping you.

**JD.MD PICKS UP THE ENTIRE MEDICAL SIDE OF YOUR CASE AND LEAVES YOU TO WHAT YOU DO BEST—THE LAW. THAT'S THE WINNING COMBINATION.**

**JD.MD**<sup>™</sup>  
INC.

For our complete brochure call our toll-free number today

1-800-225-JDMD

## MEDICAL EXPERTS

Medical and Hospital  
Malpractice  
Personal Injury  
Product Liability

1650 Board Certified *highly qualified* medical experts in all specialties, nationwide and Alabama, to review medical records and testify.

We review, approve and *guarantee* all reports.

- Flexible fee options from \$150
- Financial assistance: Alabama Bar and ABA approved
- Experience: 10 years and 9,000 cases for 4,000 satisfied attorneys. Local references.
- **FREE** books by us, one with foreword by Melvin Belli.
- **FREE** telephone consultations with our Medical Directors.

### The Medical Quality Foundation

The American Board of  
Medical-Legal Consultants  
(703) 437-3333

**TOLL FREE**  
**1-800-336-0332**



# President's Page

(From page 288)

qualified law office consultant who would agree to provide law firm consulting services, primarily to small firms and solo practitioners, on a relatively inexpensive basis. David Arendall, the chairman of this committee, Reggie Hamner and I already have met with one such consultant and intend to interview others.

Dennis Balske of Montgomery is the chairman of the Indigent Defense Committee. Through his leadership the bar has obtained a grant from the ABA Standing Committee on Legal Aid and Indigent Defendants for the purpose of implementing a program to recruit and train volunteer counsel to represent indigent death-row inmates whose lawyers have withdrawn from their cases after completion of unsuccessful direct appeals. The program will be directed primarily toward recruitment of lawyers from larger firms. The first training session will be conducted December 14-15 in Birmingham, in conjunction with the presentation by Chief Judge John Godbold of the first "Clarence Darrow Award" to a volunteer lawyer who has provided representation to an indigent capital defendant. This is a most important effort. A true crisis situation exists for the 70-plus death-row inmates.

The Task Force on Citizenship Education is chaired by Frank James of Birmingham. Its subcommittee on post high school education, chaired by Carney Dobbs of Birmingham, has been working with the Administrative Office of Courts to insure that juror slide presentations are available in all circuits in this state. The subcommittee has also recommended and the AOC intends to suggest enthusiastically to each court in the state that the court submit an annual "State of the Judiciary" report to the appropriate governing body of the city or county where it sits.

The Youth Education Subcommittee, chaired by Chris S. Christ of Birmingham, has determined it would be appropriate for the state bar to monitor and have input into those portions of the social studies curriculum in state

schools relating to the law and our legal institutions. The subcommittee is in the process of making arrangements with the Alabama State Department of Education to accomplish this.

Harold Speake of Moulton is chairman of the Committee on Programs, Priorities and Long-Range Planning. Its first priority is to bring the state bar's data compilation, record-keeping and word-processing capabilities up to present standards. For example, your state bar currently has no word-processing capacity. We simply cannot continue to operate as we have in the past. The committee is studying the purchase of a computer and software packages, and I hope we can report progress to you in the near future.

Pursuant to the requests of many of you, particularly those of you in the more urban areas of the state, I have asked the Committee on Lawyer Public Relations, chaired by Anthony Cicio of Birmingham, to explore alternatives to the present method of advertising public censures. We all believe in the vigorous enforcement of our disciplinary rules and in the implementation of sanctions where appropriate. However, a number of you apparently feel the advertisements as they currently are carried are detrimental to the bar as a whole. The committee will conduct a study of this question and report to your bar commissioners. I know both the committee and the bar commissioners would appreciate your thoughts and recommendations on this subject.

The important work of the Committee on Governance of the Alabama State Bar continues under the able leadership of Gary Huckaby of Huntsville, its chairman. As you know, significant changes in our governance structure were approved by your board of bar commissioners last summer. Their implementation now depends on legislative enactment. Bills are being prepared to be introduced in the 1986 regular session. The committee continues to study the question of whether the bar should be organized under the Alabama Legislature, as it is presently organized, or whether the bar should be organized under the Alabama Supreme Court. This is obviously an issue demanding thoughtful, deliber-

ate consideration.

Last year your Task Force on Judicial Evaluation, Election and Selection was chaired by Fournier J. Gale, III, of Birmingham. The committee recommended and the bar commissioners approved legislation designed (i) to create an Alabama judicial appellate nominating commission to fill vacancies on the appellate courts of this state (much as is now done in several of the larger cities) and (ii) to provide for the non-partisan election of judges. The legislation was introduced rather late in last year's regular session and was not pursued actively. This year, under the chairmanship of Ralph Knowles of Tuscaloosa, the committee is examining the political aspects of these two matters with a view toward finding the best approach to take with the legislature and other political leaders.

Eugene Stutts of Birmingham has chaired a subcommittee looking at the desirability of judicial evaluation and potential methods of evaluation. The subcommittee worked long and hard on this and intends to pursue this rather sensitive matter diligently and carefully.

Many of the goals we wish to accomplish as a bar depend on the Alabama Legislature. Your immediate past president, Walter Byars, graciously has accepted the responsibility of chairing the Legislative Liaison Committee. He will undoubtedly be calling on many of you for your help this year, particularly in setting up a key-man legislative system around the state.

I cannot close my comments about the legislature without saying every member of our bar owes a debt of gratitude to Lt. Governor Bill Baxley and House Speaker Tom Drake for their invaluable assistance. Likewise, Representatives Jimmy Clark and Jim Campbell in the House and Senators Hinton Mitchum and John Teague were most helpful to the bar. We simply could not have accomplished a number of things without their help.

Several of our members have achieved significant national recognition for their work. As has been previously mentioned in this publication, Fred Gray of Tuskegee is the president of the National Bar Association. Also, Julian Butler of Huntsville is president



of the National Association of County Attorneys, Lee Cooper of Birmingham is chairman of the Litigation Section of the American Bar Association and Gary Huckaby of Huntsville is the immediate past chairman of the Standing Committee on Lawyer Referral and Information Service of the American Bar Association.

In closing, you should know your Committee on Lawyer Advertising is working with the Alabama Supreme Court regarding constitutionally permissible restraints on lawyer advertising. However, it seems to me that, whatever the United States Supreme Court ultimately holds regarding lawyer advertising, as a matter of professionalism, we should not push to the outer constitutional limits. We are a learned profession, and that carries with it the burden and responsibility of self-restraint. We cannot and should not let our profession descend to the level of measuring professional success by what a lawyer has or what he earns rather than by what he does. □

—James L. North

## Start getting ready . . . for the 1986 Midyear Conference March 19 and 20!



## Where there's a will... Now there's an easier way.

AmSouth Bank's new Will and Trust Form Book provides a complete and up-to-date compilation of will and trust forms to make your job easier and faster. In addition, extensive commentaries are helpful in the design and implementation of various estate plans. These forms reflect ERTA, TEFRA and recent revisions in the Alabama Probate Code and will be updated periodically to insure continuing accuracy.

To order your set of Will and Trust Form Books, send your check for \$95.00 payable to AmSouth Bank N.A. to the Trust Division at any of the addresses below, or contact the AmSouth Estate and Trust Planning Representative in your area.

**AM SOUTH**



AmSouth Bank N.A.  
P. O. Box 1128  
Anniston, AL 35201  
236-8241

AmSouth Bank N.A.  
P. O. Box 11426  
Birmingham, AL 35202  
326-5390

AmSouth Bank N.A.  
P. O. Box 1488  
Decatur, AL 35601  
353-0941

AmSouth Bank N.A.  
P. O. Box 1150  
Dothan, AL 36302  
793-2121

AmSouth Bank N.A.  
P. O. Box 389  
Gadsden, AL 35902  
543-3000

AmSouth Bank N.A.  
P. O. Box 507  
Huntsville, AL 35804

AmSouth Bank N.A.  
P. O. Box 1628  
Mobile, AL 36629  
694-1575

AmSouth Bank N.A.  
P. O. Drawer 431  
Montgomery, AL 36101  
834-9500



# Riding

the

# Circuits



## Houston County Bar Association

The Houston County Bar Association recently held its annual banquet and installation of officers at the Dothan Country Club. Newly elected officers for 1985-86 are:

President:	J. Huntley Johnson
Vice President:	Edward Jackson
Secretary:	Charles H. McDougle, Jr.
Treasurer:	Charles Amos

## Huntsville-Madison County Bar Association

At the August meeting of the Huntsville-Madison County Bar Association, the following officers were elected for the 1985-86 year:

President:	James T. Tatum, Jr.
President-elect:	Herman Watson, Jr.
Secretary:	John Hay, III
Treasurer:	Joe W. Campbell

## Montgomery County Bar Association

The Montgomery County Bar Association announces that it will sponsor the following Continuing Legal Education seminar:

DATE:	December 6, 1985
TIME:	9 a.m.-4:45 p.m.
CLE CREDIT HOURS:	6.6
LOCATION:	First Alabama Bank 4th Floor Auditorium 8 Commerce Street
TOPICS:	"Medical Malpractice" "Toxic Waste Disposal" "Products Liability" "Coverage Questions in Insurance Contracts"
COURSE FEE:	MCBA Members — No charge Non-members — \$50

MCBA is recognized as an approved sponsor of Continuing Legal Education seminars by the Mandatory CLE Commission of the Alabama State Bar. This all-day seminar is free to MCBA members and will provide many lawyers an opportunity to complete their 1985 CLE requirements by the December 31 deadline. Partial CLE credit is allowed for this seminar, and participants may report the number of hours actually attended during any part of the day.

The Trust Department of First Alabama Bank generously has offered to provide the facility for the seminar as well as coffee and soft drinks. Due to limited parking availability in the First Alabama Bank deck, those attending are requested to park at the Montgomery Civic Center, which is one block away and has ample parking. The cost is \$1.00 for the entire day.

Lunch is from 11:45-1:30 and is "on-your-own." Arrangements have been made with the Elite to reserve either the downstairs dining room on the right or upstairs, depending on the number of reservations, so those who wish can eat together there. We will have a sign-up list at registration on the morning of the seminar for those who wish to eat at the Elite.

MCBA requests those wishing to attend pre-register for planning purposes, but pre-registration is not required. For a pre-registration form or more information call Dot Wilson at the MCBA office, 265-4793 or write MCBA, P.O. Box 72, Montgomery, Alabama 36101. For those who do pre-register and are unable to attend, a cancellation would be greatly appreciated.

## Tuscaloosa County Bar Association

Recently elected officers of the Tuscaloosa County Bar Association for 1985-86 are:

President:	Paul Skidmore
Vice President:	Ralph I. Knowles, Jr.
Secretary/Treasurer:	W. Cameron Parsons
Executive Committee:	Christopher L. McIlwain C. Delaine Mountain



Tuscaloosa Co. Bar Association: (left to right) Ralph C. Burroughs, past president; Paul Skidmore, president; Ralph I. Knowles, Jr., vice president; W. Cameron Parsons, secretary/treasurer; Christopher L. McIlwain, executive committee; and C. Delaine Mountain, executive committee. Members of the executive committee not pictured are Claude M. Burns, Daniel C. Lemley, Joseph G. Pierce and Robert V. Wooldridge, III.



# Administrative Office Report

by  
Allen L. Tapley

It has been several years since the Administrative Office of Courts has communicated to you through *The Alabama Lawyer*. To perform our statutory duties and responsibilities, our primary lines of communication are with the judges, clerks and court-support personnel throughout the state.

We, however, fully recognize and appreciate the central role that the attorneys of Alabama play in the state court system. We also realize changes in case processing procedures, juror procedures and court forms have a direct impact on your law practice.

Because of our unique relationship, it is extremely important that a permanent line of communication be established between the Alabama State Bar and the AOC. To this end, Robert A. Huffaker, editor of *The Alabama Lawyer*, has consented to provide space in your journal so we may keep you apprised of issues and programs within the courts which are of consequence to you.

While some of you are aware of the activities of the AOC through your involvement with supreme court and Judicial Study Commission committees and through contact with our staff in their work with local courts, many of you probably do not know exactly who we are or what we do.

The AOC provides the business and administrative functions for the court system at the state level. Among other things, § 12-5-10, *Code of Alabama*, 1975, provides that the AOC is to "evaluate the practice and procedures of the courts . . . prescribe administrative and business methods, systems, forms, and records . . . (and to) make recommendations for the improvement of the operations of the Unified Judicial System." As these examples indicate, it is our responsibility to work with your local officials to ensure the court system operates as efficiently and cost effectively as possible.

In accomplishing our statutory responsibilities, the AOC is organized so as to concentrate its efforts in the following areas:

- **Case management** — Assistance is rendered to municipal, district and circuit courts to expedite the flow of cases through the courts. This work may involve establishing case processing goals or developing case monitoring systems (both automated and nonautomated).

- **Jury management** — Through our central computer system, the AOC annually issues over 72,000 summons to jurors who participate in the one-step qualification and summoning program. Locally, staff personnel assist judges in minimizing juror costs by telephone call-in devices and juror pooling techniques.

- **Records management** — Alabama is one of the few state court systems that has a retention and destruction schedule for its court records. Aside from destroying unnecessary records, micrographic centers are located in Birmingham, Mobile and Montgomery for the purpose of microfilming records which must be maintained permanently.

- **Accounting** — We are responsi-

ble for preparing the budget for the Unified Judicial System, monitoring all judicial expenditures, purchasing all supplies and equipment, inventorying all court property and processing all court payrolls.

- **Personnel** — The AOC provides centralized personnel assistance to over 1,600 court officials and court support personnel throughout the state.

- **Information systems** — The AOC is perhaps one of the most automated offices in state government. Within the AOC, our accounting and personnel systems are fully automated. Seven of our trial courts have been automated and through linkage to the AOC, have access to criminal, civil and traffic case tracking systems.

- **DUI court referral programs** — The AOC coordinates and monitors the activities of some 28 separate agencies conducting DUI referral schools in 56 locations throughout the state. Attendance at these schools is mandatory for defendants convicted of DUI for the first time. Currently, a Level II DUI program is being implemented. This program will specifically address the problems of the serious al-

(Continued on page 318)



*Allen L. Tapley, administrative director of courts, received his B.S. degree from Auburn University and his M.A. degree from the University of Alabama. In this column, Mr. Tapley will keep us informed about the activities and programs of the state court system.*



# About Members, Among Firms

**David A. Garfinkel** is pleased to announce the relocation of his office for the practice of law to 2956 Rhodes Circle, The Rhodes Professional Building, Birmingham, Alabama 35253. Phone 933-8383.

Mobile attorney **John Furman** placed eighth out of 25 entries in a recent pure stock car race at Mobile Dirt Track in Semmes, Alabama. Furman drove a 1974 eight cylinder Duster, sponsored by the race track, which is his client.

**J.T. Malugen**, attorney and counselor at law, announces the removal of his office to 707 West Main Street, Dothan, Alabama. Phone 793-5448.

**J. Scott Boudreaux** is pleased to announce the relocation of his office to 604 38th Street South, Birmingham, Alabama 35222. Phone 591-6767.

**Johnny M. Langley** is pleased to announce the opening of his office on North Pond Street, West Courthouse Square, Vernon, Alabama. Phone 695-7176.

**William D. King, IV**, attorney at law, formerly associated with the firm of Gray, Espy and Nettles, Tuscaloosa, is pleased to announce the opening of his office at Suite 201 Post Office Building, Carrollton, Alabama 35447. Phone 367-8631.

**Richard M. Jordan** and **Randy Myers**, attorneys at law, take pleasure in announcing **Simeon F. Penton** has become associated with the firm. Offices are located at 302 Alabama Street, Montgomery, Alabama 36104. Phone 265-4561.

**Hand, Arendall, Bedsole, Greaves & Johnston**, 30th Floor, First National Bank Building, Mobile, Alabama, takes pleasure in announcing **Anita T. Smith** has become associated with the firm.

**Floyd, Keener & Cusimano** takes pleasure in announcing **David A. Kimberley** has become associated with the firm in the general practice of law. Offices are located at 816 Chestnut Street, Gadsden, Alabama 35999. Phone 547-6328.

The law firm of **Hardin & Wise** announces the removal of its office for the general practice of law to Suite 503 720 Energy Center Boulevard, Northport, Alabama 35476.

**Stanford J. Skinner** and **Michael A. Anderson** take pleasure in announcing the formation of their partnership, **Skinner & Anderson**, for the general practice of law at 1701 City Federal Building, Birmingham, Alabama 35203. Phone 251-0285.

The law firm of **Foster, Brackin & Bolton, P.A.**, takes pleasure in announcing **M. Mort Swaim** has become associated with the firm. Offices are located at 1715 N. McKenzie Street, Foley, Alabama 36535. Phone 943-4500.

The law firm of **Hampe, Dillard and Ferguson** takes pleasure in announcing **Leslie Ramsey Barineau** has become associated with the firm. Offices are located at Suite 331 Frank Nelson Building, Birmingham, Alabama 35203. Phone 251-2823.

**Carpenter & Gidiere** is pleased to announce **C. Jeffery Ash** has become associated with the firm, and its offices are located at Suite 320 Corporate Square, 555 South Perry Street, Montgomery, Alabama 36104. Phone 834-9950.

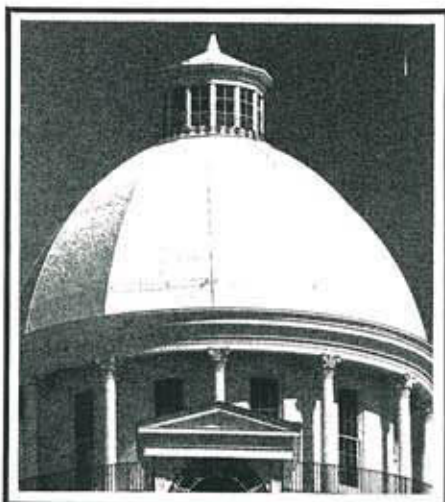
The law firm of **Falkenberry, Whatley & Heidt** is pleased to announce the relocation of its offices to Fifth Floor Title Building, 300 21st Street North, Birmingham, Alabama 35203. Phone 322-1100.

**Bell, Richardson, Herrington, Sparkman & Shepard, P.A.**, is pleased to announce the association of **Gabrielle U. Wehl, Philip N. Lisenby** and **Sylvia E. Tucker** and the relocation of the law offices to 116 Jefferson Street South, Huntsville, Alabama 35801.

The law firm of **Wooten, Boyett, Thornton, Carpenter & O'Brien** takes pleasure in announcing **R. Blake Lazenby** has become a partner in the firm. Offices are located at 212 West North Street, Talladega, Alabama 35160. Phone 362-0081.

The firm of **Watson, Gammons & Fees, P.C.**, takes pleasure in announcing **Douglas Jaye Fees** has become a partner in the firm. Offices are located at 107 North Side Square, Huntsville, Alabama 35804. Phone 536-7423.





# LEGISLATIVE WRAP-UP

by  
**Robert L. McCurley, Jr.**

The Alabama Legislature while in its second special session for 1985 amended the Alabama income tax provisions governing alimony to conform to the federal provisions which became effective January 1, 1985.

This bill (H-67) was sponsored by Senator Ted Little and Representatives Beth Marietta, Michael Onderdonk, Michael Box and Bill Fuller. Professor Jim Bryce, University of Alabama School of Law, who drafted the legislation for the institute, has summarized the effect of this amendment as follows:

The most important of the federal rules (I.R.C. §§ 71 and 215) which will now apply for Alabama income tax purposes

are: (1) deductible alimony payments must continue for at least six years, must not be designated as nondeductible in the divorce instrument and must not continue after the death of the payee spouse; (2) deductible payments within the six-year period are subject to recapture (inclusion in the payor's gross income) if they exceed later payments during the six-year period by more than \$10,000, unless one of the former spouses has died or the payee spouse has remarried; (3) payments which will cease on the happening of some contingency related to a child, e.g., attaining age 21, will no longer be deductible.

Alabama also adopted the new federal rule (I.R.C. § 1041) reversing the *Davis* case: no gain will be recognized on the transfer of appreciated property in connection with a divorce. The transferee spouse will have the same basis in the property as the transferor; thus, for example, the former husband can transfer appreciated property in a property settlement without reporting the gain, while the former wife will recognize and report the gain on the property when she sells it.

The Alabama amendments are effective for instruments executed after December 31, 1984, and for instruments executed before that date which are modified to be subject to the amended federal law. These are the same effective date rules as in the federal income tax. Thus the same rules with the same effective dates now will apply for federal and Alabama law. Instruments that result in deductible alimony for federal purposes will achieve that same result for Alabama income tax purposes.

*(Continued on page 307)*

Four Alabama and Federal Trial Practice Form Books Available for Immediate Shipment . . .

- ALABAMA AND FEDERAL PLAINTIFF DISCOVERY FORMS**
- ALABAMA AND FEDERAL MOTION FORMS**
- ALABAMA AND FEDERAL ORDER AND JUDGMENT FORMS**
- ALABAMA AND FEDERAL COMPLAINT FORMS**

Part of a series of trial practice form books by **Robert Sellers Smith** and **Joan McIntyre**.

The price of each of these books is **\$59.95** plus postage and handling.

**MADISON PUBLISHING COMPANY, INC.**  
223 EAST SIDE SQUARE  
HUNTSVILLE, ALABAMA 35801  
(205) 533-5040



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



# Alabama State Bar Committee on Legal Needs of the Elderly



Artwork courtesy Alabama Commission on Aging



by  
Harold V. Hughston, Jr.,  
Chairman

## Introduction

In July 1983, William B. Hairston, Jr., while preparing to take office as president of the Alabama State Bar and with the support of the board of bar commissioners, organized the Committee on Legal Services for the Elderly with the general purpose of the committee being "to determine the legal needs of that part of our population designated 'the elderly' that can be served through the facilities of the Alabama State Bar and its membership." The creation of this committee represented the Alabama State Bar's first organized effort to have a single vehicle to address the legal needs of the elderly.

In the first two years of its existence, the committee has been involved with basic organizational chores such as discovering broad and specific legal problems with which the elderly are confronted; determining various methods and programs that the committee, our state bar and individual lawyers might undertake to address those problems; determining opportunities to present the legal needs of the elderly to the bar membership; searching methods of funding for the various projects we as a committee might undertake; and investigating projects and programs bars in other states have done and are doing as source of ideas for projects we in Alabama also might undertake.

