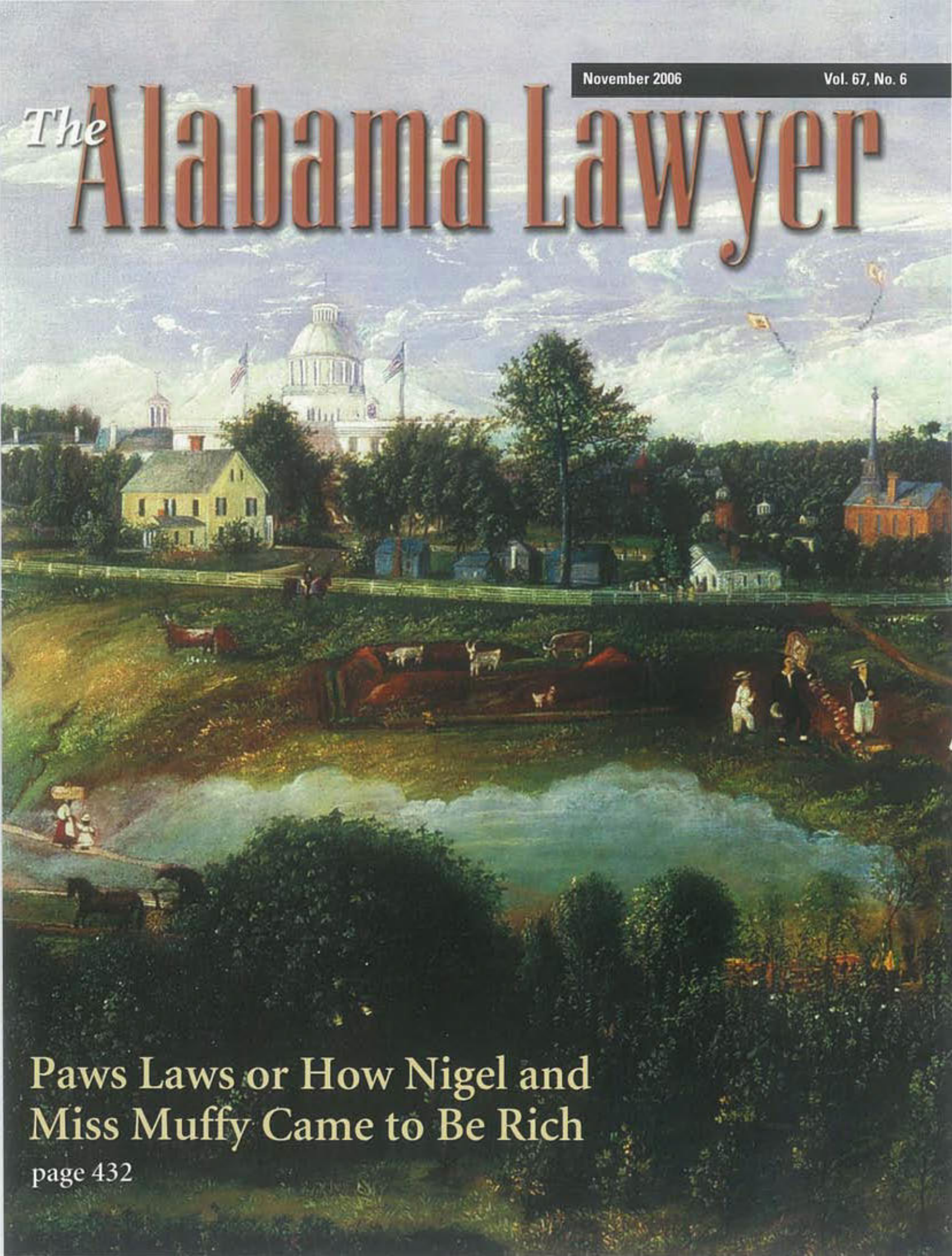
November 2006 Vol. 67, No. 6

The Alabama Lawyer



Paws Laws or How Nigel and Miss Muffy Came to Be Rich

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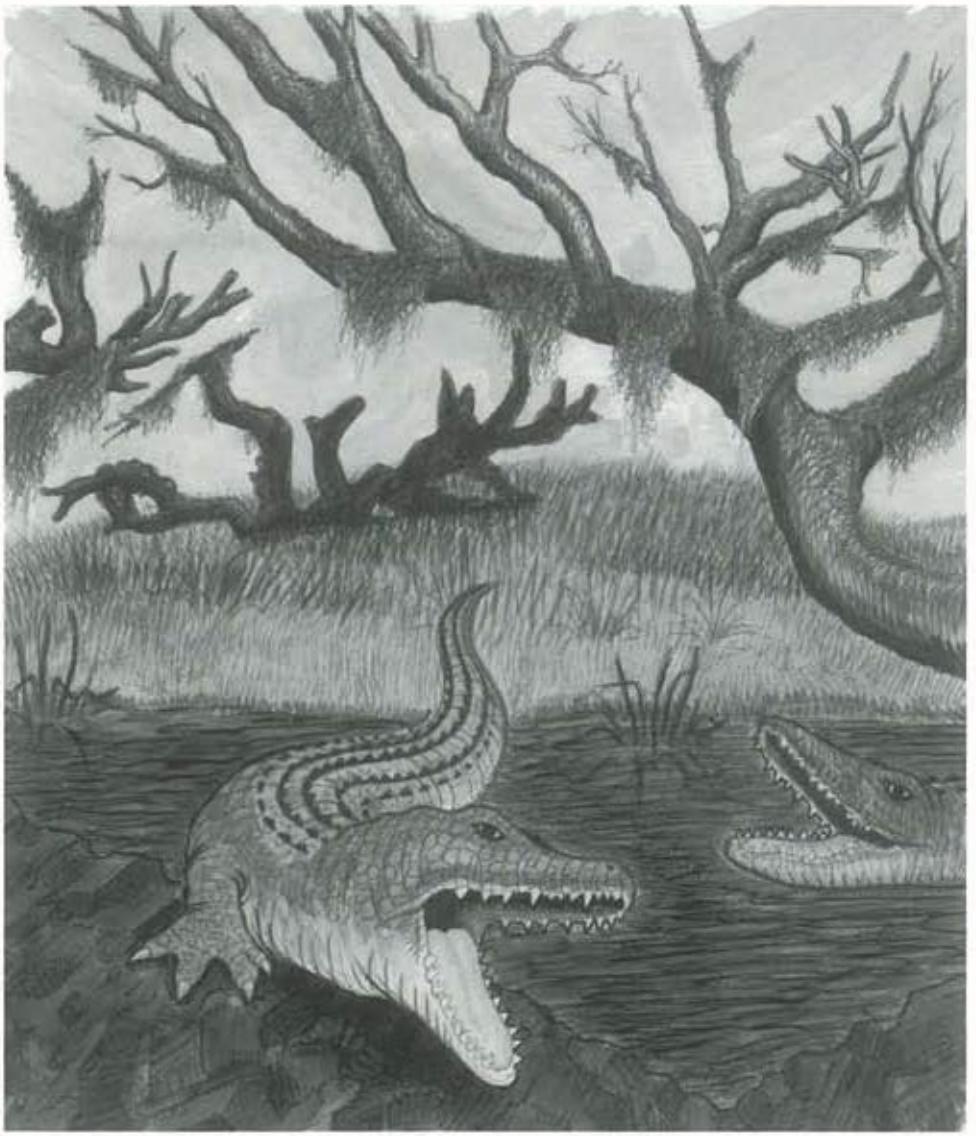

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The Alabama Lawyer

November 2006 Vol. 67, No. 6

ON THE COVER

"View of Montgomery" *ca. 1870-80, Oil on canvas.*
Courtesy of Landmarks Foundation, Montgomery, on long-term loan to the Montgomery Museum of Fine Arts

"View of Montgomery" is a fanciful topographical depiction of Montgomery as it was envisioned by an artist of the latter half of the 19th century. Certain buildings, such as the Alabama State Capitol, can be readily identified as actual historic sites, as can a number of houses of worship. Other elements, the residences, roads and general landscape, are probably at least partially a product of the artist's imagination. The work was clearly designed to focus upon the broad range of society and activity in Montgomery. There is a specific emphasis on productive enterprise, such as farming and the importance of the railroad, which had arrived in 1851. Note the small image of a train trailing plumes of white smoke in the lower section of the painting.

Anonymous artist, 19th century

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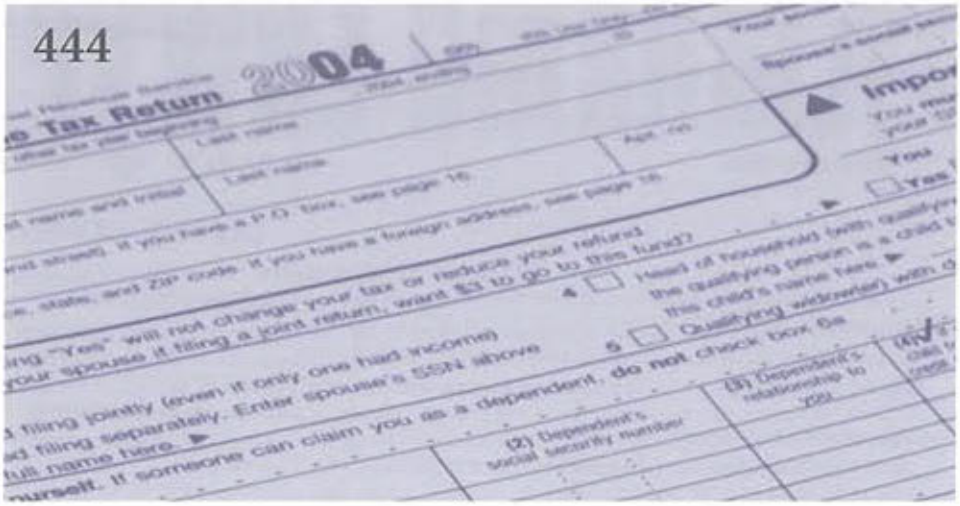

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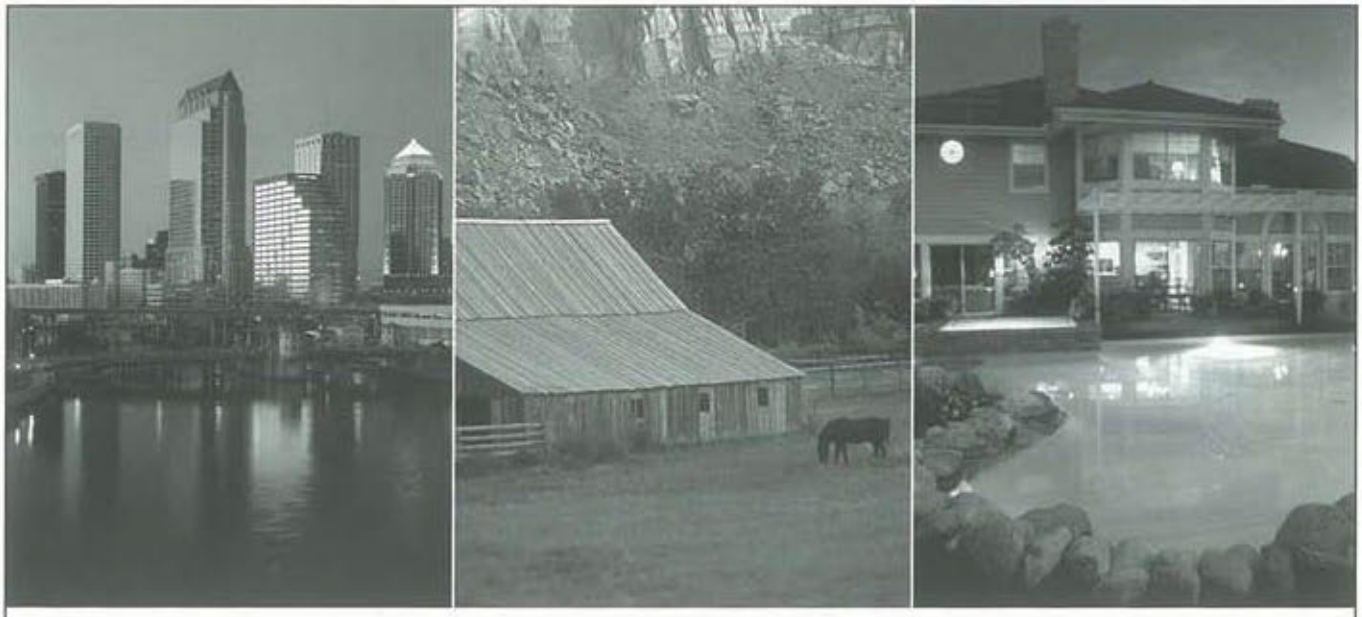
The Alabama Lawyer (USPS 743-090) is published six times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama, and additional mailing offices. POSTMASTER: Send address changes to *The Alabama Lawyer*, P.O.Box 4156, Montgomery, AL 36103-4156.



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Fournier J. "Boots" Gale, III

Mentoring– Past and Present

A task force led by **Professor Pam Bucy** of the University of Alabama School of Law is embarking on a pilot program on mentoring. The task force was appointed last year by **Bobby Segall** and was made up of **Tom Albritton, David Bagwell, Pam Bucy, Wendy Crew, Nelson Gill, Ted Hosp, Charles Miller, Donna Pate, Angie Rogers, Tom Ryan,** and **Robert Ward.** The group met throughout the fall and studied mentoring programs of the American Bar Association, other state bar associations and local bars. The task force submitted a proposal to the Alabama State Bar Board of Bar Commissioners, recommending that the bar initiate a mentoring pilot program. The board enthusiastically approved the program which will commence this month.

The mentoring pilot program will consist of ten groups: Five groups will contain five "mentees" and one mentor, and five groups will contain eight "mentees" and two mentors. "Mentees" are attorneys who have been practicing five years or less, and will be solicited for participation in the program by statewide e-mail.

Approximately 15 mentors will be initially needed. They will be solicited from former state bar presidents; former county bar presidents; former presidents of the Young Lawyers' Section of the state and local bars; bar commissioners; and former state and federal judges. All mentors must have practiced at least ten years and currently be engaged in the active practice of law.

Mentors and mentees will be grouped according to geographical proximity and interests. Each mentoring group must commit to meet between two and four times a year and to maintain monthly contact. The mentoring program is not designed to provide substantive advice or training on the practice of law, but rather to foster relationships that provide helpful guidance on professionalism and networking within the legal profession.

At the conclusion of the pilot program in November 2007, it will be evaluated and adjusted as necessary for expansion. This kind of program has been very successful in other states, especially Georgia, and we hope to have equal success. We will provide Pam and this task force with the full support of the staff and your board of bar commissioners.

If you have the opportunity to be involved in this mentoring project, I urge you to do so. This is an important part of the bar's continuing effort to foster professionalism and aid our newly admitted lawyers as they begin their careers.

When I reflected on this project it occurred to me just how important mentors can be. Many of us have been blessed with fine mentors at various stages of our lives–whether it was a special teacher in elementary school who inspired you to learn, or a high school coach or teacher, or a professor in college or law school who had a special impact on you. Our role models in life come in various shapes and

forms and their contributions are not always fully appreciated until years later.

All of us are mentors or mentees every day. As younger lawyers, we come in contact with many other members of our profession and we learn by their example. As we get older we become mentors for young lawyers who observe us practice law. We all develop patterns of behavior based on what we see and experience. This should be a sobering thought for all of us. Many are watching and learning from those of us in the profession. We all have an opportunity to be good mentors every day–it is an opportunity and an obligation.

As a young lawyer, I had the good fortune of knowing and working with many superb, seasoned lawyers who cared about the bar and our profession in the broadest sense. These "mentors" or "heroes" were great examples of what a lawyer should be, and I am grateful to have learned from them. Although this list is by no means exhaustive, I will mention some of them. They were all special to me and special to many other lawyers who were lucky to come in contact with them as well. They were mentors without a formal designation, but very significant in the development of many in our profession.

The **Cabaniss, Johnston** firm where I started had many superb lawyers and mentors, plus a long history and rich tradition. Among my "heroes" was **Joseph F. Johnston,** a senior partner whom we called "Mr. Joe." He taught me a great deal about our profession and what it meant to be a lawyer. He saw lawyers as special and demonstrated how lawyers should devote time and effort in the bar to better our community and to serve others. He had broad interests, stressed life outside of the day-to-day practice and urged young lawyers to become involved in a wide variety of community efforts–the symphony, arts, education, pro bono legal activities, etc. He gave a lot of his valuable time to the general betterment of his community and to judicial and legal reform efforts. He was one of my first "heroes" and best mentors in the legal arena.

Drayton T. Scott was a young partner and trial lawyer in the firm who also taught me a great deal. I had the privilege of trying several cases with Drayton and learned what was involved in properly preparing for trial. He treated everyone involved in a case with dignity and courtesy—the witnesses, court personnel,

Continued from page 405

bailiffs, secretaries, and the lawyers and parties on the other side. He never raised his voice and exhibited great respect for our system of justice and the legal process. He believed the adversary system worked well when all played their respective roles, with zealous advocacy but never to mislead or serve to confuse the court. Drayton was a real leader in the bar as well–serving especially in the grievance-disciplinary process. Additionally, he served for many years as the managing partner of the law firm and was a great role model. He always emphasized that the firm could accomplish great things if no one cared about who got the credit. He was a "team" player and our profession suffered a real loss when Drayton died unexpectedly in his late 40s.

Another superb mentor in my early career was **L. Murray Alley**, who is now *of counsel* with the Cabaniss firm. Like Drayton, he was an accomplished trial lawyer. Murray was probably the hardest working lawyer I ever saw. He could totally immerse himself in a case and would soon know more about the complexities of the matter than everyone else involved. He taught me the value of being better prepared than the other side and proved there is no substitute for preparation and hard work. As hard as he worked, Murray was also a superb teacher and cared about a young lawyer's development. Murray was a great lawyer because he was devoted first and foremost to the law itself. When evaluating cases or claims now, I can still hear him ask the tough and probing questions, forcing a logical analysis of the issues. He understood and taught us that the law requires disciplined analysis, not shortcuts. He loved the profession, enjoyed being with lawyers and was a well-rounded person with many interests. He was totally devoted to his family, his firm and his profession and was a special mentor to me and many others.

I had many other mentors who were not with my firm. I will briefly mention two. They are different in many ways, but shared some basic traits that made them special mentors. **Alex Newton** of the Hare Wynn firm was an outstanding trial lawyer and keen leader. Early on, I became acquainted with him through a special project of the Birmingham Bar Association and worked closely with him and others on the project. By example, he made you realize what it meant to be a member of our profession. He was constantly giving back to the bar in many ways–exhibiting professionalism, ethical behavior, courtesy, honesty, and integrity. On the same bar project, I also had the opportunity to meet **W. S. "Brother" Pritchard, Jr.** of Pritchard, McCall & Jones. He shared with Alex the same basic traits and was always devoting his valuable time to the betterment of our profession. In addition to the bar itself, these men loved their law school. Both of these mentors taught me the importance of giving back to the law school that prepared us for the profession and gave us the opportunity to practice law. They served the University of Alabama School of Law in various capacities over many years. Alex and Brother both served the Alabama Law School Foundation in leadership roles and spent countless hours raising needed funds for their alma mater. By example, they made you realize that practicing lawyers can contribute to the education and training of young lawyers at our law schools. Neither Alex nor Brother probably ever thought about the impact they had. These men are forthright, forceful and strong and taught by example. To this day, both of them continue to "give back" to their profession and are still mentoring young lawyers. Alex and Brother epitomize what it means to be a lawyer.

I am proud to be a member of our profession, and am fortunate to have had so many superb mentors. Take a moment, please, to reflect on those who have helped you along the way, and think of those who may need your example and guidance now. ■

Judicial Award of Merit

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through March 15, 2007. Nominations should be prepared and mailed to:

Keith B. Norman
Secretary
Board of Bar Commissioners
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The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation.

Nominations are considered by a three-member committee appointed by the president of the state bar which then makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.

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I.P. Audits: How to Identify and Protect Assets That Your Client May Not Realize It Even Has, and How to Avoid Losing Your Client's Patent Rights

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Keith B. Norman

Kismet

Thank You, Susan Andres, and Welcome, Brad Carr

Susan Andres joined the Alabama State Bar's staff in November 1994, becoming the ASB's first communications director. Almost a year before her arrival, plans had been underway to create the bar's communications department. We requested a communications audit by the Communications Section of the National Association of Bar Executives (NABE) and we were fortunate that **David Anderson,** the long-time communications director of the Illinois State Bar, answered the call. David spent several days with us in early 1994 evaluating the bar's resources and communications needs. His report convinced us that due to the bar's growth in members and programs we needed to form a communications department and recruit a full-time director.

Susan Andres

As fate would have it, **Reggie Hamner,** who was then the executive director of the state bar but slated to retire that September, received a call from **Gil Campbell,** executive director of the Tennessee Bar Association, informing him that the director of the Chattanooga Bar Association was moving with her husband to Montgomery. He advised Reggie that she would make an excellent staff member and that the bar could not go wrong by hiring her. We received Susan's resumé and later interviewed her. To our pleasant surprise, Susan not only had experience in bar work but she also had an extensive background in broadcasting.

Gil Campbell's words have been prophetic. We did not go wrong by hiring Susan and she was an excellent staff

member. She was the ideal choice to lead the newly created communications department. Not only did she breathe life into this new entity, she made it an integral part of the bar's operations. The many activities that have been developed by the ASB **Public Relations Committee** have been professional and well-managed, under Susan's guidance. Whether educational, informational or otherwise, our communications programs under Susan's leadership have reflected very favorably on our profession.

Susan and her husband, Hoyt, have moved and now call Highlands, North Carolina home. But, they have not retired. They have chosen to become the dealers for Lindal Cedar Homes in Highlands and several surrounding counties. (Lindal is the largest manufacturer of luxury custom log and cedar homes in the country.) With Susan's energy and "can-do" attitude and Hoyt's savvy marketing skills and media background, I bet they will have more clients wanting Lindal Homes than they can shake a stick at.

Seldom does fate smile on you twice and in the same way. Yet, fate *has* smiled on the Alabama State Bar again, with the hiring of **Brad Carr** to follow Susan as our communications director. I have known Brad many years through our mutual affiliation with NABE. To say Brad is experienced with bar work is like saying the Titanic was just another boat. He has worked with bar associations for more than 35 years. The last 22 years he served as director of media services and public affairs for the 72,000-member New York State Bar Association (NYSBA) located in Albany. Prior to his long association with the NYSBA, Brad served as associate director of the American Bar Association's Division for Bar Services in Chicago and the ABA's Commission on Correctional Facilities and Services in Washington, D.C. He has also worked with the Missouri Bar and the State Bar of Georgia.


Brad Carr

Brad not only is the "dean" of bar communications directors in the country, he is also one of the most highly regarded professionals among his peers in the business. The NABE Communications Section gave Brad its highest award by bestowing on him the E.A. "Wally" Richter Award in 1993. Interestingly, the award was named for the legendary Wally Richter with whom Brad had worked at the Missouri Bar.

