

# The Alabama Lawyer

Vol. 58, No. 3

May 1997



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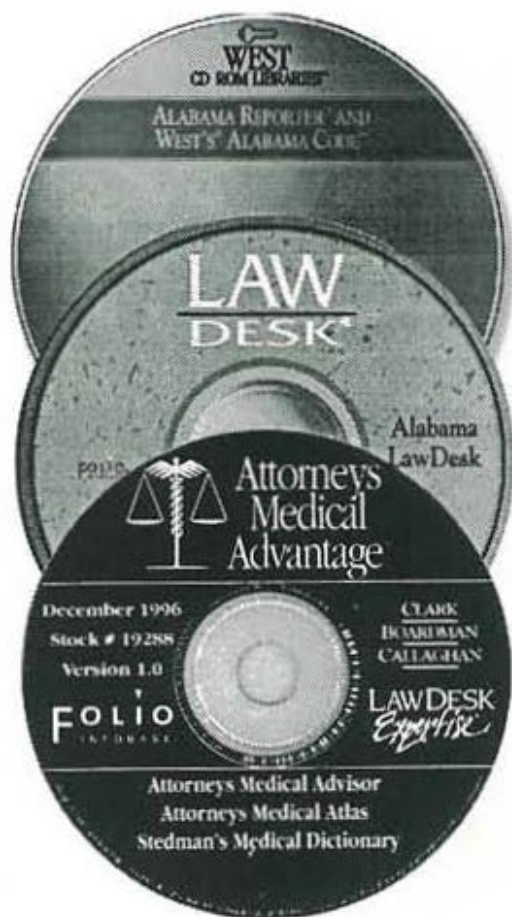
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# Alabama Lawyer

Vol. 58, No. 3

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## On the Cover

The skyline of the capital city, the site of the 1997 Alabama State Bar Annual Meeting, is framed by the Alabama river and an evening sky.

—Photo by Robert Fouts, Montgomery

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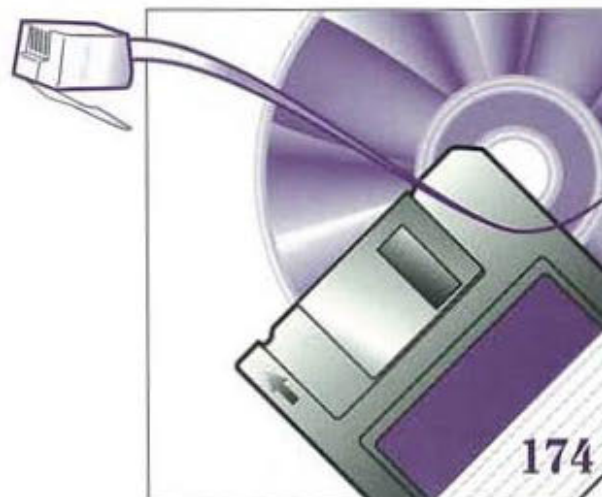
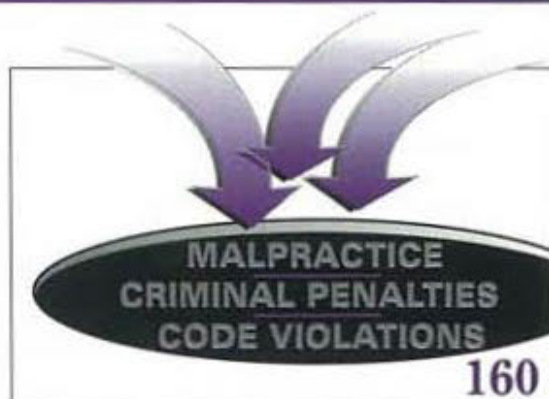
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## CATCHING UP WITH WARREN LIGHTFOOT

In late February of this year, Robert A. Huffaker, editor of *The Alabama Lawyer*, caught up with ASB President Warren Lightfoot of Birmingham about his year of service.