The committee has set as long-range goals the education of the public, the elderly, the bar and lawyers in Alabama of the legal needs of the elderly; the establishment of programs to address those needs; and establishment of this committee as a viable and active committee to coordinate the identification of needs and the resolution of those needs for the Alabama State Bar.

Toward the accomplishment of these goals the committee began its work by determining the various problems which face the elderly. This was accomplished through such endeavors as committee members discussing the problems of the elderly with members of other professions who deal with the elderly; receiving information from governmental agencies as to the needs of the elderly; and receiving input from attorneys as to their views on the needs of the elderly.

In addition to the fact-finding work the committee has done and still is doing, it has undertaken several projects. Newspaper articles on subjects dealing with the elderly have been written and distributed during the month of May in conjunction with "Older Americans Month" and "Law Day." These articles have covered such topics as powers of attorney, will preparation, Medicare and health insurance benefits, property ownership, retirement plan options and Social Security and SSI eligibility.

The committee also is preparing for distribution throughout Alabama a resource/coordination manual. This

manual will list the various organizations and agencies in Alabama dealing with meeting the needs of the elderly. The purpose of this manual is to identify and locate the proper agency designed to meet specific problems. This manual should reduce the amount of time and anxiety the elderly face in trying to locate the proper agency needed.

The committee presently is investigating and considering other projects possibly realistically undertaken to involve the Alabama State Bar and lawyers in Alabama more directly and more concretely with the elderly in order to address and meet their legal needs. We, as a state bar and as lawyers, will be strengthened as a profession and as individuals as we address the problems of the elderly citizens of Alabama and participate in the resolution of those problems and needs.

The articles in this issue of *The Alabama Lawyer* were chosen with the practitioner in mind and with the intention that we as attorneys will understand more fully some of the frequent legal problems facing the elderly. □

---

*Harold V. Hughston, Jr., is a 1979 graduate of the University of Alabama School of Law. He is a partner, with his brother, in the Tuscumbia firm of Hughston and Hughston and serves as chairman of the Alabama State Bar Committee on Legal Needs of the Elderly.*

---



# Solving Common Problems in Long-term Care and Medicaid Financial Eligibility

by  
Clayton Davis

The private practitioner long has believed that knowledge of Medicaid and other public benefits law is unnecessary. Because of the increasing longevity of the American population and the rapid rise in the cost of long-term care, this belief must be discarded.

Even middle-class clients find themselves unable to meet the cost of nursing home and other medical care in their later years. The horror stories have led many families to seek legal advice to avoid serious financial difficulties should the need arise to seek nursing home admission for one or more of their members. The number of such persons can be expected to accelerate. The Alabama State Bar must be ready to meet the challenge.

Undoubtedly, many people fail to plan for the possibility of having to pay for long-term care because they believe Medicaid will pay if they cannot. Some even assume, quite erroneously, that *Medicare* is generally available to meet these expenses. Although Medicare, Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395xx (1982), does pay some nursing home and home health care expenses, the coverage is extremely limited.<sup>1</sup>

Medicaid, *id.* Title IXI, 42 U.S.C. §§ 1396-1396p, is more generally available to help meet the needs of those who cannot afford needed long-term care. This is because Alabama has chosen to cover "intermediate care facility services," *see id.* § 1396d(c)&(d), in addition to skilled nursing home services, and no length of stay maximum is imposed.

Roughly 75 percent of Alabama nursing home residents receive at least some assistance from Medicaid.

Because Medicaid is a joint federal-state program, *id.* §§ 1396 & 1396a(2), laws and regulations governing it are found at both the federal and state levels. Attorneys who find themselves utterly perplexed after initial attempts to find solutions for clients seeking eligibility for nursing home coverage join a lengthy list of distinguished jurists who have found Medicaid law monumentally difficult to fathom. The Medicaid program and its statutory and regulatory provisions have been variously described as "almost unintelligible to the uninitiated"<sup>2</sup> (Judge Friendly); "a morass of bureaucratic complexity"<sup>3</sup> (Chief Justice Burger); "Byzantine" and "among the most intricate ever drafted by Congress"<sup>4</sup> (Justice Powell); "an aggravated assault on the English language, resistant to attempts to understand it"<sup>5</sup>; and "so drawn that

they have created a Serbonian bog from which the agencies are unable to extricate themselves."<sup>6</sup> Attorneys should not despair, however, but rather should appreciate the importance to their clients of informed legal advice in completing real property and other financial transactions (especially in estate planning) enabling them to avoid Medicaid problems in the future.

What sort of client need be concerned about Medicaid? At the risk of over-generalization, anyone who cannot reasonably expect to receive at least \$1,250 per month (in 1985 dollars) in post-retirement income (twice that amount for a couple) should take Medicaid rules into account in reviewing property holdings and in estate planning. Clients with income prospects of anything less are highly unlikely to be able to pay for nursing home care themselves.

What are the basic requirements for Medicaid eligibility in the nursing

---

*Clayton Davis is a 1978 graduate of the University of Alabama School of Law and is state director for Legal Counsel for the Elderly, the University of Alabama Law School Clinical Program. He, too, is a member of the bar's Committee on Legal Needs of the Elderly.*

---



home? First, applicants must meet the medical criteria established by the Alabama Medicaid Agency for either intermediate or skilled care.<sup>7</sup> Although not every applicant for whom a physician recommends admission to a nursing home will be certified by Medicaid, failure to meet the medical criteria is at this writing far less commonly given as the ground for denial than is failure to meet financial eligibility requirements.<sup>8</sup>

Second, applicants must have a monthly income of \$852.90 or less.<sup>9</sup> This amount is set by the state, but cannot exceed 300 percent of the monthly Supplemental Security Income (SSI) benefit amount for an individual (currently 300 percent of \$325, or \$975).<sup>10</sup> This federal limit thus rises each January when the SSI benefit is adjusted for inflation.

Third, applicants must not have "countable resources" or assets exceeding the limitations imposed by the SSI program in 42 U.S.C. §§ 1382 & 1382b(a). During 1985, this limitation is \$1,600 for a single individual or a married "individual who has no spouse with whom he is living"<sup>11</sup> and \$2,400 for a married couple living together.<sup>12</sup>

Thus, an institutionalized person is almost always subject to the \$1,600 limit even if married, but his spouse's property will not be considered as countable resources.

The following assets are the most important exclusions from countable resources:

(1) Up to \$2,000 worth of household goods and personal effects plus a wedding ring, an engagement ring, and necessary medical equipment and devices. 42 U.S.C. § 1382b(a)(2)(A); 20 C.F.R. § 416.1116; Social Security Administration Program Operations Manual System [hereinafter POMS] §§ SI 01120.500-.520; Alabama Medicaid Agency *Administrative Code* [hereinafter *Administrative Code*] Rule No. 560-X-25-.06(2)(c) (Supp. June 30, 1985);

(2) Any automobile necessary for employment, used as transport to obtain medical treatment of a specific or regular medical problem, or modified for a handicapped person and, if no automobile is excluded because of any of these three uses, then up to \$4,500 in current market value of any automobile.<sup>13</sup> 42 U.S.C. § 1382b(a)(2)(A); 20 C.F.R. § 416.1218(b); POMS §§ SI 01130.600-.620 & SI E01130.620; *Ad-*

*ministrative Code* Rule No. 560-X-25-.06(2)(a);

(3) All term insurance and burial insurance (but only if the proceeds can be used only to pay the burial expenses of the insured). 20 C.F.R. § 416.1230(a)&(b)(8); POMS § 01130.700; *Administrative Code* Rule No. 560-X-25-.6(2)(b);

(4) Whole life insurance, but only if the total face value of all whole life policies on the individual does not exceed \$1,500. (If this \$1,500 limit is exceeded, the *entire* cash surrender value of all whole life policies is included in countable resources.) 42 U.S.C. § 1382b(a) (last sentence); 20 C.F.R. § 416.1230(a); POMS §§ SI 01130.700-.910; *Administrative Code* Rule No. 560-X-25-.06(2)(b);

(5) All burial spaces intended for the individual and his immediate family plus up to \$1,500 specifically set aside for burial in burial contracts, burial trusts, or bank accounts clearly designated exclusively for burial. (Any appreciation in value and interest subsequently earned on these items are also excluded). 42 U.S.C. § 1382b(a)(1)(B), (d)(1) & (4); 20 C.F.R. § 416.1231; POMS §§ SI A01110.001-.002; *Administrative*



Photograph courtesy Montgomery Area Council on Aging



Code Rule No. 560-X-25-.06(2)(d);

(6) Income-producing nonliquid property, but only if its equity value is \$6,000 or less and it produces an annual net return of at least six percent. (Stocks, bonds, and other "liquid" resources — those that can be converted to cash within 20 days, *id.* -.06(1)(a) — cannot be excluded under this provision. On the other hand, nonliquid property worth more than \$6,000 that nets at least six percent of total equity will not disqualify the individual so long as the sum of the excess above \$6,000 together with all other countable resources does not exceed the \$1,600 limit. Thus \$7,600 can be held in 1985 if the individual has no other countable resources.) 42 U.S.C. § 1382b(a)(3); 20 C.F.R. § 416.1224; POMS §§ SI 01140.001-.010, -.1000, 200, & -.320-.325; *Administrative Code* Rule No. 560-X-25-.06(3).

(7) Unknown assets. Effective with September 1985, an asset, such as an unknown inheritance, becomes *income* for the month during which the individual discovers his ownership interest and a resource in the following month and thereafter. Unknown assets are excluded prior to discovery. POMS § SI 01110.010 B. (The *Administrative Code* has no comparable provision. Litigation would probably be required to obtain Medicaid acquiescence. Obviously, the exclusion is important only in cases in which Medicaid seeks to recover "overpayments" received during the period prior to discovery.);

(8) Retroactive Social Security and SSI payments, but only for a period of six months following the month of receipt. 42 U.S.C. § 1382b(a)(F) (Supp. 1985); POMS § SI A01110.003. (Again, the state has not adopted a comparable provision.);

(9) Property that cannot be liquidated. 20 C.F.R. § 416.1201(a); POMS § SI 01130.330 A; *Administrative Code* Rule No. 560-X-25-.06(e)(4). A major discrepancy between federal (which controls) and state law exists here. The Alabama regulation limits this exclusion to property with a net current market value of \$6,000 or to the exclusion of the first \$6,000 and the inclusion of the remainder, effectively limiting the amount to \$7,600 for an

individual with no other countable resources as in exclusion (6) above. The federal provision places no value limit on property that cannot be liquidated. In addition, the POMS provision excludes property that cannot be liquidated because of "legal technicalities, general economic conditions in the community, or the inability to find a buyer" (emphasis added). The Alabama rule seems to reject the last reason by omission. Producing evidence that the property has been on the market for 90 days (Alabama) or for six months (federal) and that no offer to purchase has been received or producing statements from two "knowledgeable sources" (see POMS § SI 01130.320 D. for a list of these) that the property is not salable because of legal entanglements or economic conditions would satisfy both federal and state requirements for property valued below the Alabama dollar limit. Exclusion under this section of property appraised at a greater value by the tax assessor would almost certainly require litigation. (Note: The Alabama Medicaid Agency recently has announced that it intends to abolish this exclusion in its entirety. 3 Ala. Adm. Monthly 457, 458 [Sept. 30, 1985].) The agency bases its decision on Transmittal MCD-25-85 (PO) of the Health Care Financing Administration. HCFA's interpretation is itself based on a decision of the Appeals Council of the Social Security Administration (not "in accordance with a recent federal court decision" as alleged by Medicaid in the *Administrative Monthly* in which the council held that the property in question was actually "marketable, but at a price which is probably less than that desired by the claimant." SSR 83-30a. The Division of Program Requirements Policy of the Social Security Administration also has announced it intends to amend POMS § SI 01130.330 (probably near the end of November), but not exactly in line with HCFA. Apparently, the new POMS section will merely stress Social Security eligibility workers must analyze each property situation individually to determine the current market value rather than always accept the applicant's statement that the property has been on the market and no offers have been received. See 11 Washington

Weekly at 143-44 (National Senior Citizens Law Center, Sept. 13, 1985). The implementation of this new HCFA policy already has been temporarily enjoined in Maine, *Willey v. Petit*, No. CV-85-401 (Kennebec County Sup. Ct., Aug. 21, 1985), and more litigation can be expected to follow before this issue is finally settled;

(10) The principal of trusts, but only if the applicant has no legal right of access to the principal. POMS § SI 01120.105; see *Administrative Code* Rule No. 560-X-25-.08(4);

(11) Funds in joint checking, savings, and other accounts, but only to the extent that the applicant can prove that the money was not really his own and that he has removed his name from the account to the extent of his non-ownership. POMS § SI 01120.210. *Contra, Administrative Code* Rule No. 560-X-25-.08(2) (attributing all such funds to the applicant without exception). Using this exclusion currently requires, at the very least, producing evidence of non-ownership (as outlined in the POMS provision) at a state administrative hearing and, at most, resort to the courts; and

(12) The home, but only if the applicant is expected to be discharged from the nursing home or his spouse or a dependent relative resides in the home. 42 U.S.C. § 1382b(a)(1); 20 C.F.R. § 416.1212(a)(2); POMS § SI 01130.425; *Administrative Code* Rule No. 560-X-25-.06(2)(e). The "home" is defined as the principal place of residence and includes the land around it and any related outbuildings. *Id.* The "dependent relative" must have been living in the home and actually dependent on the applicant at the time of his institutionalization. *Administrative Code* Rule No. 560-X-25-.06(2)(e)(2). A "relative" is defined as "son, daughter, stepson, stepdaughter, in-laws, mother, father, stepmother, stepfather, grandmother, grandfather, aunt, uncle, sister, brother, stepsister, stepbrother, halfsister, halfbrother, niece, nephew." *Id.*; see POMS § SI 01130.425 B. Whether the applicant's absence from the home is "temporary" is often a difficult question. An absence of more than six months "may indicate that the home



no longer serves as the principal place of residence." POMS § SI 01130.425 B. On the other hand, six months' absence does not create an irrebuttable presumption that it is not temporary.

Finally, applicants must not have violated the "transfer of resources" restrictions within 24 months of the date of application. The current Alabama Medicaid regulation provides as follows:

(1) Any transfer of an applicant's/recipient's resources, or interest therein, made for the purpose of establishing or maintaining eligibility for Medicaid benefits shall result in that applicant's/recipient's being ineligible for such benefits for a period of twenty-four (24) months.

*Administrative Code* Rule No. 560-X-25-.09(1). Exceptions are limited to transfers for fair market value, those worth so little that they would not cause the resources limit to be exceeded were the value of the property attributed to the applicant, and those for which convincing evidence exists that the transfer was exclusively for

some other purpose. *Id.* (2) & (3). This formulation fails in numerous ways to comply with federal law. The Alabama Medicaid Agency currently is considering amending this section of its regulations in an attempt to meet federal requirements. Some of the federal-state discrepancies are discussed later.

The effect of a transfer of assets under SSI is governed by 42 U.S.C. § 1382b(c) and 20 C.F.R. § 416.1246. Federal Medicaid transfer of assets rules for any property exceeding \$12,000 in value and for the transfer of a home of any value by a nursing home resident are governed by 42 U.S.C. § 1396p(c)(2). The transfer of any other property under Medicaid is governed by SSI rules pursuant to 42 U.S.C. § 1396p(1).

Note that the federal law states that state regulations may provide for denial of Medicaid because of transfer of assets, but only under state regulations no more restrictive than those of section 1396p(2) for property exceeding \$12,000 in value and for homes of nursing home residents and no more restrictive than those of § 1382b(c) for all

other property. Rule No. 560-X-25-.09 makes no such distinction. The agency amendments under consideration include the distinction, but primarily to provide for a disqualification period exceeding 24 months if the property exceeds \$12,000 in value.

The current regulations fail to include (but those under consideration include) exceptions for the transfer of a home to a spouse or to a child who is under 21 years of age, blind or permanently and totally disabled for that person's use as a residence. Similarly, those regulations under consideration but not current exempt transfers of homes intended to be for fair market value and those by persons whose institutionalization is expected to be temporary and prohibit disqualifications that would cause undue hardship. Undue hardship determinations will include consideration of whether the applicant is a person in need of care and protection under the Adult Protective Services Act,<sup>11</sup> whether an attempt has been made to void<sup>12</sup> or to obtain more compensation for the transfer

## ALABAMA BAR INSTITUTE FOR CONTINUING LEGAL EDUCATION

is pleased to announce the publication of an all new *Marital Law* handbook. The handbook contains 450 pages of valuable information and forms. The chapters and the authors, selected for their expertise in this area, include:

**I. INTRODUCTION**  
William H. Mills  
Redden, Mills & Clark  
Birmingham, Alabama

**II. MARRIAGE**  
J. Noah Funderburg  
Law School Clinical Program  
Tuscaloosa, Alabama

**III. GROUNDS AND JURISDICTION FOR DIVORCE**  
J. Michael Manasco  
Minor & Manasco  
Montgomery, Alabama

**IV. ANNULMENT**  
Herndon Inge, Jr.  
Inge, McMillan & Inge  
Mobile, Alabama

**V. PRELIMINARY RELIEF IN DIVORCES**  
Joe C. Morrison  
Law School Clinical Program  
Tuscaloosa, Alabama

**VI. DEFAULT DIVORCE**  
Judith S. Crittenden  
Glenda G. Cochran  
Attorneys at Law  
Birmingham, Alabama

**VII. MARITAL SETTLEMENT AGREEMENTS**  
John M. Bolton, III  
Robison & Belser, P.A.  
Montgomery, Alabama

**VIII. DISCOVERY**  
William H. Mills  
Redden, Mills & Clark  
Birmingham, Alabama

**IX. ALIMONY AND PROPERTY DIVISION**  
John R. Christian  
Attorney at Law  
Birmingham, Alabama

**X. CHILD CUSTODY, SUPPORT, VISITATION AND MODIFICATION THEREOF**  
Ernest L. Potter, Jr.  
Attorney at Law  
Huntsville, Alabama

**XI. TAX NOTES**  
Dale B. Stone  
Joseph T. Ritchey  
Sirote, Permutt, Friend,  
Friedman, Held & Apolinsky, P.C.  
Birmingham, Alabama

Allan J. Chappelle  
Chappelle Consulting Group  
Birmingham, Alabama

**XII. PREPARATION AND PRESENTATION OF TRIAL OF DOMESTIC CASES**  
Joe M. Berry  
Berry, Ables, Tatum,  
Little & Baxter, P.C.  
Huntsville, Alabama

**XIII. POST-JUDGMENT REMEDIES IN DIVORCES**  
J. Noah Funderburg  
Joe C. Morrison  
Law School Clinical Program  
Tuscaloosa, Alabama

PRICE: \$75.00

For further information:  
P.O. Box CL  
University, AL 35486  
205/348-6230



and whether the applicant or his representative has exhausted efforts to meet the applicant's needs from other sources.

One of the more important provisions of the federal SSI regulations concerning transfer of assets is found at 20 C.F.R. § 416.1246(a)(2), which provides that if the asset is returned, "the uncompensated value is no longer counted as of the date of return." Although this provision clearly applies to Medicaid nursing home applicants for transfers of nonhome property worth \$12,000 or less, neither current nor draft Alabama regulations include it. Resort to litigation ultimately may be required to obtain relief for clients under these circumstances.

Two common examples of the workings of this provision illustrate how it *should be* applied. First, suppose that Mrs. Mary Smith gives \$5,000 in cash in April to her daughter, Mrs. Susan Jones. Mrs. Smith then is admitted to a nursing home during May and applies for Medicaid to begin in June. (Assume that Mrs. Smith was not receiving SSI before admission. Her \$5,000 cash holdings would have defeated eligibility.<sup>16</sup>) Suppose then that Mrs. Jones learns the transfer may cause eligibility problems, and returns the money to Mrs. Smith late in May. Under federal law, no 24-month disqualification would be applied. Mrs. Smith would have to pay for her own care until the \$5,000 is spent down to the \$1,600 limit (\$3,100 if she puts \$1,500 in a separate burial fund), but she would be eligible beginning the month after she "spends down." When Alabama refuses to follow this provision, the very harsh result is a two-year disqualification (unless the agency adopts the "undue" hardship exception found in the draft regulations in this case). Of course, Mrs. Smith should seek relief at an administrative hearing or in the courts, but will she or Mrs. Jones know to seek help? Furthermore, will the nursing home wait several months for payment while the agency and the courts consider her appeal? Obviously, a great deal of good would result if the public were better informed and if the agency adopted state regulations to conform with federal law. In addition, knowledgeable counsel may prevent eviction from

the nursing home if the grounds and likelihood of successful appeal are carefully explained to the facility administrator. In the best of circumstances, Mrs. Smith and Mrs. Jones would have sought the advice of counsel prior to any movement of funds, and the gift would never have occurred in the first place.

Second, suppose the same set of facts except that Mrs. Jones never actually returns the \$5,000 directly to Mrs. Smith, but instead pays Mrs. Smith's nursing home and other bills with the funds. They have on their own (as often happens) requested an administrative hearing, and they seek legal advice late in July upon receipt of notice that the hearing is set for early August. Note that this scenario may leave Mrs. Smith with exactly the same available resources in reality as in the first example and actually may have resulted in a spend-down even below the \$1,600 or \$3,100 mark out of ignorance. The only arguments on appeal appear to be that the money was, in effect, returned as of the date of its being spent to pay Mrs. Smith's bills and that disqualification would be an undue hardship. The agency undoubtedly will oppose Mrs. Smith's appeals vigorously, and the outcome cannot be predicted with any certainty. If Mrs. Jones keeps the money for her own use, 24-months' disqualification is highly likely absent other facts.

One key distinction must be made when the \$5,000 is the proceeds of a bank account held jointly by Mrs. Smith and Mrs. Jones. If the money actually (not just legally) belonged to Mrs. Jones all along, no "transfer" has really occurred and POMS section SI 01120.210 (see paragraph (11) above) should mandate a favorable result, but only if Mrs. Jones' *actual* ownership can be proved (by tracing the origin of the funds, for example) and often only after appeal to the courts. The Alabama Court of Civil Appeals has addressed this question twice, but agency interpretation of the cases remains decidedly adverse to applicants.