When Brad decided to join our staff, he assured me that the transition from living and working in New York and moving to Alabama would be a smooth one because he had actually been born in the South—*the South Bronx!*

We will miss Susan for all that she meant to the bar and wish Hoyt and her all the best. We are glad that Brad and his wife **Kristi** have chosen Montgomery as their new home and we're excited about the wealth of experience that he brings to the position. Fate has once again smiled on the Alabama State Bar. ■

Editor's Note:
Susan can't really leave bar work behind after all! Last month, she was awarded the E. A. "Wally" Richter Leadership Award by the National Association of Bar Executives Communications Division. This award is "bestowed annually to an individual who has provided leadership to the NABE Communications Section, who has answered the call in actively participating in the Section and who deserves recognition from his or her peers in NABE." The award is named for Wally Richter, the first recipient and a preeminent bar communicator who served as director of public information for The Missouri Bar for 28 years.

Memorials

Booker, Norton William Jr.
Mobile
Admitted: 1968
Died: July 2, 2006

Coggin, Thomas Brindley
Cullman
Admitted: 1970
Died: July 24, 2006

Cooper, Coy McClesky
Birmingham
Admitted: 1951
Died: August 20, 2006

Green, William Lawrence
Mobile
Admitted: 1957
Died: May 29, 2006

Horn, Karen Andrea
Birmingham
Admitted: 1984
Died: December 11, 2005

Marlow, Ronnie Dale
Birmingham
Admitted: 1996
Died: August 24, 2006

Teague, Barry Elvin
Montgomery
Admitted: 1972
Died: July 23, 2006

Sapp, Robert Austin
Cullman
Admitted: 1945
Died: April 23, 2005

Scruggs, Edward Neal
Guntersville
Admitted: 1949
Died: June 5, 2005

Sharpe, Eldon
Dadeville
Admitted: 1989
Died: July 9, 2005

CORRECTIONS:

On page 334 of the September 2006 issue of *The Alabama Lawyer*, the article states, "...**retired** U.S. Judge Harold Albritton explored... ." It should have read as "...**Senior** U.S. Circuit Judge Harold Albritton explored... ."

The bar certification percentage for **Jones School of Law** was incorrectly reported in the September 2006 issue of the *Lawyer*. The correct information is that the pass rate for first-time takers of the February 2006 bar exam was **75 percent** and the overall pass rate was **47.6 percent.**

We regret any inconveniences or confusion these errors may have caused.

Disciplinary Notices

Notices to Show Cause

- Notice is hereby given to **Myra Lee Hammond**, who practiced law in Birmingham, Alabama, and whose whereabouts are unknown, that, pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated May 10, 2006, she has 60 days from the date of this publication (November 15, 2006) to come into compliance with the Client Security Fund assessment requirement for 2006. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of her license. [CSF No. 06-35]
- Notice is hereby given to **Broox G. Holmes, Jr.**, who practiced law in Mobile, Alabama, and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated June 29, 2006, he has 60 days from the date of this publication (November 15, 2006) to come into compliance with the Mandatory Continuing Legal Education requirements for 2005. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 06-08]
- Notice is hereby given to **James Carroll Morris**, who practiced law in Mobile, Alabama, and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated June 29, 2006, he has 60 days from the date of this publication (November 15, 2006) to come into compliance with the Mandatory Continuing Legal Education requirements for 2005. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 06-16]
- Notice is hereby given to **Sally Marie Page**, who practiced law in Princeton, New Jersey, and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated June 29, 2006, she has 60 days from the date of this publication (November 15, 2006) to come into compliance with the Mandatory Continuing Legal Education requirements for 2005. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 06-20]
- Notice is hereby given to **Daniel Pinson Rosser**, who practiced law in Birmingham, Alabama, and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated June 29, 2006, he has 60 days from the date of this publication (November 15, 2006) to come into compliance with the Mandatory Continuing Legal Education requirements for 2005. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 06-23]
- Notice is hereby given to **Samuel Tyrone Russell**, who practiced law in Huntsville, Alabama, and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated June 29, 2006, he has 60 days from the date of this publication (November 15, 2006) to come into compliance with the Mandatory Continuing Legal Education requirements for 2005. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 06-024]
- Notice is hereby given to **Leslie Ann Williams**, who practiced law in Fairfield, Alabama, and whose whereabouts are unknown, that, pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated May 10, 2006, she has 30 days from the date of this publication (November 15, 2006) to come into compliance with the Client Security Fund assessment requirement for 2006. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of her license. [CSF No. 06-35]

Reinstatement

- The Supreme Court of Alabama entered an order based upon the decision of Panel IV of the Disciplinary Board of the Alabama State Bar reinstating Baldwin County attorney **Timothy Patrick McMahon** to the practice of law in the State of Alabama, effective June 29, 2006. [Pet. No. 06-01]

Suspensions

- On August 30, 2006, the Supreme Court of Alabama entered an order adopting the order entered on August 9, 2006, by the Disciplinary Board, Panel V, accepting the consent to suspension for a period of one year by Somerville attorney **Randal Dean Beck**, effective August 30, 2006. This order involved two complaints. In ASB No. 04-252(A), Beck plead guilty to violating rules 1.3, 1.4(b), 1.5(a), 8.1(b), and 8.4(c) and (g), *Ala. R. Prof. C.* In ASB No. 04-297(A), he plead guilty to violating rules 1.1, 1.3, 1.4(a) and (b), 8.1(b), and 8.4(g), *Ala. R. Prof. C.* Both matters involved Beck's having been retained to represent the complainants in grandparent visitation matters. In one matter, Beck was paid an attorney's fee of $1,500 and in the other matter he received a $2,000 fee. After accepting the attorney's fees, Beck basically performed no legal work on behalf of the complainants. He promised to refund the attorney's fees but failed to do so. Beck also failed to respond to the bar when requested to do so. Restitution will have to be made by Beck prior to reinstatement of his law license. [ASB nos. 04-252(A) and 04-297(A)]

- Birmingham attorney **Virgil Jackson Elmore, III** was suspended from the practice of law in the State of Alabama for a period of three years, effective March 14, 2006 by order of the Alabama Supreme Court. The supreme court's order was based upon the decision of the Disciplinary Commission under Rule 22, *Alabama Rules of Disciplinary Procedure*, that Elmore be suspended. The Disciplinary Commission based its decision on a finding by the Office of General Counsel that Elmore had been convicted of a serious crime. In May 2002 and March 2006, in the Circuit Court of Jefferson County, Alabama, Elmore pled guilty to unlawful possession or receipt of substances, a violation of *Ala. Code* §13A-12-212(a). [Rule 22; Pet. No. 06-42]

- On August 2, 2006, the Supreme Court of Alabama entered an order adopting the June 27, 2006 order of the Disciplinary Board, Panel V, suspending the law license of Dothan attorney **Deanna Saunders Higginbotham** for a period of three years, effective August 2, 2006. The board's order included special conditions whereby the three years will be abridged to a period of one year with a probationary period of two years should certain terms and conditions be satisfied prior to the expiration of the three-year period. Higginbotham was retained on December 3, 2001 to represent a client in a child custody case. She was paid an attorney's fee of $2,000. Higginbotham assured her client that she had taken action on her client's behalf, when, in fact, she had not. Higginbotham agreed to refund the attorney's fees, but never did. Afterwards, Higginbotham failed or refused to communicate with her client. Higginbotham also failed or refused to respond to the Office of General Counsel and the Houston County Grievance Committee when requested to do so. Higginbotham was served with formal charges by publication on May 15, 2005. She did not file an answer to these charges and a default judgment was entered April 13, 2006, finding her guilty of having violated

Continued from page 413

rules 1.3, 1.4(a), 1.5, 8.1(b), 8.4(c), and 8.4(g), *Ala. R. Prof. C.* Higginbotham failed or refused to appear at the hearing to determine discipline held in this matter on June 20, 2006. [ASB No. 02-74(A)]

- On September 8, 2006, Fort Payne attorney **Sherry Ann Weldon Dobbins** received a public reprimand without general publication for violating rules 1.1, 1.3 and 1.4(a), *Ala. R. Prof. C.* Dobbins' client was injured in an automobile accident in June 2002 in Tennessee. The client retained Dobbins and signed a contingency fee contract in July 2002. Dobbins told the client that the statute of limitations would expire in June 2004. On more than one occasion, the client made appointments with Dobbins that Dobbins did not keep. On at least one of those occasions, after waiting for hours in Dobbins' office, the client was told by Dobbins' secretary that there was no reason for Dobbins to meet with him. The client also called Dobbins' office approximately twice a month for updates on his case. Dobbins did not return his calls. In May 2004, after not hearing from Dobbins about the status of his case, the client contacted another attorney who suggested that he give Dobbins until the end of the month to communicate with him about his case. Dobbins did not contact the client, so the client terminated her services. The client's new lawyer checked into his case and discovered that the Tennessee statute of limitations had run and that Dobbins had not filed suit.

  Dobbins was retained well within the statute of limitations. However, Dobbins did not prepare the case and allowed the statute of limitations to expire without filing a civil action on behalf of her client. Dobbins willfully neglected her client's case and did not provide competent representation to her client, and, in so doing, violated rules 1.3 and 1.1, *Ala. R. Prof. C.* Dobbins also did not communicate with her client during the course of the representation, a violation of Rule 1.4(a), *Ala. R. Prof. C.* [ASB No. 04-159(A)]

  On September 8, 2006, **Dobbins** received a public reprimand without general publication for violating rules 1.1, 1.3 and 1.4(a), *Ala. R. Prof. C.* In July 2003, Dobbins was retained to represent the complainant in a bankruptcy matter. Between July and September 2003, the complainant made several telephone calls to inquire about the status of his bankruptcy matter. Dobbins did not return these calls. In September 2003, the complainant contacted the bankruptcy trustee who advised him to write Dobbins about his case. The trustee also sent Dobbins a letter requesting that she communicate with her client. Dobbins contacted the complainant the next month. In March 2004, the complainant met with Dobbins about his loss of employment, about steps he should take regarding the sale of personal and real property, and about paying off his bankruptcy. After this meeting, Dobbins failed to keep appointments with the complainant. In April 2004, the complainant delivered funds in the amount of $18,000 to Dobbins to pay off his bankruptcy. These funds were in the form of a cashier's check in the amount of $10,000 and a personal check in the amount of $8,000. Dobbins was not in and the complainant gave the funds to Dobbins' secretary. Between May and June 2004, the complainant received no information regarding his bankruptcy. In June 2004, the complainant called Dobbins' office several times and was told by Dobbins' secretary that the paperwork was on her desk. In July 2004, Dobbins' secretary left the complainant a message indicating that Dobbins was working on his case and that Dobbins did not realize that she had the funds in his file, rather than on deposit in her trust account. That same month, the complainant received a letter from the trustee regarding a motion to dismiss the case due to lack of payments to the trustee. Dobbins represented to the complainant that it was taking extra time to file the pleadings because they had to be filed electronically. Dobbins told the complainant that the trustee knew Dobbins had the funds to pay off the bankruptcy. A few days later, the complainant communicated with the trustee and was told that she was unaware that any monies had been paid to Dobbins. Dobbins had not communicated with the trustee. The trustee advised the complainant to contact Dobbins and make sure the matter was handled promptly before the August 2004 court date. The next day, Dobbins' secretary telephoned the complainant and informed him that Dobbins was mailing the funds to the trustee. The complainant did not hear anything further from Dobbins. The funds were eventually delivered to the trustee.

  Although Dobbins filed her client's bankruptcy, thereafter she willfully neglected his case. Dobbins did not respond to the client's reasonable requests for information regarding the status of his case to the point that Dobbins' client sought assistance from the bankruptcy trustee. Dobbins' office procedures for receipt and accounting of client funds were not adequate to protect her client's interests. [ASB No. 04-230(A)]

- On May 19, 2006, Mobile attorney **Willie Julius Huntley, Jr.** received a public reprimand with general publication for violations of rules 3.3(a), 8.4(c) and 8.4(d), *Ala. R. Prof. C.* Huntley had been retained to represent a client in connection with injuries she suffered in a natural gas explosion in Moss Point, Mississippi. A civil complaint was filed in the Circuit Court of Jackson, Mississippi. On October 31, 2003, Huntley filed a verified application to appear *pro hac vice* pursuant to Rule 46 of the *Mississippi Rules of Court.*

  Rule 46 required Huntley to submit an affidavit containing a statement that he was not currently suspended or disbarred by any jurisdiction in which he was admitted. The rule also inquired as to whether Huntley had been subjected to disciplinary action by the bar or court of any jurisdiction during the

preceding five years. The verified application Huntley submitted contained statements to the effect that he was not currently suspended, disbarred or subject to disciplinary action in any jurisdiction in which he was admitted. Huntley further stated that he had not been subject to any disciplinary action by the bar or courts of his jurisdiction during the preceding five years.

Huntley failed to state in his verified application for admission *pro hac vice* that on September 19, 2000, he received a private reprimand for violating Rule 1.5(a), *Ala. R. Prof. C.* He further failed to disclose that on June 9, 2003, he received discipline consisting of a 45-day suspension, abated to probation with special conditions, requiring $6,000 in restitution and annual audits of his trust account for three years. When Huntley was notified in April 2004 by the Alabama State Bar that his application failed to reflect prior discipline, he failed to amend the application to reflect current or past disciplinary history. Huntley then responded to the Alabama State Bar and continued to advance his interpretation of Rule 46 of the *Mississippi Rules of Court* by stating that his statement should have been drafted as follows: "I have not been subject to disciplinary action by the bar or courts of ANY OTHER jurisdiction during my practice which includes the proceeding (sic) five years." Huntley falsely asserted that he did not understand that the statement regarding prior discipline applied to discipline in Alabama. [ASB No. 04-55(A)]

- On September 8, 2006, Birmingham attorney **Henry Earl Lagman** received a public reprimand without general publication for violations of rules 1.3, 1.4(a) and 1.16(d), *Ala. R. Prof. C.* In August 2004, Lagman was retained by the complainant to pursue a bankruptcy matter. The complainant paid Lagman a $950 retainer as well as a $210 filing fee. Lagman gave the complainant a "bankruptcy package" which she completed and returned to Lagman in September 2004. Thereafter, the complainant began contacting Lagman to inquire about the status of her bankruptcy matter. Each time Lagman stated that he was filing the paperwork by the end of that particular week. In April 2005, the complainant learned that nothing had been filed on her behalf and immediately contacted Lagman. Lagman explained to the complainant that he had various personal problems, and that his legal secretary, who is also his wife, had become embroiled in other personal family matters. Lagman also stated to the complainant that his father-in-law had recently died but promised that he would immediately file the bankruptcy. Thereafter, the complainant demanded a full refund of her retainer and filing fee and sent Lagman a certified letter terminating his services which he signed for on April 28, 2005. In May 2005, after having not received a refund, the complainant filed a complaint with the Alabama State Bar. Lagman did not refund the complainant's attorney's fee or filing fee until June 13, 2005. [ASB No. 05-163(A)] ■

JUDGE HAROLD ALBRITTON: From Covington County Lawyer to Respected Federal Judge

BY CHARLES F. CARR

Covington County is one of Alabama's southernmost counties. It is 85 miles south of Montgomery and borders the panhandle of Florida. It is the home of former **Alabama Supreme Court Justice Hugh Maddox, Speaker of the Alabama House Seth Hammett, Public Service Commissioner Jim Sullivan,** former Alabama and NBA basketball star **Robert Horry,** and the subject of this article, **Senior United States District Judge Harold Albritton,** who sits in the Middle District of Alabama in Montgomery.

Judge Albritton and one member or another of his family have practiced law in Andalusia since 1887. His great-grandfather, **Edgar Thomas Albritton,** sought relief from financial and family tragedy of post-Civil War North Carolina and searched for the "end of nowhere" to make a new start. Early Andalusia, Alabama seemed to fit his needs.

All of the Albrittons who have followed the patriarch have been special. Many have been called the best lawyers of their time. Along the way, they have served as mayor, city attorney, judge, Mason, board of education member, bar commissioner, member of the state Democratic Executive Committee, leader in the Republican Party, member of the board of bar examiners, church deacons and elders, state bar presidents, civic leaders, and many other important positions. They have been great family leaders, and have raised children who have become good moral men and women.

Judge Albritton has certainly carried on the family tradition. During his 30-year career as a defense attorney, Judge Albritton served as president of the Alabama Defense Lawyers Association and of the Alabama State Bar. He was inducted into the prestigious American College of Trial Lawyers, a select group of trial attorneys limited to no more than 1 percent of the attorney population in any one state or province. During those years, he quietly and calmly tried cases throughout Alabama, primarily as a civil defense litigator. Thorough, organized, meticulous, methodical, soft-spoken, and calm are all words that have been used to describe Judge Albritton as a trial attorney.

Reggie Hamner, former executive director of the Alabama State Bar, has

The Albritton family includes, front row, left to right: Amanda, James, Hunter, Will, Lucy and Hal. Middle row, left to right: Buddy, Bynum, Rollins and Sharon. Back row, left to right: Tom, Will, Jane and Judge Albritton.

probably worked with the judge as much as anyone. He only recalled one time when Judge Albritton became angry–and then deservedly so. "He never lost his composure and handled the issue calmly and directly, but I could tell he was hot," said Reggie.

In addition to his calm demeanor, no lawyer could out-prepare him. Preparation has been a genetic trait of all the Albritton attorneys. Judge Albritton has a notebook that his great-grandfather took to court with him in his office at the federal courthouse in Montgomery. The notebook contains handwritten summaries of cases, with citations, organized under alphabetical headings of issues that might come up in court, together with handwritten forms for pleadings and other documents. Judge Albritton described it as a "100-year-old laptop."

Judge Albritton may have been the only federal judge in the country who was serving as president of a state bar association while being confirmed for the judgeship by the United States Senate. It was only after research found no ethical prohibition against joint service that Judge Albritton agreed to finish his term as bar president while beginning his career as a federal judge.

In what may be another "first" for Judge Albritton and his family, he and his father may be the only father-son presidents of the Alabama State Bar. The judge served as bar president 19 years after his father held the same position.

In my recent interview with Judge Albritton, it became clear that one of his proudest achievements as federal district judge involved the planning and construction of the new federal courthouse. Ordinarily, federal courthouse building issues rest exclusively within the province of the General Services Administration (GSA), the agency that serves as the federal government's landlord while ensuring that the office space requirements of the federal workforce are met.

During the early planning stages for the construction of the new courthouse, the federal judges then sitting in Montgomery realized that if they wanted to maintain the magnificent history and beauty of the old federal courthouse, they would have involve themselves in the construction of the courthouse. It would not be an easy task, for the GSA accepted no interference, even from federal judges, in the planning and construction of federal courthouses. Using the same methodical preparation skills that he had demonstrated as a trial judge, and armed with his old Alabama

State Bar Executive Director Reggie Hamner (whom he coaxed out of retirement), Judge Albritton played a major role in the construction of the majestic new federal courthouse.

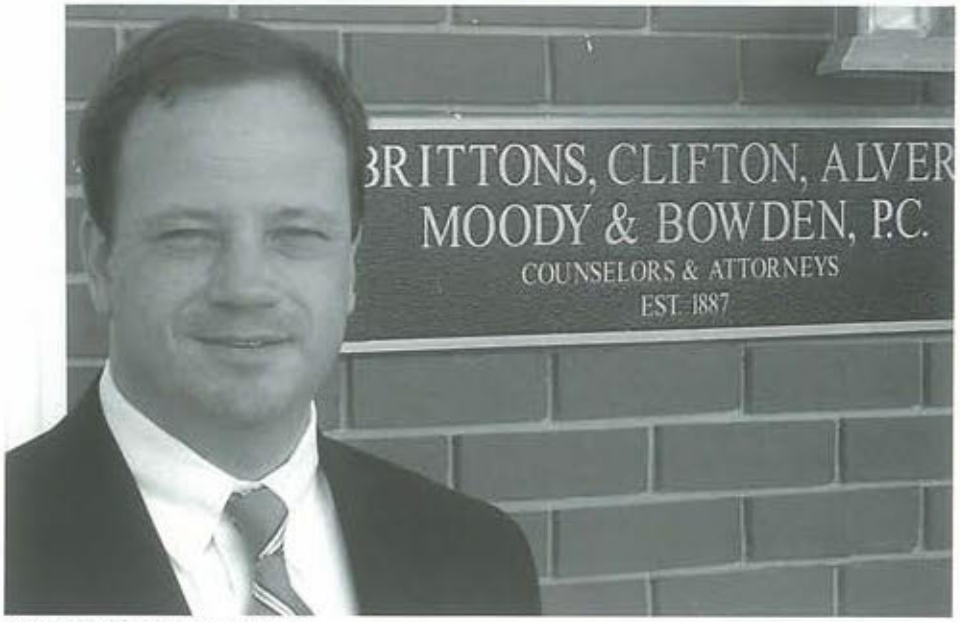
As much fun as I had interviewing Judge Albritton in early April, spending some time with his secretary, **Elna Behrman,** was equally special. Elna has been with Judge Albritton since he came on the bench in 1991. On the day of our interview, however, I discovered that she was the former Elna Bromberg, and the former band majorette for the Enterprise High School Marching Band. It brought back wonderful memories for another student who walked those halls during those years.

Later, I took a trip to Judge Albritton's old firm in Andalusia. It is still located on Opp Avenue, across from the police station and a short walk from the Covington County Courthouse. The town has grown, but it remains, in many ways, the same sleepy town it was when Judge Albritton first started practicing law.

The name of the firm has changed since Judge Albritton went on the bench. It still starts with "Albrittons" rather than "Albritton." The last "s" was added years ago because there were often at least two Albrittons in the firm. The Albritton name has been used to refer to great-grandfather Edgar Thomas, grandfather **Harold,** uncles **Harold, Jr., Bill** and **Marvin** and father **Bob.** Other outstanding lawyers have joined the "Albrittons" in the firm including **Dempsey Powell, Albert Rankin, John Givhan, Rick Clifton, Bill Alverson, Julie Moody,** and **Ben Bowden.** At one time or another, one or more of these names have appeared with "Albrittons" to make up one of the truly outstanding law firms in Alabama. It is reported to be the oldest law firm in continuous existence in the state.

Look at this again, if it didn't register. We are not talking about a couple of generations of lawyers in the family. ***The Albritton who is practicing law in Andalusia today is doing the same thing that his great-great-grandfather was doing in Andalusia in 1887!***

The Albritton practicing in Andalusia today is **Tom Albritton.** He is Judge Albritton's youngest son. Tom met me around four o'clock on a Thursday afternoon. We had talked about meeting at five o'clock, but baseball with Tom's nine-year-old son would take precedence. Family has taken the front seat in Judge Albritton's family for years. With oldest son **Hal** on a speaker phone from his office in the **Bradley Arant** firm in Birmingham, the Albritton "boys" let me know quickly that their mom, **Jane,** had always come first in their dad's eyes.



Tom Albritton outside his office in Andalusia

This was confirmed separately by Reggie Hamner and **Sid Fuller.** Sid was one of the former plaintiffs' attorneys in Andalusia who had crossed swords with the judge most often. In fact, after I had first spoken with Sid, he made a special point to call me later. He had two points that he wished to make (one of which will be mentioned later). It was very important, according to Sid, that I understand that Jane Albritton was a much more important player in Judge Albritton's life than might be the case for most wives. "Much of what he is probably results from the positive influence of Jane," said Sid. "You can't imagine how close they are."