**AL:** You're almost through with your administration. What do you consider the main accomplishments of your term?

**Lightfoot:** One of our themes has been accenting the positive aspects of our profession. We have undertaken educating the public about what lawyers do for the good of everybody, not just for lawyers. One way we did that was to compose an educational video that is being distributed to libraries and schools and is available to the public. It tells the public a great deal about what lawyers do other than professionally.

**AL:** How could a local bar association get a copy of this video?

**Lightfoot:** Each of them will be sent a copy. It tells what we do professionally, but just as important, what we do in our spare time, too. Another aspect of that positive approach is the Legal Milestones program. Pat Graves in Huntsville had the idea for the Alabama State Bar to periodically dedicate a legal milestone in some area of the state, recognizing legal accomplishments of the past. The first one will be in Monroeville on May 1 at the Monroe County Courthouse. This one memorializes a fictitious character—Atticus Finch—and, especially, the attributes that Finch stood for and that so many of our

fellow lawyers have. We'll have others who come along who will be real live heroes, both living and dead, as this program progresses.

**AL:** How active have your task forces been this year?

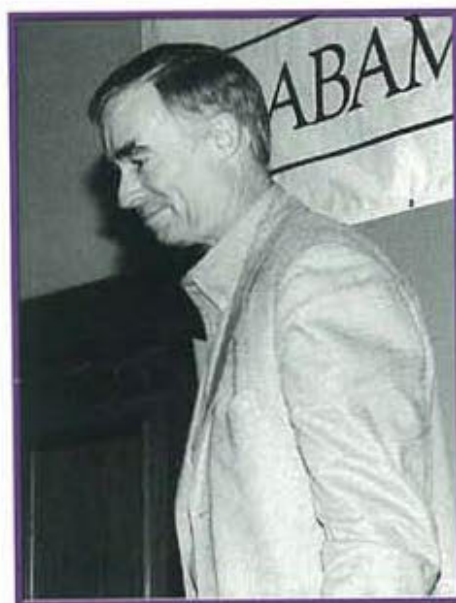
**Lightfoot:** Very active. We have 39 committees and task forces. The most recent task force we've created is one for elder law—law for the elderly. A great deal of our task forces help not just lawyers but members of the public. We have over 600 lawyers involved in these committees and task forces and these lawyers contribute well over \$6 million dollars a year in volunteer time. That is astounding to me! It was an eye-opening experience for me to see how many lawyers are willing to give of their time, and give dedicated service without any pay, sometimes without expenses being reimbursed, for the good of the profession and for the good of the public.

**AL:** Do you think that the bar is responsive to the needs of the younger lawyers?

**Lightfoot:** I do, but we need to do better and that has not been one of my themes. It may be a theme of successor presidents, though.

**AL:** I've asked this same question of most of your predecessors—bring us up to date on the bar's position regarding judicial selection or elections.

**Lightfoot:** That's one of my pet projects, as you may know. The bar has reaffirmed its position in favor of non-partisan election. We received the report of the Third Citizens' Conference on the judiciary, representing over two years of work, and that group of 150 citizens came to the same conclusion: non-partisan elections. I feel that doesn't go far enough and that we need merit selection/retention election for judges. With the approval of the board of bar commissioners, I have appointed a committee of eight distinguished practitioners who are working very hard to come up with a constitutional amendment that will place into effect a merit selec-



Warren Lightfoot accepts ASB presidency in 1996.

tion/retention election system. I'd like to tell you the names of those eight folks but that's going to be published elsewhere and we may not want to put it here.

**AL:** What about tort reform? As we're conducting this interview, the legislature is in session and that's one of the items on the legislative agenda. Do you see that tort reform serves as a divisive part of our bar?

**Lightfoot:** Unfortunately, yes. It is a polarizing controversy. As a bar, though, we don't get into that controversy. We're an integrated bar and we represent both sides in the on-going arguments about tort reform. All we can do as a bar is encourage both sides to search for common ground. We can say "we'll do whatever we can to facilitate discussion and compromise", but we're not about to touch that one—as a bar we cannot.