In *Baggiano v. Miller*, 437 So.2d 557 (Ala. Civ. App.), *cert. denied*, No. 82-911 (Ala. 1983), the court held that when applicant's daughter withdrew money

from joint bank accounts (held in applicant and her daughter's names), applicant had made no "transfer" to her daughter, thus making the "transfer" of resources rules inapplicable. In *Miller*, the facts seemed to indicate that nearly all the money in question was actually accumulated by applicant's daughter in the first place, but the court stated this was "interesting to note," but "not determinative." *Id.* at 559. The facts also seemed to indicate that applicant's daughter had paid much of her mother's expenses for many years. Obviously, the court could have relied on POMS section SI 01120.210 to mandate eligibility because the money *actually* belonged to applicant's daughter all along. Instead, the court stated broadly that no "transfer" occurred when applicant's daughter as a joint account holder "withdrew the funds as she had a legal right to do." *Id.*

In *Flannagin v. Baggiano*, 462 So.2d 931 (Ala. Civ. App. 1984), *cert. denied*, No. 84-64 (Ala. 1985), Judges Bradley and Holmes restated the *Miller* formulation, but presiding Judge Wright dissented, fearing "that the majority opinion leaves [t]he door . . . opened for the use of joint accounts with transfers by one other than the applicant to be freely made without fear of disqualification." *Id.* at 934. Judge Wright would have required "convincing" evidence from applicant that the transfer was made exclusively for some purpose other than for establishing Medicaid eligibility. Neither the majority nor the dissenting opinion gave more than scant attention to the original actual ownership of the funds, but the majority did analyze the related question whether the agency should be allowed to apply *all* the funds in a joint account to one owner. Although perhaps not directly at issue in *Flannagin*, the majority stated flatly that "it is error to give such a restrictive interpretation of Rule No. 560-X-25-.08. . . ." *Id.* at 933.

Clearly, the Court of Civil Appeals finds agency interpretation of its joint bank account rules overly restrictive; however, Judge Wright's dissenting opinion serves as a warning that not every joint account withdrawal will



pass muster. Furthermore, the agency persists in its own reading of *Flannagin*, so that even the successful litigant may spend years involved in administrative and judicial appeals before finally establishing eligibility. Until the apparent conflict between the agency and the courts clearly is resolved, transactions of this sort should be avoided whenever possible.

The "convincing evidence" rule mentioned by Judge Wright may not always be the obstacle it seems. Cases in which the evidence clearly shows the transfer was made at a time when the applicant had absolutely no expectation of admission to a nursing home can be won at the administrative hearing level. Evidence, for example, that the admission was precipitated by a stroke and that the transfer pre-dated the stroke should show the transfer was made exclusively for some purpose other than to establish eligibility. Unfortunately, the agency is very difficult to convince on this issue, especially when the applicant has had a history of chronic medical problems. The very fact that the applicant is elderly and has been hospitalized near the time of the transfer may be enough to result in a negative administrative hearing decision, the agency apparently believing that such persons have a natural inclination to consider the possibility of a nursing home admission. Thus, although the burden of proving the transfer was made exclusively for some purpose other than to establish Medicaid eligibility is difficult to meet, it is not impossible.<sup>18</sup> Perhaps future litigation will yield decisions that begin to clarify the law in this area.

One approach to avoiding problems associated with transfers is the use of *written* agreements to transfer property in exchange for care or for the payment of living expenses. Past compensation is not considered compensation by the agency unless it is pursuant to a previously executed written agreement. Thus, the common practice in many families of children supporting their parents with the understanding that the parent's property will eventually be deeded to the children will not be considered by the agency in determining whether property has been transferred for less than fair market

## Nominations Open for 4th Annual Edward J. Devitt Award for Distinguished Service to Justice

"Dedication and excellence of service"

"Promoting and protecting the dignity and effectiveness of the American legal system"

"Lifelong contributions to the improvement of the administration of justice"

"A living monument to the strength and vitality of the constitution of the United States."

Such words describe past winners of the Edward J. Devitt Distinguished Service to Justice Award: 1982 — Albert B. Maris, senior judge of the United States Court of Appeals for the Third Circuit; 1983 — Walter E. Hoffman, senior judge of the United States District Court, Eastern Division; 1983, a Special Award to Warren E. Burger, chief justice of the United States; and in 1984, Frank M. Johnson, Jr., circuit judge of the United States Court of Appeals for the 11th Circuit.

Nominations for the fourth annual Devitt Award are now open. The award, carrying an honorarium of \$10,000, is made available by West Publishing Company in the name of Edward J. Devitt, long-time chief U.S. district judge for the District of Minnesota. Judge Devitt will serve, with Justice Lewis F. Powell, Jr., of the Supreme Court and Chief Judge James R. Browning of the Ninth Circuit Court of Appeals, to select the award winner for 1985.

The award was established to recognize the dedicated public service of members of the federal judiciary. All federal judges appointed under Article III of the Constitution are eligible recipients.

Any interested person may submit a nomination. Entries should be in writing and should list: examples of leadership in improving court administration, effectiveness in improving discovery practice or accomplishment of any professional activity contributing to the advancement of justice.

Nominations for the 1985 award should be submitted by November 30, 1985, to: Devitt Distinguished Service to Justice Award, P.O. Box 43810, St. Paul, MN 55164.

### LEGISLATIVE WRAP-UP (From page 299)

#### Miscellaneous Acts Passed During Second Special Session 1985

Of the 475 bills introduced in the second special session, numerous local bills were approved, but only 48 bills of statewide concern were approved. Several of the approved bills merit review. First, senate bill 44 amended Sections 15-8-8, 15-22-50 of the *Code of Alabama* to allow the court to grant split sentences for convictions of up to 15 years. Previously the court's authority to grant split sentences was limited to sentences of up to 10 years.

Second, senate bill 109 amends the rules of the road so that hit and run drivers in accidents involving death or personal injury will be punished as a Class C felony.

Three additional bills were approved, house bills 72, 91 and 133, were proposed by the Alabama Department of Pensions & Securities. They amend and further provide for enforcement of support payment including extending the coverage of several Alabama support laws to encompass alimony as well as child support when DPS is providing support. Parties in divorce actions are prohibited from waiving garnishment orders. Furthermore, state tax refunds may be offset to satisfy child support or alimony debts owed any individual served by DPS. Further discussion of these acts will follow in the next *Alabama Lawyer*. □



value unless the agreement has been reduced to writing and is legally enforceable. In the real world, this sort of agreement is usually oral and its terms often vague. Families need to know that unless they execute binding written agreements, they may find that, although they have spent tens of thousands of dollars caring for and supporting their parents, the family home will have to be sold and the proceeds spent paying their parents' nursing home bills before Medicaid will become available.

Because even the most careful planning may not prevent the initial denial of a Medicaid application, one needs to be familiar with the procedures for appeal. First, a written request for a hearing must be received by the agency within 60 days of the adverse decision. The agency reportedly is considering reducing this to 45 days. If the claimant currently is receiving Medicaid benefits, the request must be received within ten days for the benefits to continue pending the outcome of the hearing. *Administrative Code* Rule No. 560-X-25-.03(5).

Although anyone over 18 years of age may practice before the agency, *id.* Rule No. 560-X-26-.01, a written appointment of representative must be executed by the claimant if competent or his guardian, a member of his immediate family, or his "sponsor."<sup>19</sup> This appointment must contain authorization to receive notices and confidential information and must include the applicant's name and Medicaid or Social Security number. *Id.* -.02. The agency's standard form is found at Rule No. 560-X-28-.01.(16).

Financial eligibility hearings are usually held in the district office of the Medicaid agency. The rules of evidence are those used in civil nonjury cases. *Id.* -.26-.01. The hearings are conducted by hearing officers appointed by the agency, who are empowered only to make recommendations to the commissioner, who is the final hearing authority. *Id.* -.3-.01(2). One should note that the commissioner's role is not merely formal. She will on many occasions "nonconcur" in the hearing officer's findings, even when both the hearing officer and the agency attor-

neys at the hearing agreed with claimant's position at the hearing. Thus, counsel must be careful to inform the client that, even after a favorable ruling by the hearing officer at the time of the hearing, the final agency decision may be unfavorable.

Second, a rehearing may be requested within 15 days of an adverse decision by the commissioner. *Code of Alabama* § 41-22-17. This step in the process is optional and is usually useless unless new evidence can be submitted with the request or simply to buy time before proceeding to a judicial appeal.

Third, a notice of appeal must be sent the agency within 30 days of the adverse decision of the commissioner on hearing or rehearing. Finally, a petition for review must be filed in circuit court within 30 days of the filing of the notice of appeal. *Id.* § 41-22-20(d).

The Alabama Medicaid Agency must be named as the defendant in the petition for review. *Id.* § 41-22-20(h). The review is conducted by the court on the record, and no new evidence may be presented unless the court determines that material evidence exists and that good reason exists for its not having been presented at the hearing. *Id.* § 41-22-20(i) & (j).

One of the major points of contention between the agency and claimants concerning financial eligibility is the value attributed to property. Agency rules state the current market value of real estate is the *appraised* value given it by the local tax assessor. *Administrative Code* Rule No. 560-X-25-.06(3)(a). Because many older persons are entirely exempt from ad valorem taxation on their homes, most of them have probably ignored the tax assessor's appraisals in recent years. If the condition of the property has deteriorated, this appraisal may be significantly out of line. The best practice is to obtain a reduction in the appraised value through the tax assessor of the board of adjustment *before* applying for Medicaid.

Eligibility will be based on the claimant's equity value in the property, i.e., the current market value less any recorded liens and encumbrances. Apparently, this includes liens filed by

the agency on income-producing or other property still held by the claimant but exempt from the resources calculations.<sup>20</sup> Property not made exempt under one of the provisions previously discussed will probably have to be sold and the proceeds expended to pay for the claimant's care if the equity value exceeds the \$1,600 resources limit. Counsel should be aware that sales at prices significantly below the equity values thus established will be scrutinized closely by the agency, especially if the buyer is a relative.

The value attributed to life estates is contested very frequently. Agency rules state the value of a life estate is the equity value of the whole property multiplied by the percentage listed beside the life tenant's age in the IRS regulations at 26 C.F.R. § 20.2031.10.<sup>21</sup> Because these tables appear to assume a life expectancy of 109 years, the result is uniformly ridiculous. Of course most lay persons and certainly most real estate experts know that no market exists for life estates, especially those of the very old; convincing the agency of this is exceptionally difficult. Statements from real estate experts who are familiar with the property should be sufficient to rebut the value attributed by the agency, especially after the decision in *Cothran v. Wallace*, No. 83-V-963-N (M.D. Ala., Feb. 8, 1985), in which the court held that the use of values based on the IRS tables to the exclusion of actual evidence of the open market value of life estates violates the Social Security Act. The agency has not amended its rules in line with the *Cothran* decision and continues vigorously to oppose any assertion of value other than that based on the tables. Use of statements from realtors is sometimes successful at administrative hearings, but not uniformly so. Apparently only successful class litigation will resolve this problem, which is particularly common because of the large number of persons holding life estates as a result of a spouse or parent's having died intestate before the adoption of the new probate code. The problem is particularly egregious because the property cannot really be sold for the amount specified by the agency.

Shall we assume that you now have



successfully maneuvered your way through the "Serbonian bog" and that your client is eligible for Medicaid in the nursing home? Is it time to breathe a huge sigh of relief and to close the case? Unfortunately, probably not. You will soon hear from the family that they still are being presented with bills from the nursing home that they cannot afford. What happened?

Medicaid does not pay the entire nursing home bill. First, a personal liability amount is set, which is generally the client's entire income minus \$25 and any amount used to pay supplemental health insurance premiums. *Administrative Code* Rule No. 560-X-25-.10(3). This personal liability must be paid the nursing home each month. Medicaid then pays the remainder of the Medicaid basic per diem rate for covered services. Essentially, this leaves the client with \$25 per month to pay for personal needs.

This situation would be manageable if all the necessary services were covered. Many of them are not. The most common problem is that a personal laundry charge (not for washing linens or hospital gowns, simply for washing personal clothing!) of between \$45 and \$70 per month will be charged unless the family does the laundry, which often is impossible because of facility rules requiring daily pickup before six a.m. in some cases. Next, many prescription drugs and even oxygen are not covered by Medicaid. Some of the most expensive drugs, such as Tagamet, are not covered; cough and cold remedies are not covered. In fact, some Medicaid-eligible residents of nursing homes have noncovered bills of more than \$200 per month! The "sponsor" will have to pay the difference between the available \$25 and the actual bill. Most families know what to expect on the personal laundry charge, but few are prepared for the bills for the other noncovered items. What can be done?

First, attempt to convince the treating physician to prescribe equivalent covered drugs. If none exists, ask him to apply for "prior authorization" from Medicaid to have the noncovered drugs covered based on medical necessity. Second, make sure covered services are not being billed as noncovered items. Some facilities have attempted

to bill for items such as aspirin, toothpaste, ordinary shampoo and wash used to prevent bedsores even though these items are included in the basic Medicaid per diem rate. Finally, apply to the Medicaid office to have the client's personal liability reduced by the amount of the bill for noncovered *medical* expenses (not including personal items such as laundry). This deduction is mandatory under 42 C.F.R. § 435.725,<sup>22</sup> and appeal if denied.

One final problem occasionally arising in computing the personal liability is whether court-ordered alimony can be deducted. Under *Administrative Code* Rule No. 560-X-25-.10(3)(b), the maintenance needs of the "spouse and dependents living outside the facility" may be deducted. Of course, a former spouse is not a "spouse;" however, is a former spouse a "dependent" when a

court has awarded alimony? The answer may appear when *Tidwell v. Alabama Medicaid Agency*, No. CV-85-001903 (Mobile County Cir. Ct., filed July 10, 1985) is decided.

This enumeration of some of the numerous complexities and traps associated with Medicaid rules on the treatment of the income and resources of nursing home residents may convince the reader Judge Friendly was correct in stating Medicaid is "almost unintelligible to the uninitiated." It should also challenge members of the bar to join the ranks of the initiated. Thousands of prospective clients will seek our help in the years ahead. They deserve and desperately need legal advice of the highest quality when they face the "morass of bureaucratic complexity" of Medicaid. □

## WE WANT YOU TO JOIN OUR SPEAKERS BUREAU!

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



### SPEAKER'S BUREAU APPLICATION

Name \_\_\_\_\_

Firm Name (if applicable) \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Telephone \_\_\_\_\_

Please list subjects on which you are willing to speak:

1) \_\_\_\_\_

2) \_\_\_\_\_

3) \_\_\_\_\_



## FOOTNOTES

<sup>1</sup>In general, Medicare long-term care coverage is limited to payment for "extended care services," see 42 U.S.C. § 1395x(h) (1982), provided in a "skilled nursing facility," see *id.* (j), and for "home health services," see *id.* (o). *Id.* § 1395d(a) (2) & (3). Even the skilled nursing payments are limited to 100 days, *id.* (b)(2), and the existence of a copayment (during 1985, \$50 per day), *id.* § 1395e(a)(3), limits payment in the practical sense to at most 20 days because it exceeds the actual per diem rate in most Alabama nursing homes.

<sup>2</sup>*Friedman v. Berger*, 557 F.2d 724, 727n.7 (2d Cir. 1976), cert. denied, 430 U.S. 984 (1977).

<sup>3</sup>*Herweg v. Ray*, 445 U.S. 265, 278 (1982) (dissenting opinion).

<sup>4</sup>*Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981).

<sup>5</sup>*Friedman v. Berger*, 409 F. Supp. 1225, 1226 (S.D.N.Y. 1976).

<sup>6</sup>*Feld v. Berger*, 424 F. Supp. 1356, 1357 (S.D.N.Y. 1976). The author of this article gratefully acknowledges the work of the National Senior Citizens Law Center in collecting these classic descriptions of Medicaid in *Medicaid and the Elderly Poor*, Representing Older Persons 23 (1985).

<sup>7</sup>Alabama Medicaid Agency Administrative Code [hereinafter *Administrative Code*] Rule No. 560-X-10-13 (Supp. June 30, 1985). The version of this rule in effect between April 1982 and September 1983 was challenged in *Appleyard v. Wallace*, No. 83V-667-N (M.D. Ala. Dec. 15, 1983), vacated and remanded, 754 F.2d 955 (11th Cir. 1985). *Appleyard* is currently on remand for a decision on the merits, but does not involve the current medical criteria.

<sup>8</sup>Medical criteria decisions involve a determination whether, at the very least, services are required "than can only be provided by or under the direction of a licensed nurse," *Administrative Code* Rule No. 560-X-10-13(1)(c)(8), and are beyond the scope of this article.

<sup>9</sup>*Id.* Rule No. 560-X-25-.03(1)(b).

<sup>10</sup>42 U.S.C. § 1396b(f)(4)(c); 42 C.F.R. § 435.1005.

<sup>11</sup>42 U.S.C. § 1382(a)(1)(B) (Supp. 1985).

<sup>12</sup>The countable resource limits rise to \$1,700/\$2,500 for 1986; \$1,800/\$2,700 for 1987; \$1,900/\$2,850 for 1988; and \$2,000/\$3,000 for 1989 and beyond. *Id.* § 1382(a)(3).

<sup>13</sup>Note that market value rather than equity value is used here. For example, if an individual owns an automobile worth \$8,000 and owes \$10,000 on it, \$3,500 of the market value (the difference between \$8,000 and the \$4,500 exclusion) will count and will in and of itself disqualify the individual even though it has no equity value whatsoever. Oddly enough, any automobile after the first is counted only to the extent of its equity value. 20 C.F.R. § 416.1218(b)(3).

<sup>14</sup>*Ala. Code* §§ 38-9-1 to -11 (Supp. 1984).

<sup>15</sup>Under *id.* § 8-9-12 or § 35-1-2 (1975).

<sup>16</sup>Alabama Medicaid pays for nursing home expenses from the date of admission for persons already receiving SSI, but only from the first day of the month following admission for non-SSI recipients. This often results in practical difficulties for the non-SSI individual seeking nursing home admission. Essentially, someone must pay the nursing home's "private pay" rate (usually several hundred dollars more than the Me-

icaid rate) for the first partial month. In addition, many nursing homes require a deposit of one entire month's private pay rate prior to admission (sometimes even for SSI recipients, who almost never have personal funds approaching this sum because of the \$1,600 SSI resources limit). Of course, a refund can usually be obtained once Medicaid certifies the individual's eligibility, but the obstacle to admission of individuals without savings remains. Federal law prohibits facilities from charging pre-admission deposits for Medicaid eligibles. 42 U.S.C. § 1396h(d) (punishable by up to five years' imprisonment or up to a \$25,000 fine or both). A possible loophole is used to permit these "deposits" in Alabama. The Medicaid Agency may not certify applicants until after admission (not until the first of the next month for non-SSI individuals). Facilities thus argue that they have not charged any Medicaid-eligible individual a deposit. The agency has not moved to eliminate this practice, and whether this practice under these circumstances violates section 1396d(h) remains unresolved.

<sup>17</sup>*Administrative Code* Rule No. 560-X-25-08 provides that bank accounts are countable resources if the applicant has "unrestricted legal access to the accounts." What if someone deposited \$2,000 in a joint bank account named every citizen of Alabama as a joint owner? Would anyone ever qualify for Medicaid?

<sup>18</sup>*Compare In re Eula B. Newton* (Ala. Medicaid Agency, Sept. 4, 1985) (favorable decision

based on physician statement that claimant had no medical reason to expect admission to nursing home at the time and on claimant's statement that she was prepared to fly to Arizona and "wanted the property in their name to prevent a possibility of going to court.") with *In re Tommie Lee Dailey* (Ala. Medicaid Agency, July 26, 1985) (unfavorable decision despite statement that transfer was made so that daughter could better handle her affairs and that the deed was drawn up at least eight months prior to admission, which was never considered a possibility until immediately prior to admission).

<sup>19</sup>The agency has of late challenged authorizations of representation signed by non-guardian sponsors. These challenges have been rejected. *E.g., In re Arthur L. Wallace* (Ala. Medicaid Agency, Aug. 15, 1985).

<sup>20</sup>*Id.* Liens may be imposed on a Medicaid recipient's real property unless a sibling with an equity interest or a spouse or a child who is disabled or under 21 years of age lives on the property. 42 U.S.C. § 1396p(a).

<sup>21</sup>*Administrative Code* Rule No. 560-X-25-06 (3)(b).

<sup>22</sup>The Health Care Financing Administration has proposed to make this deduction optional with the states, 50 Fed. Reg. 10,992 (March 19, 1985), but the proposal has created a firestorm of opposition. California was recently ordered to allow the deduction, *Johnson v. Rank*, No. C-84-5979 SC (N.D. Cal. March 22, 1985).

## BE A BUDDY

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

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



### Local Bar Activities and Services Buddy Program Application

Name \_\_\_\_\_

Firm Name (if applicable) \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Telephone \_\_\_\_\_

New Lawyer

Experienced Lawyer

Please return to: Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101.



# CONTEMPORARY LITIGATION SERIES

New Titles in 1985

The Contemporary Litigation Series consists of expertly written handbooks and treatises on specific types of cases and aspects of courtroom practice. The latest titles in the Series include:

## **MANN'S MEDICAL HANDBOOK FOR LITIGATION**

By Arnold Mann, 1985

Appx. 575 pages, hardbound, illustrated . . . . \$50.00\*

Provides all the background information you need to handle medical aspects of civil litigation. Written in comprehensible, layman's terms to help you understand and speak with confidence about all types of injuries, diseases, and medical conditions. Includes Mini Dictionary of medical terms and exhaustive index.

## **AIRCRAASH LITIGATION TECHNIQUES**

By Daniel C. Cathcart, 1985

515 pages, hardbound, illustrated . . . . . \$65.00\*

A step-by-step guide from investigation of the accident to judgment. Explains investigation and reconstruction so you can confidently interpret investigative reports and physical evidence. Includes practical advice on practice and procedure, discovery, trial techniques, and use of experts.