My path with the current Andalusia attorney Albritton, Tom, had crossed several years earlier. While I was serving as hiring partner for the old "**Rives & Peterson**" firm in Birmingham, Tom became one of my clerk recruits. It would be my job to convince him that Birmingham and "Rives & Peterson" should be part of his legal future. If I had known then about the incredible history of the Albrittons' firm in Andalusia, I would have realized why my mission was doomed to fail. Tom graciously passed on our offer of employment in order to practice with brother Hal in the Albrittons' firm back in Covington County.

When I spent part of this April day with him in his Andalusia office, it became clear that Tom was no longer the quieter of the brothers. He has moved away from the strong defense lawyer tradition that father Harold and brother Hal had offered and has become a well-respected and well-balanced litigator, handling more plaintiffs' cases than defense cases.

Middle brother **Ben** walks to a different beat. He lives in Birmingham but works in Montgomery and handles civil litigation around the state for the **Alabama Attorney General's office.**

When I talked to Judge Albritton about his career, it became clear that he recognized that strong competition had helped sharpen his legal skills. Judge Albritton's courtroom skills were constantly

improved by encounters with good opponents like **Frank Tipler** and **Sid Fuller**, who were consistently ranked as two of the top plaintiffs' attorneys of their day. Having them right down the street just gave him that much more experience.

Similarly, having good defense lawyers working with him as co-defense counsel in complex litigation would continuously improve Judge Albritton's defense lawyer skills. Lawyers such as **Joe Cassady** in Enterprise, **Bob Norman, Sr.** in Birmingham and **Tabor Novak** in Montgomery would team up with Harold in courthouses in Elba and other cities throughout the state. It was a continuous learning experience for an already gifted litigator. Celebrations would ensue even if only one juror might stand in the way of a verdict against their clients.

I was somewhat surprised by Judge Albritton's feelings about alternative dispute resolution. Courtroom lawyers believe that judges push lawyers to settle cases. Judge Albritton worries that fewer cases are being tried now. He questions whether we are grooming a generation of mediation lawyers rather than trial lawyers. He still remembers the day when a trial judge strong-armed him to settle a case that he and his client knew they should win. To this day, he will make subtle inquiry as to whether a case needs some help in settling, but will not force the litigants to settle when they want their day in court.

Technology also gets mixed reviews from Judge Albritton. Although he is proud to show off the state-of-the-art technology in his modern courtroom, he feels that today's lawyers rely on it too much. "If you want to quickly turn off a jury, turn on your 'PowerPoint' and start reading to the jury," he said. In his day, Harold Albritton, the defense attorney, developed a dialogue with his juries.

Joe Cassady remembers the judge "talking to the juries" in closing arguments. Judge Albritton believes that courtroom projectors often stand in the way of a lawyer's ability to talk to his jury.

When I spent the day with Judge Albritton, I enjoyed most our discussion about his judicial philosophy. When appointed to the bench, Judge Albritton did not become "Defense Lawyer Judge Albritton." When he retired as a defense lawyer, he became a United States District Court Judge. He didn't make the law. He didn't slant the law in favor of defense lawyers. It would not have helped a client to have a former defense lawyer friend representing that client before Judge Albritton. I am not saying that he

would have bent over backwards to prove that he showed no favoritism by favoring the plaintiff's lawyer. I just think it would have made no difference.

The thing that endeared Judge Albritton the most to this writer was his ability to laugh at himself. Early in his judicial career, Judge Albritton was concerned about his lack of criminal law training before becoming a federal judge. He "studied up" on the subject, and there were few who ever realized that criminal law was not his strongest suit. Nevertheless, he tipped off his deficiency early on in his judicial career.

He recalled presiding over the arraignments of several criminal defendants. He called all the names and all the defendants entered a plea. After repeated calls for the last defendant, he thought he saw a snicker come from the face of one of the U.S. attorneys. For the third time, he asked loudly and strongly that John Lnu step forward. The U.S. Attorney quietly told the judge that while civil cases might use fictitious names like "John Doe," criminal arraignments used fictitious names like John LNU (Last Name Unknown). It was not until the judge broke out in laughter that the whole courtroom was willing to follow suit.

As Judge Albritton enters the "senior" years of his term as federal judge, it is important that the words of two respected lawyers be shared with the readers of this article. One story was told by Reggie Hamner. It involved **Sylvia Walboldt**, who is a member of the **American Bar Associations' Standing Committee on the Federal Judiciary.** For years, she had conducted background checks for the ABA on a number of southerners who had been nominated to the federal bench. Ms. Walboldt told Mr. Hamner that she wanted to attend the "swearing-in" of Judge Albritton. When he asked her why, she told him that she wanted to see the man who not one interviewee had said one negative thing about. It was a first for her in her many years of conducting these background checks.

The second story was from Albritton's former adversary, Sid Fuller. Sid said that he has had more conversations with other lawyers about sitting state and federal judges than he can remember. When he called me to tell me about Judge Albritton's wife, Jane, he also said there was one other thing that he had been on his mind. "Not one lawyer who has ever commented on the job that Harold is doing on the federal bench has ever said one negative thing about the job he is doing," said Sid. "That is almost unheard of."

To Judge Albritton, I would merely say, "Congratulations, sir, job well done." ■

Charles F. Carr
Charles Carr is president of the Carr Allison firm which has offices in Alabama, Florida and Mississippi. He is a native of Enterprise and practiced in Birmingham for many years before starting the firm's Daphne office. He now lives in Fairhope.

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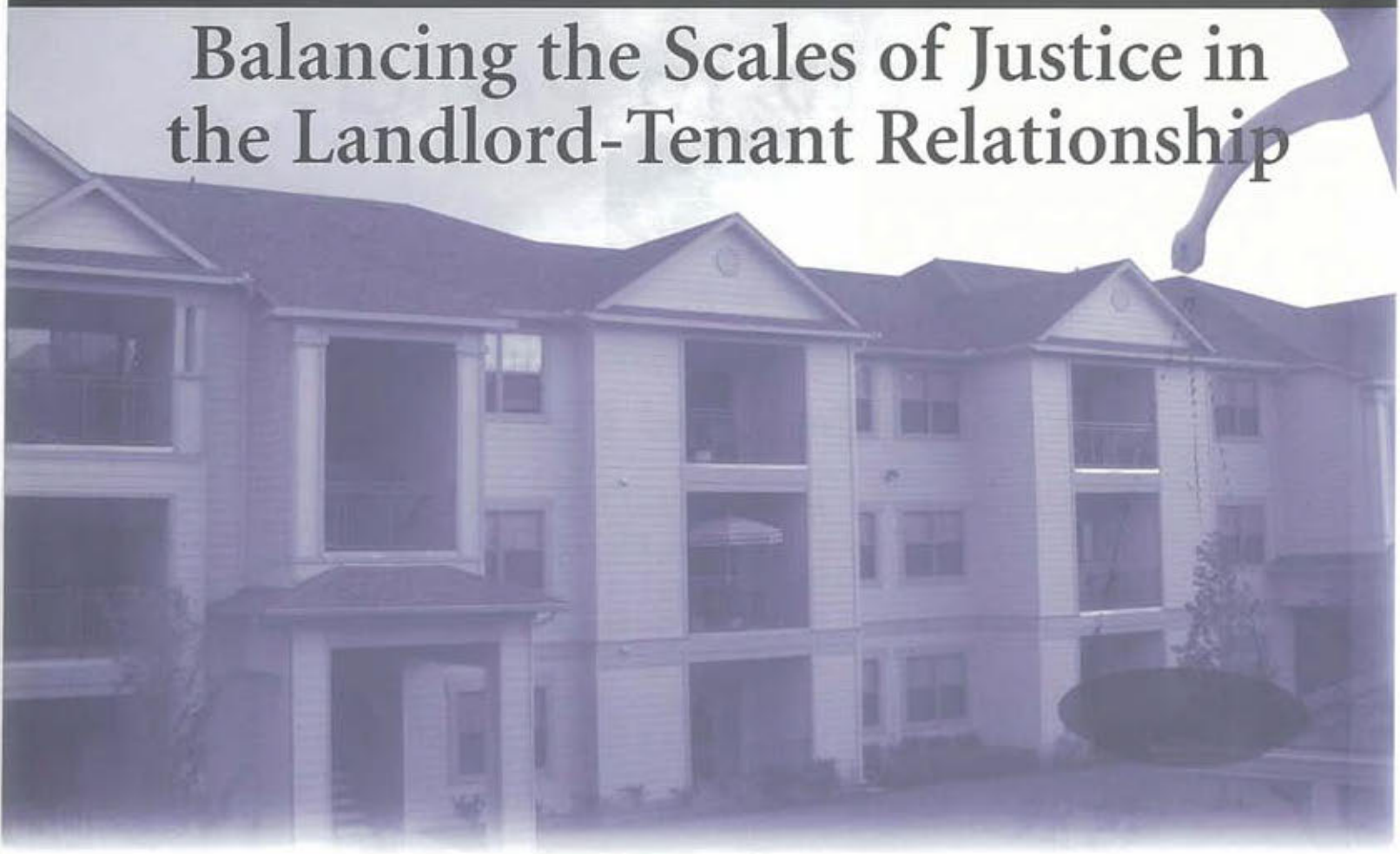
The New Uniform Residential Landlord and Tenant Act:

Balancing the Scales of Justice in the Landlord-Tenant Relationship



BY JEFFREY C. SMITH

On April 6, 2006, Governor Riley signed into law Alabama's version of the Uniform Residential Landlord and Tenant Act[1] ("Act"). As a result, the legal relationship between residential tenants and landlords was dramatically changed. Prior to the adoption of the Act, the relationship between a residential tenant and a landlord was governed by principles of common law and somewhat antiquated views of the contractual relationship between the parties. This left the residential tenant with little or no bargaining power with regard to the terms and conditions of the lease. This new legislation represents an attempt to balance the bargaining power between the parties and impose affirmative duties upon the landlord that did not arise in common law. The result of the Act's passage is a dramatic shift in the law governing residential leases.

For example, the landlord now has an affirmative duty to maintain the premises in a habitable condition.[2] Under the common law the landlord had no such duty.[3] Prior to the Act, the amount of security deposit required by landlords and the ability of the landlord to keep the deposit for unspecified "damages" to the property caused by the tenant was unregulated. Now the amount of security required, and the terms of its repayment to the tenant, are clearly delineated in the statute.[4] In virtually all existing residential leases, the tenant must pay the landlord's costs of enforcing the lease agreement and collecting past due rents. Under the new law, the landlord is no longer automatically entitled to recover the cost of collection and attorney's fees in the event of a default by the tenant.[5] In fact, the mere presence of such a clause in the lease is a violation of the

Act which will give rise to statutory penalties against the landlord who knowingly uses such language in a rental agreement.[6] Also, the landlord's lien on the personal property of the tenant is abolished by the Act.[7] These are just a few of the dramatic changes which you and your residential landlord clients and tenants need to be aware.

The history of the Act is quite interesting. The move toward a uniform Act among the states originally arose during the civil rights movement of the late '60s and early '70s.[8] During this period it was estimated that the concentration of poor urban populations gave rise to a disproportionate number of "non-whites" living in substandard housing.[9] The original uniform committee proposed a model for the current Act in 1973. *Id.* Given that the history of the Act finds its origins in the era of the civil rights movement, it is not surprising that many of the Act's provisions are aimed at shifting the balance of power away from the landlord and in favor of the tenant. When the original model of the Act was adopted by the uniform committee, tenants were widely abused by landlords who took advantage of their economic power at the expense of their tenant's rights. These landlords made no warranties and assumed no duties to repair or maintain the premises during the tenancy. This left the tenant in a "take it or leave it" negotiating position.[10] Further compounding the economic disparities between the landlord and the tenant was an antiquated common law system which provided that the doctrine of *caveat emptor* applied to the rental of residential property. The following statement from the Uniform Committee Report in 1973 summarizes the purpose of the Act well:

> Some extremely inequitable situations have resulted from the lease being used as an adhesion contract by the landlord offering the burdensome lease agreement to the tenant on a "take it or leave it" basis. The Commissioners have attempted to remedy this particular aspect of imbalance in the relative bargaining powers of landlord and tenant ....[11]

In Alabama, the common law principals of caveat emptor also applied to the rental of residential property; thus, the landlord had no duty to repair or maintain the premises, absent an agreement between the parties.[12] Consequently, most standard leases provided that the tenant would be responsible for repairs and maintenance of the property. The landlord would simply disclaim his or her responsibility for repairing or maintaining the premises,

leaving the tenant very few rights under the lease other than the obligation to pay rent. The new Act changes the relationship between the parties in numerous ways.

I will attempt to simplify the various provisions of the Act and their implications below:

Which properties are covered by the Act?

Section 35-9A-102(c) provides that the chapter shall apply only to the residential landlord and tenant relationship.[13] However, certain dwelling units are not covered by the Act, including:

- Institutional residences for medical geriatrics, educational, counseling, religious, or other services.[14]
- Properties under a contract for sale.[15]
- Property occupied by fraternal or social organizations.[16]
- Transient occupancies such as hotels and motels.[17]
- Occupancy by residential managers of rental property.[18]
- Agricultural leases.[19]
- Occupancy by the seller of residential property for no longer than 36 months after the sale.[20]

How does the Act dictate the terms of the rental agreement itself?

The general provisions of the Act provide that the rental agreement comes with an implied obligation of good faith on the part of both parties.[21]

The Act also provides that the mere presence of certain terms in the lease itself is unconscionable and unenforceable.[22] For example, the court may find as a matter of law that a rental agreement or any provision thereof that was unconscionable when made is unenforceable.[23] The court can also enforce the remainder of the agreement without the unconscionable provision, and limit the application of any unconscionable provision to avoid an unconscionable result.[24] Likewise, when a settlement is reached in which a party waives or agrees to forego a claim of right under the Act or under an unconscionable agreement, the court may refuse to enforce the settlement between the parties, or enforce all but the unconscionable provisions of the settlement agreement.[25]

Several items that are now specified by the terms of the Act itself

- The Act provides that a landlord and tenant may include any provisions in a rental agreement that are not prohibited by the Act.[26]
- In the absence of an agreement, the tenant is required to pay the fair rental value for the use and occupancy of the premises.[27] Further, rent is payable without demand or notice and, unless otherwise agreed, is payable at the premises itself at the beginning of the term of the lease.[28]
- Unless specified in the rental agreement, a residential tenancy shall be construed to be week-to-week in the case of a tenant who pays weekly rent, and in all other cases month-to-month.[29]
- There is no requirement that the lease be signed or delivered by the landlord or the tenant.[30] Acceptance of rent without reservation by the landlord gives a rental agreement the same effect as if it had actually been signed and delivered by the landlord.[31]
- Likewise, if the tenant fails to sign and deliver the written rental agreement to the landlord, acceptance of possession and payment of rent without reservation gives the rental agreement the same effect as if it had been fully executed by the tenant.[32]
- If the written agreement of the parties provides for a lease term longer than one year, but is not properly executed by the parties, the Act provides that the rental agreement shall only be effective without execution for one year.[33]

What provisions in a rental agreement are prohibited by the new Act?

First, the Act prohibits the rental agreement from waiving any rights the tenant might have under the Act.[34] Additionally,

the rental agreement may not authorize any person to confess a judgment or claim arising out of the rental agreement.[35] The rental agreement also may not require the tenant to pay the landlord's attorney's fees or costs of collection.[36] Most importantly, any provision that provides for a limitation of liability on the part of the landlord arising under the law, or provides that the tenant must indemnify the landlord for any liability or the costs associated with the landlord's potential liability arising from the rental agreement is prohibited.[37]

Any provision of the lease which is prohibited by the Act is unenforceable.[38] Furthermore, if a landlord deliberately uses a rental agreement containing a provision known to be prohibited, the tenant may recover, in addition to actual damages related to the prohibited provision, an amount of up to one month's periodic rent and reasonable attorney's fees. *Id.* This is a potential trap for the unwary landlord. While this provision will not be enforceable until January 1, 2008,[39] it is important that you stress to those clients who lease residential rental property that their leases need to be modified to comply with the Act. This is to ensure that they are protected from the potential exposure caused by the inclusion of a prohibited provision in their rental agreements.[40]

What are the landlord's obligations under the new Act?

Security deposits

The landlord is now limited to the sum equal to one month's periodic rent as the maximum security he or she can require for a residential lease (except in the case of pets where additional security may be required).[41] Further, the landlord must itemize any deductions taken from the security deposit and return any balance remaining in the security deposit, if any, within 35 days after the termination of the lease.[42] If the tenant does not provide a forwarding address to the landlord, the landlord may mail the security deposit to the last known address of the tenant, or to the leased unit.[43] Any deposit not claimed within 180 days is forfeited.[44] If the landlord fails to comply with the 35-day deadline, he or she may be liable to the tenant for an amount double the original deposit.[45]

Disclosure of agents

A landlord is required to provide the tenant, in writing, the name and business address of any person authorized to manage the premises on the landlord's behalf, and the owner or person authorized to act on behalf of the owner for the purpose of receiving notices and demands by the tenant.[46] Any person who fails to provide such written notice to the tenant shall become the agent of the landlord for the purposes of receiving notices and demand and, more importantly, performing the obligations of the landlord under this chapter.[47] Therefore, it is important that the landlord correctly identify his or her agents for service. Otherwise, a property manager failing to provide such notice may become responsible for complying with the landlord's obligations to the tenant.

Landlord must maintain the habitability of the dwelling

The Act imposes upon the landlord a duty to make all repairs and do whatever is necessary to maintain the premises in a habitable condition.[48] This includes an obligation for the landlord to comply with the requirements of all applicable building and housing codes,[49] and to maintain in a good and safe working order all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other appliances.[50] The landlord must also provide for the removal of garbage and other waste incidental to the occupancy of the unit.[51]

The landlord and a tenant of a single-family residence may agree in writing that the tenant will perform the landlord's duties of supplying running water and heat to the property, and making certain specified repairs, maintenance, tasks, alterations, and remodeling.[52] Landlords and tenants of multifamily housing may also agree that the tenant is responsible for performing repairs and maintenance. However, this agreement must be contained in a separate writing signed by the parties and supported by separate adequate consideration.[53] It is important to note, though, that the agreement may not provide that the tenant is responsible for the compliance with applicable building codes,[54] and the landlord may not treat performance of the separate agreement as a condition to any other obligation or performance contained in the rental agreement.[55]

What if the landlord conveys property subject to a lease?

The landlord who conveys rental property to another party when that property is subject to a rental agreement at the time of the transaction is relieved of liability under the rental agreement for events occurring after written notice to the tenant that the property has been conveyed.[56] However, the landlord remains liable to the tenant for all security deposits recoverable by the tenant, and for all prepaid rent.[57] Therefore, it is critical for attorneys to be familiar with this provision so that they may adequately protect the parties in a transaction involving residential rental property from the implications of this provision. Further, the manager of the premises is relieved of liability under the rental agreement for those events occurring after written notice to the tenant of the termination of the management by the manager.[58] It is clear that the intent of this section is to transfer the burden for complying with the landlord's responsibilities under a rental agreement to those persons in privity with the tenant at the time of the occurrence giving rise to the landlord's obligations, or the manager's obligations, to remedy a defective condition on the premises.[59]

What are the tenant's obligations to the landlord?

The tenant has relatively few obligations under the lease other than to pay the rent when due. However, the tenant does have a statutory obligation to comply with applicable building codes where possible, maintain the premises in a clean and safe manner, keep all plumbing fixtures clear and use the property and its fixtures and appliances in a reasonable manner.[60] The tenant may not deliberately or negligently destroy, deface, damage or remove any part of the premises.[61] Furthermore, the tenant may not knowingly, recklessly or negligently permit any other person to destroy, damage or remove any part of the premises.[62] The tenant is also required to conduct himself or herself in a manner that will allow other tenants "quiet enjoyment" of their property as well.[63]

Landlord may adopt certain rules for the tenants to follow

The landlord may adopt rules or regulations as long as their purpose is to promote the convenience, safety and welfare of other tenants along the property.[64] These rules may be imposed upon the tenant as long as they are reasonably related to the purpose for which they are intended, apply to all tenants in a fair and reasonable manner, and are sufficiently drafted to inform the tenant of what the tenant must do or not do in order to comply with these rules.[65] These rules may not be enacted by the landlord for the purpose of evading the obligations of the landlord,[66] and the tenant must have notice of the rules at the time the tenant enters into the rental agreement.[67] Any rule or regulation adopted after the tenant enters into the rental agreement that substantially modifies the tenant's use of the leased premises is not valid unless the tenant consents to the new rule in writing.[68]

Tenant must allow reasonable access to the premises

The tenant must provide reasonable access to the premises for the landlord to make repairs, alterations or improvements to the property.[69] The tenant must also make the property available for the landlord's inspection, or to allow the landlord to exhibit the property to purchasers, mortgagees, prospective tenants, workmen, or contractors.[70] The landlord may not abuse the right of access or use the right of access to harass a tenant.[71] Except in the case of an emergency, or unless impractical to do so, the landlord must provide the tenant with at least two days' notice of the landlord's intent to enter, and the landlord may only enter at reasonable times.[72] Such notice should be posted on the primary entry of the residence of the tenant and should provide the intended time and purpose of the entry.[73] The landlord also maintains the right of access when acting pursuant to a court order,[74] and when the landlord has reasonable cause to believe the tenant has abandoned or surrendered the premises.[75] Other than complying with these rules, the tenant need only maintain the unit as a dwelling unit.[76] If the tenant expects to be absent for more than 14 days, the lease may require the tenant to provide the landlord written notice.[77]

What are the tenant's remedies in the event of a breach by the landlord?

Tenant may terminate the lease

The tenant may terminate the lease if the landlord is not in compliance with the rental agreement or with the Act if such non-compliance materially affects health and safety.[78] The tenant may exercise his or her rights to terminate the lease by delivering written notice to the landlord specifying that the lease will terminate within 14 days unless the breach is cured within these 14 days.[79] If the breach is remedied by the landlord within the date specified in the notice, the breach will not result in a termination of the lease.[80]

Landlord's failure to provide utilities may trigger termination of lease

If the landlord fails to provide heat, running water, hot water, electrical, gas, or other essential services, the tenant may provide notice to the landlord that the lease will terminate within 14 days if the service is not provided.[81] However, the tenant may not terminate the lease for a condition caused by the deliberate or negligent acts of the tenant, the tenant's family, the tenant's licensee or other person on the premises with the tenant's consent.[82]

The tenant is also entitled to recover damages based upon the diminution of the fair market rental value of the dwelling unit.[83] The tenant may also recover actual damages and/or obtain injunctive relief for non-compliance by the landlord with the rental agreement, or for the landlord's responsibility to maintain the premises.[84] Further, if the landlord's non-compliance is in bad faith, the tenant may recover reasonable attorney's fees.[85] If the lease is terminated due to the landlord's failure to maintain, the landlord must return all security deposits recoverable by the tenant, and all unearned prepaid rent.[86]

Landlord's failure to deliver

If the landlord fails to deliver possession of the property at the commencement of the lease period, rent shall abate until possession is delivered.[87] In addition to the rent abatement, the tenant may also terminate the rental agreement upon written notice to the landlord.[88] Within five days thereafter, the landlord must return all prepaid rent and security.[89] If the landlord's failure to deliver possession is willful and not in good faith, the aggrieved party may recover an amount of not more than three months' rent, or the actual damages sustained, whichever is greater, as well as reasonable attorney's fees.[90] Here again, the provisions for attorney's fees are to protect the tenant from abuse by the landlord, which is another obvious attempt to balance the power between the landlord and the tenant.