**AL:** Are you satisfied with the help that you received from the state bar staff?

**Lightfoot:** Absolutely. That is a very able, professional group. We had a conference for bar leaders in September, and several dozen bar leaders and judges from all over the state came and got together and talked about what we can do in terms of bar activities. The last part of the day we



Margaret Richardson of Leo Tichell Productions and Warren Lightfoot discuss ASB video.



showcased the talent we have at bar headquarters, and it is formidable.

**AL:** Mediation has certainly become an active part of our practice. How do you think that will affect the litigation side of our practice?

**Lightfoot:** I think it's very salutary. I have been stunned by the success of mediation in my practice and in hearing comments from others. It is a wonderful mechanism and process, and cases that are impossible to settle go into mediation and come out resolved. It can't do anything but inure to the benefit of the public when we have litigation streamlined and resolved more expeditiously. It's cheaper, it's faster, it's wonderful.

**AL:** Doesn't the bar have facilities available for use for conducting mediation?

**Lightfoot:** It certainly does. We use the bar facilities for discovery, for conferences and certainly for mediation. On this video that you will have seen by the time this article comes out, there's a long section about the mediation facilities that are

available, and it shows a mediation underway in bar headquarters. It's a very thorough explanation of what is available.

**AL:** How would you assess the state of the bar?



1997 Alabama State Bar President Lightfoot and Past President John A. Owens

**Lightfoot:** The bar is very healthy. It's busy. There are 11,000 of us. The bar conducts its usual activities of testing applicants and grading exams and its usual disciplinary functions and, in that way, serves the public but it goes far beyond that. We've got a very active, dedicated group of

colleagues and I'm just proud to be associated with them.

**AL:** Did your tenure involve more time than you anticipated?

**Lightfoot:** That's affirmative. I had an idea about it because the way our system works, you have a year's service as president-elect. In fact, I had six years as a bar commissioner way back in the '70s and '80s, but you never quite know how much time is going to be required. There are lots of speeches and there are a lot of ceremonial appearances; it's extraordinarily time consuming but very gratifying. I told somebody the other day that it was exhilarating but there's a limit on how much exhilaration anybody can stand.

**AL:** Are you ready to go back to making an honest living?

**Lightfoot:** I will be firing out of this job like a rocket in July, but I still care about the bar. Past presidents, as you know, are still active in the year after they serve, so I'll be involved; but yes, I'll be delighted to return to civilian life. ■

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## EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

# The 1997 Annual Meeting— MONTGOMERY “WELCOME HOME”



Keith B. Norman

We are very excited about this year's Annual Meeting, which will be held in Montgomery for the first time in 30 years! Many things have changed in both the profession and the city of Montgomery since 1967. We hope to highlight some of those changes during the meeting.

This year's meeting dates are **July 16-19**. The newly constructed Embassy Suites Hotel will serve as the convention hotel, with additional rooms available at the Holiday Inn (formerly the Madison Hotel), which has been refurbished. The deadline for hotel reservations at the Embassy Suites is June 16 and must be made through the state bar. Hotel reservations for the Holiday Inn may be made directly with the hotel by calling (205) 264-2231.

Attendees will have the opportunity to obtain most, if not all, of their CLE credits for the year at the Annual Meeting. An outstanding array of programs featuring technology, updates and bread-and-butter issues will be offered, appealing to the needs of today's lawyer. The Annual Meeting kick-off begins with a panel discussion by three former Alabama Supreme Court Justices, **Hon. Howell Heflin**, **Hon. C.C. "Bo" Torbert** and **Hon. Sonny Hornsby**. **Hon. Myron Thompson**, chief judge, United States District Court for the Middle District of Alabama, will be the speaker for Thursday's Bench and Bar Luncheon. CLE programming will continue throughout Thursday and Friday with most of the bar's 20 practice sections, the **Alabama Lawyer's Association**, the bar's **Access to Legal Services Committee** and the **Volunteer Lawyers Program** sponsoring programs. Saturday will feature our committee and task force breakfast, the Grande

Convocation and the annual business meeting of the state bar.