## **SOCIAL SCIENCE RESEARCH METHODS FOR LITIGATION**

By Donald E. Vinson and Philip K. Anthony, 1985

488 pages, hardbound . . . . . \$45.00\*

Designed to help you interpret social science research results and challenge research findings damaging to your client. Discusses the kinds of statistical analysis occurring in evidence and testimony in such complex areas as product liability, antitrust, class action suits, and breach of contract.

## **INDUSTRIAL LOW BACK PAIN**

By Sam W. Wiesel, Henry L. Feffer and Richard H. Rothman, 1985

781 pages, hardbound, illustrated . . . . . \$60.00\*

A compilation of articles on every issue in this complex field. Discusses medical, legal, insurance, and regulatory aspects of low back pain management. Presents a standardized, objective method for rating the severity of low back pain.



THE  
**MICHIE COMPANY**



PUBLISHERS OF THE CODE OF ALABAMA

For customer service contact:

**JAMES R. SHROYER**

P.O. Box 717 • Pelham, AL 35124

(205) 326-9899

Or call toll-free 1-800-446-3410

\*plus shipping, handling and sales tax where applicable



# Recent Developments Concerning Eligibility for Social Security Disability

by  
J.F. Janecky

Does this sound familiar? A prospective client comes to you seeking aid to obtain Social Security disability payments. He or she is approximately 45 years old, but looks much older, and suffers from a wide variety of physical and mental impairments. Considering the age and variety of disorders, you are reluctant to take the case. You know from experience the secretary of Health and Human Services, as well as administrative law judges, have applied the age grids almost mechanically and conclusively. Furthermore, they tend to view each ailment of the claimant separately in their determination as to eligibility. The prospects of a favorable outcome here do not look good. Yet, it is obvious the prospective client needs some sort of assistance. What should you do?

You might take the case. Recent amendments to 42 U.S.C. §423(d)(2)(A)&(C) provide good supporting ammunition for your case. As amended in 1984, §423(d)(2)(A)&(C) state that in the determination of whether a claimant's physical and mental state are of a "significant medical severity," the secretary shall consider the *combined effect* of all the claimant's impairments.

Formally, the secretary would attack the claimant's eligibility by presenting each particular ailment separ-

ately to the administrative law judge. If the ailment, considered thusly, was not of sufficient severity to entitle the claimant to disability coverage, the next ailment would be presented, the same determination made and so on until the claimant was (usually) denied coverage.

What the new amendments provide is that the ailments must be considered *in toto* to determine eligibility. At least one 11th Circuit decision has been handed down which contemplates the working of the statute. In *Reeves v. Heckler*, 734 F.2d 519 (11th Cir. 1984), the claimant suffered from a variety of impairments: degenerative joint disease, chronic pain associated with the degeneration, loss of hearing, chest

pain and various mental disorders. The administrative law judge, considering each ailment separately, denied coverage. The district court affirmed. On appeal, the 11th Circuit vacated and remanded for a determination of whether the ailments, considered together, would entitle the claimant to disability.

While you may be convinced the claimant's ailments, considered as to their cumulative effect, may be of sufficient medical severity to entitle him to disability, you still are concerned his age may prevent him from obtaining coverage under the grjd scheme. While he suffers from a variety of disorders which would enable an older person to disability, under the age grids, he may

---

*J.F. Janecky graduated from the United States Air Force Academy and the University of Alabama School of Law. He is a partner with the Mobile firm of Nettles, Barker & Janecky and is a member of the Committee on Legal Needs of the Elderly.*

---



not be due coverage. The determination of the extent of disability often involves a good deal of subjective analysis, particularly in the area of mental disorders. Administrative law judges, consequently, have relied on the age grids as one of the more concrete and objective reasons for denying coverage, practically to the point of making the grids conclusive.

However, recent cases have held that age must not be used conclusively. Initially, the secretary may use the grids in the determination as to whether or not to grant coverage. In cases where coverage would be denied because of the age grids, the claimant may produce evidence that his ability to adapt to a new work environment is more limited than that established by the grids. In other words, the courts now recognize the person, because of his physical and mental state, may be older than his chronological age. Thus, a younger person may present evidence which would take himself out of his chronological age grid (a position on the grid which would deny coverage) to place himself in an older age group, a position on the grid which would possibly permit coverage.

The amendments to 42 U.S.C. (d) (2) (A) & (C) and the court's treatment of the amendments present a more humane and realistic approach to deciding whether or not a person is entitled to Social Security disability coverage. It is only logical that courts, which must consider a person's age, education and work experience, or the total person, as well as the physical and mental state, should consider all factors together to determine the cumulative effect. Applying the age grids mechanically and rigidly creates a situation where a young person with the same disabilities as an older one could be denied coverage. The amendments and case law now prevent this injustice from happening.

As a final impetus to take the case, you might take interest in 28 U.S.C.A. §(d)(1)(A) & (B), the Equal Access to Justice Act, which provides that a prevailing party in a suit against the United States may recover fees and other expenses where "the position of the United States was not substantially justified." The Equal Access to

Justice Act has been held applicable to disability determinations under the Social Security Act. *Blanchette v. Heckler*, 586 F.Supp. 903 (D.C. Colo. 1984)

Generally, the standard of the "reasonable litigation attorney" is to be used by the courts to determine whether the government's position in defending its refusal to grant benefits was

substantially justified. The amount of attorney fees recoverable is set by statute at \$75 per hour. The number of hours claimed by the successful attorney must be reasonable. Finally, attorney fees and other expenses may be taken on top of any award for past due benefits. *Love v. Heckler*, 588 F. Supp. 1346 (M.D. Ala. 1984) □

## Resource Manual

The Alabama State Bar Committee on Legal Services for the Elderly is preparing a resource manual for distribution to members of the bar and other professionals involved in counseling senior citizens. Attorneys often are unaware of agencies and private organizations providing assistance to their elderly clients, and the committee seeks to fill that void.

The resource manual will include listings for bar referral services, *pro bono* bar programs, Legal Services Corporation offices and legal counsel for the elderly offices. It also will cover medical, recreational, income subsidy, charitable and other miscellaneous resources. Listings will be by county or service area to assist individuals in finding the agencies and organizations in their locale. Each organization's listing will include a brief description of services available, along with the organization's address and phone number.

As the resource manual has not yet been published, anyone interested in providing the committee with input concerning resources available in their area should contact Margaret Helen Young, 215 West Alabama Street, Florence, Alabama 35630, (205) 767-0700.

# Introduce Your Clients to a Valuable Service.

Refer them to **Business Valuation Services** for expert determination of fair market value of businesses, and financial analysis and consultation in cases of:

- |   |  |
|---|--|
| <input type="checkbox"/> Estate planning                | <input type="checkbox"/> Bankruptcy proceedings      |
| <input type="checkbox"/> Estate settlement              | <input type="checkbox"/> Mergers or acquisitions     |
| <input type="checkbox"/> Marital dissolutions           | <input type="checkbox"/> Buy-sell agreements         |
| <input type="checkbox"/> Recapitalizations              | <input type="checkbox"/> Dissident stockholder suits |
| <input type="checkbox"/> Employee stock ownership plans |  |

Contact Dr. John H. Davis, III  
4 Office Park Circle • Suite 304 • Birmingham, Alabama 35223  
P.O. Box 7633 A • Birmingham, Alabama 35253  
(205) 870-1026



# CLE opportunities

## november

### 14 thursday

**1985 SURVEY OF ALABAMA LAW**  
Von Braun Civic Center, Huntsville  
Sponsored by: Alabama Bar Institute for  
Continuing Legal Education  
Credits: 6.0 Cost: \$75  
For Information: (205) 348-6230

### 15 friday

**1985 SURVEY OF ALABAMA LAW**  
Birmingham-Jefferson Civic Center  
Sponsored by: Alabama Bar Institute for  
Continuing Legal Education  
Credits: 6.0 Cost: \$75  
For Information: (205) 348-6230

### 18-20

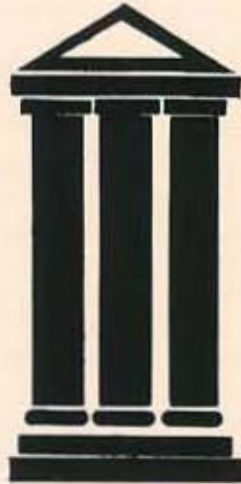
**LOCAL GOVERNMENT PROBLEMS**  
Colony Parke, Dallas  
Sponsored by: Southwestern Legal  
Foundation  
For Information: (214) 690-2377

### 21 thursday

**1985 SURVEY OF ALABAMA LAW**  
Quality Inn, Airport Blvd., Mobile  
Sponsored by: Alabama Bar Institute for  
Continuing Legal Education  
Credits: 6.0 Cost: \$75  
For Information: (205) 348-6230

### 21-22

**FEDERAL TAX CLINIC**  
Ferguson Center, University of Alabama,  
Tuscaloosa  
Sponsored by: University of Alabama,  
Alabama Society of CPAs,  
Alabama State Bar and the  
Alabama Bar Institute for CLE  
Credits: 13.8  
For Information: (205) 348-6222



### 21-23

**FUNDAMENTALS OF BANKRUPTCY LAW**  
Ritz-Carlton, Boston  
Sponsored by: ALI-ABA  
Credits: 20.9 Cost: \$360  
For Information: (215) 243-1600

### 22 friday

**DEFENDING THE UNPOPULAR CLIENT**  
Cumberland School of Law, Birmingham  
Sponsored by: Cumberland Institute for CLE  
Cost: \$75  
For Information: (205) 870-2865

**1985 SURVEY OF ALABAMA LAW**  
Civic Center, Montgomery  
Sponsored by: Alabama Bar Institute for  
Continuing Legal Education  
Credits: 6.0 Cost: \$75  
For Information: (205) 348-6230

### 22-23

**LEGAL WRITING SKILLS**  
Hyatt Regency, Washington  
Sponsored by: ALI-ABA  
For Information: (215) 243-1600

## december

### 3 tuesday

**PSYCHOLOGY OF A TRIAL**  
Birmingham-Jefferson Civic Center  
Sponsored by: Alabama Bar Institute for  
Continuing Legal Education  
Credits: 6.0 Cost: \$75  
For Information: (205) 348-6230

### 4 wednesday

**PSYCHOLOGY OF A TRIAL**  
Civic Center, Montgomery  
Sponsored by: Alabama Bar Institute for  
Continuing Legal Education  
Credits: 6.0 Cost: \$75  
For Information: (205) 348-6230



### 4-6

**PLANNING, ZONING AND EMINENT  
DOMAIN**  
Doubletree Inn, Dallas  
Sponsored by: Southwestern Legal  
Foundation  
For Information: (214) 690-2377

### 5 thursday

**SECURED LENDING**  
Atlanta  
Sponsored by: ICLE of Georgia  
Credits: 7.2  
For Information: (404) 542-2522

### 5-6

**CIVIL RICO LITIGATION**  
Marriott Marquis, New York City  
Sponsored by: ALI-ABA  
For Information: (215) 243-1600



## 5-7

### NEGOTIATION: A SYSTEMATIC APPROACH

Northwestern School of Law, Chicago  
Sponsored by: National Institute for Trial  
Advocacy

Credits: 18.0 Cost: \$550  
For Information: (312) 908-8932



## 6 friday

### ESTATE PLANNING

Birmingham-Jefferson Civic Center  
Sponsored by: Alabama Bar Institute for  
Continuing Legal Education

Credits: 7.0 Cost: \$75  
For Information: (205) 348-6230

### YEAR-END TORTS SEMINAR

First Alabama Bank Auditorium, Montgomery  
Sponsored by: Montgomery County Bar  
Association

Credits: 6.6 Cost: None/members;  
\$50/nonmembers  
For Information: (205) 265-4793

### BUSINESS TORTS AND ANTITRUST LAW

Cumberland School of Law, Birmingham  
Sponsored by: Cumberland Institute for CLE  
Cost: \$75

For Information: (205) 870-2865

## 9-10

### UNJUST DISMISSAL UPDATE

Doral Inn, New York City  
Sponsored by: Practising Law Institute  
Credits: 14.4 Cost: \$390

For Information: (212) 765-5700

## 10-13

### SECURITIES REGULATION

The Fairmont, Dallas  
Sponsored by: Southwestern Legal  
Foundation

For Information: (214) 690-2377

## 12 thursday

### TRIAL TACTICS

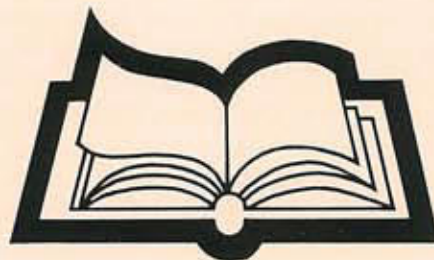
Birmingham-Jefferson Civic Center  
Sponsored by: Alabama Bar Institute for  
Continuing Legal Education

Credits: 7.5 Cost: \$75  
For Information: (205) 348-6230

### CAPITAL LITIGATION

Riverview Plaza, Mobile  
Sponsored by: Alabama State Bar, Alabama  
Criminal Defense Lawyers  
Association, National Association  
of Criminal Defense Lawyers and  
the Southern Poverty Law Center

Credits: 7.0  
For Information: (205) 264-0286



## 12-13

### BAD FAITH

Marriott, New York City  
Sponsored by: Defense Research Institute  
For Information: (312) 944-0575

### TENNESSEE FEDERAL TAX INSTITUTE

Opryland Hotel, Nashville  
Sponsored by: Tennessee Federal Tax  
Institute, Inc.

Credits: 14.0 Cost: \$175  
For Information: (615) 926-6185

## 12-14

### CIVIL PRACTICE IN FEDERAL AND STATE COURTS

Hyatt Palm Beaches, West Palm Beach  
Sponsored by: ALI-ABA  
For Information: (215) 243-1600

## 13 friday

### END OF YEAR TAX PLANNING

Cumberland School of Law, Birmingham  
Sponsored by: Cumberland Institute for CLE  
Cost: \$75

For Information: (205) 870-2865

### TRIAL TACTICS

Civic Center, Montgomery  
Sponsored by: Alabama Bar Institute for  
Continuing Legal Education

Credits: 7.5 Cost: \$75  
For Information: (205) 348-6230

### LABOR LAW INSTITUTE

Atlanta  
Sponsored by: ICLE of Georgia  
Credits: 7.2  
For Information: (404) 542-2522

## 13-14

### CRIMINAL DEFENSE

Riverview Plaza, Mobile  
Sponsored by: Alabama Criminal Defense  
Lawyers Association

Credits: 12.6 Cost: \$125/members;  
\$175/nonmembers  
For Information: (205) 263-0003

# january

## 25 saturday

### MIDWINTER SEMINAR

Grand Hotel, Point Clear  
Sponsored by: Mobile Bar Association  
Credits: 4.0

For Information: (205) 433-9790

## jan. 25-feb. 1, 1986

### SKI TRIP/CLE SEMINAR

Jackson Hole, Wyoming  
Sponsored by: Cumberland Institute for CLE  
Cost: \$75 plus air/resort costs  
For Information: (205) 870-2865



# Alabama Living Will Statute

by  
Anne W. Mitchell

---

Anne W. Mitchell received her undergraduate degree from Huntingdon College and her law degree from Cumberland School of Law. She is a partner with the Birmingham firm of Berkowitz, Lefkowitz, Isom & Kushner and serves on the bar's Committee on Legal Needs of the Elderly.

The right of the seriously incapacitated individual to die is a moral issue that is profound but fundamental. The issue poses unsettling challenges to clerics, physicians and judges. Yet its essence lies in two simple questions: When may an infirm person die? Who makes the decision?

The emergence of such institutions as the Hemlock Society and the Euthanasia Society of America may indicate a growing public acceptance of euthanasia in our country. Undoubtedly, many thought Big Chief in *One Flew Over the Cuckoo's Nest* did the right thing in snuffing out the life of McMurphy, who had been lobotomized. Undoubtedly, too, many who saw the film *Whose Life Is It Anyway?* would, as did Richard Dreyfuss, choose death over an existence as a quadriplegic.

The law, however, remains steadfast in its opposition to euthanasia. Having roots in Judeo-Christian morality, our jurisprudence embraces the precept that a person should not die before his time. Thus, all states have laws proscribing suicide, although as a practical matter such statutes are not generally enforced, and without exception, the courts have shown no mercy in mercy-killing cases. Judges have ruled consistently that humanitarian motivation and even the consent of the deceased do not mitigate the offense of killing. In one case, the defendant was found guilty of murdering his terminally ill wife, although he merely made poison accessible to her without actually administering it.<sup>1</sup> While our legal system may look the other way when the stricken individual takes his own life, it will not condone having another take it for him.

While rejecting euthanasia, in recent years courts and legislatures have been reevaluating the situation of the terminally ill patient for whom death is imminent. The *Quinlan* case held in 1976 a patient could refuse medical treatment when there was no hope for recovery.<sup>2</sup> In the wake of *Quinlan*, many states, including Alabama, have promulgated "living will" or "natural death" statutes.<sup>3</sup> These laws enable

one to decide whether his or her life should be sustained by life support systems when death would otherwise ensue naturally. Additionally, they protect physicians and hospitals from liability for following the instructions in a living will, provided the statutory



procedures are observed. The painful choice to die is then taken out of the hands of judges, physicians and the individual's family or friends. With a living will statute, the individual can make the decision prior to the time the need arises.



Under Alabama's Natural Death Act, enacted in 1981,<sup>4</sup> an adult may make a written declaration instructing his or her physician to withhold or withdraw life-sustaining procedures in the event of a terminal condition.<sup>5</sup> For purposes of the statute, a terminal condition is

tute does require that the declaration be: (1) in writing; (2) signed by the individual making the declaration or by another in his presence and at his direction; (3) dated; and (4) signed in the presence of at least two adult witnesses.<sup>7</sup> These witnesses must be disinterested in the sense that neither may be a relative of the declarant nor have a pecuniary interest in the decedent's estate. Section 22-8A-4(c) illustrates a sample declaration.

While some states require executed declarations be registered with the state, in Alabama the declarant need only notify his or her physician of the declaration.<sup>8</sup> The physician then must include the declaration or a copy of it with the declarant's medical records.<sup>9</sup>

If the declarant has second thoughts about having a living will, revocation is possible at any time. The statute provides three ways to revoke a declaration. The declarant may personally destroy or deface the declaration "in a manner indicating intention to cancel." Another method is a written revocation signed and dated by the declarant or another person acting at his or her direction. Finally, the declarant may revoke the declaration by "a verbal expression." This "expression" must occur in the presence of an adult who signs and dates a writing confirming that the declarant manifested such intent. A physician who is notified of a revocation must note the fact of revocation in the patient's medical record, but is not subject to criminal or civil liability for failure to act upon a revocation of which he or she did not have actual knowledge.<sup>10</sup>

Absent a declarant's second thoughts, the declarant's physician should act upon the living will's provisions "without delay" once the declarant is diagnosed as having a terminal condition.<sup>11</sup> The statute directs that the physician take the necessary steps to provide for written certification of the declarant's terminal condition.<sup>12</sup> Since the declarant's physician could provide such certification, this process generally would involve no more than finding a second physician to confirm the diagnosis and give a second certification of the declarant's terminal state.

Suppose the physician does not wish to carry out the certification process for

a patient. In this instance the physician would not be subject to liability.<sup>13</sup> Apparently, the Alabama legislature was hesitant to impose on the medical profession a legal obligation that would run counter to the ethics of many physicians. However, the statute directs that the reluctant physician permit the patient to be transferred to another physician.<sup>14</sup> Moreover, a physician or any other individual who willfully conceals a declaration may be found guilty of a Class A misdemeanor.<sup>15</sup>

Alabama's living will statute elicited a wide range of reactions from state physicians contacted for this article. One doctor at a Birmingham hospital said he would not abide by a patient's living will if the family challenged it, stating that despite the act's specific language, there is "no proof" that a living will would shield a doctor from a lawsuit by the family. (Note: There are no reported Alabama cases dealing with the act.) Several other doctors admitted they had not heard of the Alabama Natural Death Act, and suggested physicians should be better educated regarding the act.

Most physicians contacted who are aware of the act favor living wills, seeing no ethical or legal problems. However, many of these doctors feel there is room for improvement in the use of these documents. One strong sugges-

---

## For the "Elderly" Advocate

For the past decade, the nonprofit Legal Council for the Elderly (LCE) has been dealing with many of the problems of the nation's elderly. LCE has developed a number of reasonably priced manuals and handbooks that can be used by attorneys who are beginning to delve into the morass of Social Security, retirement, disability, Medicare, Medicaid, conservatorships and wills. Write to Legal Council for the Elderly, P.O. Box 19269-K, Washington, DC 20036 for a free listing of LCE publications.



Photograph by James W. Bodiford, Jr.

one in which "death is imminent" or one that is "hopeless" unless the patient is artificially supported by life sustaining procedures.<sup>6</sup>

The procedure for making a living will declaration is simple and does not require an attorney. However, the sta-



tion was that the patient discuss the living will with his family and leave a copy with a family member, so the doctor would not be left with the sensitive task of breaking the news of the patient's wishes to the family. Another physician suggested the inclusion of a copy in the patient's hospital chart, since terminally ill patients often receive treatment from a number of physicians. In this connection, one doctor suggested the patient should be asked to sign a new living will prior to major surgery at the hospital, so there would be no doubt of his wishes. Finally, one physician proposed persons favoring a natural death should carry the equivalent of a uniform donor card.

As previously stated, the Alabama Natural Death Act has not been tested in the courts. Future court actions may reveal its possible shortcomings, as suggested by some of our doctors, but for now, it stands as a major first step toward coping with a difficult moral issue. □

## ADMINISTRATIVE OFFICE *(From page 297)*

cohol-dependent driver.

• **Legal** — The legal division supplies the chief justice, the administrative director of courts, states judges and clerks of court with research assistance as an aid in formulating policy effecting the operation of the court system.

• **Research** — Primarily in response to the Judicial Study Commission, staff personnel are involved in extensive research in a variety of areas which impact Alabama's court system.

• **Judicial education** — The Alabama Judicial College, which is a division of the AOC, is charged with spon-

soring and coordinating all judicial education programs for judges, clerks and all other court officials and support staff. Additionally, the Judicial College provides orientation training to new judges and court officials.