Tenant has right of set-off

The Act provides for a recovery by the tenant of a set-off against any rent owed while the premises are not made available for the tenant's use.[91] Likewise, if the premises are damaged or destroyed by a fire not caused by the tenant to the extent that the use of the dwelling is substantially impaired, the tenant may either vacate the premises and notify the landlord that within 14 days thereafter the rental agreement shall be terminated,[92] or vacate any portion of the dwelling rendered unusable by the fire and reduce the rent in proportion to the diminution of the fair market value for the dwelling unit.[93]

Tenant protected from retaliation by landlord

The landlord may not retaliate in any way against the tenant for complaining to any governmental agency charged with enforcing building or housing codes, complaining to the landlord of a violation under § 35-9A-204, or organizing or becoming a member of a tenant's union.[94] If the landlord does retaliate against a tenant, the tenant may pursue remedies including terminating the rental agreement; recovering damages of not more than three months' periodic rent, or actual damages, whichever is greater; and recovering reasonable attorney's fees.[95] The tenant is also entitled to a return of all the security deposit and all unearned prepaid rent.[96]

Exclusion from premises and intentional interruption of services

Lastly, the Act provides that if the landlord unlawfully removes or excludes the tenant from the premises, or willfully diminishes services to the tenant by interrupting or causing interruption of services, the tenant may recover possession or terminate the rental agreement at his or her

option.[97] In either event, the tenant may recover an equal amount of no more than three months' rent or actual damages sustained by the tenant together with attorney's fees.[98] This provision is clearly designed to prevent the landlord from willfully withholding services from the tenant in an effort to constructively evict the tenant, or from otherwise removing the tenant from the premises. The imposition of three months' rent as liquidated damages, and the payment of attorney's fees, will serve as at least some deterrent from such conduct.

What are the landlord's remedies under the Act?

Landlord's right to terminate lease

If the tenant breaches the rental agreement, or if he or she acts so as to affect the health and safety of the premises, the landlord may deliver written notice to terminate the lease to the tenant specifying the acts and omissions which constitute the breach, and the rental agreement will terminate after 14 days from receipt of the notice if the breach is not remedied.[99]

If a tenant fails to pay rent when due, the landlord may deliver written notice to the tenant to terminate the lease for nonpayment of rent, and if the rent is not paid within the seven-day period as specified in the notice, the landlord may terminate the rental agreement at the end of the seven-day period.[100] This section modifies existing law wherein the landlord had to provide a ten-day notice of termination of the lease to a tenant in the event of breach.[101]

Landlord may obtain injunctive relief

The landlord is entitled to recover actual damages and obtain injunctive relief if the tenant is in breach of the rental agreement pursuant to his or her obligations under § 35-9A-301, including the obligation to maintain the premises in a clean and safe manner.[102] If the tenant's non-compliance is willful, the landlord may recover reasonable attorney's fees for the breach as a result of the enforcement of the lease.[103]

Landlord may increase rent for repairs arising from tenant's failure to maintain premises

If the tenant fails to maintain the premises as outlined in § 35-9A-301, the landlord may enter the dwelling unit and perform the necessary work to remedy the breach, and may submit an itemized bill for the actual costs of the repairs as additional rent due on the next date that the ordinary rental payments are due.[104]

Landlord may reenter premises in case of abandonment by tenant

If the lease requires a tenant to provide notice to the landlord for an absence of 14 or more days, and if the tenant abandons the premises for more than 14 days without giving notice, the landlord may recover actual damages from the tenant.[105] Also, during such an absence the landlord may enter the dwelling at any reasonable time necessary.[106] If the tenant abandons the dwelling unit, the landlord has a duty to make reasonable efforts to rent the property at a fair rental value.[107] This implies the landlord's duty to mitigate his/her damages in case of the tenant's abandonment of the premises. The landlord has no duty to store or protect the tenant's property in the unit, and may dispose of it without obligation.[108] This provides additional statutory protection for the landlord from claims of conversion by the tenant in case of such an abandonment.

Landlord's acceptance of rent may serve as a waiver of default

One should be aware that if a landlord accepts rent during a period of default on the part of the tenant, the acceptance of such rent shall constitute a waiver of the landlord's right to terminate the rental agreement for that breach.[109] Furthermore, the Act has abolished landlord liens found in former law.[110]

Landlord's right to recover attorney's fees for damages to premises and in event of holdover

There are few circumstances that will give rise to the landlord's recovering his or her attorney's fees from the tenant. Those instances include willful breach on the part of the tenant[111] of his or her duty to maintain the unit in a clean and safe manner, deliberately or negligently destroying or damaging the property,[112] and in the case of a holdover tenant.[113] The simple breach

of the tenant's obligation to pay rent will not give rise to a claim by the landlord for attorney's fees. This is a departure from what most residential leases currently provide and places the financial burden upon the landlord in enforcing the rental agreement. If a tenant remains in possession without the landlord's consent after the term of the lease or rental agreement, the landlord may bring an action for possession, and if the holdover is willful and not in good faith, the landlord may recover three months' periodic rent or actual damages, whichever is greater, together with a reasonable attorney's fee.[114]

How will landlords enforce their rights to eviction and damages?

The landlord may bring an action for eviction, rent, monetary damages or other relief either in district court or circuit court.[115]

Venue

Venue shall lie in the county in which the leased property is located.[116] Additionally, eviction actions are entitled to precedence in scheduling over all other civil cases.[117] This provides the landlord with a more appropriate venue than is currently available. For example, in an action to collect unpaid rent, the current venue statutes provide that the tenant may only be sued where he or she resides at the time of the filing of the action.[118] Therefore, transient tenants may avoid collection efforts by moving to an unfavorable or inconvenient venue. This section of the new Act, on the other hand, provides that venue shall lie where the premises are located, and also provides that the landlord's action have priority over other civil cases.[119]

Service of process

The Act also provides for a new method of service of process. If service is unable to be made under the ordinary service Rule 4 of the *Alabama Rules of Civil Procedure,* service may be had by delivering the notice to any person who is residing on the premises, or if after reasonable effort no one is found residing on the premises, by posting a copy of the notice on the door of the premises and on the same day mailing a notice of the filing of the unlawful detainer action to the tenant at the mailing address of the premises.[120] If there is no mailing address for the premises, notice shall be mailed to the last known address of the tenant by first-class mail.[121] This again provides for a simplified method of service to the tenant who seeks to avoid service of process.

Appeal to circuit or appellate courts

In a case of eviction, the tenant's appeal to the circuit court or any appellate court will not prevent the issuance of a writ of restitution unless the tenant continues to pay the clerk of the circuit court all rent payable under the lease.[122] Furthermore, the tenant has the obligation to continue to pay all rent as it becomes due under the terms of the lease during the pendency of appeal.[123] If there is a dispute as to the appropriate amount to be paid, that dispute shall be ascertained by the court.[124]

Conclusion

As one can see, there are new affirmative duties imposed upon the landlords of residential rental property. The tenant also has new responsibilities as well. It

will be interesting to see how Alabama courts interpret the various provisions of the Act. Given that this Act is a departure from the common law, one will need to look to the laws of other states that have adopted similar statutes for guidance.[125] Landlords and tenants alike need to become familiar with the new Act so that they may avoid the unfortunate consequences of violating any provision of the new Act. Landlords also need to carefully modify their leases to make certain that they are in compliance with the new Act. Only time will tell if the Act will accomplish its intended purpose of balancing the bargaining power between the parties, or has created an undue burden upon landlords who may now be forced to alter their longstanding practices in an effort to comply with the Act. ■

Endnotes

1. H.B. 287, 2006-316, Reg. Sess. (Ala. 2006) (to be codified at *ALA. CODE* §§ 35-9A-101 to -602).
2. *ALA. CODE* § 35-9A-204(a)(2) (effective Jan. 1, 2007).
3. See *Johnson v. Passmore*, 581 So. 2d 830, 832 (Ala. 1991) (observing that the landlord has no affirmative duty to make repairs apart from the contract between the parties).
4. *ALA. CODE* § 35-9A-201 (effective Jan. 1, 2007).
5. *ALA. CODE* § 35-9A-163(a)(3) (effective Jan. 1, 2007).
6. *ALA. CODE* § 35-9A-163(b) (effective Jan. 1, 2007).
7. *Compare ALA. CODE* § 35-9-60 (1975) (allowing a lien "on the goods, furniture and effects belonging to the tenant"), *with ALA. CODE* § 35-9A-425 (effective Jan. 1, 2007) ("A lien or security interest on behalf of the landlord in the tenant's household goods is not enforceable unless perfected before January 1, 2007.").
8. Brian J. Strum *et al.*, "Proposed Uniform Residential Landlord and Tenant Act, Report of Subcommittee on the Model Landlord-Tenant Act of Committee on Leases," 8 *REAL PROP. PROB. & TR. J.* 104, 106 (1973).
9. Bruce N. Bagni, "The Uniform Residential Landlord and Tenant Act: Reconciling Landlord-Tenant Law with Modern Realities," 6 *IND. L. REV.* 741, 745 (1973).
10. Brian J. Strum *et al.*, "Proposed Uniform Residential Landlord and Tenant Act, Report of Subcommittee on the Model Landlord-Tenant Act of Committee on Leases," 8 *REAL PROP. PROB.* & TR. J. 104, 108 (1973).
11. *Id.*
12. *Johnson v. Passmore*, 581 So. 2d 830, 832 (Ala. 1991) (observing that the landlord has no affirmative duty to make repairs apart from the contract between the parties); *Murphy v. Hendrix*, 500 So. 2d 8, 8 (Ala. 1986) (reaffirming that Alabama does not recognize an implied warranty of habitability in residential real property).
13. *ALA. CODE* § 35-9A-102(c) (effective Jan. 1, 2007).
14. *ALA. CODE* § 35-9A-122(1) (effective Jan. 1, 2007).
15. *ALA. CODE* § 35-9A-122(2) (effective Jan. 1, 2007).
16. *ALA. CODE* § 35-9A-122(3) (effective Jan. 1, 2007).
17. *ALA. CODE* § 35-9A-122(4) (effective Jan. 1, 2007).
18. *ALA. CODE* § 35-9A-122(5) (effective Jan. 1, 2007).
19. *ALA. CODE* § 35-9A-122(7) (effective Jan. 1, 2007).
20. *ALA. CODE* § 35-9A-122(8) (effective Jan. 1, 2007).
21. *ALA. CODE* § 35-9A-142 (effective Jan. 1, 2007).
22. *ALA. CODE* § 35-9A-143 (effective Jan. 1, 2007).
23. *ALA. CODE* § 35-9A-143(a)(1) (effective Jan. 1, 2007).
24. *Id.*
25. *ALA. CODE* § 35-9A-143(a)(2) (effective Jan. 1, 2007).
26. *ALA. CODE* § 35-9A-161(a) (effective Jan. 1, 2007).
27. *ALA. CODE* § 35-9A-161(b) (effective Jan. 1, 2007).
28. *ALA. CODE* § 35-9A-161(c) (effective Jan. 1, 2007).
29. *ALA. CODE* § 35-9A-161(d) (effective Jan. 1, 2007).
30. *ALA. CODE* § 35-9A-162(a) (effective Jan. 1, 2007).
31. *Id.*
32. *ALA. CODE* § 35-9A-162(b) (effective Jan. 1, 2007).
33. *ALA. CODE* § 35-9A-162(c) (effective Jan. 1, 2007).
34. *ALA. CODE* § 35-9A-163(a)(1) (effective Jan. 1, 2007).
35. *ALA. CODE* § 35-9A-163(a)(2) (effective Jan. 1, 2007).
36. *ALA. CODE* § 35-9A-163(a)(3) (effective Jan. 1, 2007).
37. *ALA. CODE* § 35-9A-163(a)(4) (effective Jan. 1, 2007).
38. *ALA. CODE* § 35-9A-163(b) (effective Jan. 1, 2007).
39. *ALA. CODE* § 35-9A-601 (effective Jan. 1, 2007).
40. *ALA. CODE* § 35-9A-601 (effective Jan. 1, 2007).
41. *ALA. CODE* § 35-9A-201(a) (effective Jan. 1, 2007).
42. *ALA. CODE* § 35-9A-201(b) (effective Jan. 1, 2007).
43. *ALA. CODE* § 35-9A-201(d) (effective Jan. 1, 2007).
44. *Id.*
45. *ALA. CODE* § 35-9A-201(f) (effective Jan. 1, 2007).
46. *ALA. CODE* § 35-9A-202(a) (effective Jan. 1, 2007).
47. *ALA. CODE* § 35-9A-202(c) (effective Jan. 1, 2007).
48. *ALA. CODE* § 35-9A-204(a)(2) (effective Jan. 1, 2007).
49. *ALA. CODE* § 35-9A-204(a)(1) (effective Jan. 1, 2007).
50. *ALA. CODE* § 35-9A-204(a)(4) (effective Jan. 1, 2007).
51. *ALA. CODE* § 35-9A-204(a)(5) (effective Jan. 1, 2007).
52. *ALA. CODE* § 35-9A-204(c) (effective Jan. 1, 2007).
53. *ALA. CODE* § 35-9A-204(d)(1) (effective Jan. 1, 2007).
54. *ALA. CODE* § 35-9A-204(d)(2) (effective Jan. 1, 2007).
55. *ALA. CODE* § 35-9A-204(e) (effective Jan. 1, 2007).
56. *ALA. CODE* § 35-9A-205(a) (effective Jan. 1, 2007).
57. *Id.*
58. *ALA. CODE* § 35-9A-205(b) (effective Jan. 1, 2007).
59. *Id.*
60. *ALA. CODE* § 35-9A-301(1)-(5) (effective Jan. 1, 2007).
61. *ALA. CODE* § 35-9A-301(6) (effective Jan. 1, 2007).
62. *Id.*
63. *ALA. CODE* § 35-9A-301(7) (effective Jan. 1, 2007).
64. *ALA. CODE* § 35-9A-302(b)(1) (effective Jan. 1, 2007).
65. *ALA. CODE* § 35-9A-302(b)(2)-(4) (effective Jan. 1, 2007).
66. *ALA. CODE* § 35-9A-203(5) (effective Jan. 1, 2007).
67. *ALA. CODE* § 35-9A-302(6) (effective Jan. 1, 2007).
68. *ALA. CODE* § 35-9A-302(c) (effective Jan. 1, 2007).
69. *ALA. CODE* § 35-9A-303(a) (effective Jan. 1, 2007).
70. *Id.*
71. *ALA. CODE* § 35-9A-303(c) (effective Jan. 1, 2007).
72. *Id.*
73. *Id.*
74. *ALA. CODE* § 35-9A-303(d)(1) (effective Jan. 1, 2007).
75. *ALA. CODE* § 35-9A-303(d)(3) (effective Jan. 1, 2007).
76. *ALA. CODE* § 35-9A-304 (effective Jan. 1, 2007).
77. *Id.*
78. *ALA. CODE* § 35-9A-401(a) (effective Jan. 1, 2007).
79. *Id.*
80. *ALA. CODE* § 35-9A-401(a)(1) (effective Jan. 1, 2007).
81. *ALA. CODE* § 35-9A-404(b)(1) (effective Jan. 1, 2007).
82. *ALA. CODE* § 35-9A-401(a)(2) (effective Jan. 1, 2007).
83. *ALA. CODE* § 35-9A-404(b)(2) (effective Jan. 1, 2007).
84. *ALA. CODE* § 35-9A-401(b) (effective Jan. 1, 2007).
85. *Id.*
86. *ALA. CODE* § 35-9A-401(d) (effective Jan. 1, 2007).
87. *ALA. CODE* § 35-9A-402(a) (effective Jan. 1, 2007).
88. *ALA. CODE* § 35-9A-402(a)(1) (effective Jan. 1, 2007).
89. *Id.*
90. *ALA. CODE* § 35-9A-402(b) (effective Jan. 1, 2007).
91. *ALA. CODE* § 35-9A-405 (effective Jan. 1, 2007).
92. *ALA. CODE* § 35-9A-406(a)(1) (effective Jan. 1, 2007).
93. *ALA. CODE* § 35-9A-406(a)(2) (effective Jan. 1, 2007).
94. *ALA. CODE* § 35-9A-501(a) (effective Jan. 1, 2007).
95. *ALA. CODE* § 35-9A-407 (effective Jan. 1, 2007).
96. *ALA. CODE* § 35-9A-201 (effective Jan. 1, 2007).
97. *ALA. CODE* § 35-9A-407 (effective Jan. 1, 2007).
98. *Id.*
99. *ALA. CODE* § 35-9A-421(a) (effective Jan. 1, 2007).
100. *ALA. CODE* § 35-9A-421(b) (effective Jan. 1, 2007).
101. *ALA. CODE* § 35-9-5 (1975).
102. *ALA. CODE* § 35-9A-421(c) (effective Jan. 1, 2007).
103. *Id.*
104. *ALA. CODE* § 35-9A-422 (effective Jan. 1, 2007).
105. *ALA. CODE* § 35-9A-423(a) (effective Jan. 1, 2007).
106. *ALA. CODE* § 35-9A-423(b) (effective Jan. 1, 2007).
107. *ALA. CODE* § 35-9A-423(c) (effective Jan. 1, 2007).
108. *ALA. CODE* § 35-9A-423 (effective Jan. 1, 2007).
109. *ALA. CODE* § 35-9A-424 (effective Jan. 1, 2007).
110. *ALA. CODE* § 35-9A-425(a) (effective Jan. 1, 2007).
111. *ALA. CODE* § 35-9A-421(c) (effective Jan. 1, 2007).
112. *ALA. CODE* § 35-9A-301 (effective Jan. 1, 2007).
113. *ALA. CODE* § 35-9A-441(c) (effective Jan. 1, 2007).
114. *ALA. CODE* § 35-9A-441(c) (effective Jan. 1, 2007).
115. *ALA. CODE* § 35-9A-461(b) (effective Jan. 1, 2007).
116. *Id.*
117. *Id.*
118. *ALA. CODE* § 6-3-2(a)(2) (1975).
119. *ALA. CODE* § 35-9A-461(b) (effective Jan. 1, 2007).
120. *ALA. CODE* § 35-9A-461(c) (effective Jan. 1, 2007).
121. *ALA. CODE* § 35-9A-441(c) (effective Jan. 1, 2007).
122. *ALA. CODE* § 35-9A-461(d) (effective Jan. 1, 2007).
123. *Id.*
124. *d.*
125. The following states have enacted similar statutes, and their case law may provide persuasive authority in interpreting the Alabama Act: Alabama, Alaska, Arizona, Connecticut, Florida, Hawaii, Iowa, Kansas, Kentucky, Michigan, Mississippi, Montana, Nebraska, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, and Washington.

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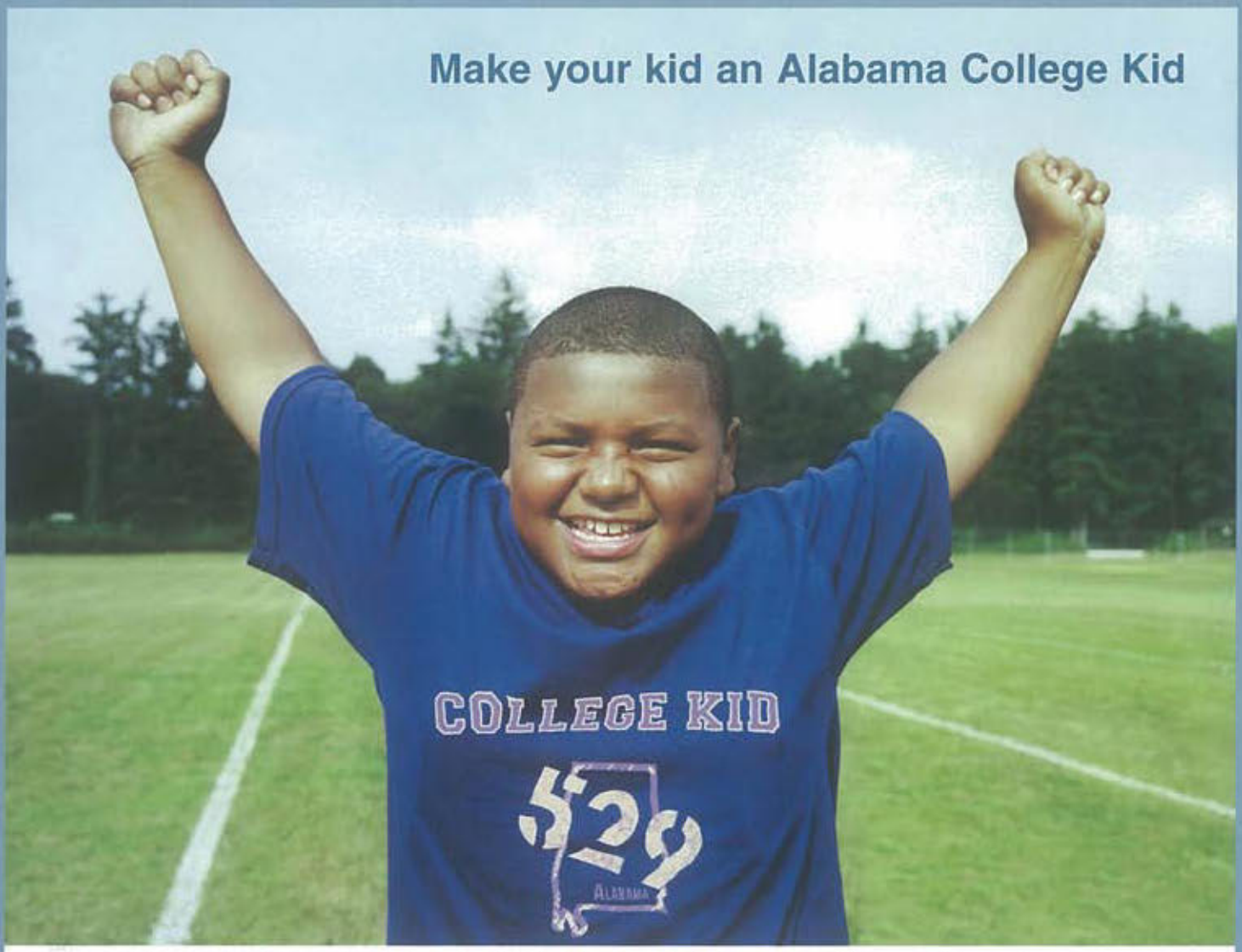

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VAN KAMPEN INVESTMENTS

PAWS LAWS

or

How Nigel and Miss Muffy Came to Be Rich

BY KATHARINE COXWELL AND WANDA D. DEVEREAUX

"Many have forgotten this truth, but you must not forget it. You become responsible forever for what you have tamed."

Antoine de Saint-Exupery, *The Little Prince*

For those of us who grew up in the 1950s and before, life was definitely simpler, especially when it came to the family pet. We all knew families who had a mixed breed dog, or perhaps a stray cat who wandered up one afternoon demanding to be fed. The cat played at chasing mice to justify its daily ration of Puss 'n' Boots and as for the dog, well, the dog might chase a stick or catch an old ball, but for the most part he spent his days lying in the sun dreaming of whatever it is dogs dream about when they whine and twitch in their sleep.

The dogs had names like Buster, Fido, Spot, Honey, or Lady. The felines, on the other hand, were usually dubbed Fluffy, Snowball or Midnight, or just plain Kitty. Very few people owned purebred animals, and most of the time even those were the product of friends saying to each other, "Hey, my children are after me to let Lady have puppies. Your Buffy is a Cocker, too, so let's get 'em together." The family cat usually met up with another desirable feline while out on an evening stroll, and the result was a litter of varicolored kittens of unknown origin. My, but times have changed!

No more living on scraps from the dinner table or terrible fishy-smelling cat food. No siree. Today's pet owners can choose a food formulated to suit their pet's age, size, level of activity or medical needs. They no longer eat from an old chipped white enamel pan, but have special personalized dishes which are placed in ergonomically correct feeding stations. An old blanket or rug carelessly thrown in a cardboard box on the back porch or in the garage would never be acceptable for today's pampered pets. The dog or cat of today, regardless of his pedigree, lives with the family and has a special bed from L.L. Bean®, Orvis®, In the Company of Dogs® or even Neiman Marcus®. There are beds with or without bolsters to keep the neck from hurting. Beds today run the gamut in terms of quality and construction. Plain beds are made from everything from twill stuffed with cedar shavings to hospital-quality foam with a monogrammed washable cover. For the really well-to-do dog or cat there are wooden or decorative brass beds with cushions made of satin or faux fur and stuffed with down. Nothing is overlooked when it comes to the pet's comfort.

The children of the house do not have the onerous responsibility of bathing the dog in an old washtub in the backyard as they did years ago. If the dog got a bath at all, it was usually in the summertime, and more water ended up on the children than the poor disgruntled canine. As for bathing the cat, many a child has learned the hard way that that chore is best left to the cat itself.

Today the dog goes to a specialized shop where a person trained in the art of trimming, styling, bathing and primping takes over. There is no washtub behind the shop. There is, however, a specially designed tub with a ramp for the dog to walk up so the groomer doesn't have to lift the animal. The shop smells not of dirty dog, but of lots of sweet fragrances added to a shelf full of shampoos, conditioners and the like. The shampoos are, like the dog food, designed to fit the kind of coat the dog has. There are whiteners, darkeners, softeners and color-coordinated shampoos designed to bring out red, black or white in the coat. There are conditioners for harsh, soft or silky coats. Nigel, formerly known as Fido, is brushed, de-matted, bathed, dried with a special cage dryer, and brushed again. If Lady Lollipop, the neighbor's Shih Tzu, is being pampered, she will no doubt leave wearing a fashionable satin bow in her top-knot, and she might even have her nails painted. The shop will also sell sets of color-coordinated designer collars and leashes, a must-have for the well-dressed canine companion. All these things make Nigel and Lady Lollipop look adorable, but the only scent either one can catch is himself. Themselves.

There are shelves of books about pet care, as well as books to help the potential pet buyer decide what kind and what breed best suits his or her taste, lifestyle and family size. There are magazines such as *Dog Fancy®*, *Dog World®*, *Cat Fancy®* and the *AKC Gazette*, all dedicated to keep today's pet owner abreast of the very latest in veterinary breakthroughs, toys, food, breed information, and human interest stories.

And, what about Miss Muffy, formerly known as Fluffy? She doesn't care for pet spas or any kind of bathing routine, but that doesn't mean she has been left out of the burgeoning pampered pet industry. To avoid scratches on the furniture there are sisal

posts on the low end, and high-end climbing furniture with several levels designed to look like trees, and a tiny house on top. The house itself has two-way exposure and has a small hammock for the cat which simply must rest after a full day of play with his Kitty Cat Circus Interactive Gym™. Bedtime means curling up in a sweet retreat Cat Cradle with Convertible Canopy™ or perhaps a Heated Thermo-Kitty Bed™ made of faux suede and faux lambskin. Daytime naps for Miss Muffy may be taken in either a plain or heated deluxe window seat.

Veterinary treatment for animals in our day was limited as well. Dogs and cats were fortunate if they had a rabies shot once a year. If a dog got sick and was lucky enough to be taken to the local vet, the first question the owner asked was, "How much is this gonna' cost me, Doc?" About the only diagnostic tools back then were the vet's hands and a stethoscope. Today we have cat scans, myelograms, x-ray and ultra-sound, eye tests, and blood tests for just about everything. There are treatments for almost every ailment, including pills, injections, ointments, creams, surgery, and even cataract surgery. Dog and cat vitamins, flea and tick preventatives, heartworm preventatives, diet supplements, milk replacements for newborns, and arthritis tablets for the aging may be found on the shelves or ordered from any one of a number of catalogs such as Care-A-Lot Pet Supply®, PetEdge® Dr.s Foster and Smith® or Cherrybrook®. For those who prefer to shop online, there are thousands of Web sites just waiting for a hit from a well-heeled pet owner.

There are chiropractors who work exclusively in pain management for dogs and horses, as well as veterinary ophthalmologists, radiologists and reproduction specialists. The owners themselves may not have any health insurance, but of course Nigel and Miss Muffy have pet insurance available to cover their veterinary expenses.

Nigel no longer suns himself on the porch or in the yard as Fido once did, while his master or mistress (or possibly both) works all day to provide him with this life of luxury. At least two days a week he goes to doggie daycare, where an adorable young college student is paid big bucks to entertain him and keep him happy. When he tires of the play yard, he naps in his own heated and cooled room while the wall-mounted television set plays re-runs of "Lassie," "Rin-Tin-Tin" movies and "Goofy" or "Pluto" cartoons.

Just to give the reader an idea of how serious this pet industry is, here are a few statistics:

$5.8 billion	Annual amount dog owners spend at the veterinarian
$3 billion	Annual amount cat owners spend at the veterinarian
$50 million	Annual amount bird owners spent at the veterinarian
$100	Average amount pet owners spent on holiday gifts
43.5 million	Homes with a dog
37.7	Homes with a cat
14.7	Homes with a fish
6.4 million	Homes with a bird
79%	Of pet owners whose pet sleeps with them
37%	Of pet owners who carry pictures of their pets in their wallet
31%	Of pet owners who have taken off work to be with ailing pets
20%	Of pet owners who admit breaking up a romance over a pet

THE ROAD TO CLE COMPLIANCE 2006

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The pet industry has become one of the fastest growing businesses in America. Huge chain store like Petsmart®, Petco ® and PetsPlus® dominate the market, but there are smaller independent stores which still manage to do a bustling business. These purveyors of treats, toys, food, bedding, clothing, costumes, scratching posts, gerbils, rabbits, guinea pigs, snakes (yes, snakes!), mice, water and food dishes, collars, leashes, and flavored bones are the driving force behind this multi-billion dollar industry.

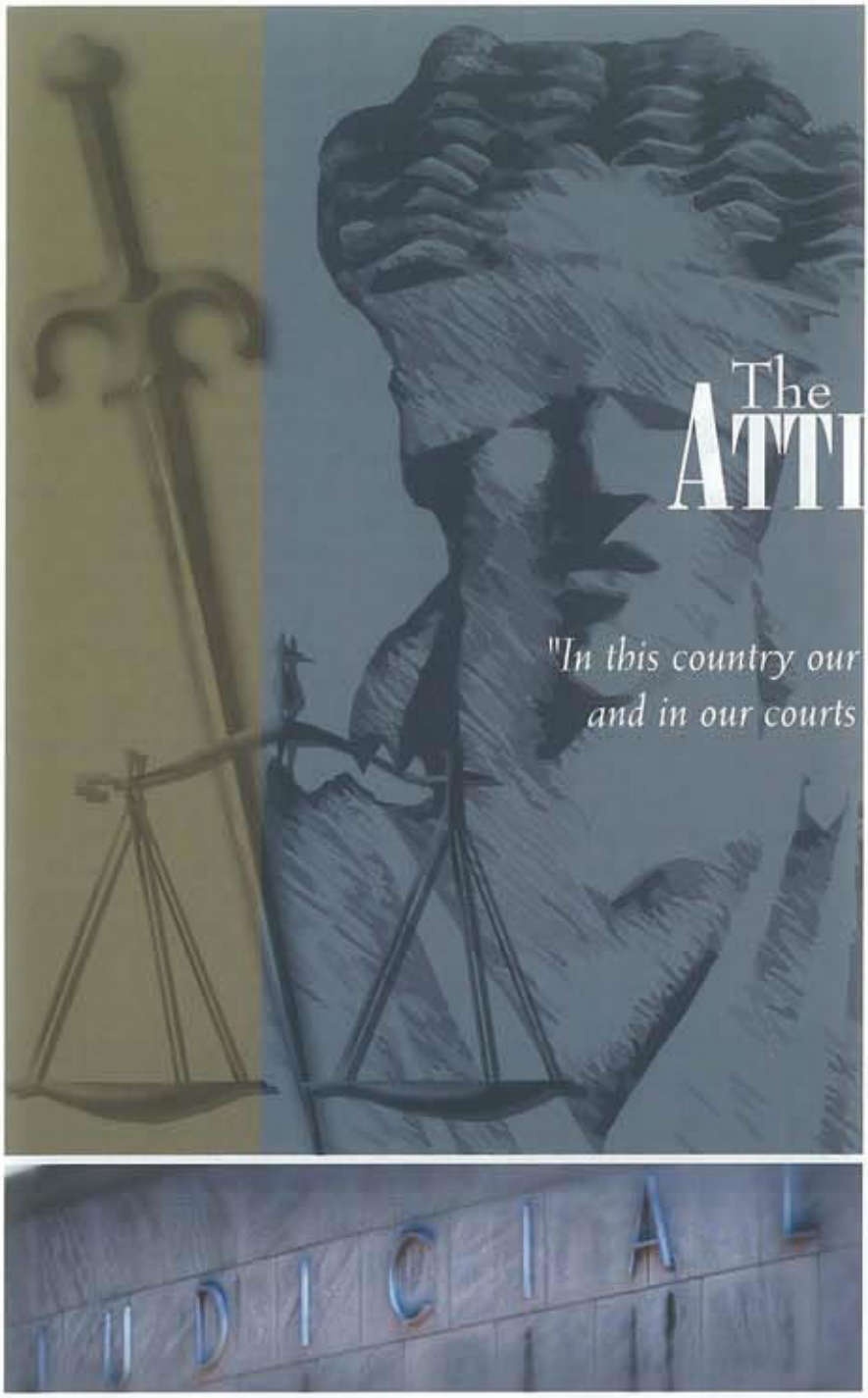
Americans, primarily yuppies without children, and the middle-aged empty nesters now spend more on keeping their pets well-fed, well-groomed and properly exercised than they do on entertainment for themselves. Pets have become anthropomorphized to such an extent that owners speak to them and about them as if they were human children. Their pets have baskets of toys, most of which are ignored in favor of an old sock, but Mr. or Ms. Pet Owner is ever ready to purchase the latest doll, stuffed animal, tug toy, catnip ball, or feather on a stick which might catch Nigel's or Miss Muffy's (the cat, and Nigel's nemesis) attention.

Owners today lavish time, attention and love on their animals. They are members of the family, and when a pet dies, the owner grieves for it as if for a dear friend. There are pet cemeteries and pet crematoriums. Special caskets and grave markers are available, as are plain and fancy urns to hold the ashes of the deceased. All these things allow the owner to care for a deceased pet, but what happens when the owner becomes the first dearly departed, and Nigel or Miss Muffy is left behind?

Over the past 14 years, 36 states have passed legislation allowing the drafting of trusts to protect animals after their owners die. If a pet owner lives in any one of those states, he or she can have the opportunity to provide for the care of a pet by setting up a trust and naming a trustee to see that Nigel and Miss Muffy are properly vetted, fed and looked after for the remainder of their lives.

For those of you still scratching your heads in disbelief (or hanging it because you know you're "one of those pet owners"), we can look at examples of what some well-known personages have done or are planning to do for their pets. Singer Dusty Springfield made provisions in her will for Nicholas, her cat. The will instructed that the cat's bed be lined with Dusty's nightgown, and Dusty's recordings played for him every night at bedtime. Nicholas' food was to be imported. ("Dusty's Cool Fat Cat," *People*, April 19, 1999, at 11.)

Doris Duke, sole heir to the Duke fortune and daughter of Baron Buck Duke who endowed Duke University, left the sum of $100,000 in trust for the benefit of her dog. (Scott, Walter, "Personality Parade," *Parade Magazine*, Sept. 11, 1994, at 2.) Natalie Schafer, the actress who played Lovey on Gilligan's Island, provided that her fortune be used for the benefit of her dog. (Williston, Beverly. "Gilligan's Lovey Leaves It All to Her Dog," *San Antonio Star*, Apr. 28, 1991, at 5). Betty White, star of



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"The Golden Girls," and a well-known animal rights activist, has reportedly left her estate valued at approximately $5 million for the benefit of her pets. ("Betty White Leaves $5M to Her Pets," *San Antonio Star*, Nov. 4, 1990, at 25.)

How did we arrive at this point? Where have we come from, and where are we going with regard to the care of pets after the death of their owner? History shows that English law approved gifts to support animals. *In re Dean*, 41 Ch. D. 552 (1889). Even though we brought many great things to this country from England, this attitude toward provisions for pets was not one of them. (Beyer, Gary W. "Estate Planning for Non-Human Family Members," Probate and Trust Section, *Houston Bar Association*, Apr. 25, 2006). Many owners have attempted to set up some kind of provision for their companion animals, but these have usually failed. There were issues involving the rule against perpetuities, because the measuring life was not human, or the trust was considered "honorary," because there was no human or legal entity as beneficiary to enforce the provisions. (Beyer, 2)

Because the American attitude was changing, and more pressure was brought to bear on state legislatures, the National Conference of Commissioners on Uniform State Laws added a new section to the Uniform Probate Code in 1990. This section was designed to validate "a trust for the care of a designated domestic or pet animal and the animal's offspring." UNIF. PROB. CODE § 2-907, cmt. (1990). The provision, amended in 1993, reads, in part, as follows:

> (b) [Trust for Pets.] Subject to this subsection and subsection (c), a trust for the care of a designated domestic pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument must be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.

Many have enacted this provision, while others have used the Uniform Trust Code, adopted in 2000, as the basis for their own legislation guaranteeing the validity of pet trusts. The passage and adoption of these two pieces of legislation ensured for the first time that there was legal authority not only for the existence of a pet trust, but for its enforcement as well. At long last there was a mechanism in place which could actually force the trustee to use the money for the care of the designated pets. (Pancheri, Michael, "Pet Trusts—Do You Have One for Your Pets?" *LivingTrustNetwork, LLC*, 2005.)

Historically, any trust created in Alabama for the benefit of an animal was considered to be an honorary trust and unenforceable. Alabama operated on the theory that without a human beneficiary, there could be no one to make sure the provisions of the trust were enforced. Without that human beneficiary to oversee and ensure the trustee honored his fiduciary duty, the trust would fail. For the past 16 years, Alabama continued to lag behind in passing pet trust legislation which would adopt the provisions of either the Uniform Probate Code, or the Uniform Trust Code. All of that is about to change.

Beginning January 1, 2007, pet trusts in Alabama no longer will be considered honorary trusts and unenforceable. Like many other states, the Alabama legislature has adopted § 408 of the Uniform Trust Code, and it is upon this statute that valid trusts for animals will be based. Similar in form to the Uniform Probate Code, § 408 of the Uniform Trust Code also provides the framework for preparation of a valid, enforceable trust for a pet.

SECTION 408—TRUST FOR CARE OF AN ANIMAL

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove the person appointed.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, or otherwise to the settlor's successors in interest.

Federal Income Taxation

As it is with most everything else in life, nothing gets past the Internal Revenue Service. Death and taxes are certain, and some

pet trusts are no exception. The general rule is that there is no taxable event simply because Miss Lizzie gives her companion pet and a sum of money to her oldest friend Miss Fannie Lou to care for the pet. This changes dramatically, however, if Miss Fannie Lou is a shrewd investor and the trust funds earn dividends or interest.

(*Tax Considerations. estateplanningforpets.org/legal-primer-tax.htm*, p.1).

Federal Estate and Gift Taxation

As it stands, any amount passing to a pet trust by reason of the settlor's demise will be included in the gross estate. The IRS, in Revenue Ruling 78-105, 1978-1 CB 295, has determined that no portion passing to a valid trust for the lifetime benefit of a pet qualifies as a charitable estate tax deduction, even if the remainder beneficiary is a qualifying charity. Attorneys should be aware when drafting a pet trust under the new Alabama law that pet owners who are wealthy need to consider exactly how the taxes on such a trust will be handled.

(*Considerations. estateplanningforpets.org/legal-primer-tax.htm*, p.1).

Federal Income Taxation of Trust for Pet

Revenue Ruling 76-486, 1976-2 CB 192 provides that if a trust for the benefit of an animal is valid under state law, then the trust itself will be subject to income taxation. There is no tax liability, however, for the trustee or the pet. The trustee is generally required to file a fiduciary tax return if the trust earns taxable income in excess of $100.

(*Considerations. estateplanningforpets.org/legal-primer-tax.htm*, p.2).

Who Pays the Income Taxes?

If the caretaker is considered the beneficiary, then under IRC § 661, the trust is entitled to deduct the amount of "distributable net income" paid out to the caretaker. The caretaker in turn is required to recognize this amount on his or her tax return. Depending on whether income is distributed annually or simply accumulated, either the trustee or the caretaker pays the income taxes. This should be a prime consideration when drafting the trust to ensure that the caretaker can be made whole.

In spite of all their luxuries, pampered lifestyles and the belief by owners that their companion animal posses intelligence beyond that of the lowly human brain, not even the IRS has figured out a way to force Nigel or Miss Muffy to pay income taxes. The closest the IRS has come is with Revenue Ruling 76-486, which provides that if the pet is considered the beneficiary (and this seems to be what the pet statutes indicate), then the trust does not receive any income distribution deduction for distributions to the beneficiary and would be required to pay taxes. As has been noted, the trust cannot qualify as a charitable trust, even if the remainder beneficiary is a qualifying organization such as The Morris Foundation for Animals®, The Humane Society of the United States® or an American Kennel Club® breed rescue organization. For additional information, see IRC §§ 170, 664 and 7701(a) (1); and Reg. §§ 1.664-2(a)(3) and 1.664-3(a)(3).

Deductibility of Payments for the Care of the Pet

Having looked at the pet as beneficiary of the trust, we turn to the pet as *property* of the trust. One could argue that expenses incurred for the care of the pet represent valid deductible trust administration expenses, thus reducing the amount of taxable income to the caretaker or trust. IRC § 212 allows for the deduction of the following ordinary and necessary expenses:

1. For the production of income;
2. For the management, conservation or maintenance of the income-producing property; and
3. In the determination, collection or refund of any tax.

The accompanying regulations in IRC § 212 also state that expenses incurred "in connection with the performance of the duties of administration" may be deducted by the trustee. Any fees incurred, such as trustee fees or fees charged by an accountant, would be deductible, but no expenditures for the care of the pet may be deducted, because the pet does not produce income and nothing he or she does is related to the administration of a trust.

(*Considerations. estateplanningforpets.org/legal-primer-tax.htm*, p.2-3).

In spite of the seemingly straightforward language in the statute, certain questions remain:

1. **If there is no caretaker or trustee willing or able to serve, who will be responsible?**

The court may appoint an alternative caretaker-trustee.

2. **Who can enforce the terms of the trust against a trustee who fails to follow through with his fiduciary duty?**

The terms may be enforced against the caretaker-trustee by an individual named in the trust instrument, or if there is no such person designated, the court may appoint such a person.

3. **Is the caretaker-trustee required to give an accounting or file any reports which are normally associated with a fiduciary relationship?**

The degree to which a settlor trusts his named caretaker-trustee comes into play in this situation, because unless required by the trust instrument, the caretaker-trustee is not required to make filings, accountings, separate maintenance of funds or any of the usual duties associated with such a relationship.

4. **What happens to any funds remaining in the pet trust after the demise of the companion animal?**

Once Nigel and Miss Muffy have gone to the Rainbow Bridge, any funds remaining after they have been suitably interred in satin-lined caskets or cremated and their ashes placed in lovely bronze urns, will pass to the beneficiaries of the settlor's estate, unless the trust instrument provides otherwise.

5. Is there a limit as to how much money is allowed to fund a pet trust?

Under most pet trust statutes, the court has authority to reduce the amount of property transferred if it determines that the amount substantially exceeds the amount necessary to care for the companion animal. If there are human beneficiaries who are not happy with the way Great-Aunt Maude divided her fortune, and left more for Nigel and Miss Muffy than she did for them, they can petition the court to reduce the trust's amount. If the court agrees, it can reduce the amount set aside for the pet's trust. Attorneys who draft pet trusts should be well-informed regarding an animal's life expectancy, cost of veterinary care, (especially when the animal requires geriatric care), food and boarding when the caretaker-trustee is away. This knowledge will enable the drafter to advise his client properly regarding the amount necessary to fund the trust, and to avoid potential litigation if a trust is over-funded.

The other side of the coin is to ensure that the trust is not under-funded. It is possible that the trust will require a diversified investment portfolio to ensure a steady stream of income to keep Nigel and Miss Muffy in luxury for the remainder of their lives.

As happens far too often in a normal trustee-beneficiary relationship, there will be trustees who use their positions for personal gain. The first of the two most likely scenarios is when the trustee is the remainder beneficiary and decides that good old Nigel and Miss Muffy have outlived their usefulness. He poisons them in order to collect sooner rather than later. The second is when there is a third-party beneficiary, and the trustee wants to keep those trustee fees coming for a long time. The trustee in this case might find dead ringers for Nigel or Miss Muffy and keep them alive until they're ready for the record books as the longest-lived cat and dog in history. Doesn't one collie or one Siamese cat look just like another?

If some of you jaded practitioners think all of this is ridiculous, let me enlighten you even further. As of this writing, six state bars (including Arizona, Connecticut, Michigan, Minnesota, Texas, and Washington State) have animal law sections, and five others (Florida, Missouri, New Jersey, New York, and Pennsylvania) have animal law committees. Massachusetts has a section in the process of forming, and there is an animal law committee within a section of the American Bar Association. (Eigo, Tim. "Laws for Paws: A New Breed of Law Section," *Arizona Attorney*, December 2005.

Have Americans gone too far with their dedication to their pets? Many would say yes, but at least we now have an enforceable means to put at rest the minds of those clients who look upon their pets as children and the natural objects of their bounty. ■

Katharine Williams Coxwell

Katharine Williams Coxwell is a native of Montgomery, and received her BA in English from Presbyterian College; her MA in Education of the Deaf and Audiology from the University of Alabama and her JD from Jones School of Law, Faulkner University. She is a partner in the Monroeville firm of Coxwell & Coxwell, and a charter board member of the ASB Family Law Section, a past president of the Monroe County Bar Association and a member of the Alabama State Bar and the American Bar Association. Coxwell also is a member of the ASB Disciplinary Rules Committee, The Alabama Lawyer Board of Editors; a member of the Grants Committee of the Alabama Law Foundation, and a municipal judge for the Town of Excel. She is president of the Bearded Collie Club of America (BCCA), Alabama coordinator for BCCA Beardie Rescue, a member of BONE Rescue and a member of the Board of Directors for BEACON (Bearded Collie Foundation for Health).