This article is an overview of the major operations of the AOC. Future articles will provide an in-depth look at particular areas of operation as well as information about research projects and new programs. We always have enjoyed our close working relationship with the Alabama State Bar, and as you have any questions about the AOC, our responsibility, or our services, please feel free to call us. Our in-state toll free number is 1-800-392-8077. We look forward to hearing from you. □

### FOOTNOTES

<sup>1</sup>*People v. Roberts*, 178 N.W. 690 (Mich. 1920). See also 40 Am. Jur. 2d *Homicide* §111 (1968).

<sup>2</sup>*In re Quinlan*, 355 A.2d 647 (N.J. 1976).

<sup>3</sup>See, e.g., Alabama Natural Death Act, Ala. Code §§ 22-8A-1 et seq. (1981); Georgia Living Wills Act, Ga. Code Ann. §§ 31-32-1 et seq. (1984); Mississippi Act, Chap. 365, Laws of 1984; New Mexico Right to Die Act, N.S. Stat. Ann. §§ 24-7-1 et seq.; Wyoming Act, Wyoming Act, Wy. Stat. 33.26 §§ 144 et seq. (1984).

<sup>4</sup>Ala. Code §§ 22-8A-1 et seq.

<sup>5</sup>*Id.*, § 22-8A-2

<sup>6</sup>*Id.*, § 22-8A-3(6)

<sup>7</sup>*Id.*, § 22-8A-4

<sup>8</sup>*Id.*, § 22-8A-4(b)

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*, § 22-8A-5

<sup>11</sup>*Id.*, § 22-8A-6

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*, § 22-8A-8(a)

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*, § 22-8A-8(b)

## THE SUN DIDN'T HAVE TO SET ON THE BRITISH EMPIRE



If only the British had known about title insurance! Title insurance would have protected them from anyone who questioned their right to ownership.

With MVT behind real estate investments, your clients are assured of clear ownership. That's because we'll defend their title against all challenges. In addition, we're fully computerized to serve you more effectively.

Don't let the sun go down on your empire—insure with Mississippi Valley Title.



**Mississippi Valley Title Insurance Company**

Home Office, Jackson, MS 39205

Wholly owned subsidiary of Title Insurance Company of Minnesota





## HUGO BLACK CENTENNIAL CELEBRATION

Justice Hugo Black and The Constitution, 1937 - 1971

The University of Alabama School of Law March 17 - 18, 1986

As part of its commemoration of the 100th anniversary of the U.S. Supreme Court Justice Hugo L. Black, The University of Alabama will present a conference March 17-18, 1986. Participants in the program will include some of America's most distinguished jurists, journalists, and scholars. They will explore Black's unique contribution to the role of the Supreme Court in modern America and the Court's relationship to the Constitution and public affairs.

In addition to the formal presentations, there will be several social occasions during which those attending the conference will have the opportunity to meet and talk with the other participants.

The conference is free and will be held on campus of The University of Alabama, in Tuscaloosa, Alabama. For more information and/or registration materials, write:

Dean Charles W. Gamble  
The University of Alabama  
School of Law  
P.O. Box 1435  
University, AL 35486

### Participants

Honorable William J. Brennan	Anthony Lewis
Honorable Arthur Goldberg	Dr. Howard Ball
Honorable Harry T. Edwards	Dean Guido Calabresi
Honorable John C. Godbold	Professor Gerald T. Dunne
Honorable Frank M. Johnson, Jr.	Professor A. E. Dick Howard
Honorable Truman Hobbs	Professor Daniel J. Meador
Irving Dilliard	Dr. Abigail M. Thernstrom
Max Lerner	



March 17 - 18, 1986



# Young Lawyers' Section



by  
**J. Bernard Brannan, Jr.**  
YLS President

It appears we are now into a very active year for the Young Lawyers' Section. We have an extremely energetic group of young lawyers who have volunteered to serve on the executive committee of the section. We are fortunate this year to have a committee made up of both individuals experienced in the work of the Young Lawyers' Section and those who are enthusiastic about becoming involved in the section for the first time.

At the annual meeting in July, officers elected to guide the section were Claire Black, Tuscaloosa, president-elect; Charles R. Mixon, Jr., Mobile, secretary; and N. Gunter Guy, Jr., Montgomery, treasurer. The people who presently are serving as members of the executive committee and the various subcommittees which they chair are as follows: Keith Norman, Montgomery, Youth Legislative Judicial Program Committee; Laura Crum, Montgomery, Bar Admission Committee; Charles R. Mixon, Mobile, Meeting Arrangements Committee and Annual Seminar Committee; Claire Black, Tuscaloosa, Long-Range Planning Committee; Ronald Davis, Tuscaloosa, Public Information Committee and Sub-committee on Publication; John W. Donald, Jr., Mobile, Disaster Emergency Legal Assistance Committee; Holley Crim, Montgomery, Domestic Abuse Committee/Missing Children Project; Edward Dean, Mobile, By-laws Committee; Pat Harris, Montgomery,

Administration Committee; Frederick Kuykendall, Birmingham, Local Bar Coordinating Committee, Jefferson County and North; Lynn McCain, Gadsden, Community Law Week/Constitution Bicentennial; N. Gunter Guy, Jr., Montgomery, ABA/YLS Liaison, Committee and Finance Committee; James A. Miller, Birmingham, Continuing Legal Education Committee; Caine O'Rear, III, Mobile, Annual Seminar Sub-committee; Sid Jackson, Mobile, Local Bar Coordinating Committee South of Jefferson County; Randolph Reaves, Montgomery, Legislative Committee and Conference for the Professions; Percy Badham, Birmingham, Leadership on Issues/Grants Committee; James Anderson, Montgomery, Alabama Bar Information Sub-committee, and Newspaper, Television and Radio Sub-committee; and William Traeger, III, Demopolis, Law Student Liaison Committee. Each has shown a strong dedication to the legal profession by the work they are doing for the Young Lawyers' Section. If you see any of them, please offer your encouragement and thanks for their efforts toward a better profession.

Over the last few months, the one committee of our section which we keep diligently prepared but hope is never needed, has been called on to serve the community again. The Disaster Emergency Legal Assistance Committee, chaired by John W. Donald, Jr., of Mobile, was called upon to

assist on the Gulf Coast as a result of Hurricane Elena. In conjunction with the Young Lawyers' Division of the American Bar Association, and the Young Lawyers' Section of the Mississippi Bar, John's committee went into action as soon as the Federal Disaster Declaration was made. The committee provided *pro bono* legal services to the victims of Hurricane Elena. The Federal Emergency Management Agency set up disaster centers and volunteer young lawyers continuously staffed each center, answering questions and providing guidance and counseling for the hurricane victims. The questions ran from how to file insurance claims to the landlord and tenant relationships. The young lawyers offering this assistance were Mike Sullivan, Young Dempsey, Sam Crosby, Danny Blackburn, Mary Murchison, Larry Sutley, Mike Ballard and Alice Boswell. Each of us, as members of the bar, owes a deep debt of gratitude to these lawyers for donating their time and helping to give our profession a brighter image in the public's eye.

The bar admissions ceremony for the fall admittees was held October 31 at the Civic Center in Montgomery. The Honorable Ginny Granade, assistant United States attorney, southern district, gave the luncheon address to the new admittees. Laura Crum of Montgomery, who serves on the executive committee of the section and is chairman of the bar admissions cere-



mony sub-committee, worked zealously to insure the success of the ceremony. She should be commended for her efforts.

In the past, our section has received some excellent ideas, to better serve the profession and the public, from the various affiliate outreach project meetings provided by the Young Lawyers' Division of the American Bar Association. We expect and hope to have delegates attend as many of these meetings as possible. During the next year, there will be meetings in Austin, Texas; Baltimore, Maryland; Charleston, South Carolina; and New York, New York.

Although the various committees of the Young Lawyers' Section are presently working enthusiastically, there is always a need for a greater involvement in the hands-on activities of the section. The only requirement for membership in the Young Lawyers' Section is that one must be a lawyer who is under 36 years of age or in his or her first three years of practice. If you are in that category and wish to become actively involved in your state bar association, please contact me. □

# CLE News



by  
**Mary Lyn Pike**  
Assistant Executive Director

December 31 is the deadline for completion of 1985 continuing legal education requirements. Twelve credits, either earned this year or brought forward from 1984, are required for most members.

Credits are reported by way of the form entitled "Annual Report of Compliance," mailed to each member in late September. An extra form is provided for use by those who may have misplaced the first one. It also may be used to report additions to 1985 reports already submitted.

At its July 24 meeting in Huntsville, the Mandatory Continuing Legal Education Commission:

1. Recommended that bar commissioners Wade H. Baxley and Francis R. Hare, Jr., be nominated to replace commissioners P. Richard Hartley and Warren B. Lightfoot, whose terms as bar commissioners expired June 30, 1985;

2. Recommended that commissioner John B. Scott be nominated chairman of the commission, succeeding outgoing chairman P. Richard Hartley;

3. Approved a seminar, offered by an insurance company, strictly for private attorneys who handle cases for that company;

4. Granted two attorneys final extensions of the 1984 compliance deadline; and

5. Granted partial credit for a Soviet-American comparative law seminar conducted in the Soviet Union.

September 13 in Montgomery the

MCLE Commission:

1. Elected commissioner Gary C. Huckaby vice chairman;

2. Approved a permanent program of substitute compliance for a blind attorney;

3. Declined to change its policy on the calculation of teaching credit for panel members;

4. Denied a request for credit for teaching nonlawyers;

5. Denied a sponsor's request for permission to submit evaluations every six months rather than monthly, but granted permission for quarterly submissions;

6. Designated the National Legal Aid and Defenders Association an approved sponsor of CLE activities for 1986;

7. Denied approval of a financial planning seminar designed for CLUs, CPAs and attorneys;

8. Approved a perinatology seminar designed for attorneys and physicians;

9. Approved a medical malpractice seminar designed for attorneys, physicians and risk managers;

10. Tabled consideration of a videotaped seminar designed for attorneys, physicians and dentists, pending receipt of additional information;

11. Approved an English-American comparative law seminar conducted in London; and

12. Discussed possible regulation of in-house CLE seminars, tabling finalization of a policy until its next meeting. □

## Larson & McGowin FOREST MANAGERS inc & CONSULTANTS

Benefitting attorneys and their clients with the following professional services:

- PROPERTY DIVISIONS
- LAND OR TIMBER APPRAISALS
- ESTATE OR TAX PLANNING
- EXPERT WITNESS TESTIMONY
- LAND SALE, EXCHANGE OR ACQUISITION
- PHOTOGRAPHIC INTERPRETATION
- SEISMIC, OIL OR MINERAL ADVICE
- TIMBER ESTIMATES
- FEASIBILITY STUDIES
- FORESTRY CONSULTING

P.O. Box 2143 • Mobile, AL 36652  
438-4581

Members: Association of Consulting Foresters







**1985 CREDIT REPORT**  
List only 1985 courses

**A. ATTENDANCE**

	Sponsor	Course or Seminar Title	Date(s)	City	Credits Earned
(1)			/ /		
(2)			/ /		
(3)			/ /		
(4)			/ /		
(5)			/ /		
(6)			/ /		
					<b>TOTAL:</b>

**B. TEACHING**

	Sponsor	Subject(s) Taught	Date(s)	City	Hours Taught	Credits Claimed*
(1)			/ /			
(2)			/ /			
(3)			/ /			
(4)			/ /			
					<b>TOTAL:</b>	

I affirm that the information given above is, to the best of my knowledge, accurate and complete.

Signature \_\_\_\_\_

Date \_\_\_\_\_

**\* TEACHING CREDITS**  
 Speakers who prepare thorough, high quality, readable written materials earn six credits per hour of class presentation.  
 Speakers who do not do so earn three credits per hour of class presentation.  
 Repeat presentations qualify for one half the credits available for the initial presentation.





Certified Commercial Investment Member (CCIM) is an individual, who, by education, experience and knowledge of the marketplace, is an expert in commercial-investment real estate.

Each CCIM is a licensed real estate professional who has completed a rigorous course of study and fulfilled experience requirements to earn the designation, Certified Commercial Investment Member. The experiences and training prepare CCIMs to identify their clients' commercial and investment real estate needs and satisfy them.

CCIMs have accumulated knowledge and mastered techniques in diverse areas, including real estate investment analysis, taxation, and property development.

#### THEIR SKILLS ENABLE THEM TO:

- Assist clients in establishing investment goals.
- Compare real estate with other investments for an accurate measurement of potential after-tax yield.
- Conduct comprehensive site analyses.
- Evaluate market and financial feasibility.
- Evaluate and negotiate real estate financing.
- Act as a liaison with a client's accountant and attorney regarding real estate matters.
- Structure tax-deferred exchanges of real estate.
- Perform lease/purchase analyses.

The CCIM is trained to provide services in selling, exchanging, leasing, managing, developing, financing and syndicating commercial and investment real estate. Individuals who possess this high level of competency are a valuable resource to the real estate investor and to the commercial user.



When seeking commercial investment real estate counseling, the person to turn to is the Certified Commercial Investment Member. This professional will help you achieve your investment or commercial real estate goals. CCIMs bring a full-time commitment to the field of commercial investment real estate.





Samuel E. Russell, Jr.  
President  
Birmingham, AL  
322-7500



Thomas H. Lowder  
Vice-President  
Birmingham, AL  
967-9550



John C. Stanley  
Secretary  
Montgomery, AL  
263-4483



Ben Tom Roberts  
Treasurer  
Mobile, AL  
344-9220

**I**n assembling an investment team, start with a Certified Commercial Investment Member — the main link in the chain that produces a profitable Investment portfolio. Call one of these professionals today!



Joe Turner  
Past President  
Roanoke, AL  
865-8901



Charles B. Todd  
Birmingham, AL  
326-2222



E. Porter Thrower  
Dothan, AL  
794-3122



Owen E. Duke  
Mobile, AL  
460-0700



Ben L. Chenoault  
Birmingham, AL  
969-1760



Bill Moss  
Birmingham, AL  
967-9550



Charles (Bill) Barnhill  
Mobile, AL  
432-1287



Joan Partridge  
Montgomery, AL  
834-5900



Michael L. Carroll  
Tuscaloosa, AL  
752-3582



Andrew T. Graybar  
Birmingham, AL  
979-0367



Gaines Beibze  
Mobile, AL  
661-5586



C. Austin Johnson  
Birmingham, AL  
870-1200



Troy McCleendon  
Past President  
Vestavia, AL  
979-9727



Steven Dorrough  
Past President  
Birmingham, AL  
942-6654



John Lauriello  
Birmingham, AL  
967-9550



Carey P. Gilbert  
Birmingham, AL  
631-8724



Charles E. White  
Birmingham, AL  
967-9550



W.A. Watts, III  
Birmingham, AL  
251-1267



Don Milton  
Birmingham, AL  
251-1131



Richard Weavil  
Mobile, AL  
438-6000



Elizabeth Pearson  
Mobile, AL  
438-6000



Randy McKinney  
Birmingham, AL  
791-0001



Leonard F. Allen, III  
Mobile, AL  
479-0032



Stephen W. House  
Birmingham, AL  
322-7789

CERTIFIED COMMERCIAL INVESTMENT MEMBER





# A General Practitioner's Introduction to Copyright Law: A Primer on Intellectual Property, Part II

by  
Harold See

Copyright law is a specialized area of practice, but there are many things the general practitioner should know in order to represent clients effectively. And, it is an area of practice in which any attorney should be able to develop an expertise if he or she has the interest and if the prospect of future copyright work justifies the cost of becoming proficient.

## Definitions

The three major categories of intellectual property are patents, copyrights and trademarks. Rough definitions of these three follow:

- A. **PATENT** A patent is a federal statutorily granted monopoly to *make, use or sell* a machine; a manufacture; a composition of matter; or a process.
- B. **COPYRIGHT** A copyright is a federal statutorily granted monopoly of the exclusive right to reproduce, distribute, perform or display certain original works of authorship. Basically, protection is against copying and extends only to the form of expression.
- C. **TRADEMARK** A trademark (or trade name) is a state law granted

monopoly in the right to use a mark on goods to designate them as coming from a particular source (or on a business to identify the business). There are federal and state registration schemes.

## Source of federal authority

The United States Constitution, Article I, Section 8, provides:

- "The Congress shall have Power . . .
- (3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .
  - (8) To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ."

Clause (8) is the source of federal power over patents and copyrights. By application of the supremacy clause conflicting state law must yield. Clause (3) is the source of federal authority for a trademark registration system. Therefore, although trademark registration is limited to interstate commerce, patents and copyrights are not.

## Copyright law (17 U.S.C.A. §§101-810)

[Note: The following discussion relates to the "New" Copyright Act of 1976 which became effective January 1, 1978. *Section 301 of the Act abolishes virtually all common law copyright.*]

### A. Who may practice copyright law?

Anyone may practice copyright law, but with each amendment to the Copyright Act this area of the law becomes more complicated. Various areas of copyright law — music, recordings, movies, books, newspapers and television — may require specialized knowledge of the industry.

### B. What should the general practitioner know?

#### 1. What is copyrightable

Section 102 of the Copyright Act defines what is copyrightable in the following terms:

" . . . original works of authorship fixed in any tangible medium of ex-



*Harold F. See received his bachelor's degree from Emporia State University (Kansas), his master's from Iowa State University and his law degree from the University of Iowa. Since 1976, he has been a professor at the University of Alabama School of Law.*



pression . . . [including] the following categories:

- a) literary works;
- b) musical works . . . ;
- c) dramatic works . . . ;
- d) pantomines and choreographic works;
- e) pictorial, graphic and sculptural works;
- f) motion pictures and other audiovisual works; and
- g) sound recordings."

Thus, the type of works protected include nearly all manner of expression provided they are "fixed in a tangible medium of expression." That is, they must be captured in some form that provides them with a life that is of "more than transitory duration." It also should be noted that the categories listed above include works whether or not they are what most people would consider works of art: commercials, personal letters and diaries, architects plans and even the design on fabric may be covered.

## 2. The scope of copyright protection

(a) Copyright protection extends only to the form of expression. Section 102(b) provides as follows:

"In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

For example, an idea or invention cannot be protected under copyright law simply by describing it and copyrighting the description. In such a case all that is protected is the description itself, not the underlying idea or invention. For example, if someone develops a new device for catching mice and describes the device in a copyrighted article, the copyright prohibits others from describing the device using the same language. It does *not* prohibit others from making the device. (Only a patent can do that.)

In the same vein, section 202 provides:

"Ownership of a copyright, or any of the exclusive rights under a copy-

right, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object . . . does not of itself convey any rights in the copyrighted work embodied in the object, nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object."

In other words, purchase of a painting does not convey any right to copy that painting. Similarly, purchase of the copyright in a painting does not convey any right to the painting itself — not even access to it to copy it. The "thing" and the copyright are two distinct legal entities.

(b) Copyright is comprised of a number of conceptually distinct exclusive rights which are listed in section 106:

"Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work . . . ;

- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public . . . ;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomines, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomines, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."

Many of the terms that appear in section 106 are defined terms, or have particular legal significance, but the overall thrust of section 106 is to raise a copyright question whenever a copyrighted work is copied or used publicly.

(c) There are exceptions to the section 106 rights. These exceptions

# THINK STRUCTURE

When you have a personal injury case, THINK STRUCTURE. That's right. Think structured settlement as an alternative to a lump sum settlement and maximize the cash available for the claimant at the lowest possible cost to the defendant. Call now for ideas on what creative use of U.S. Treasury securities and annuities can do for your settlement needs.

Lamar Newton

**Southern Structured Settlements, Inc.**

1200 Bank for Savings Building

Birmingham, Alabama 35203

205-328-2666



appear in sections 107-118. The exceptions relate to fair use, use by libraries, sale or display of a particular copy, certain non-profit or special performances and displays, cable transmissions, ephemeral recordings, useful items, sound recordings, compulsory licenses, juke boxes, computers and certain noncommercial broadcasting. Possibly the most important, and probably the most misunderstood exception is the Fair Use exception (§107). Limited use of a copyrighted work is allowed without permission "for uses such as criticism, comment, news reporting, teaching . . . , scholarship, or research. . . ." These purposes appear to, and in general probably do, limit fair use to such activities as teaching, research and reporting. (However, in the *Betamax* case the supreme court applied the fair use doctrine to non-commercial time-shifting of programs for private viewing.) Even if the purpose of the use is permissible, the copy of the use is limited based on, *inter alia*:

- (1) the purpose and character of the use . . . ;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used . . . ; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work."

The underlying policy is that while one should have the right accurately to refer to a copyrighted work by citing short portions of it, this should not be an excuse for substantially appropriating its commercial value.

There are, incidentally, voluntary guidelines for libraries and for educators. While these do not bind copyright owners or users, they probably serve as safe harbors since one can expect courts to give them great weight in defining uses that are clearly permissible.

### 3. What constitutes copyright infringement

Section 501 of the Act provides that:

"Anyone who violates any of the [Section 106] exclusive rights of the copyright owner . . . is an infringer of the copyright."

Although infringement may occur as a result of displaying or performing (usually commercially) someone else's

work, ordinarily infringement results from copying. There is a two-part test of such infringement: first, whether there has been copying, and, second, whether there has been an appropriation. Unlike a patent, in which the owner is given a monopoly on a particular device, copyright merely precludes the act of taking another's work. Thus, if two people, independently, compose the same musical arrangement, each may use it, and, in fact, each may copy-right it and preclude others from copying from the copyright owner's work. The protection is against copying, not against independent creation.

Copying may be shown in either of two ways: first, by direct proof, or, second, by a showing of access and similarity. In many cases of commercial infringement there will be documentary or testimonial evidence that the alleged infringer used the copyrighted work as a model. There may even be an admission the copyrighted work was used as a model. Absent such a showing, the second means of establishing copying is to deduce it from a showing the alleged copier had access to the work and the alleged copy is too similar to the original to be explained by mere chance. Both access *and* similarity must be shown. Access alone is not enough if the works are sufficiently dissimilar that they fail to support an inference of copying. On the other hand, no matter how similar the works, if the alleged copier did not have access to the copyrighted work, he could not have copied it. In practice the two elements of this test of copying probably will interact. The stronger the showing of access, the weaker may be the showing of similarity, and vice versa.