Wanda D. Devereaux

Wanda D. Devereaux graduated from the University of Alabama School of Law and was admitted to the Alabama State Bar in 1978. She serves on the Advisory Committee to the Board of Bar Examiners and is chair of Panel IV of the Character and Fitness Committee, and is a member of the Committee on Solo and Small Firm Practitioners, the Task Force to Study Rules and Procedures Governing Admission and the Practice Management Assistance Program Committee. Wanda also served as a member of the Board of Bar Commissioners, representing the 15th Circuit. She practices in Montgomery with Devereaux & Associates LLC.

SPANISH
LEGAL HOTLINE AVAILABLE

Alabama State Bar and Legal Services Alabama launch Spanish Legal Hotline to help meet needs of Alabama's Spanish-speaking population

In partnership with the Alabama State Bar's Spanish Outreach Project, Legal Services Alabama has launched a dedicated statewide toll-free legal hotline for Spanish-speaking persons in Alabama. The Spanish Legal Hotline has its own separate toll-free number (888-835-3505) and calls are answered and routed by Spanish-speaking staff members at call centers across the state.

Regular Spanish Legal Hotline network hours are 8:00 a.m. to 8:00 p.m. Monday through Friday and 9 a.m. to noon on Saturdays. If a bilingual staff member is not available or is on another call, a message in Spanish will tell the caller the best time to call back. Based on specific legal needs and guidelines, callers will be referred to Legal Services Alabama, the Volunteer Lawyers Program of the Alabama State Bar or the state bar's Lawyer Referral Service for legal assistance.

Other core partners in this project include the **Auburn Cooperative Extension System; Hispanic Interest Coalition of Alabama (HICA); Alabama Latin American Association; Cumberland School of Law;** and **KPI Latino.**

Spanish Legal Hotline information is available at the state bar's Web site *www.alabar.org.* as well as at the Legal Services Alabama Web site *www.alsp.org.* Brochures are available upon request from the Alabama State Bar or may be picked up at any county Auburn Cooperative Extension System office.

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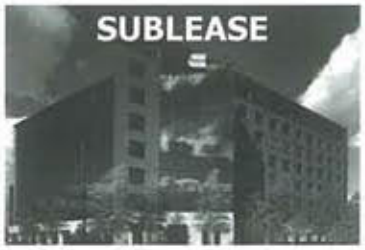

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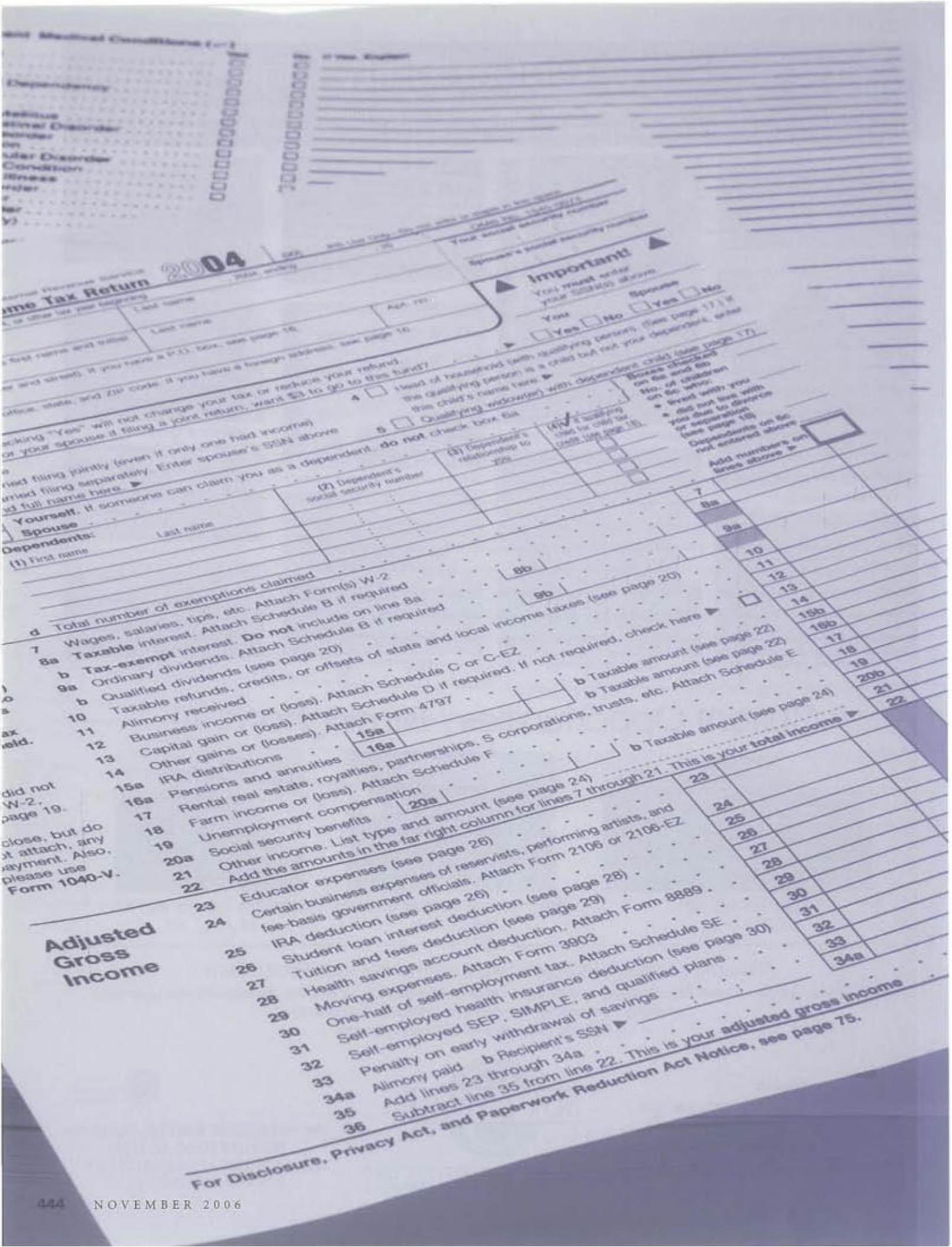
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Deductibility of Litigation Expenses Paid by Alabama Attorneys

BY PROFESSOR JOSEPH W. BLACKBURN

Attorneys in the State of Alabama have an important advantage over their brethren in other states. The advantage lies in the long-standing conflict between the Internal Revenue Service and litigation attorneys throughout the United States over deductibility of litigation expenses paid or incurred by such attorneys "on behalf of their clients."[1]

In 1995, the Alabama State Bar proposed,[2] and the Alabama Supreme Court adopted, a progressive change in Alabama's *Model Rules of Professional Conduct*. The purpose of the change was to conform such rules to the demands of 21st century litigation on lawyers seeking to ethically and effectively represent their clients' interests.[3] As a result of the change in the *Alabama Model Rules of Professional Conduct*,[4] payment of litigation costs by attorneys is no longer required to be merely advances "on behalf of their client" which the client has an unconditional obligation to repay. Alabama attorneys may now incur and pay such expenses in their own name and on their own behalf.

Permitting an Alabama attorney to incur and pay such costs in the attorney's own name should allow attorneys to currently deduct such costs rather than being required to treat them merely as nondeductible "loans" made to their clients. Unfortunately, many Alabama attorneys and their tax advisors are still unaware of this important change. It is hoped that this article will highlight the change in the *Alabama Model Rules of Professional Conduct*, the resulting potential tax benefits and the actions attorneys should consider in their contractual, tax and accounting treatment of litigation expenses.

The Tax Issue

The costs associated with prosecuting a civil action in today's legal environment are enormous. These costs are substantially beyond the ability of clients to pay during the course of the litigation or to even reimburse to their attorney at the conclusion of unsuccessful litigation. Obviously, such costs are paid, and have been for decades, normally and properly, by the attorney and not the client.

Historically, the attorney's payment of such costs has been treated as an "advance" to the client, a treatment previously mandated by the *Model Rules of Professional Conduct*.[5] Generally, such advanced costs have also been contractually required to be repaid by the client to the attorney at the conclusion of the litigation. The client's obligation to repay was fixed and often *not* conditioned upon the outcome of such litigation. The attorney's tax, financial and accounting records would normally also be maintained in a consistent manner, i.e. litigation expenses would be reflected as an account receivable from the client, not as an expense of the attorney.

Based on the client's unconditional obligation to reimburse the attorney for out-of-pocket costs, the Internal Revenue Service has long held that payment of such costs is not a deductible expense for the attorney. Rather, such advances by the attorney have been treated by both the IRS and the courts as a "loan" to the client.[6] Such a loan was deductible, if at all, only when a client was subsequently unable to repay the debt, i.e., when the "loan" became an uncollectible business bad debt.[7]

The *Boccardo* cases[8] became the most often cited precedent in the area. These cases not only relied on the "advance" theory of denying a deduction, but invoked the *Model Rules of Professional Conduct* as ethically requiring attorneys to only make such payments as advances "on behalf of the client." After *Boccardo* I and II, the *Model Rules of Professional Conduct* became a legal obstacle[9] to attorneys wishing to treat such litigation costs as their own "ordinary and necessary" business expenses.[10]

Ultimately, Boccardo did enjoy success using a "gross fee" contract that did *not* require the client to reimburse out of pocket expenses.[11] The Ninth Circuit reversed the Tax Court and allowed deduction of litigation expenses as incurred and paid directly by Boccardo.[12] As to the requirement of the *Model Rules of Professional Conduct*, the Ninth Circuit noted that such California rules were not laws of the State of California.[13]

Thus, *Boccardo* I and II remain as precedent for denial of an attorney's deduction of litigation expenses in all but "gross" fee arrangements. However, "gross" fee arrangements would have to be financially acceptable to attorneys who would be required to estimate costs at the outset of litigation in order to ensure a remunerative fee arrangement. Also, attorneys in all states would have to assure themselves that a "gross" fee arrangement satisfied their applicable ethical responsibilities.

Another element was added by the IRS in Technical Advice Memorandum 9432002. After citing the established *Boccardo* precedent, i.e. one taxpayer could not deduct payments made on behalf of another,[14] the TAM cited an exception to such precedent. A taxpayer can deduct a payment made on behalf of another if the taxpayer is "expending such funds in order to protect or promote his own established business."[15]

Recognizing the need to address these issues ethically and responsibly, Alabama lawyers proposed consideration by the Alabama State Bar of modifications to the *Alabama Model Rules of Professional Responsibility*.[16] These proposed modifications carefully and deliberately took into account the need to ensure advancement of legitimate client needs while carefully working within the parameters of the foregoing tax precedent.

Modification of the *Alabama Model Rules of Professional Conduct*

In 1990, the Alabama State Bar adopted the American Bar Association's *Model Rules of Professional Conduct* of 1983. Former Disciplinary Rule 5-103(B) was replaced with Rule 1.8(e) which originally provided as follows:

A lawyer shall **not** provide financial assistance to a client in connection with pending or contemplated litigation, **except** that:

- A lawyer may ***advance*** court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- A lawyer representing an indigent client may pay court costs and expenses of litigation **on behalf of** the client; and
- A lawyer may **advance** or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer. (Emphasis added)

Alabama's Rule 1.8(e) was slightly different from Alabama's Disciplinary Rule 5-103(B). Rule 1.8(e) did allow the "advance" of litigation expenses in the event repayment was contingent on

the case's outcome. Nevertheless, when incurred, such litigation expenses still constituted "advances" made "on behalf of the client", and, following *Boccardo*, could not be deducted.

In 1995, the Alabama Supreme Court adopted revised Professional Conduct Rule 1.8(e), by adding subparagraph (e) (4) which reads as follows:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> * * * *
>
> (4) in an action in which an attorney's fee is expressed and payable, in whole or in part, as a percentage of the recovery in the action, **a lawyer may pay, for his own account, court costs and expenses of litigation.** The fee paid to the attorney **from the proceeds of the action** may include an amount **equal to** such costs and expenses incurred. (Emphasis added)

The exception in Rule 1.8(e) (4) does not provide for an "advance" of litigation costs. Clearly, the lawyer's payment of litigation expenses is "for his own account" and not for the benefit of or on account of the client. Such litigation expenses should therefore constitute "ordinary and necessary" expenses incurred in carrying on the attorney's trade or business. There is no provision for repayment or reimbursement of any such litigation costs. However, like the "gross fee" arrangement approved in *Boccardo* III , the final fee may, but need not, be grossed-up in order to cover such costs.[17] The exception in Rule 1.8(e) (4) is carefully restricted to percentage-fee arrangements contingent upon the outcome of the case. The long-established and well-reasoned rule restricting financial assistance to a client or potential client is maintained in every other respect.

Recommendations

Potential planning benefits can only be realized if Rule 1.8(e) (4) is properly implemented through attorneys' contracts with their clients.[18] Even if Alabama's *Model Rules of Professional Conduct* permit advantageous treatment and characterization of litigation expenses, potential planning is wholly ineffective unless attorneys' client contracts are appropriately modified.

In any context, consistency of treatment of expenses for financial and tax purposes is clearly advisable, whether or not required. Furthermore, the manner in which a business's financial records treats an item often dictates how the item must be reported for income tax purposes. Thus, attorneys' business records, i.e. financial accounting records, should be modified to be consistent with properly anticipated tax accounting treatment.

Also, professionals, like all persons engaged in activities for profit, must determine what treatment is most appropriate for their practice. For attorneys, however, this decision is first and

foremost a matter of their compliance with the highest standards of professional responsibility to their clients and to their profession. ■

Endnotes

1. "[P]ayment by one taxpayer of the obligation of another taxpayer is not considered an 'ordinary and necessary' expense for purposes of section 162(a)." Priv. Ltr Rul. 94-32-002 (Mar. 30, 1994) (TAM 9432002, 1994 WL 420348) citing *Boccardo, infra,* note 133, and *Herrick v. Commissioner,* 63 T.C. 562 (1975); Canelo v. Commissioner, 53 T.C. 217 (1969), aff'd, 447 F.2d 484 (9tth Cir. 1971); *Silverton v. Commissioner,* 36 T.C.M. (CCH) 817 (1977), aff'd, 647 F.2d 172 (9th Cir. 1981)
2. This author and other tax attorneys provided the initial impetus for the Alabama State Bar's review of and proposed change in *Alabama's Model Rules of Professional Conduct.* These tax attorneys recognized both the unfairness of the tax ramifications of the prior rules and their inherent punitive impact on the public. Thus, the unfairness in the treatment of attorneys who ethically incurred litigation costs that their clients could not possibly have afforded did focus the bar's attention on the growing injustice inherent in such rules.
3. Mass torts, resulting class action lawsuits, changes in demands of pretrial discovery and innumerable other pervasive changes in litigation procedures and the resulting crippling costs associated with them necessitated revision of the *Model Rules of Professional Conduct.*
4. See *infra,* note and accompanying text of the modification.
5. Rule 1.8(e), *infra,* note and accompany text of the rule.
6. See, e.g., *Milan, Miller, Berger, Brody & Miller, P.C. v. United States,* 679 F. Supp.692, 695 (E.D. Mich. 1988); *Boccardo v. United States,* 12 Cl. Ct. 184, 185-86 (1987); *Boccardo v. Commissioner,* 65 T.C.M. (CCH) 2739, 2743 (1993); In re *Carroll,* 602 P. 2d 461, 466 (Ariz. 1979).
7. Under section 166(a) (1), the business bad debt provision, business bad debts are only deductible when determined to be wholly or partially worthless. Worthlessness is an often litigated question of facts and circumstances. See e.g. *Hearn v. Commissioner,* 309 F 2.d at 431, aff'g 36 T.C. 672 (1961).
8. *Boccardo* I, *Boccardo v. United States,* 12 Cl. Ct. 184, 185-86 (1987); and *Boccardo* II, *Boccardo v. Commissioner,* 65 T.C.M. (CCH) 2739, 2743 (1993).
9. See also *Milan, supra,* note 131, following *Boccardo* I and II.
10. Section 162 requires payments to be "ordinary and necessary" expenses of carrying on a trade or business before being generally deductible.
11. Essentially, Boccardo's fee structure was increased so that his gross fee alone would adequately compensate him for both the legal services and estimated costs of litigation, i.e. based on recommendations of his tax advisors, his services fee was grossed-up to cover anticipated out-of-pocket expenses.
12. See , *Boccardo v. Commissioner,* 65 T.C.M. (CCH) 2739, 2741 (1993).
13. Boccardo responded to the Tax Court's reference to *California Model Rules of Professional Conduct* Rule 5-104 by arguing that his contingency fee arrangement did not violate a generally enforced state law that subjected the taxpayer to any penalty. Under section 162(c) (2), the Internal Revenue Service has the authority to deny deductibility of a business expense that violates a generally enforced state law. As for California Rule 5-104 [since amended to 4-210(a) but effectively still the same], the court questioned whether it was even a state law. There was a specific California state statute, the *California Business and Professional Code,* which regulated contingency fee arrangements and did not prohibit lawyers from paying expenses. Even if it was a state law, the court found no evidence that it was generally enforced but rather found that in California "the line between 'costs' and attorney overhead included as part of the lawyer's fee [was] an undefined and changing one." Because the gross fee arrangements were not illegal, the court held that the payment of litigation costs were ordinary and necessary business expenses." See *Thrasher and Blackburn, supra,* note **Error! Bookmark not defined.,** at 21.
14. See *supra,* note .
15. Id.
16. *Supra,* note 127.
17. "The *Boccardo* law firm was entitled to the fee if the client recovered, but it was not entitled to reimbursement of the litigation costs 'off the top' or before computing its percentage fee. By contrast, a net fee arrangement would normally permit reimbursement of the costs before computing the percentage fee." *Pelton & Gunther v. C.I. R.,* 1999 WL 801399 (1999).
18. *Infra,* note 142.

Professor Joseph W. Blackburn
Professor Joseph W. Blackburn received his JD from the University of Virginia and was admitted to the Alabama State Bar in 1974. He is the Palmer Professor of Law at Cumberland School of Law, Samford University.

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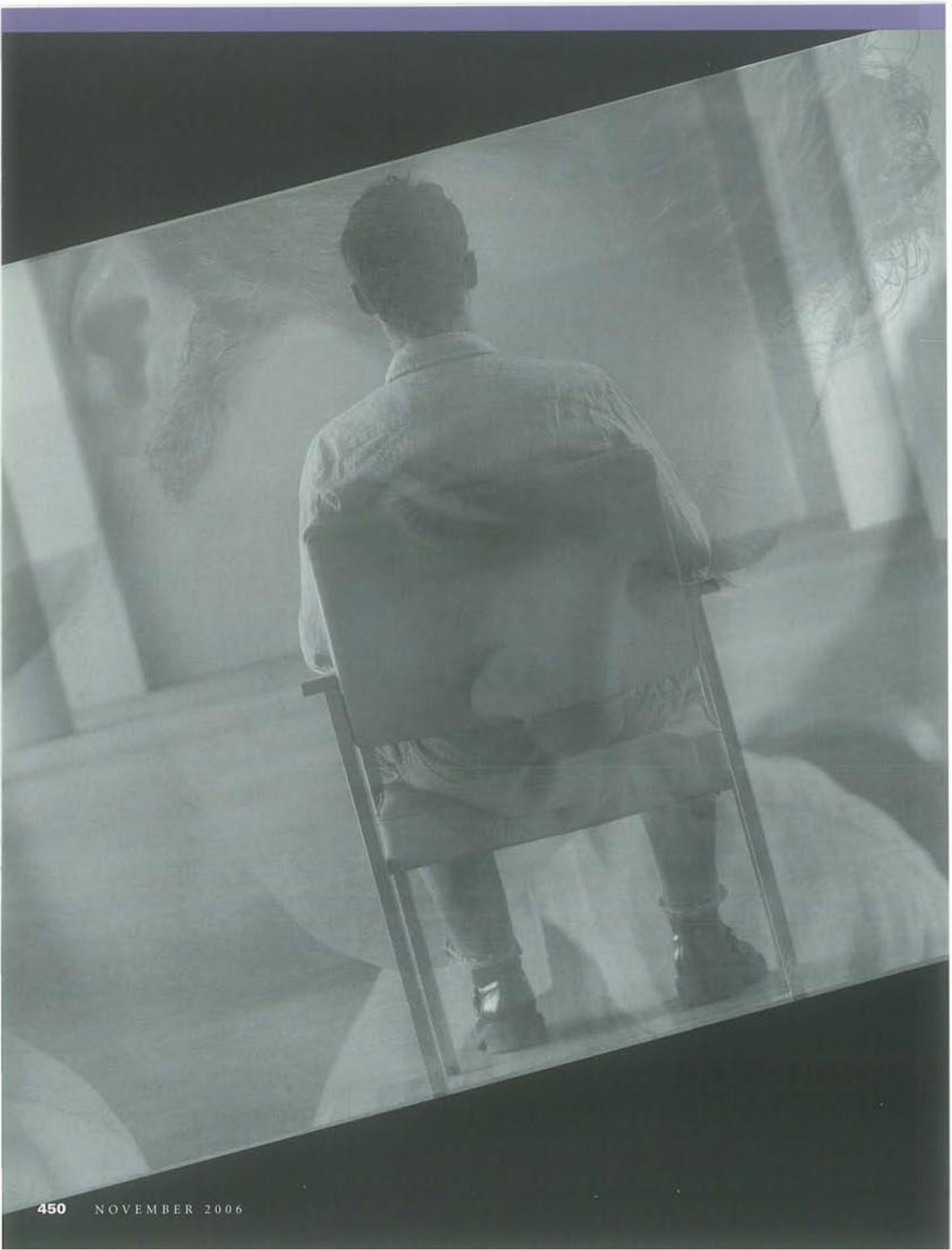

Involuntary Commitment from a Probate Judge's Perspective

BY JUDGE REESE MCKINNEY, JR.

As a probate judge, I hear many types of emotionally charged cases, spanning from the joy of an adoption to the heartbreak of a contested estate matter. Some of the most difficult cases, though, involve *involuntary commitment*. Involuntary commitment is the process by which a mentally ill individual is ordered to receive inpatient treatment at a state psychiatric facility. The commitment process is an unfortunate but necessary court action designed to protect a dangerously mentally ill person and the public. Of course, there are legal criteria which must be met before a person can be subject to an involuntary commitment. In short, a person must: (1) be mentally ill, (2) present a real and present threat of substantial harm to self or others, (3) be unable to make a rational decision regarding the need for treatment, and (4) be found to be in a condition which will continue to deteriorate without treatment. The intent of the law is to provide for involuntary mental health treatment when necessary, while also protecting the rights of the individual.

Alabama's version of the commitment law is substantially similar to that of most states, with some exceptions. In the mid-90s, the "*overt act*" language in the commitment law was repealed, making it possible to commit an individual based on behavior which poses a "real and present *threat* of substantial harm" to self or others, without having to wait for an *actual, overt act of harm* to occur. Without the restrictive overt act language, the courts can better protect both the mentally ill individual and the public, because there is now no reason to wait until an act of violence has occurred before taking action. Obviously, there is a potential for abuse in this law. For instance, without the requirement of an overt act, a mentally ill individual could conceivably be committed based merely on bizarre behavior and threatening words. However, there are safeguards in place to prevent the potential slippery slope to a wrongful commitment, namely; a guardian *ad litem* appointment, professional recommendations, open hearings and the discretion and perspective of

the probate judge. Although this system is not perfect, the current law does a fair job of accomplishing its purpose without leaving individual rights open to attack.