Even though copying may be shown, infringement is not established without appropriation. Copyright protects only expression. Others are free to copy the underlying ideas, concepts, etc. The test of appropriation is a lay observer test, and mere paraphrase *is* appropriation. On the other hand, one is free to study the works of others on, for example, investing in commodities, and to write a book describing those ideas. (The law of plagiarism may require proper attribution, but as long as the *expression* of the other writers is not appropriated there is no copyright

problem.) As an extension of this principle, note one may attempt to produce a copy of a painting, but be so unskilled the "copy" does not appropriate anything of the expression of the original.

### 4. Who may obtain a copyright, and how

The author of a work automatically has a copyright in it: §201(a) provides that "Copyright in a work protected under this title vests initially in the author or authors of the work. . . ." And, he or she obtains that copyright the moment the work is created: §302(a) provides that "Copyright . . . subsists from its [the work's] creation. . . ."

### 5. How the copyright may be lost

(a) Transfer A non-exclusive license to use a copyrighted work can be granted orally. Such a non-exclusive right does *not* divest the original owner of any rights, except, of course, that the licensee as well as the copyright owner may use the copyrighted work. The owner can be divested of ownership only by "transfer." Section 204(a) specifies the requirements for a valid transfer:

"A transfer of copyright ownership . . . is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."

That is, if there is no signed writing, there is no transfer (except, possibly, of a non-exclusive license).

(b) Publication without notice. In order to keep one's copyright, one must either (1) refrain from publishing, or (2) publish only *with notice*. "Publication" is a term of art, so the safest thing to do is put notice on all copies, and especially those distributed to others.

### 6. What constitutes proper copyright notice (§401)

Copyright notice is the word "copyright" or the symbol "©" (or the abbreviation "Copr.") followed by the year of first publication and the name of the copyright owner (author or transferee). There are advantages to the use of the copyright symbol, but it is somewhat easier for a printing error to result in defective notice where only the symbol



is used. It may, therefore, be a good idea to give notice in the following form:

© Copyright 1985 Jane Jones  
All Rights Reserved

One is faced with the question of publication date. This may not be a problem, since creation and publication both may have occurred in the same year. Though there are advantages to a later publication date, it is almost always preferable to err on the side of too early rather than too late a date. Notice is defective and the copyright lost if the year appearing in the notice is more than one year after the date of actual first publication. (Recall that "publication" is a term of art.)

The "All Rights Reserved" is not necessary and is not a part of the notice, but there are certain treaty advantages which could be relevant.

Copyright notice "shall be affixed to the copies in such a manner and location as to give reasonable notice of the claim of copyright. . . ." (§401) "Safe harbors" are provided at 37 C.F.R. §201.20. In the case of phonorecords (this includes tapes) the notice is:

P 1985 Jane Jones  
All rights reserved

Notice must be "placed on the surface of the phonorecord, or on the phonorecord label or container, in such a manner and location as to give reasonable notice of the claim of copyright."

*Note that some errors or omissions of notice are correctable. (§405-406)*

### 7. Copyright registration not a prerequisite to notice

Registration is permissive (§408). Notice is required in order to preserve one's copyright after publication, but registration is not. However, under the Act the Library of Congress requires deposit of copies of any copyrighted and published work.

There are advantages to registration, chiefly:

- (1) the certificate of registration is *prima facie* evidence of the validity of the copyright (§410);
- (2) registration must be obtained before an infringement suit may be instituted, though one may sue for infringements which pre-date the registration (§411); and

- (3) registration makes available certain remedies not otherwise available (notably, statutory damages which do not require proof of actual damage and award of attorney fees) (§412).

### 8. How to register

(a) The appropriate form for copyright registration may be obtained by writing the Copyright Office, Library of Congress, Washington, D.C. 20559, or calling (202) 287-9100 and asking for copyright forms. Be sure to describe the type of work since there are different forms for different types of work. Be sure to give your return address. (The street address of the Copyright Office is: The Copyright Office, Building No. 2, Crystal City Mall, Jefferson Davis Highway, Arlington, Virginia.)

(b) For help filling out the forms one can call (202) 287-8700 weekdays between 8:30 a.m. and 5 p.m., Eastern time. (Calls to this number are nearly always backed up.)

(c) Registration requires completion of the proper form, payment of the \$10 fee and (usually) two copies of the work.

### 9. The duration of a copyright

The duration of a copyright is, in general, the life of the author plus 50 years. Unless there are records to the contrary at the Copyright Office, the author is presumed to have died at least 50 years ago if either of the following has occurred: (1) 75 years have expired since the work was first published, or (2) 100 years have expired since the work was created. To take advantage of the presumption of death, a certified report that there is no record of the author being alive less than 50 years ago must be obtained from the Copyright Office. (§302)

### 10. Remedies available

Remedies available under the Act are damages (§504), impoundment and destruction of infringing items (§503) and injunctive relief (§502). In addition, if the work was registered at the time of the infringement, or within three months of first publication (see §412), then there are available the additional remedies of statutory damages (which do not require a showing of actual damage (§504[c]) and the award of costs and attorney's fees (§505). Statu-

tory damages may range from \$250 to \$10,000. Depending on culpability these amounts may be reduced to not less than \$100 or enhanced to not more than \$50,000.

Willful infringement for commercial advantage or private financial gain also is punishable criminally pursuant to Section 506 of the act. Violations of Section 506 are punishable by a fine of up to \$250,000 or imprisonment for not more than five years, or both.

### C. What should the general practitioner handle?

A simple registration should not be a problem for the general practitioner, and clearly the general practitioner should advise the client to affix notice to the work. Beyond that, although any attorney is free to practice copyright law, the question one should ask is whether the work involved to become proficient can be cost justified. The Copyright Act is becoming increasingly complex, and the industry context makes the application of the statute vary. If one does not expect to have recurring copyright business, then the cost of learning the intricacies and interrelations of the Act probably does not justify handling matters beyond simple registrations. On the other hand, if the cost can be justified, copyright practice can be very exciting and can lead to other business as some copyright clients incorporate, enter publishing or entertainment contracts, require tax and estate planning and so on.

If the general practitioner chooses not to develop a copyright practice, how can he or she locate a copyright attorney? There is no handy directory. A firm with a substantial entertainment law practice should have, or use, a copyright lawyer; patent law firms usually have a copyright group, or can recommend someone.

### D. A final caution

First, the foregoing discussion only has touched on the highlights of a complex area of the law. If a substantial property (*Star Wars*, *The Autobiography of Bernard Goetz*) is involved, even a "simple" registration should not be attempted without a thorough understanding of the act.



Second, the foregoing discussion assumes the work was created after the Copyright Act of 1976 became effective January 1, 1978. There are special rules that may affect works created or published before that date.

### E. State criminal penalties for theft of recordings

It is a felony under Alabama law knowingly to transfer recorded sounds with the intent to sell the article onto which the sounds are transferred, or to manufacture, distribute or wholesale such articles, without the consent of the owner (§13A-8-81). The criminal penalties are from one to three years' imprisonment or up to a \$25,000 fine, or both, for the first offense, and from three to ten years' imprisonment or up to a \$100,000 fine, or both, for any subsequent offense (§13A-8-86). Civil damages, including punitive damages, also are provided (§13A-8-85). Whether this statute is pre-empted by Section 301 of the Copyright Act of 1976 has not been tested, but a similar Florida statute was held pre-empted. *Crow v. Wainwright*, 720 F.2d 1224 (11th Cir. 1983), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 105 S. Ct. 89 (1984).

A recent U.S. Supreme Court decision, *Dowling v. U.S.*, \_\_\_\_\_ U.S. \_\_\_\_\_, 105 S.Ct. 3127 (1985), has held that the National Stolen Property Act, 18 USC 2314, is inapplicable in bootleg recording cases, leaving the Copyright Act the appropriate criminal provision.

### F. Computer chip protection

In November 1984, the President signed into law the Semiconductor Chip Protection Act of 1984, Pub. L. 98-620. For semiconductor chip products, if they are first commercially exploited after November 8, 1984; if their design, considered as a whole, is not staple, familiar, or commonplace; and if they are registered within two years of first commercial exploitation, then the owner of the mask work has the exclusive right to reproduce the work and to import or distribute semiconductor chips that embody the work. Remedies include injunctive relief, damages and profits. Reverse engineering, however, is permissible, and there are provisions to protect innocent purchasers.

## It's Hot Off The Press The 1985 ALABAMA BAR DIRECTORY

Current address and phone listings of members of the Alabama State Bar, state and federal courts, state bar committees, policies and procedures, the *Code of Professional Responsibility* and sections on the judicial, executive and legislative branches of government

Name \_\_\_\_\_

Address \_\_\_\_\_

Check or Money Order Enclosed

QUANTITY	@ \$10.00	TOTAL ENCLOSED
		\$

Please make check payable to *The Alabama Bar Directory*.  
Allow 2 to 4 weeks delivery.

Mail to:

The Desk Book Committee  
Alabama State Bar  
P.O. Box 671  
Montgomery, AL 36101

\$10.00 PER COPY

## State Bar Meetings

November-December 1985

- | <b>November</b> | <b>Group, Committee or Task Force — meeting location</b>   |
|-----------------|--|
| 1               | BOARD OF BAR COMMISSIONERS<br>MCLE COMMISSION<br>DISCIPLINARY COMMISSION<br>Bar headquarters, Montgomery |
| 15              | COMMITTEE ON LAWYER ALCOHOL AND DRUG ABUSE<br>Bar headquarters, Montgomery                               |
| 22              | INDIGENT DEFENSE COMMITTEE<br>12th Floor, Watts Building, Birmingham                                     |
| <b>December</b> |  |
| 6               | PROFESSIONAL ECONOMICS COMMITTEE<br>2107 - 5th Avenue North, Suite 501, Birmingham                       |
| 6               | COMMITTEE ON CORRECTIONAL INSTITUTIONS AND PROCEDURES<br>Bar headquarters, Montgomery                    |
| 6               | TASK FORCE TO CONSIDER REVISION OF THE CONSTITUTION OF 1901<br>Cumberland School of Law, Birmingham      |
| 13              | TASK FORCE ON ALTERNATIVE METHODS OF DISPUTE RESOLUTION<br>1400 Park Place Tower, Birmingham             |



# Moving Toward Closure

"I want us to bring to a conclusion as many as possible of the varied and important tasks your committee and task force members already have undertaken," stated Alabama State Bar President James L. North in his first report to the membership.

Twenty-one committees and task forces have heeded that charge and met over the last two months. Reports of some of their activities follow.

## Bar management and services

The *Alabama Bar Directory* was mailed to members in late September. The first directory of its kind since 1973, the directory was compiled, published and mailed without charge to members and without bar funds. The **Desk Book Committee**, co-chaired by Dorothy F. Norwood and Brenda Smith Stedham, enlisted advertisers and contributors to underwrite the cost. The bar owes this committee its thanks for a job well done. Please support their efforts by ordering extra copies for your staff (\$10 per copy, payable to *The Alabama Bar Directory*, P.O. Box 671, Montgomery, AL 36101).

Plans for the **1986 Midyear Meeting** of the bar are well under way, according to committee chairman James T. Sasser. The meeting will begin in Montgomery, Wednesday and Thursday, March 19 and 20, and continue in Bermuda, Thursday through Monday, March 20-24. CLE, committee meetings and social activities will make up Wednesday's and Thursday's program. The Bermuda program will include a CLE seminar and thus will be tax deductible. Places are limited, and the cost will be \$600 to \$700.

Forty-five bar members had joined the proposed **Litigation Section** by late September. Chairman Tennent Lee encourages all trial lawyers, plain-

tiffs' and defendants' alike, to consider becoming charter members of this important new group.

## Public service

The Alabama State Bar, through its **Indigent Defense Committee**, has received an American Bar Association grant. The funds are being used to implement a program to recruit and train volunteer counsel to represent indigent death-row inmates whose lawyers have withdrawn from their cases after unsuccessful direct appeals. The program is spearheaded by a special committee of civil lawyers, Douglas Arant, chairman. Project director is Dennis M. Balske, Indigent Defense Committee chairman. The first training session will be conducted December 12 in Mobile. The session is free and will provide approximately 7.0 CLE credits. Chief Judge John Godbold, United States Court of Appeals for the 11th Circuit, will present the "Clarence Darrow Award" to a lawyer or lawyers who have provided volunteer services to indigent capital defendants.

As requested by the **Task Force on Alternative Methods of Dispute Resolution**, the board of commissioners has endorsed the concept of a uniform arbitration act. The board is expected to adopt a proposed act at its November meeting and authorize its introduction in the next session of the Alabama legislature.

Local bar associations should note that the board approved the concept of mediation centers for minor disputes and authorized the task force to assist in development of local programs. Interested associations may obtain assistance by calling or writing mediation subcommittee chairman Rodney A. Max, 2125 Morris Avenue, Birmingham, Alabama 35203, telephone 328-

5760. The subcommittee has developed resources and expertise which will prove valuable in local efforts.

## Focus on the profession

The American Bar Association's "Model Rules of Professional Conduct" are under study by the **Permanent Code Commission**. The commission is working closely with the ABA's special counsel on the model rules. It planned to complete the first phase of its study by late October 1985.

In the face of *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S.Ct. 2265 (1985), the **Task Force on Lawyer Advertising and Solicitation** has redrafted proposed rules for consideration by the Supreme Court of Alabama. Those rules have been submitted to the board of commissioners for study, approval and transmittal to the court. The task force also considered several other U.S. Supreme Court cases in preparation for the drafting project and utilized extensive commentaries developed by the ABA to accompany its model rules of professional conduct. MLP □

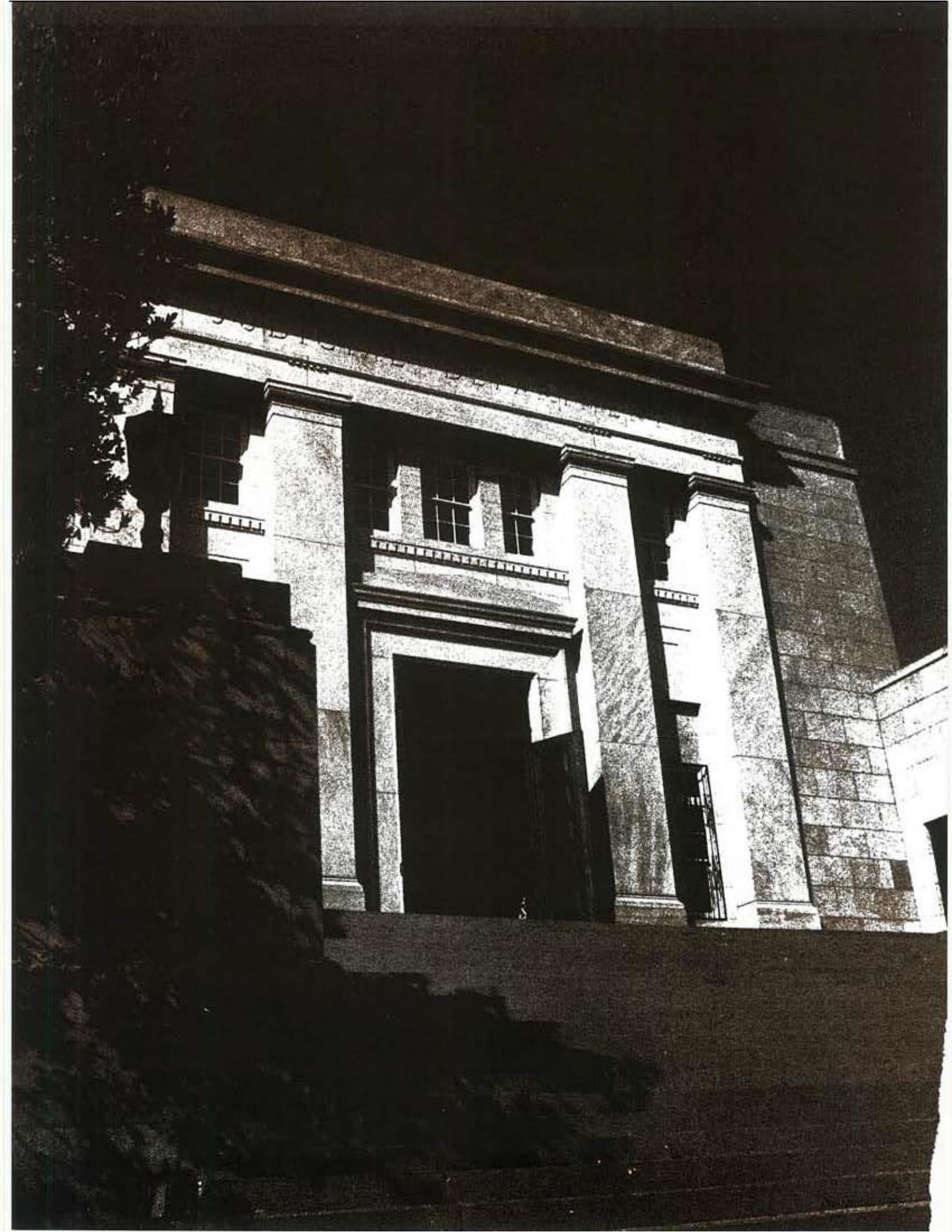
## Richard Wilson & Associates

Registered  
Professional  
Court Reporters

132 Adams Avenue  
Montgomery, Alabama 36104

264-6433







# Recent Decisions

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

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

### Executors and administrators . . . section 43-8-198 'initial pleading' defined

*Eugenia Kaller, etc. v. James R. Rigdon*, 19 ABR 3364 (August 30, 1985) — In this case, the court was asked to consider whether a motion to transfer a will contest filed by the proponent without support of a responsive answer can serve as a proponent's "initial pleading" for purposes of §43-8-198, *Code of Alabama* 1975. The supreme court said no. The proponent submitted the will for probate. The same day, Kaller filed a contest to the will. The proponent filed several papers during the ensuing months but never filed an answer. Shortly before the case was to be tried, the proponent filed a motion to transfer the contest to circuit court. The motion was granted, and Kaller filed a motion to remand to probate court for lack of jurisdiction. Both motions were denied, and this appeal followed.

Section 43-8-198, *supra*, provides that the probate court must transfer the contest "upon . . . demand . . . made in writing at the time of the initial pleading. . . ." Therefore, the demand must be made when the movant files his initial pleading. The supreme court looked at Rule 7, ARCP, and determined that a "Motion to Transfer" is not a "pleading." In the context of this case, the proponent's "initial pleading" for pur-

poses of §43-8-198, is his answer. In this case, there was no answer and, consequently, the circuit court did not have jurisdiction.

### Insurance . . . duty to defend may continue even though policy limits are tendered

*Guy Allen Samply, Jr., et al. v. Integrity Insurance Company*, 19 ABR 3268 (August 30, 1985) — In a case of first impression in Alabama, the supreme court was asked to consider whether an insurer is relieved of its obligation to defend its insured by paying the policy limits into court. Integrity wrote a \$10,000-20,000 policy insuring Samply. The policy provided that the "duty to settle or defend ends when our limit of liability for this coverage has been exhausted." Samply was in an accident and was sued. Integrity commenced the defense and subsequently filed a declaratory judgment action seeking permission to pay its limits into court and to be relieved of further defense

obligations. The trial court ruled in favor of Integrity. The supreme court reversed.

The parties agreed that there is a split of authority among the jurisdictions over this issue. However, the majority opinion is that the insurer is absolved of its duty to defend only *after* (1) it had either settled with the plaintiff for its policy limits, or (2) the insurance claimant had obtained a judgment equal to or exceeding those limits or (3) it had obtained the consent of the insured. The supreme court followed the majority view which reasoned that the courts' concern was that by simply tendering the limits, the insurer would avoid all the burdens of defense. The defense of suits by the insurer is a valuable right of the insured for which he pays and to which he is entitled. The insurer may not pay relatively low limits into court and abandon the insured simply because the cost of defense and appeal may be formidable.

### Oil, gas and mineral leases . . . 'Mother Hubbard' clause valid

*John J. Whitehead, et al. v. J.B. Johnston, et al.*, 19 ABR 1115 (March 15, 1985) — In a case of first impression in Alabama, the supreme court considered the validity and application of a "cover-all" or "Mother Hubbard" clause contained in an oil, gas and mineral lease. The clause provided that in addition to land described therein, the lease also covers all contiguous, adjacent or adjoining land owned or claimed by the lessor by "limitation, prescription, possession, reversion or unrecorded in-



John M. Milling, Jr., a member of the Montgomery law firm of Hill, Hill, Carter, Franco, Cole & Black, received his B.S. degree from Spring Hill College and J.D. from the University of Alabama. As a co-author of significant recent decisions, he covers the civil portion.



David B. Byrne, Jr., a member of the Montgomery law firm of Robison & Belser, received his B.S. and LL.B. degrees from the University of Alabama. He covers the criminal law portion of significant recent decisions.



strument." Cain, the lessor, leased five acres to Johnston. Cain also claimed ownership of an additional one-acre adjoining strip of land by adverse possession. Cain subsequently leased the one-acre strip to another party, and Johnston claimed an interest in the strip by virtue of the Mother Hubbard clause. The trial court awarded the strip of land to Johnston by virtue of the clause. The supreme court affirmed the trial court.

Although there were no Alabama authorities in point, other jurisdictions have given limited application to these clauses to "cure minor defects in descriptions and to close up gaps, wedges and omitted strips." The clause is intended to apply only to small tracts of land adjacent to specifically described land, but inadvertently omitted small tracts of land which were said to constitute a part of a larger described tract.

#### **Privilege tax, section 40-17-174 . . . "wholesale" and "retail" sales defined**

*Ex parte: Zewen Marine Supply, Inc., et al. (State of Alabama v. Zewen Marine Supply, Inc.), 19 ABR 2817 (July 19, 1985)* — In this case, the court was asked to determine the meaning of the term "wholesale" as used in §40-17-174, Code of Alabama 1975, the privilege tax statute for fuel oil sellers. The

statute levies a privilege tax on "each firm . . . selling fuel oils at wholesale, that is to say in quantities of 25 gallons or more. . . ." The court of appeals held that petitioners were subject to the tax, i.e., they sold at "wholesale" because they sold in quantities of 25 gallons or more. Petitioners argued that the quantity of the sale should not control and that they sell exclusively at "retail" because they sell to *ultimate consumers* of the fuel oils.