In addition to making difficult decisions regarding involuntary commitment, the probate court must also bridge the gap between local mental health providers and the court system. Although there are no easy answers to the issues involved in involuntary commitment, I have found that a cooperative system in which the legal and mental health fields work together is the best option. Probate Court Mental Health (PCMH) liaisons are one example of the type of partnerships which are critical to connecting the public to resources. The function of the PCMH liaison is to provide the public with a one-on-one resource during a mental health crisis, and to provide evaluations and recommendations to the court. This program has been very successful in Montgomery and has now expanded to comprise an entire *Mental Health Crisis and Support Team*, incorporating case management, crisis intervention and nursing services, all located within the courthouse. Making this kind of connection with the public is vital, especially in light of a recent evaluation by the National Alliance for the Mentally Ill (NAMI), which gave Alabama a grade of "D" regarding linkage to services.

In Montgomery County, there is a shortage of available inpatient psychiatric treatment. In fact, there is a mental health treatment crisis throughout the United States. In 2002, President Bush described the mental health system in the U.S. as "fragmented" and identified the service delivery system as a major obstacle which prevents the mentally ill from receiving the care they need. In Montgomery, the county commission and the city council partnered with the local mental health center to provide a local crisis unit. My court has utilized these beds, as well as the local hospitals, emergency rooms and the state hospital. Again, there is still a need for more beds, but the cooperative spirit between the local governments, courts and mental health systems has helped diffuse the crisis.

Historically, one of the primary catalysts for change in the Alabama mental health system was the case of *Wyatt v. Stickney 325 F. Supp. 781, 782 n.1 (M.D. Ala. 1971)*. As a result of this famous case, the state was required to implement sweeping changes in its approach to treating the mentally ill in state hospitals. This, at least in Alabama, was the start of what is now known as the "*de-institutionalization movement*." The basic philosophy of involuntary treatment of the mentally ill was forever changed, with an emphasis on treating the mentally ill as individuals, with basic human, civil and constitutional rights. With these changes came better treatment, a higher staff-to-patient ratio, less restrictive means of detainment, more individualized treatment plans, and limits on how many patients a state hospital could hold and treat. This new philosophy placed a higher priority on community outpatient treatment, geared toward preventing the need for involuntary commitment. Today, we are attempting to realize the vision of **Judge Frank M. Johnson, Jr.** by making community mental health treatment the first priority. However, any family member of a seriously mentally ill person will tell you that, unfortunately, inpatient treatment remains a necessary option in times of crisis. For this reason, it is my opinion that short-term, inpatient, crisis units are the wave of the future. These units can be utilized by the probate courts and the community to stabilize a mental health crisis and prevent the need for long-term involuntary commitment. In my court, I have often utilized our local crisis unit, which has resulted in many respondents being stabilized in a matter of days, and not having to be committed to the state hospital for long-term treatment. In short, these crisis units, combined with a strong outpatient community mental health center, can serve to prevent another bed space crisis from occurring.

...the probate court must also bridge the gap between local mental health providers and the court system.

In the commitment law, as in many other legal areas, the "devil is in the details." In turning toward the mechanics of the legal process of commitment, I will illustrate some Alabama cases that have shed some light in this area. Many commitment cases in Alabama have been appealed under the theory that the "substantial harm" criteria were not met. The court of civil appeals has interpreted substantial harm in many different ways and has affirmed commitments based on factors other than what is typically thought of as an overt act of harm toward self or others. As I mentioned earlier, an overt act is no longer required today, which serves to broaden the interpretation of "substantial harm" even more. The following cases outline some of these interpretations.

In the matter of: Denise Wilson, 431 So. 2d 552 (Ala. Civ. App.1983). In this case, a mentally ill woman had confined herself in her room and refused to eat or communicate with others, resulting in substantial weight loss and withdrawal from family. The court held:

> "...although a person does not threaten actual violence to herself, a person may be properly committed under the standard....if it can be shown that she is mentally ill, that her mental illness manifests itself in neglect or refusal to care for herself and that such neglect or refusal poses a real and present threat of *substantial harm to her wellbeing*, and that she is incompetent to determine whether treatment would be desirable." (Emphasis added)

Sandra Thompson v. State Department of Mental Health, 620 So. 2d 25 (Ala. Civ. App.1992). In this case, a mentally ill woman was appealing her re-commitment. She had a history of starting fires when not on medication and, four months before the petition was signed, had hit another patient with a dining tray. The court held that:

> "...if a patient is *no longer dangerous only because she is on medication*

or in a structured environment, then clearly whether she will take her medication or be in a structured environment after release should be considered prior to release." (Emphasis added)

This case is especially interesting because the court considered an act which had occurred four months earlier a recent, overt act. In addition, the court viewed the patient's history as a predictor of future behavior. This rationale makes perfect sense to any family member who has lived with a person with a chronic mental illness.

Walker v. Dancer, 386 So. 2d 475, 479 (Ala. Civ. App. 1980). This case involved a schizophrenic woman living in a group home who began cursing at others, refusing her medication and basically acting out in an aggressive, but not exactly "harmful," manner. The court held that:

"...although dangerousness to self and dangerousness to others are frequently considered together, it is clear that they actually represent quite different state interests. Commitment on account of dangerousness to others serves the police power, while commitment for dangerousness to self partakes of the *parens patriae* notion that the state is the ultimate guardian of those of its citizens who are incapable of caring for their own interests. *Valid exercise of the parens patriae power presumes an incapability to manage one's affairs that approximates, if it is not identical with, legal incompetence to act.*" (Emphasis added)

...it is my opinion that short-term, inpatient, crisis units are the wave of the future.

It is worth noting that in the probate hearing which resulted in commitment, the probate judge obviously was struggling with some issues I have dealt with in my courtroom when he made the following statement:

"I sure would like someone to take this up on appeal and see what the supreme court is going to say about where we can send these people. I just doubt if we meet the statutory requirements. You've got a very negative situation as far as the overt act.

But for this woman's sake, I've got to get her some place to sleep and some place to eat. I don't have any other choice. There is nowhere I can turn her aloose to. If I had anybody to take care of her, I would let them, but I don't have anybody."

This case came out of Birmingham in 1980. It didn't make it to the supreme court, but the court of civil appeals affirmed the probate judge's commitment order. In doing so, the court stated, "In the case of dangerousness to others, the threat of harm comprehends the positive infliction of injury, ordinarily physical injury, but possibly emotional injury as well. In the case of dangerousness to self, *both the threat of physical injury and discernible physical neglect may warrant a finding of dangerousness.*" (Emphasis added)

Winchester v. Bartlett, in his capacity as director of Searcy Hospital, 532 So. 2d 1258 (Ala. Civ. App. 1988). This case dealt with a man committed to Taylor Hardin Secure Medical Facility after a jury found him not guilty by reason of insanity of robbery and kidnapping. The man was mildly mentally retarded and had been diagnosed with antisocial personality disorder and alcohol idiosyncratic intoxication. During the hearing, the expert testimony indicated that it was "presently more probable than not that he will drink and become dangerous. His history indicates that he becomes violent when he drinks even a small amount of alcohol." In ruling in favor of commitment, the court stated:

"...whether the acquittee is mentally ill at the time he seeks release is a medical question, but whether he is dangerous is a question that involves not only medical opinion but *also a legal and social judgment.* The dangerousness of an insanity acquittee is established by his antisocial behavior in committing a crime. This past conduct justifies a greater role for the trial judge in determining whether an insanity acquittee remains dangerous to society in order to protect society from *similar behavior in the future.*" (Emphasis added)

The court went on to state:

"Release criteria...such as whether there is an appropriate place for the acquittee to go and whether the acquittee can be trusted to take his medication, are relevant to a determination of continued mental illness or dangerousness."

Our mentally ill citizens and their families expect to be treated in a fair and just manner when in the probate court.

Finally, the court held that:

"Releasing someone who has been proven dangerous, *when it has not been proved that he has recovered,* poses a real threat of danger to society. On the other hand, the consequences of continued confinement for the individual, although a serious deprivation of liberty, are ameliorated by some countervailing factors. He will benefit from the continued treatment he will receive, and he will be released as soon as the hospital's trained medical professionals consider that he is no longer mentally ill or dangerous...." (Emphasis added)

Obviously, this case involves a criminal proceeding, but the rationale is both relevant and persuasive and could apply to many probate commitment cases. Certainly, a probate judge handling an involuntary commitment case has a responsibility to make both legal and social judgments. After all, the substantial harm which the law seeks to prevent applies both to the patient and to others.

As the above cases illustrate, there are many ways to interpret "substantial harm" and other language in the commitment law. Probate judges make difficult decisions in these cases every day. Many times, these decisions are based on different factors and circumstances. If nothing else, the above cases demonstrate a willingness by the courts to seek creative legal solutions and shine a light on the often murky waters of commitment law. One might be tempted to label these rulings "judicial activism" or worse. The families who live with the trauma of mental illness on a daily basis, however, surely would not.

Having attempted to provide an overview of involuntary commitment from my perspective as Montgomery County Probate Judge, I want to make it plain that I am not alone in dealing with these issues. Every probate judge struggles with involuntary commitment law, bed space and other related problems. Make no mistake, however, that the people we are attempting to help suffer the most, and, therefore, deserve our best. Our mentally ill citizens and their families expect to be treated in a fair and just manner when in the probate court. More importantly, they expect to be *helped.* I take my responsibility in these matters very seriously and I am humbled by the strength and resolve that is demonstrated by the mentally ill and their families. I have seen them repeatedly overcome hurdles in life which seem insurmountable. The least we can do as courts, governments and agencies is to be available when needed and perform our functions to the best of our abilities. ■

Judge Reese McKinney, Jr.
Judge Reese McKinney, Jr., attended public school in Montgomery. After attending Marion Military Institute, he received a B.S. degree in business administration from Huntingdon College and a B.F.A. degree in environmental design from the New School University. He became probate judge of Montgomery County in March 1998, and was elected for his first full six-year term in November 2000.

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- **Bruce Barze** of Balch & Bingham LLP has been elected president-elect of the **Alabama Defense Lawyers Association.**

- **James L. Birchall** of Walston, Wells & Birchall LLP was elected to the **American College of Bond Counsel.**

- **Henry Callaway** received the **Liberty Bell Award** from the Mobile Bar Association. The award honors a local citizen who "promotes a better understanding of the U.S. Constitution and encourages respect for the law and the courts." He is a partner with Hand Arendall.

- **John J. Coleman, III,** a partner in Burr & Forman LLP, has been inducted as a Fellow into the **College of Labor and Employment Lawyers.**

John J. Coleman, III

- **Stephen R. Glassroth** of Montgomery was sworn in as second vice president of the **National Association of Criminal Defense Lawyers.** He has served as the association's treasurer, secretary and a member of its board of directors.

- **James D. Harris, Jr.,** a partner with Wyatt, Tarrant & Combs LLP in Bowling Green, was elected to the **Board of Governors for the Kentucky Bar Association** for the 2nd Judicial District. Harris is a graduate of the University of Alabama School of Law.

- **Wyndall A. Ivey,** an associate with Maynard, Cooper & Gale PC and a 2006 graduate of the Alabama State Bar Leadership Forum Class II, recently received two honors from the American Bar Association. He was selected to participate in the **ABA Leadership Academy for the Tort, Trial and Insurance Practice Section** (TIPS), and chosen as one of only six **TIPS Now Fellows** in the country. In addition, he received the University of Alabama at Birmingham's Outstanding Young Alumni Award for 2006.

- A historic marker honoring the late **Judge Frank M. Johnson, Jr.** was unveiled in August at the Frank M. Johnson, Jr. Federal Courthouse in Montgomery. Johnson served in Montgomery as a United States District Judge from 1955-1979, as U.S. Circuit Judge of the 5th Circuit Court of Appeals from 1979-1981 and as U.S. Circuit Judge of the 11th Circuit Court of Appeals from 1981-1999. Johnson presided over several landmark cases, including issuing major rulings on civil rights and prison and mental health reform.

- **Randall D. McClanahan,** a member of Johnston, Barton, Proctor & Powell LLP, has been appointed by the Law and Accounting Committee of the **Section of Business Law of the ABA** to serve as chairman of its Subcommittee on Accounting Standards.

- Bradley Arant Rose & White LLP partner **Matthew H. Lembke** has been elected to the Executive Committee of the **ABA's Council of Appellate Lawyers.**

Matthew H. Lembke

- Tuskegee attorney **Walter McGowan** was named a Fellow of the **American College of Trial Lawyers.**

- **Scott Powell,** with Hare, Wynn, Newell & Newton in Birmingham, was elected president of the **International Society of Barristers.**

- **Ken Simon,** who currently serves as chairman of the Board of Directors of **Cornerstone Schools of Alabama,** was recently honored by the organization. Cornerstone was founded in 1993 by Birmingham-area business and community leaders to provide competitive education and character-building for inner-city students, many of whom are from families who live at or below the poverty level. Today the Cornerstone program serves 275 K-4 through 8th-grade students.

- **H. Thomas Wells,** a member of Maynard, Cooper & Gale PC, has been named distinguished practitioner-in-residence for the University of Alabama School of Law for fall 2006. ■

J. Anthony McLain

Contact with Employees of Opposing Party–Refined Opinion

QUESTION:

"I have a slip-and-fall case in a retail store and I would like an opinion as to whether I can contact directly some of the cashiers. It seems that my client slipped and fell in a certain area of the store. After she fell, she says that one of the cashiers told her that a store employee had been mopping or buffing in that area immediately before the fall and had left moisture. I would like to interview the cashiers to get that straight.

"I would be grateful if you would give me an opinion as to whether such an interview would be allowed under the circumstances. It is not my understanding that the cashiers were the people who had done the mopping or buffing."

ANSWER:

Pursuant to Rule 4.2 of the *Rules of Professional Conduct* of the Alabama State Bar, an attorney may communicate directly with an employee of a corporation or other organization who is the opposing party in pending litigation without the consent of opposing counsel if the employee does not have managerial responsibility in the organization, has not engaged in conduct for which the organization would be liable and is not someone whose statement may constitute an admission on the part of the organization. It is the opinion of the Disciplinary Commission of the Alabama State Bar that the third category, i.e., a "person . . . whose statement may constitute an admission on the part of the organization" should be limited to those employees who have authority on behalf of the organization to make decisions about the course of the litigation.

DISCUSSION:

Communication with persons represented by counsel is governed by Rule 4.2 of the *Rules of Professional Conduct*, which provides as follows:

> "Rule 4.2 Communication with Person Represented by Counsel
>
> "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

When the represented party is a corporation or other organization, communication with some of the employees of the organization is also prohibited.[1] The Comment to Rule 4.2 delineates three categories of employees with whom communication is prohibited, viz:

> "In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

The information provided in your letter indicates, and for purposes of this opinion it will be assumed, that the cashier does not fall within either of the first two categories, i.e., she does not have managerial responsibility nor did she engage in conduct for which the organization would be liable. The question, therefore, is whether the cashier falls into the third category, i.e., would her statement to you constitute an admission on the part of the retail store?

There is a significant divergence of opinion among various jurisdictions as to which employees fall within this third category. Some jurisdictions take the position that the prohibition extends broadly to all employees of a corporation. Others have held that the prohibition applies to any employee whose statement would constitute an "admission against interest" exception to the hearsay rule, as provided in Rule 801(d)(2) of the *Rules of Evidence*. Still others have interpreted the rule narrowly to prohibit contact with only a "control group", which is limited to the company's highest-level management. There appears to be no case law in Alabama which definitively addresses the issue.

A recent decision of the Massachusetts Supreme Judicial Court provides what the Office of General Counsel considers to be a rationally defensible and well-balanced approach to the question. In *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 436 Mass. 347, 764 N.E. 2d 825 (2002), a police sergeant with Harvard's security department sued the school for

Continued from page 459

sex discrimination. The plaintiff's attorney interviewed five Harvard employees who were not accused in the lawsuit, two of whom had supervisory authority over the plaintiff. The trial court ordered sanctions against the attorney for violation of the Massachusetts version of Rule 4.2. The supreme judicial court reversed concluding, in pertinent part, as follows:

> "The [trial] judge held that all five employees interviewed by MR&W were within the third category of the comment. He reached this result by concluding that the phrase 'admission' in the comment refers to statements admissible in court under the admissions exception to the rule against hearsay.
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> * * *
>
> However, other jurisdictions that have adopted the same or similar versions of Rule 4.2 are divided on whether their own versions of the rule are properly linked to the admissions exception to the hearsay rule, and disagree about the precise scope of the rule as applied to organizations.
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> * * *
>
> Some jurisdictions have adopted the broad reading of the rule endorsed by the judge in this case. (citations omitted) Courts reaching this result do so because, like the Superior Court, they read the word 'admission' in the third category of the comment as a reference to Fed. R. Evid. 801(d)(2)(D) and any corresponding State rule of evidence. Id. This rule forbids contact with practically all employees because 'virtually every employee may conceivably make admissions binding on his or her employer.'
>
> * * *
>
> At the other end of the spectrum, a small number of jurisdictions have interpreted the rule narrowly so as to allow an attorney for the opposing party to contact most employees of a represented organization. These courts construe the rule to restrict contact with only those employees in the organization's 'control group,' defined as those employees in the uppermost echelon of the organization's management.
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> * * *
>
> Other jurisdictions have adopted yet a third test that, while allowing for some *ex parte* contacts with a represented organization's employees, still maintains some protection of the organization.
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> * * *
>
> Although the comment's reference to persons 'whose statement may constitute an admission on the part of the organization' was most likely intended as a reference to Fed. R. Evid. 801 (d)(2)(D), this interpretation would effectively prohibit the questioning of all employees who can offer information helpful to the litigation. We reject the comment as overly protective of the organization and too restrictive of an opposing attorney's ability to contact and interview employees of an adversary organization.
>
> * * *
>
> We instead interpret the rule to ban contact only with those employees who have the authority to 'commit the organization to a position regarding the subject matter of representation.' (citations omitted) The employees with whom contact is prohibited are those with 'speaking authority' for the corporation who 'have managing authority sufficient to give them the right to speak for, and bind, the corporation.'
>
> * * *
>
> This interpretation, when read in conjunction with the other two categories of the comment, would prohibit *ex parte* contact only with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.
>
> * * *
>
> Our test is consistent with the purposes of the rule, which are not to 'protect a corporate party from the revelation of prejudicial facts' (citations omitted) but to protect the attorney-client relationship and prevent clients from making ill-advised statements without the counsel of their attorney. Prohibiting contact with all employees of a represented organization restricts informal contacts far more than is necessary to achieve these purposes. (citations omitted) The purposes of the rule are best served when it prohibits communication with those employees closely identified with the organization in the dispute. The interests of the organization are adequately protected by preventing contact with those employees empowered to make litigation decisions, and those employees whose actions or omissions are at issue in the case. We reject the 'control group' test, which includes only the most senior management, as insufficient to protect the 'principles motivating [Rule 4.2].' (citations omitted) The test we adopt protects an organizational party against improper advances and influence by an attorney, while still promoting access to relevant facts. (citations omitted) The Superior Court's interpretation of the rule would grant an advantage to corporate litigants over nonorganizational parties. It grants an unwarranted benefit to organizations to

require that a party always seek prior judicial approval to conduct informal interviews with witnesses to an event when the opposing party happens to be an organization and the events at issue occurred at the workplace.

While our interpretation of the rule may reduce the protection available to organizations provided by the attorney-client privilege, it allows a litigant to obtain more meaningful disclosure of the truth by conducting informal interviews with certain employees of an opposing organization. Our interpretation does not jeopardize legitimate organizational interests because it continues to disallow contacts with those members of the organization who are so closely tied with the organization or the events at issue that it would be unfair to interview them without the presence of the organization's counsel. Fairness to the organization does not require the presence of an attorney every time an employee may make a statement admissible in evidence against his or her employer. The public policy of promoting efficient discovery is better advanced by adopting a rule which favors the revelation of the truth by making it more difficult for an organization to prevent the disclosure of relevant evidence."

The Office of General Counsel hereby adopts the logic and reasoning of the Massachusetts Supreme Judicial Court as quoted above and concludes, therefore, that since the cashier does not "have authority on behalf of the corporation to make decisions about the course of the litigation", you are not ethically prohibited from communicating with her.

However, there is an additional ethical consideration which should be addressed. The conclusion reached above means that the cashier is an unrepresented third person within the meaning of Rule 4.1 and Rule 4.3 of the *Rules of Professional Conduct*. Those rules provide, respectively, as follows:

"Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

* * *

"Rule 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

These rules mandate the use of extreme caution to avoid misleading the cashier with regard to any material issue of law or fact, and most particularly, to avoid any misunderstanding on the part of the cashier as to your role in the lawsuit. You should initiate any conversation with the cashier by acknowledging that you are an attorney representing a client with a claim against the cashier's employer and that, by virtue of such representation, you have an adversarial relationship with her employer. If, following such disclosure, the cashier indicates a desire to terminate the conversation, you are ethically obligated to respect the cashier's wishes and immediately discontinue any further attempt at communication. [RO-02-03] ■

Endnote

1. Obviously, communication is also prohibited with any employee who is individually represented.

Robert L. McCurley, Jr.

Lawyers Rendering Service Through the Alabama Law Institute

The Alabama Law Institute was created by the legislature in 1967 as a legislative agency that operates with volunteers. Our purpose is to simplify and clarify the laws of Alabama, revise out-of-date laws and fill in gaps in the law where there exists legal confusion.

The membership is a diverse group of lawyers and judges, many of whom are appointed by position as presiding judges of the appellate courts, bar president, attorney general, lawyer members of the legislative council, and 150 active, practicing lawyers. The legal services provided each year far exceed the state's appropriation to the Institute.

Over the almost 40 years of existence, the law institute has had five presidents: **Representative Hugh Merrill**, 1967 to 1978; **Senator Finis St. John, III**, 1978 to 1984; **Oakley Melton**, 1984 to 1991; **Speaker Pro Tem James M. Campbell**, 1991 to 2001; and **Speaker Pro Tem Demetrius Newton**, 2001 to present.

The institute has been housed from the beginning in the Law Center building at the University of Alabama campus to have available the research facilities of the state's largest research law library, which is essential for major law revision. Many of the faculty members at the University of Alabama and Cumberland law schools serve as reporters for the various projects under revision.

In 2006, the legislature passed three major pieces of legislation prepared by the institute which will become effective January 1, 2007. They are the Uniform Trust Code (*See* September 2006 *Alabama Lawyer*); Uniform Residential Landlord Tenant Act (*See* September 2006 *Alabama Lawyer*); and a complete revision of Alabama's Election Code. In addition, the legislature added to the specified purposes of the institute that it would conduct training for public officials, a function that it has been performing since 1975.

Orientations

The institute will conduct a legislative orientation and conference for all legislators in December of this year. This will include the basics for all new legislators, a status report and projection for Alabama's economy for the next four years and the opportunities facing the legislature in areas of energy and young children. In addition, the conference will highlight the needs of the state. It is expected that the governor, lt. governor, speaker of the house, president pro tem of the senate, and chief justice of the supreme court will address the legislators during this three-day conference. There will be a concurrent program for legislative spouses.