The supreme court agreed with the petitioners and stated that even if "wholesale" originally only meant sales in large quantity, its meaning has now come to include the concept such sales are usually sales for resale, not sales to ultimate consumers. The supreme court also noted the sales tax statutes preserve the distinction between sales for resale and those for consumption and that it would be anomalous to treat the same sales differently depending merely on the tax statute. The supreme court noted any ambiguity in a taxing statute is to be resolved in favor of the taxpayer.

#### **Torts . . . city immune from suit for failure to provide police protection**

*John M. Calogrides v. City of Mobile, 19 ABR 3133 (August 23, 1985)* — Calogrides was assaulted by a group of teenage males while attending a fire-

works display sponsored in part by the City of Mobile. Eighty-two police officers were assigned to the fireworks display. The suit alleged that the city negligently failed to provide adequate security. The trial court granted the city's motion for summary judgment, and plaintiff appealed.

This precise question had not been decided by Alabama's Supreme Court, although the court earlier had announced a general immunity rule for cities "in those narrow areas of governmental activity essential to the well-being of the governed, where the imposition of liability could be reasonably calculated to materially thwart the city's legitimate efforts to provide . . . public services." In this case, the supreme court stated the immunity extends to matters involving "public health, safety and [the] general welfare of its citizens. . . ." The immunity includes the alleged failure of the city to provide adequate police protection. Quoting from New York authorities, the court noted the amount of police protection is limited by the resources of the city and by a considered legislative-executive decision as to how those resources may be deployed.

#### **Venue . . . may a foreign corporation be sued in a county where it does no business?**

*Ex parte: Burford Equipment Com-*



**UNITED COMPANIES  
FINANCIAL CORPORATION**

## **REALLY GOOD NEWS**

Here's a lender making 20 year loans with FIXED interest rates. Not variable, FIXED FOR 20 YEARS Commercial — Investment loans, first mortgages.

**Properties:** Office buildings, shopping centers, light industrial. New construction, rehab. properties, or existing buildings.

**Bankers:** We can provide Forward Commitments, up to one year in advance, for permanent loans to cover your construction loans.

**United Companies is a one-billion dollar, financial company listed on AMEX.**

**Phone:  
(205) 979-0367**

**Andrew T. Graybar, CCIM  
Southcrest Bldg., Suite 201  
1025 Montgomery Highway  
Birmingham, AL 35216**



pany (*Burford Equipment Company v. Tony Myrick, et al.*), 19 ABR 2737 (July 12, 1985) — Burford Equipment Company sold a skidder to Myrick. Burford financed the sale and took a security interest in the skidder and assigned its interest to CIT. Myrick defaulted, and Burford sued Myrick and CIT in Montgomery County seeking a declaration of its rights under the contract. Myrick is a resident of Butler County and filed a motion to change venue to Butler County. The trial court granted the motion, and Burford filed this petition for writ of mandamus to vacate the transfer on the grounds that CIT was a foreign corporation qualified in Alabama but which did no business by agent in Butler County.

The supreme court denied the writ and stated the trial court did not abuse its discretion in determining that CIT was not a "material" defendant and that, therefore, the venue provisions relative to individual defendants, not those of foreign corporations, governed this action and made venue proper in Butler County. The supreme court reasoned that since CIT might have been joined as a plaintiff or might have been dismissed without prejudice because of §6-6-227, *Code of Alabama* 1975, in which case Butler County would have been the correct venue, the joining of CIT as a defendant should not defeat the otherwise proper venue of "material" defendants, especially where the interest of Burford and CIT are substantially the same.

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

#### New standard required for preserving instructional error

*Ex Parte Curry*, 471 So.2d 476 (Ala. 1984), reh. den. April 1985 — The standard set forth in *Allen v. State*, 414 So.2d 989 (Ala. Crim. App. 1981) and Temporary Rule 14, Alabama Rules of Criminal Procedure, abolish the old rule which provided for an "automatic exception" for refusal to give requested jury charges. The proper procedure to preserve error on appeal is delineated

in Temporary Rule 14, Alabama Rules of Criminal Procedure, which reads in pertinent part as follows:

"No party may assign as error the Court's giving or failing to give a written instruction or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge, unless he objects thereto before the jury retires to consider its verdict stating the ground to which he objects and the grounds of his objection."

Accordingly, if the trial judge marks a written requested instruction "refused," then defense counsel would have been placed on notice that the charge was not going to be given, and at this point his failure to object to the refusal would constitute a waiver.

The *Curry* case ultimately was reversed notwithstanding the defense counsel's failure to comply with Temporary Rule 14 because the unanimous verdict charge is so fundamental to the rights of the defendant that the court's failure to charge on that requirement necessarily must be prejudicial.

### 'Good time' revocation mandates full due process hearing

*Hawkins v. State*, 19 ABR 2730 (August 23, 1985) — An inmate may not be deprived of "good time" benefits without being accorded at least some modicum of due process at his disciplinary hearing. *Ex Parte Bland*, 441 So.2d 122 (Ala. 1983) In order to satisfy the due process requirements in a prison disciplinary proceeding which could result in the revocation of "good time" benefits, the inmate must be provided with advance written notice of the charges against him and a written statement of the evidence relied upon and the reasons for the actions. *Wolf v. McDonnell*, 418 U.S. 539 (1974); *Williams v. Davis*, 386 So.2d 415 (Ala. 1980)

In *Williams v. Davis, supra*, the Supreme Court of Alabama held that due process required an inmate be allowed to introduce witnesses and produce documentary evidence unless the attendance of such witnesses or the pro-

## Imagine: You're about to erect a spectacular new office tower. There's just one small hitch.

The site for the monumental new office building seemed perfect. Except for one thing. The company preferred not to have a train running through the lobby.

But a railroad held a right of way across the property, and train tracks were scattered over part of an otherwise picturesque scene. A number of other problems threatened to shatter everything.

They didn't. Because Commonwealth worked with counsel and representatives from the railroad, the city and the company to keep things on the track. So the building—instead of the 5 o'clock express—arrived right on schedule.

Whether your project is an office building that's stretching skyward, or a single-family home that's sitting pretty, call Commonwealth. Our service really can make a difference.

**We turn obstacles into opportunities.**



**COMMONWEALTH LAND\***  
TITLE INSURANCE COMPANY  
A Reliance Group Holdings Company

164 St. Francis Street • P.O. Box 2265  
Mobile, AL 36652 • (205) 433-2534



duction of such documentary evidence would be unduly hazardous to institutional safety or correctional goals. However, the due process standard enunciated in *Williams* is flexible and must be utilized by the courts to balance the interest of the inmate in avoiding the loss of his good time benefits against the interest of the prison in institutional safety and correctional goals.

### Lesser included offense . . . when to charge

*Stork v. State*, 19 ABR 2678 (July 3, 1985) — In *Stork*, the sole issue before the supreme court was whether a person who denied committing an offense with which she is charged is nevertheless entitled to a jury instruction on a lesser included offense supported by the evidence.

The defendant was charged with assault in the first degree, and the trial court charged the jury on assault in the first and second degrees, but refused the defendant's request to charge on assault in the third degree. The jury found the defendant guilty of assault in the second degree.

Justice Maddox, writing for a unanimous court, held the defendant has the right to request instructions based upon any material hypothesis which the evidence in his favor tends to establish. In this case, one view of the facts was that the defendant was involved in fighting with the victim, which would have justified a charge on the lesser included offense of third degree assault.

In reversing, the court followed its earlier decision in *Ex parte Chavers*, 361 So.2d 1106 (Ala. 1978):

"An individual accused of the greater offense has the right to have the court charge on the lesser offenses included in the indictment, when there is a reasonable theory from the evidence supporting his position. *Fulghum v. State*, 291 Ala. 71, 277 So.2d 886 (1973). A court may properly refuse to charge on lesser included offenses only (1) when it is clear to the judicial mind that there is no evidence tending to bring the offense within the definition of the lesser offense, or (2) when the requested charge would have the tendency to mislead or confuse the jury.

...

### Juvenile record . . . proper impeachment

*Lynn v. State*, 19 ABR 2687 (July 3, 1985) — Lynn was a death penalty case. Prior to calling Strong (an admitted accomplice to the crime) to testify, the prosecution made an oral motion *in limine* which was argued in chambers outside the presence of the jury. The motion requested that counsel for the defendant be precluded from an inquiry into Strong's juvenile record. The trial court granted the motion stating such evidence was not admissible for impeachment purposes and instructed Lynn's lawyer not to mention Strong's juvenile record in any way. The supreme court reversed and held on independent state grounds (Ala. Const. 1901, Art. I, ¶ 6; *Code of Alabama* 1975, ¶ 12-21-137), that the defendant's right to a thorough and sifting cross-examination was unduly hampered by the trial court's granting of the state's motion. Mr. Justice Jones reasoned as follows:

"It is not an overstatement to assert that Strong's testimony contributed to this Defendant's being sentenced to the electric chair. In exchange for his sworn statement, shifting the bulk of the blame for the homicide away from himself and on to Defendant Lynn, Strong was offered, and he received, a thirty-year sentence for the non-capital offense of burglary. Because of their relationship in the joint commission of this horrible crime and the overwhelming weight of Strong's testimony against Lynn, constitutional considerations mandate that the Defendant not be restricted in his cross-examination of Strong as to any matters of probity of worth."

Ultimately, the supreme court held "that the rules of fair play as contemplated by the constitutional guarantee of witness confrontation and as implemented by statute, place in the defendant's arsenal the right to subject that witness and his credibility, which

necessarily includes his potential bias and self-interest to cross-examination, including the use of his juvenile record."

### Representative of co-defendants . . . conflict of interest

*Paradise v. State*, 19 ABR 3168 (August 23, 1985) — In August 1973, two Atmore prison farm inmates, Ollie Adams and John Wesley, were killed. The grand jury returned an indictment against Paradise for the first degree murder of Ollie Adams. By separate indictment, the grand jury charged Paradise's accomplice and co-defendant, Issac Hood, with the first degree murder of John Wesley. Paradise and Hood had the same counsel appointed to represent them. Subsequently, Paradise filed a *pro se* petition for writ of *coram nobis*, alleging his Sixth Amendment right to effective assistance of counsel was violated. The writ was denied without a hearing by the trial court. Paradise appealed, and the court of criminal appeals affirmed without opinion. The supreme court, in a unanimous decision, reversed.

Paradise asserted his Sixth Amendment right to adequate counsel was denied when his appointed counsel represented him despite a conflict of interest because of counsel's representation of his co-defendant. Under the doctrine established in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the petitioner must show a potential conflict of interest amounts to a constitutional violation, i.e., he must show a conflict of interest which adversely affects his lawyer's performance. In support of his writ, Paradise filed an affidavit which asserted that his lawyer arranged Hood's plea bargain, which included the requirement that Hood testify against Paradise in the event of a capital offense trial. If true, such a conflict would clearly constitute a Sixth Amendment violation of due process.

□

---

**Start getting ready . . .  
for the 1986 Midyear Conference  
March 19 and 20!**

---



# Black Attorneys Stand Up And Be Counted

The National Bar Association  
Is Launching A Historic  
Nationwide Census  
Of Black Attorneys  
September 1 through October 31, 1985.

By calling the Census Hotline, 1-800-232-0111,  
you will:

- Become a part of a computer-based network of over 11,000 black lawyers in 50 states.
- Receive a complimentary subscription to the **NBA Bulletin** which covers topics and issues of interest to you.
- Receive an invitation to be listed in the first **National NBA Membership Directory**, an invaluable networking tool for today's black attorney.

Be Counted With Your  
Colleagues Across The  
Country And Across Town  
By Calling Today!

1-800-232-0111

#### Census Sponsors

Anheuser-Busch Companies  
Burger King Corporation  
Chrysler Corporation  
Clorox Corporation

Hanes Group  
Mead Data Central  
Mobil Oil Corporation  
Prudential Foundation

Founded in 1925, the National Bar Association (NBA) is the nation's oldest and largest organization consisting primarily of black attorneys.



The National Bar Association, Inc., 1773 T Street, N.W. Washington, D.C. 20009



# Opinions of the General Counsel

by  
William H. Morrow, Jr.

## QUESTION:

**"Does a lawyer have a duty to report all unprivileged knowledge of conduct of another lawyer which he believes clearly to be in violation of a Disciplinary Rule when the other lawyer is opposing counsel in a pending matter?"**

## ANSWER:

A lawyer has a duty to report to a tribunal or authority empowered to investigate or act upon such violation all unprivileged knowledge of conduct of any lawyer he believes clearly to be in violation of a Disciplinary Rule, and the fact that the other lawyer is opposing counsel in a pending matter does not relieve him of his duty. However, it is unethical for a lawyer to threaten to present to the proper tribunal or authority the violation of a Disciplinary Rule by another lawyer solely to obtain an advantage in a pending matter.

## DISCUSSION:

Ethical Consideration 1-4 in pertinent part provides:

"The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes *clearly* to be in violation of the Disciplinary Rules." (emphasis added)

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

"(A) A lawyer shall not:  
(1) Violate a Disciplinary Rule."

Disciplinary Rule 1-103(A) provides:

"(A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowl-

edge to a tribunal or other authority empowered to investigate or act upon such violation."

Although the language of DR 1-103(A) appears to be clear and unambiguous, we have received at least one request for a formal opinion and several informal inquiries concerning the question posed herein.

The reluctance on the part of lawyers to report incidences of professional misconduct by other lawyers was a special concern to the ABA Special Committee on Evaluation of Disciplinary Enforcement headed by Justice Clark. The report of this committee contains the following:

\*\*\*

"Although lawyers and judges have the necessary background to evaluate the conduct of attorneys and are far better equipped than laymen to recognize violations of professional standards, relatively few complaints are submitted to disciplinary agencies by members of the profession. This fact has been cited as a major problem by nearly every disciplinary agency in the United States surveyed by this Committee.

\*\*\*

"If individual attorneys and judges shirk that responsibility permitting wrongdoers in their midst to escape disciplinary action unless the circumstances are reported by laymen, the public may conclude that 'self-policing' is in reality 'self-protection.' The failure of attorneys and judges to report instances of misconduct, while undoubtedly the result of the almost universal reluctance to inform, hampers effective enforcement and does a disservice to the bench, the bar and the public.

"The existence and proposed use of sanctions, together with a restatement of the obligations of lawyers and judges, should be emphasized in bar publications."

\*\*\*



The case of *Estates Theatres, Inc. v. Columbia Pictures Industries, Inc. et al.*, 345 F. Supp. 93 (S.D.N.Y. 1972), *United States v. Gopman*, 531 Fed. 2d 262 (5th Cir. 1976) and *Kevlik et al. v. Goldstein et al.*, 724 Fed. 2d 844 (1st Cir. 1984), involved motions for disqualification of opposing counsel because of alleged conflicts of interests. However, the opinions in each case specifically refer to DR 1-103(A) and discuss the obligation of an attorney to report unethical conduct of an opposing attorney to the appropriate authorities.

In *Estates Theatres, Inc.*, the court stated:

\*\*\*

"When the propriety of professional conduct is questioned, any member of the Bar who is aware of the facts which give rise to the issue is duty bound to present the matter to the proper forum, and a tribunal to whose attention an alleged violation is brought is similarly duty bound to determine if there is any merit to the charge."

In the *Gopman* case the court cited the *Estates Theatres* case with approval and observed:

\*\*\*

"When an attorney discovers a possible ethical violation concerning a matter before a court, he is not only authorized but is in fact obligated to bring the problem to that court's attention. See *Estates Theatres, Inc. v. Columbia Pictures Industries, Inc.*, 345 F. Supp. 93, 98 (S.D.N.Y. 1972). Nor is there any reason why this duty should not operate when, as in the present case, a lawyer is directing the court's attention to the conduct of opposing counsel. In fact, a lawyer's adversary will often be in the best position to discover unethical behavior."

The opinion in the *Kevlik* case contains the following:

\*\*\*

"The Model Code of Professional Responsibility, DR 1-103(A) clearly requires that an attorney come forward if he has knowledge of an actual or potential violation of a Disciplinary Rule: 'A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act

upon such violation.' It is evident that the disqualification motion, although in the name of the plaintiffs, was actually brought by Attorney Gardner."

The Committee on Ethics and Professional Responsibility of the American Bar Association in Informal Opinion 1379 (1976) held that if a lawyer only suspects opposing counsel of misconduct, the lawyer has no duty to report under DR 1-103(A). Specifically, the committee held that an attorney has no duty to report opposing counsel's potential conflict of interest if a conflict has not clearly materialized in the course of the litigation.

Although a lawyer does have a duty to report all unprivileged knowledge of conduct of another attorney which he believes clearly to be in violation of a Disciplinary Rule when the other lawyer is opposing counsel in a pending matter, we believe that for an attorney to threaten to report a violation of a Disciplinary Rule by an opposing counsel in a pending matter, unless opposing counsel concedes to certain demands in a pending matter, would constitute unethical conduct. Although DR 7-105(A) deals with "criminal charges" and provides "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter," we believe that by analogy this DR is relevant and an attorney threatening to present to an appropriate authority a violation of a Disciplinary Rule solely to obtain an advantage in a pending matter would constitute unethical conduct in violation of DR 1-102(A)(5) and (6) and perhaps other provisions of the *Code of Professional Responsibility*. □

An Intensive Program in  
**TRIAL ADVOCACY**  
FIRST ANNUAL  
GULF COAST REGIONAL  
January 2-12, 1986  
Loyola Law School  
New Orleans, Louisiana

This intensive program is designed for attorneys with less than five years of experience. The NITA method of teaching trial advocacy incorporates team teaching, video technology, faculty demonstrations and student participation.

For an informational brochure and application, contact:



**NITA**<sup>®</sup>

Internationally Acclaimed for Trial Advocacy Training

Pamela Jackson  
Loyola Law School  
Box 17  
6363 St. Charles Ave.  
New Orleans, LA 70118  
(504) 865-2260

**JAMES G. MUNGER AND ASSOCIATES**

Fire/Building/Safety Code Consultants  
Fire/Explosion/Liability Investigations

P.O. BOX 1773  
CULLMAN, ALABAMA 35056

(205) 739-3755



# In Memoriam



## Fontaine Maury Howard

Fontaine M. Howard died March 20, 1985, following a massive stroke on that date. He was 76 years of age and

had been a member of the Alabama State Bar and the Montgomery County Bar for more than 40 years.

He was a native of Mulberry, Alabama, receiving his early education in the public schools of Autauga County. He graduated from Birmingham Southern College in 1929, receiving his legal education at the University of Alabama Law School, Jones Law Institute, from which he graduated in 1938, and Harvard University following World War II, where he did graduate work in income, estate and gift taxation.

During the 1930s, following his graduation from Birmingham Southern, Fontaine taught history and mathematics and was an assistant athletic coach at Montgomery's Cloverdale Junior High School. There are people today who refer to him as "Coach" Howard. With his quiet and reticent manner, such is hard for some to understand, but not the writer, for when

chips were down, I have never known a more determined and resolute person.

The following are only a few of Fontaine's many contributions to his profession and to mankind:

Fontaine was president of the Montgomery County Bar Association in 1959. He served as chairman of the Montgomery Estate Planning Council, chairman of the Alabama Federal Tax Committee, member of the Alabama Lawyers Advisory Board, president of Montgomery Jaycees, chairman of the Montgomery County Education Study Committee, president of the 1973 Montgomery Area United Appeal and president of the Montgomery Kiwanis Club in 1970-71. He further served as chairman of the Board of Stewards of the First Methodist Church of Montgomery, was a Sunday school teacher there for nearly 40 years and was generally active in the Alabama-West Florida Conference of the United Methodist



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

**Ahearn, Mary Louise Gardner**  
Birmingham — Admitted: 1977  
Died: August 6, 1985

**Boone, James Carter**  
Houston, Texas — Admitted: 1930  
Died: November 2, 1984

**Cammack, Ernest Grey**  
Fairhope — Admitted: 1931  
Died: June 14, 1985

**Carter, James Johnston**  
Montgomery — Admitted: 1934  
Died: October 4, 1985

**Corcoran, Raymond Austin**  
Mobile — Admitted: 1972  
Died: July 18, 1985

**Fenn, William Holt**  
Birmingham — Admitted: 1959  
Died: September 7, 1985

**Murphy, Ray Walker**  
Andalusia — Admitted: 1948  
Died: September 2, 1985

**Nolen, Charles William**  
Fayette — Admitted: 1949  
Died: September 7, 1985

**Payne, James Reid, Jr.**  
Montgomery — Admitted: 1933  
Died: September 8, 1985

**Reece, William Archibald**  
Birmingham — Admitted: 1979  
Died: September 18, 1985

**Robison, Samuel Hill**  
Florence — Admitted: 1947  
Died: July 19, 1985

**Smyer, Sidney William, Jr.**  
Vestavia Hills — Admitted: 1951  
Died: August 15, 1985

**Whitmire, Bryant Andrew**  
Birmingham — Admitted: 1936  
Died: July 10, 1985



Church. At the time of his death and since 1971, Fontaine was a member of the Board of Trustees of Birmingham Southern College.

In the World War II years, Fontaine served as an officer in the United States Navy. Just before he left for service (it seems like yesterday), this writer helped him close his law office in the Bell Building. Taking over his uncompleted files, correspondence, etc. was an exasperating experience, but, as always, Fontaine's pleasant sense of humor and smile came through to make it easier when he said, "You know, I'm beginning to believe it is harder to close a law office than it is to open one."

During the war years in England, Fontaine met Janet (Jan) E. Poole, a 'Wren' in the British navy. Their courtship continued after the war when Jan was stationed at the British Embassy in Washington. They were married November 22, 1946, and thereafter had two children: Jennifer, now an executive in a business consultant firm in Atlanta, and Richard F., now a Boston lawyer.

Fontaine and this writer formed a partnership to practice law in August of 1947. For many years and until the firm got larger, we did not have a written agreement. Upon our starting our practice together, we took our wives out to dinner at the old Blue Moon Inn in Montgomery to celebrate the occasion. At this dinner, Jan announced she was pregnant. Years later, when Fontaine and I tried to remember how long we had been partners, his answer would be Ricky's (Richard F.) age plus nine months, so much like him and our 38 years of no disagreement as partners.

Fontaine was a "scholar and a gentleman," and everyone who was fortunate enough to have had any contact with him has to be a better person because of that experience. He was loved and respected by all who knew him, especially the people in his law firm, from the employees to each of his partners.

In the March 26, 1985, issue of the "Kiwani's Builder," a publication of the Montgomery Kiwanis Club, an article on Fontaine's death appropriately closed with the following words of Robert W. Service:

"Master, I've filled my contract, wrought in Thy many lands; not by my sins wilt Thou judge me, but by the work of my hands. Master, I've done Thy bidding, and the light is low in the West, and the long, long shift is over. . . Master, I've earned it — rest."

Jack L. Capell

(This memorial appears courtesy of the Montgomery County Bar Association.)

## Charles William Nolen

Judge Charles W. Nolen of Fayette died September 7. He was 58.

Survivors include his wife, Mrs. Louise B. Nolen of Fayette; two sons, Charles W. Nolen, Jr., Tuscaloosa, and Steven M. Nolen, Fayette; four daughters, Deborah N. Bynum, Fayette; Teresa N. Price, Sulligent; Candy N. Hocutt, Tuscaloosa; and Faith N. Anderson, Birmingham; five brothers, Wilbur B. Nolen, Jr., Montgomery; DeForest M. Nolen, Ashland; retired Navy Cmdr. Dan R. Nolen; Jack M. Nolen of Fayette; and Jean W. Nolen of Ashford; five granddaughters; and other relatives.

Judge Nolen, a native of Ashland, graduated from the University of Alabama School of Law in 1949 and was admitted to the Alabama Bar. He was a member of the Alabama State Bar, the Fayette Bar Association, the American Bar Association, Alabama Trial Lawyers Association, the Charles Baskerville Masonic Lodge, the Farrah Law Society and the Alabama Commerce Executive Society.

He was a member of the First United Methodist Church of Fayette, where he had served as teacher of the Adult Friendship Class since 1949. He was appointed judge of Fayette County in June 1951 and served until May 1963. In 1975 he began serving as a member of the Livingston University Board of Trustees.

(This memorial appears courtesy of *The Tuscaloosa News*.)



### **Interstate Investigations and Consultants, INC.**

RECONSTRUCTION INVESTIGATIONS  
CONDUCTED THROUGHOUT THE U.S.

LAND AIR SEA RAIL  
ACCIDENT INVESTIGATION  
ACCIDENT RECONSTRUCTION  
WRONGFUL DEATH  
INCAPACITATING INJURY  
PRODUCTS LIABILITY  
EXPERT WITNESS  
COURT CONSULTANT  
WRONGFUL CHARGE  
PROPER PARTY LIABILITY

**PHILIP W. STUART, P.E.**  
PRESIDENT

**MEMBER**

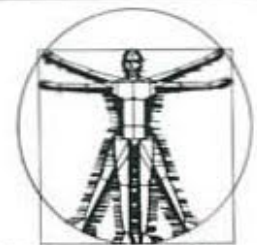
NATIONAL SOCIETY OF  
PROFESSIONAL ENGINEERS  
INSTITUTE OF TRANSPORTATION  
ENGINEERS  
(ITE ACCIDENT INVESTIGATION  
COMMITTEE MEMBER)  
AMERICAN SOCIETY OF SAFETY  
ENGINEERS

AOPA AIR SAFETY FOUNDATION

**REGISTERED ENGINEER  
FORMER STATE TROOPER**

716 INGLESIDE AVENUE  
TALLAHASSEE, FLORIDA 32303  
(904) 222-7101

"FOR THE SPECIFIC PURPOSE OF  
DETERMINING CAUSATION"



## Expect the unexpected!

By way of introduction, we're SOUTHEASTERN MEDICOLEGAL ASSOCIATES, INC., and we know we've got a hard pitch to make. We know you've used services like ours before. . . but the similarity ends there. As the headline says Expect the unexpected.

- Evaluation and analysis of cases with an honest answer as to its worth.
- Preparation of pleading and discovery documents; we can take or assist at depositions.
- Research on drugs and procedures.
- Can supply actively practicing Board Certified Physicians as expert witnesses for valid malpractice cases.

When you call SOUTHEASTERN MEDICOLEGAL ASSOCIATES, INC. expect answers, expect your case handled in a professional manner, and on time. . . in short Expect the Unexpected.



SOUTHEASTERN  
MEDICOLEGAL ASSOCIATES, INC.  
P.O. BOX 550129/BIRMINGHAM, ALABAMA 35255-0129  
(205) 879-4700



# Disciplinary Report

## Private Reprimand

• On July 24, 1985, a lawyer was privately reprimanded for having violated DR 1-102(A)(6), [conduct adversely reflecting on fitness to practice law], and DR 7-102(A)(5), [knowingly making a false statement of law or fact], by having agreed to represent the plaintiff in a civil suit for a specific fee, but subsequently, after the suit was settled, having told his client that there was a state law providing that his fee would be one-third of the recovery in the case, though he knew that there was no such law. [ASB No. 83-183]

## Public Censure

• Anniston lawyer **Thomas M. Semmes** was censured on June 7, 1985, for having willfully neglected a legal matter entrusted to him, in violation of DR 6-101(A), *Code of Professional Responsibility* of the Alabama State Bar, by having undertaken to represent the estates of Lewis Dewitt Marlowe and Annie Elese Marlowe, both of whom died without leaving wills, and by having accepted from the administrator of the estates \$89.50 in mid-April 1982, to be paid to the Probate Court of Calhoun County as court costs in the estates, but then having failed to pay the court costs to the Probate Court until December 2, 1983, after the administrator of the estates had filed a complaint against Mr. Semmes with the Alabama State Bar. [83-507 & 83-529]

## Suspensions

• Atmore lawyer **Joseph R. Tucker** was sus-

pending, effective September 15, 1985, for failure to comply with the Mandatory Continuing Legal Education requirement of the Alabama State Bar.

Etowah County lawyer **Kenneth Wyatt Gilchrist** was suspended from the practice of law in the State of Alabama for a period of five years, effective November 15, 1985, as a result of his having pleaded guilty in Etowah County Circuit Court to the crime of Third Degree Theft on April 15, 1985, and under the requirement of the Rules of Disciplinary Enforcement of the Alabama State Bar that any lawyer convicted of a crime involving moral turpitude must be disbarred or suspended. [84-673]

## Disbarments

• **J. Massey Relfe, Jr.**, of Birmingham, was disbarred, effective September 30, 1985, pursuant to his Consent to Disbarment that was filed before the Disciplinary Board of the Alabama State Bar on July 29, 1985, under Rule 15, Rules of Disciplinary Enforcement of the Alabama State Bar. [83-175, 83-498, 83-578 & 84-99]

• Birmingham lawyer **Tom L. Larkin** was disbarred from the practice of law in the State of Alabama, effective October 7, 1985, under Rule 14, Rules of Disciplinary Enforcement, based upon his June 6, 1985, felony conviction in the United States District Court for the Northern District of Georgia, Atlanta Division. [ASB No. 85-39]



## A Partnership of Love and Care

For over 120 years, the Presbyterian Home for Children has served children and families in need. During this time Alabama attorneys have been very important partners in this Christian work with children and their families.

The needs of today's children and families are more complex than in the past and so the expertise and philosophy of the Presbyterian Home for Children has expanded and grown to meet those needs. One need, however, does not change, and that is the need for financial resources to sustain this work for the future.

The tax laws for your clients are in a constant state of flux but in many cases a mutual benefit will accrue to them as well as the Presbyterian Home, particularly in the area of wills, bequests, and estate planning. Remember, too, gifts to this agency during your client's lifetime can provide your client with **significant** tax advantages.

We at the Presbyterian Home for Children stand ready to help you and your clients in ways that will mutually benefit them as well as children and families over the next 120 years.

Contact: **Benjamin S. Booth, President • Presbyterian Home for Children**  
P. O. Drawer 577 • Talladega, Alabama 35160  
205/362-2114



# Classified

## Notices

### services

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

**FORENSIC ENGINEERING Services:** Accident reconstruction, seatbelts, mechanical failures, slip and fall. Registered Mechanical Engineer serving Alabama, Mississippi, Georgia and Florida. Rates and references upon request. Charter Member — National Academy of Forensic Engineers. James D. Anderson, Jr., P.E., 9663 Hollowbrook Circle, Pensacola, Florida 32514, (904) 478-8208.

**KRAMER DETECTIVE Agency:** Licensed and bonded agents. A complete investigative agency specializing in domestic, criminal, industrial, civil, surveillance, accident and insurance, background check, missing persons and child custody matters. Call Ron Kramer, private investigator, 4631 26th Street East, Tuscaloosa, 556-6053.

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

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

### miscellaneous

**FOR SALE:** IBM System 23 Data Master Computer. Make inquiries to P.O. Box 2263, Tuscaloosa, Alabama 35403. Phone (205) 759-1226.

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

**SAVE 30-60%**

★ ★ ★

**USED LAW BOOKS**

★ ★ ★

- West • Lawyers Coop • Harrison
- Matthew Bender • Callaghan • Others

**WE BUY — SELL — TRADE**

**Law Book Exchange**

P. O. Box 17073

Jacksonville, FL 32216

1-800-325-6012

### THE ALABAMA LAWYER CLASSIFIEDS

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

### RATES:

Members: No charge  
Nonmembers: \$35 per insertion of fifty (50) words or less  
\$.50 per additional word

### DEADLINES:

Classified copy and payment must be received no later than the first day of the month prior to publication date, with no exceptions.

### MAILING:

Send classified advertising copy and your check, made out to *The Alabama Lawyer*, to:

Alabama Lawyer Classifieds  
c/o Margaret Dubberley  
P.O. Box 4156  
Montgomery, AL 36101



### books for sale

**FOR SALE:** Alabama Digest; Southern Reporter 1 & 2; Federal Reporter 1 & 2; Federal Supplement; F.R.D.; U.S. Led 1 & 2; Am Jur 2d, Am Jur Legal Forms 2d; ALR 2, 3, 4 & Federal; Williston on Contracts 3d, complete tax library. For all your law book needs: The Lawbook Exchange, Ltd., buys & sells, 135 W. 29th Street, New York, New York 10001, (212) 594-4341.

**FOR SALE:** *Words & Phrases*, \$200 OBO. Contact Wendell Morgan, P.O. Box 1900-C, Montgomery, Alabama 36197 or phone (205) 263-6441.

**FOR SALE:** Complete set of Alabama reported cases, including Alabama Reports; Southern Reporter; Southern Reporter, Second Series, to date; Alabama Digest; Corpus Juris Secundum; United States Supreme Court Reporter; United States Supreme Court Digest; Shephard Reporter, complete, with some additional volumes, being a complete library. Also an Abstract Plant, since I desire to retire as soon as this library can be disposed of. All of my library is up to date. Call or write Hugh Reed, Jr., 120 S. River Street, Centre, Alabama 35960. Phone number Monday through Friday, (205) 927-5252.

**FOR SALE:** Alabama Digest, new 1985. \$1,295. Call Edwin B. Jeakle at 766-7706 or write 321 Flurnoy, Florence, Alabama 35630.

**FOR SALE:** Law books (excellent condition, bargain prices): ALR 3d Vol. 1-100; ALR 4th Vol. 1-23; ALR 2d Later Case Service; Quick Index for ALR 1st through 4th. Call or write J. Forrest Hinton, 643 Magazine Street, New Orleans, Louisiana 70130. Phone (504) 586-1200.

**FOR SALE:** Criminal Defense Techniques, Vol. 1, 1A, 2-6, Index Tables; Defense of Narcotics Cases, Vol. 1, 2, by David Bernheim, 1984; Defense of Drunk Driving Cases, 3rd Ed., Vol. 1-3, by Richard Erwin, et al; Defense of Drunk Driving Cases, 1963, ed. by Richard Erwin; The Prosecution and Defense of Criminal Conspiracy Cases, 1984, by Paul Marcus; Larson's Workmen's Compensation, Desk Ed., Vol. 1, 2, by Arthur Larson, Bender's Forms of Interrogatories, Vol. 1-13, ed. by Kolish and Parnell; 1981-84 SMU Products Liability Institute, ed. by Walkowsak; Southeast Transaction Guide, Fla., Ga., Ala., 1984; Vol. 1-4 Business Ethics; Vol. 5-8 Estate Planning; Vol. 9-12 Commercial; Vol. 13-16 Real Estate; Vol. 17-19 Personal; and Index; Collier Pamphlet Editions: 1974 Bankruptcy Act and Rules, Parts 1, 2, by Herzog, King, Lauke; 1975 Bankruptcy Act and Rules, two volumes, by Herzog, King, Lauke; and 1979 Bankruptcy Rules, two vol. Part 2, by Moller, King; Collier on Bankruptcy, 14th ed., Vol. 1, 1A, 2, 2A, 3 (parts 1, 2), 3A, 4, 4A, B, 5, 6 (parts 1, 2), 6A, 7, 7A, 8-10, 11, 11A, 12, 13, 13A, 14, 14A, 15, Table of Cases, Index; Collier Bankruptcy Cases, 2d series, Vol. 1-12, Cumulative Index; Collier on Bankruptcy, 15th ed.,

ed. by King; Vol. 1-7, Index, Appendix 1-3; Collier on Bankruptcy pamphlet, Rules of the United States Bankruptcy Appellate Panel of the Ninth Circuit; Collier on Bankruptcy, paperback, 15th ed., Preliminary draft of proposed Bankruptcy Rules and Official Bankruptcy Forms; Collier Bankruptcy Practice Guide, paperback; Collier Bankruptcy Manuals: 2nd ed., Vol. 1, 1A, B, 2, 2A, 3, by Herzog and King, et al; and 3rd ed., Vol. 1-3, ed. by King; Collier Bankruptcy Practice Guide, Vol. 1-6, Appendix, ed. by Herzog and King; 1974 Collier Pamphlet Edition, Bankruptcy Act and Rules, by Herzog, King and Lauke; 1979 Collier Pamphlet Edition, Bankruptcy Code, Parts 2, 3, by Herzog and King; 1971 Collier Pamphlet Edition, Bankruptcy Rules, Parts 2, 3, by Herzog and King; Collier on Bankruptcy, Special Supplement, Text of Bankruptcy Tax Act of 1981 with House and Senate Reports, ed. by King; Collier Forms Manual, 2nd Ed., 1978, Vol. 1, 2, by Ryan and Moller, et al; Alabama Workmen's Compensation with Forms, 1962, by Williams; Occupational Safety and Health Act (OSHA), Vol. 1, 2, by Hogan and Hogan, 1979; Bender's Federal Practice Forms, Vol. 4A, 1978 and 1979, by Frumer and Hall; 1973 Handbook for Trustees and Receivers in Bankruptcy, by Paskay; 1978 Handbook for Trustees and Receivers in Bankruptcy, by Paskay; and Supplement to 1978 Handbook for Trustees and Receivers in Bankruptcy, by Paskay. Contact Crownover & Black, P.O. Box 2507, Tuscaloosa, Alabama 35403. Phone 349-1727.

## I AM SEARCHING FOR YOU IN MONTGOMERY

COUNTY ★ STATE ★ FEDERAL

UNIFORM COMMERCIAL CODE • SEARCHES • FILINGS • TAX LIENS  
CORPORATE TRANSACTIONS • ARTICLES • CERTIFICATES • REGISTERED AGENT  
COURTHOUSES • PUBLIC SAFETY • VEHICLE REGISTRATION • FRANCHISE TAX

**FOR QUICK EFFICIENT COURTEOUS DOCUMENT RETRIEVAL  
CALL**

**DEDE HARBIN 205-263-0054**

2094 MYRTLEWOOD DRIVE MONTGOMERY, AL 36111





---

# LEGAL PRINTING

---

*Legal and Financial Printers Since 1910*  
Experienced, Dependable, Responsible,  
Confidential

**Prospectuses, Proxy Statements,  
Official Statements, Tender Offers,  
Indentures and Briefs**



**BIRMINGHAM PUBLISHING COMPANY**

130 South 19th Street  
Birmingham, Alabama 35233  
Telephone: 205/251-5113  
Contact: Harold Fulton, *Vice President*





**"Only one federal law source helps you find cases easily with alphabetical indexes to annotations. Only one."**

Only United States Code Annotated helps you find cases fast with detailed alphabetical indexes to the Notes of Decisions. These carefully developed indexes highlight key words and phrases so you can easily pinpoint cases covering particular subject matter.

The easy-to-use alphabetical arrangement is far superior to non-alphabetical arrangements which are hard to follow.

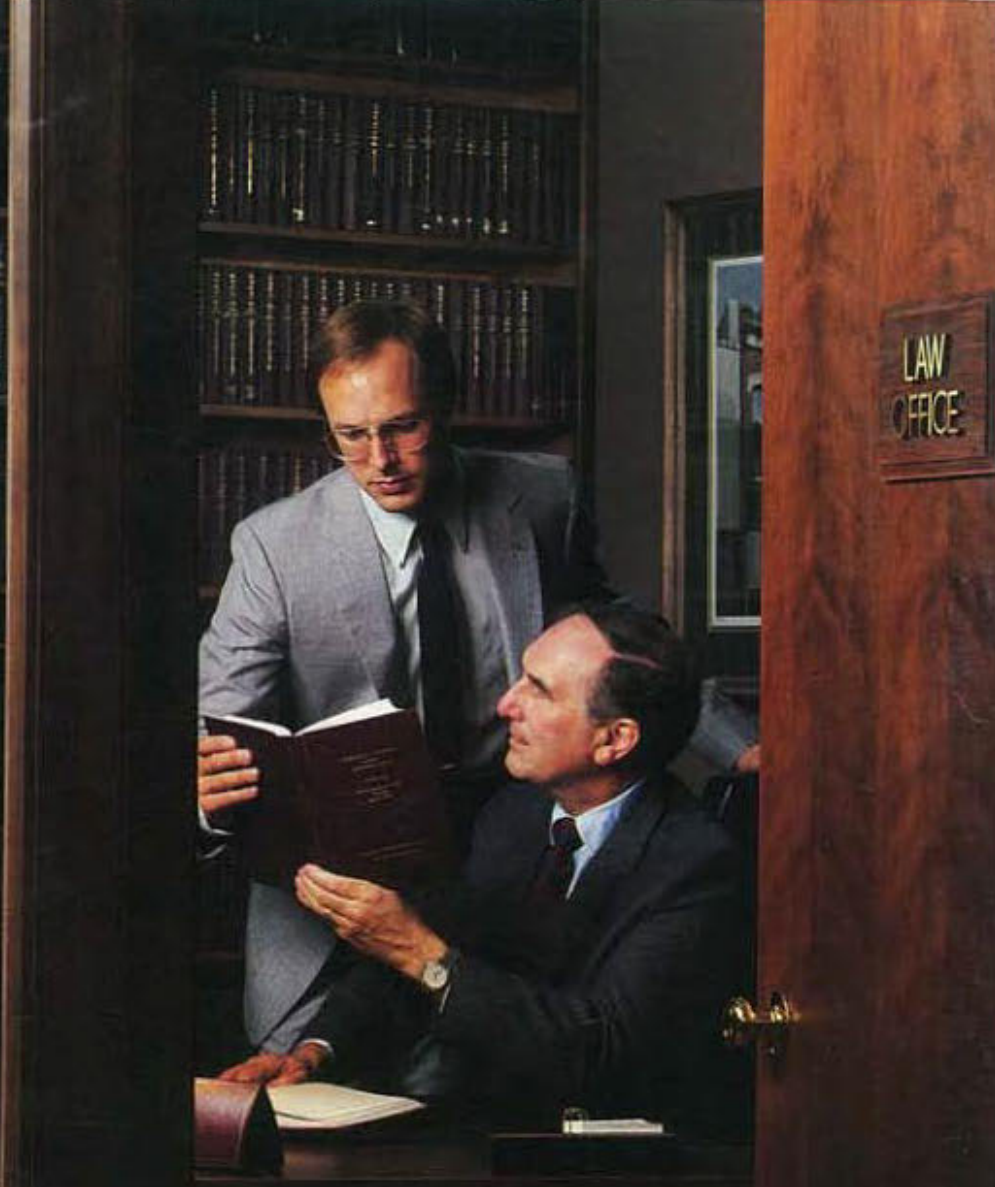
Your West Sales Representative will demonstrate to you the many other reasons why USCA is the leading federal statute source. Contact your West Sales Representative today, or write to: West Publishing Company, P.O. Box 64526, St. Paul, MN 55164-0526

**USCA, of course**

Call 1-800-328-9352  
(or 612-228-2973)

**The Alabama Lawyer**

P.O. Box 4156  
Montgomery, AL 36101



Alphabetical Indexes to Notes of Decisions help you locate cases on your subject

**15 § 77t**

**SECURITIES**

**Ch. 2A**

**Notes of Decisions**

- I. GENERALLY 1-20**
- II. INVESTIGATIONS 21-50**
- III. CRIMINAL PROCEEDINGS 51-80**
- IV. INJUNCTION PROCEEDINGS 81-127**

<b>Generally 1-20</b>	<b>Burden of proof 118</b>
<b>Abuse of discretion, review 130</b>	<b>Civil actions against Commission 31</b>
<b>Admissibility of evidence</b>	<b>Civil and criminal distinctions 2</b>
<b>Criminal proceedings 56</b>	<b>Complaint for relief</b>
<b>Injunction proceedings 119</b>	<b>Generally 111</b>
<b>Affidavits, future wrongs 95</b>	<b>Amendment 112</b>
<b>Allowance of injunctions</b>	<b>Time of violation as controlling 113</b>
<b>Discontinuance of practices as pre-</b>	<b>Criminal proceedings 51-80</b>
<b>cluding injunctions 91</b>	<b>Default judgment 130</b>
<b>Future wrong 96</b>	<b>Defenses 114</b>
<b>Allowance of preliminary or temporary</b>	<b>Disallowance of injunctions</b>
<b>injunctions 90</b>	<b>Discontinuance of practices as pre-</b>
<b>Amendment of complaint for relief 112</b>	<b>cluding injunctions 92</b>
<b>Attorney General's powers and duties 53</b>	<b>Future wrongs 97</b>
<b>Books and records 30</b>	