In January, the institute will conduct a probate judges' orientation, a training program that began in 1976 and has occurred every six years, soon after their elections. This conference will focus on the general responsibilities of the probate office, estates, commitments, eminent

domain, guardians and conservators, adoptions, and the various other laws that affect their office.

In February, the institute will conduct a sheriffs' orientation, which they began in 1979 and have conducted every four years after the sheriffs' elections. This program includes information about the service of process, records, administrative duties, repossessions and attachments. A number of topics relating to their jail responsibilities are discussed, including work release and detention and care of juveniles.

Model City Ordinances

In addition to working with public officials, the institute developed, with the help of the League of Municipalities, a model set of municipal ordinances for use by the more-than-400 small municipalities in the state that do not have full-time attorneys. Law students who have been trained in this area are made available to cities to compare the city ordinances with the Model Code. A small fee is charged and is paid directly to the student.

Capitol Intern Program

The Institute, since 1979, has conducted an intern program by allowing gifted college students to observe and participate in the process of the legislative and executive branches of state government. These interns work during the legislative session with legislative leadership. In 2006, an additional intern program was established in the house of representatives to provide house members with an intern to assist them in providing constituent services. Legislators in Alabama are part-time. They serve with only a small Montgomery office and without a staff. This enables legislators to become more independent and give more effective service to their constituents.

Handbooks

In addition to these programs, the institute also has drafted handbooks and manuals for government officials. A new edition will be available in 2007 for the following: *Alabama Government Manual,* 12th Edition; *The Legislative Process, a Handbook for Alabama Legislators,* 9th Edition; *Alabama Legislation Cases and Statutes,* 6th Edition; *Probate Judges' Handbook,* 8th Edition; and *Handbook for Alabama Sheriffs,* 4th Edition. In 2005, the *Handbook for Alabama Tax Administrators: Tax Assessors, Tax Collectors, License Commissioners, Revenue Commissioners,* 6th Edition was completed. Election officials currently use the institute's *Alabama Election Handbook,* 12th edition as a guide for elections.

Institute Staff

The institute could not function without the generous contributions by practicing lawyers who assist in the drafting of now almost 100 pieces of major legislation in the past 30 years.

Institute staff in Tuscaloosa is composed of **Bob McCurley,** director since 1975; **Penny Davis,** associate director since 1979; **Linda Wilson,** office manager since 1973; **Nancy Foster,** secretary since 1997; and **Alison Daugherty,** secretary since 2005. During a part of 2005 and 2006, the institute has also had the services of **LaVeeda Morgan Battle** who has worked in the office as an institute resident fellow. The institute's newest resident fellow is **Bill Lindsey,** who began work in October 2006. Bill had worked several years as assistant district attorney in Tuscaloosa.

Institute Fellows

Over the years, the Institute has recognized lawyers for their exceptional work with the institute during an extended period of time. Many of them are working, or have worked, on major projects without any compensation from the institute. Institute fellows include **George Maynard, Dean Nat Hansford, Dean Tom Jones, Andrew Noble, III, Mary Lee Sapp, Lewey Stephens, Dr. Richard Thigpen, Professor Howard Walthall,** and **Professor Jim Bryce.**

Legislative Wrap-Up

Continued from page 463

Institute Resident Fellows

The institute announces the resumption of its resident fellows program. Previous fellows have been on loan from their practice to assist the institute for up to one year, conducting studies, assisting in government training and working with the legislature. These fellows will receive a salary and benefits during their term.

Organizational Session of the Legislature

The newly elected legislature will convene January 9, 2007 in an organizational session. At that time, leadership will be selected in each house and committee appointments made. The governor and other constitutional officers will be inaugurated January 15, 2007.

Regular Session of the Legislature

The regular session of the legislature will convene March 6, 2007 and may continue 105 calendar days with adjournment no later than June 18, 2007. Institute projects that will be completed by that date and are expected to be introduced include an Estate Tax Apportionment Act, a Residential Mortgage Satisfaction Act and an Environmental Covenants Act. Other projects nearing completion for introduction in the legislature are the Business Entity Code and the Uniform Parentage Act.

The next *Alabama Lawyer* article will feature the new lawyers who have been elected to the legislature.

For more information, contact Bob McCurley at (205) 348-7411 or visit *www.ali.state.al.us*. ■

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

National Law Conference Adopts Eight New Uniform Acts

BY REPRESENTATIVE CAM WARD

The National Conference of Commissioners on Uniform State Laws recently approved eight new acts dealing with issues ranging from new rules on volunteer healthcare services in declared emergencies to a revision of the established rules governing organ donations.

The conference is comprised of more than 300 lawyers, judges, law professors, legislators, and government attorneys, appointed by every state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. The uniform law commissioners draft proposals for uniform laws on issues where disparity between the states is a problem.

The new uniform acts adopted were:

The new **Uniform Emergency Volunteer Healthcare Practitioners Act** allows state governments to give reciprocity to other states' licensees of emergency services providers so that covered individuals may provide services without meeting the disaster state's licensing requirements.

The new **Uniform Anatomical Gift Act** updates the act (which was originally promulgated in 1968 and adopted in every state; a revised version has been available since 1987) in light of changes in federal law relating to the role of hospitals and procurement organizations in securing organs for transplantation.

The **Uniform Prudent Management of Institutional Funds Act** (UPMIFA), like its predecessor, the Uniform Management of Institutional Funds Act (UMIFA), provides statutory guidelines for management, investment and expenditures of endowment funds of charitable institutions–institutions such as colleges, universities and hospitals.

The **Uniform Child Abduction Prevention Act** provides courts with guidelines to follow during domestic dispute proceedings to help courts identify families with children at risk for abduction and to provide methods to prevent the abduction of children.

The **Uniform Power of Attorney Act** provides a simple way for people to deal with their property by providing a power of attorney that survives the incapacity of the principal.

The **Uniform Limited Liability Company Act** permits the formation of limited liability companies (LLCs), which provide the owners with the advantages of both corporate-type limited liability and partnership tax treatment.

The **Uniform Representation of Children in Abuse and Neglect and Custody Proceedings Act** seeks to improve the representation of children in proceedings directly affecting their custody by clearly defining the roles and responsibilities of children's representatives and by providing guidelines to courts in appointing representatives.

The **Model Registered Agents Act** provides state with one registration procedure for registered agents no matter the kind of business entity represented by the agent.

Alabama joined the conference in 1906, and since that time has enacted 56 of the uniform or model acts promulgated by the conference. Alabama has seven uniform law commissioners appointed to the conference: **Jerry Bassett, Justice Gorman Houston, Jr., Tom Jones, Senator Ted Little, Robert McCurley, Jr., Bruce McKee,** and **Representative Cam Ward.**

Information on all of these acts, including the approved text of each act, can be found at *www.nccusl.org.* ■

Representative Cam Ward

Representative Cam Ward graduated from Troy University and from Cumberland School of Law at Samford University in Birmingham. He served as deputy attorney general in the Alabama State Auditor's Office from April 1996 until December 1997. In 1998, he joined the Alabama Secretary of State's Office as confidential assistant to the Secretary of State.

From November 1998 to June 2001, Ward worked as district director for Congressman Spencer Bachus of Birmingham. In June 2001, he became executive director of the Industrial Development Board of Alabaster. Ward has been a member of the Alabama Republican Party State Executive Committee since 1999 and was elected as an alternate delegate for George W. Bush to the 2000 and 2004 Republican National conventions. In 2002, he was elected to the Alabama House of Representatives for District 49.

About Members, Among Firms

The Alabama Lawyer no longer publishes addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice.

About Members

Stuart D. Albea announces the opening of his office at 2802 7th St., Ste. B, Tuscaloosa 35403. Phone (205) 248-9556.

Thomas Lavon Carmichael announces the opening of **The Law Office of Thomas L. Carmichael** at 101 19th St., W., Jasper 35501. Phone (205) 302-0099.

Maxwell D. Carter announces the opening of **Maxwell D. Carter LLC** at One Perimeter Pk. S., Ste. 100N, Birmingham 35242. Phone (205) 967-2509.

Russell Ray Enfinger announces the opening of **Russell Enfinger LLC** in Panama City. Phone (850) 230-1631.

Samuel Mark Hill announces the opening **The Law Offices of Sam Hill, LLC** at 2117 Magnolia Ave. S., Ste. 100, Birmingham 35205-2808. Phone (205) 250-7776.

Amanda Burkhalter Nichols announces the opening of her firm in Letohatchee.

William Grady Nolan announces the opening of **Nolan Elder Law** at One Chase Corporate Dr., Ste. 400, Birmingham 35244-7001. Phone (205) 313-6536.

William Stitt Poole III announces the opening of **The Law Offices of William S. Poole III LLC** at 2205 4th St., Ste. 23, Tuscaloosa 35401. Phone (205) 752-8338.

William Morgan Rayborn announces the opening of **Rayborn Law Firm LLC** at 9385 N. Main St., Brantley 36609. Phone (334) 527-1700.

James M. Roth announces the opening of **The Roth Firm LLC** at 3500 Independence Dr., Birmingham. Phone (205) 879-9595.

Mark A. Stephens announces the opening of **Stephens Law Firm LLC** at One Chase Corporate Center, Ste. 400, Birmingham 35244. Phone (205) 313-6420.

Among Firms

J. David Whetstone announces his association with **Adams & Reese.**

Chief Justice John G. Roberts, Jr. announces the appointment of **James C. Duff** as director of the **Administrative Office of the United States Courts.** Having served as chief of staff of the U.S. Supreme Court under the late Chief Justice William H. Rehnquist, Duff will lead the administration of the entire federal court system under Chief Justice Roberts.

John Alick Henderson announces his association with the **United States Air Force JAG.**

Dwain Churchill Denniston Jr. announces his association with the **13th Judicial Circuit** in Mobile.

Former Birmingham attorney **Steven F. Long** announces his association with the District Attorney's Office for the **19th Judicial Circuit**, comprised of Chilton, Autauga and Elmore counties, in Wetumpka. Phone (334) 567-2237.

John Edwin Searcy, Jr. announces his association with **Akridge & Balch PC.**

Tammy Renee Hudson and **Angela Marie Evans Johnson** announce their association with **Alabama Medicaid Agency.**

Christine Marie Gates announces her association with the **State of Alabama** as assistant attorney general, DHR.

Elizabeth Anne Sikes Hornsby announces her association with the **University of Alabama School of Law.**

Christopher B. Estes, Kathleen Cobb Kaufman and **J. Richard Moore** have been named partners at **Alford, Clausen & McDonald LLC.**

Drew Thornley announces his association with **Americans United for Life.**

Anthony Scott Allen announces his association with **AmSouth Bank's Private Client Services.**

Armbrecht Jackson LLP announces that **Tamela E. Esham, Gregory P. Bru** and **Craig D. Martin** have become partners.

Edgar Pritchard Walsh announces his association with **The Atchison Firm PC.**

William Alfred Austill and **Joseph Edward Bishop Stewart** announce their association with **Austill Lewis PC,** formerly Austill, Lewis & Simms PC.

DeShannon Nicole McDonald announces her association with **BTW Magnet High School Center for Law.**

Bill Bensinger, Elizabeth R. Floyd and **John Murphy McMillian, III** announce their association with **Baker, Donelson, Bearman, Caldwell & Berkowitz PC** and **Jennifer Fox Swain** has joined as *of counsel.*

Amy D. Adams and **Barbara H. Gallo** announce their association with **Balch & Bingham LLP.**

Teresa R. Lewis announces her association with **Baswell-Guthrie PC.**

Beasley, Allen, Crow, Methvin, Portis & Miles PC announces that **Larry Golston** has become a shareholder and **Alyce Robertson** has joined as an associate.

A. David Fawal announces his association with **Beers, Anderson, Jackson, Patty, Van Heest & Fawal PC.**

James Lee Webb announces his association with **Bradley Arant Rose & White LLP.**

Devin C. Dolive and **John Martin Sheffield** announce their association with **Burr & Forman LLP.**

Butler Pappas Weihmuller Katz Craig LLP announces that **Carin D. Brock, Daniel R. Schuler** and **Kirby D. Howard** have joined as associates.

Steven Craig Curtis announces his association with **Calhoun, Faulk, Curtis & Faircloth LLC.**

Robin Cobb Freeman announces her association with **Capps & Associates PC.**

George Edwin Cash announces his association with **Cash, Godwin & Associates LLC.**

Robert S. Caliento announces his association with **Chicago Title Insurance Company/ Security Union Insurance Company.**

John Emory Waddell announces his association with **Cobb, Shealy, Crum & Derrick PA.**

Bernard D. Nomberg announces his association with **The Cochran Firm.**

Jessica D. Kirk announces her association with **The Crittenden Firm.**

Ferris Salim Ritchey III announces his association with **Dempsey, Steed, Stewart, Ritchey & Gache LLP.**

Diana Kirilova Leskovska announces her association with **Dowdy & Hinote.**

Matthew Shane Geller announces his association with **Emageon Inc.**

Robert Brian Gray announces his association with **Emerson Electric Co.**

Charles D. Stewart, Jr. announces his association with **Executive Real Estate Group LLC.**

Allen L. Anderson and **Jeffrey L. Roth** have become shareholders with **Fees & Burgess PC.**

About Members, Among Firms

Continued from page 467

Jay Ephriam Tidwell announces his association with **Ferguson, Frost & Dodson LLP.**

Franklin Leaston Bell announces his association with **Galese & Ingram.**

Daniel B. Graves announces his association with **Graves & Watkins LLC.**

Laura A. Palmer announces her association with **Hand Arendall LLC.**

Amanda Lane Stansberry-Johns announces her association with **Harbert Realty Services.**

John Anderson Harp announces the opening of **Harp & Callier LLP,** formerly Taylor, Harp, Callier & Morgan.

Haskell Slaughter Young & Rediker LLC announces the addition of **Margaret Mary Fullmer** and **James W. Porter** as associates.

Stephen Christopher Collier announces his association with **Hawkins & Parnell LLP.**

Gary Lee Weaver announces his association with **Hayes & Swinford.**

D. Andrew Stivender announces his association with **Helmsing, Leach, Herlong, Newman & Rouse.**

Laura Rene Perez announces her association with **Hibbett Sporting Goods, Inc.**

Jennifer Rhea Lacy announces her association with **Hollis & Wright.**

Jane G. Hall announces her association with **Huie, Fernambucq & Stewart LLP.**

Erin Elizabeth May announces her association with **Infinity Insurance Company.**

K. Lyn Hillman announces her association with the **Internal Revenue Service, Texas.**

John Poole Strohm announces his association with **Johnston Barton Proctor & Powell LLP.**

Joi Tatum Montiel announces her association with **Jones School of Law.**

Amanda S. Wells announces her association with **Jones, Walker, Waechter, Poitevent, Carrere & Denegre LLP** in Louisiana.

Ann Marie Puccio announces her association with **LandAmerica/Lawyers Title Insurance Corporation Commonwealth Land Title Insurance Company.**

Scott Bradley Holmes announces his association with the **Legal Aid Society of Birmingham Family Court.**

Maceo Orlando Kirkland, Perry Myer and **Summer Gomillion Walker** announce their association with **Legal Services Alabama.**

Jon E. Lewis and **J. Stuart McAtee** announce the opening of **Lewis & McAtee PC. Robert F. Lewis,** formerly of Robert F. Lewis PC, will be *of counsel.*

Gray M. Borden and Wesley Bowen Gilchrist announce their association with Lightfoot, Franklin & White LLC.

French Andrew McMillan announces his association with Lloyd, Gray & Whitehead PC.

David L. Dean announces his association with Lusk, Lusk, Dowdy & Caldwell PC.

Katherine A. Herndon announces her association with Lyons, Pipes & Cook PC.

Jane C. Smith announces her association with the Madison County Courthouse, circuit court division.

Michael Caddell, Jeffrey Hudson, Kenya Lavender Marshall and Warren Parrino announce the formation of Marshall, Caddell, Hudson & Parrino at 2015 First Ave. N., Birmingham 35203. Phone (205) 458-1141.

Maynard, Cooper & Gale PC announces that Robert H. Adams has joined the firm as a shareholder and Kimberly B. Glass has joined as *of counsel*.

Michael Anthony Williams announces his association with the McLaurin Law Firm.

Jayme Lynn Kirkland announces her association with The Miller Law Firm LLC.

Douglas Hugh Bryant and Keri Donald Simms announce their association with Miller, Hamilton, Snider & Odom LLC.

Robert Tyler Hand announces his association with Miller & Martin PLLC.

William Patton Vines announces his association with the Montgomery County District Attorney's Office.

Michael L. Wade, Jr. announces his association with Moore & Van Allen PLLC.

Richard Willis Holmes announces his association with Morrow, Romine & Pearson PC.

Dana Lynne Fountain Mostashari announces her association with Nathan & Nathan PC.

Jeffrey G. Hunter announces his association with Nix Holtsford Gilliland Higgins & Hitson PC.

About Members, Among Firms

Continued from page 469

William R. Hill, Jr. announces his association with the Office of the Public Offender, Shelby County.

Michael Cory Bradley and William T. Johnson, III announce their association with Pittman, Dutton, Kirby & Hellums PC.

Steven Reid Dunlap announces his association with Progressive Insurance Co.

Walter Frances Scott III announces his association with Reli Title & Closing Services.

Daniel Feig announces his association with Rumberger, Kirk & Caldwell.

C. Zackery Moore announces his association with Rushton, Stakely, Johnston & Garrett PA.

John W. Ryan, Jr. announces his association with The Law Office of James H. Seale, III.

Edith Schauble Pickett announces the formation of Shapiro & Pickett LLP at 651 Beacon Crest Pkwy. W., Ste.115, Birmingham 35209. Phone (205) 323-7757.

Angelina McGehee Stayton announces her association with Shutts & Bowen LLP.

Sidney Travis Bartee and Colleen Elizabeth McCullough announce their association with Sirote & Permutt PC.

Meredith Lee Tolar announces her association with Sonic Automotive, Inc.

Angela F. Thornhill announces her association with Southern Nuclear Operating Company, Inc.

James Edmund Ferguson, III announces his association with Spain & Gillon.

Kell A. Simon announces his association with Sprenger & Lang PLLC.

Starnes & Atchison LLP announces that Jay M. Ezelle, J. Will Axon, Jr., Brian A. Dodd, John Peter Crook McCall, and Alicia Medders Harrison have become partners.

Roslyn Crews announces her association with Thomas, Means, Gillis & Seay PC.

Richard Sears Dukes, Jr. announces his association with Turner, Padget, Graham & Laney PA.

Brenda Fay Ward announces her association with U.S. General Services Administration.

Vickers, Riis, Murray & Curran LLC announces that Clay A. Lanham has become a member of the firm and Roy W. Harrell, III has become an associate.

Michael Lee Allsup announces his association with Lanny Vines & Associates LLC.

Jon Parker Gaston announces his association with Waller, Lansden, Dortch & Davis LLP.

Timothy Michael Davis and Joseph H. Johnson, Jr. announce their association with Walston, Wells & Birchall LLP.

Weaver Tidmore LLC of Birmingham announces the addition of William H. Hassinger, IV as an associate.

Whatley Drake LLC announces that Edith M. Kallas, Deborah Clark-Weintraub, Joseph P. Guglielmo and Mitchell M. Breit have become members, and the firm name is now Whatley Drake & Kallas, LLC. Also, Joy Nesbitt, Elizabeth Rosenberg, Lili R. Sabo, Patrick J. Sheehan, Matt Spilka, and Ilze C. Thielmann announce their association with the firm.

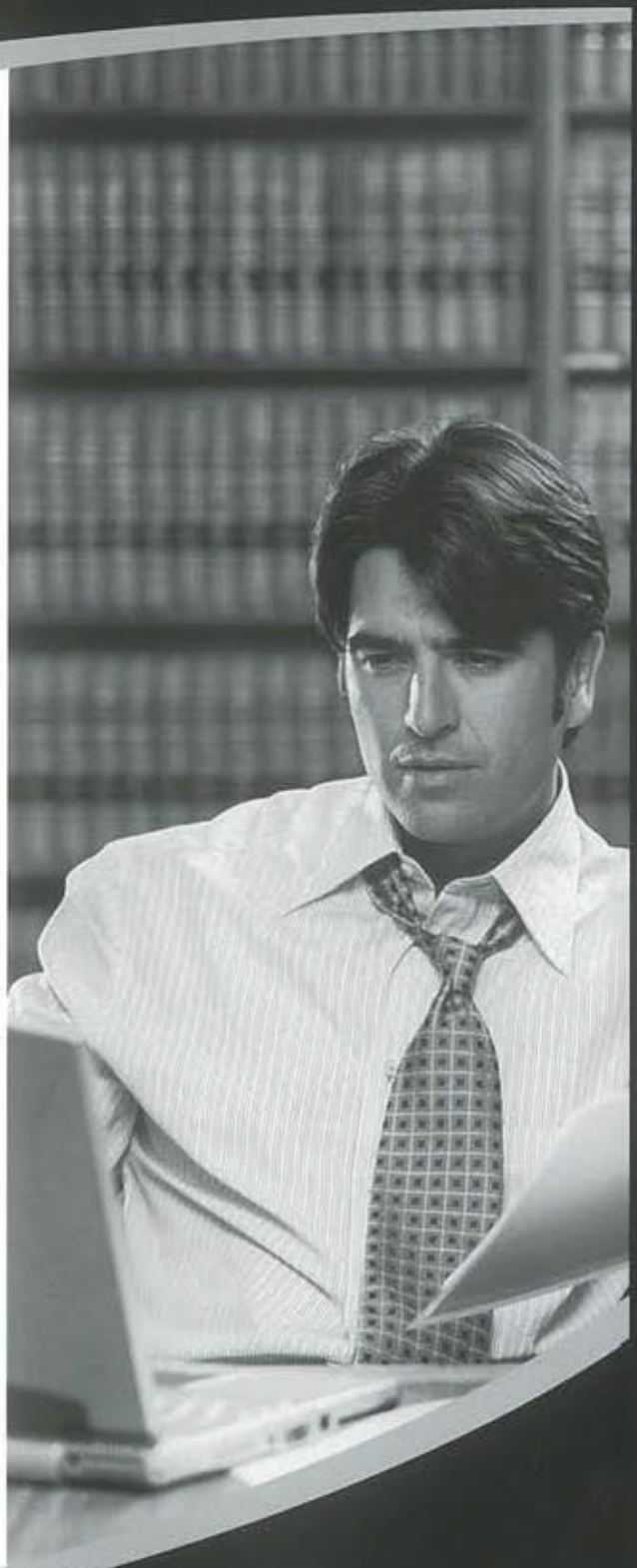
Audrey Elizabeth Channell and Ethan Richard Dettling announce their association with Wiggins, Childs, Quinn & Pantazis LLC.

Wilson Price announces that Michael Beringer, Justin Clark and Lee Parks have become principles of the firm, Jon Chancey and Michelle Parks have become managers of the firm and Tatia W. Knight has become a shareholder.

Wooten, Thornton, Carpenter, O'Brien, Lazenby & Lawrence announces that Davis A. Williamson has joined the firm as an associate.

G. Hampton Smith, III announces his association with Zarzaur & Schwartz PC. ■

Build your Case on a Solid Business Valuation



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