Social activities are planned to let bar members and their guests enjoy some of Montgomery's, and Alabama's, most significant attractions and most noted entertainment. Thursday's **A Capital Evening** will feature Montgomery's Lightening Route trolley cars making stops at the new Alabama Judicial Building, the refurbished State Capitol Building and the new and refurbished state bar headquarters building. State bar members and their guests may sample foods prepared by three of Montgomery's finest caterers while touring each of these buildings.

On Friday afternoon, the golfers will be able to compete in the annual **Kids' Chance Golf Tournament**, benefiting the Kids' Chance Scholarship fund. Friday evening will feature a sumptuous **Evening of the Arts** at the beautiful Montgomery Museum of Fine Arts located in the Wynton Blount Cultural Park. Also located in the Blount Cultural Park is the Carolyn Blount Theater, home to the nationally acclaimed Alabama Shakespeare Festival. A limited number of tickets are available for purchase from the Festival in advance. Performances for the evening are Shakespeare's **Macbeth** on the Festival Stage and Henrik Ibsen's **Ghosts** playing in the Octagon Theater. Friday evening's affair should be one to remember! With the diversity of excellent CLE programming, an impressive line-up of speakers and truly wonderful social events planned, this year's Annual Meeting in Montgomery will be unlike any other. **Welcome home to Montgomery—we look forward to seeing you!**





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3. A court reporter shall not, in act or appearance, indicate that the court reporter is participating as part of an advocacy support team for any one of the parties.
4. A court reporter shall always comply with federal, state and local laws and rules that govern the conduct of court reporters (such as those that deal with certification, confidentiality and custody of transcripts, and contracting).



# Profile

*Pursuant to the Alabama State Bar's rules governing the election of president-elect, the following biographical sketch is provided of Victor H. Lott, Jr. Lott was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 1997-98 term, and will assume the presidency in July 1998.*

Victor H. Lott, Jr. received his B.A., *cum laude*, in 1972 from the University of the South and his J.D. in 1975 from the University of Alabama School of Law. He was admitted to the Alabama State Bar in 1975.

He has served on the state bar's board of bar commissioners since 1988; as chair of the Disciplinary Commission since 1990; as chair of the Section on Oil, Gas and Mineral Law from 1984-85; on the executive committee of the Section on Environmental Law from 1992-95; as chair of the Task Force on Professionalism from 1990-91; and on the Executive Council from 1992-93.

He is a member of the American Bar Association's Corporation, Banking and Business Law Section and served on the Mobile Bar Association's Executive committee from 1988-96.

He is a director of the Alabama Law Institute and a fellow of the Alabama Law Foundation. He has served as a trustee of the Alabama Bar Foundation from 1988-96 and as a director of the University of Alabama Law School Foundation since 1994. He also was a director of the Mid-Continent Oil and Gas Association (Mississippi-Alabama Division) from 1984-88.

Lott's civic service has included serving on the board of directors of the Mobile Area Chamber of Commerce (since 1996 as general counsel); on the board of trustees of UMS-WRIGHT Corporation (chair from 1994-96); on the board of directors of Touchdown Club of Mobile, Inc. (president from 1994-95); on the board of directors of the Mobile Arts and Sports Association, Inc. (vice-chair since 1996); on the board of trustees of the YMCA of Metropolitan Mobile, Inc. (chair from 1985-86); on the board of directors of the Boys and Girls Clubs, Inc. from 1978-90 (on the advisory board since 1990); on the board of trustees of the Boys Club of Mobile Foundation, Inc. from 1985-92; on the board of directors of the Mobile Ballet, Inc. from 1991-94; on the board of trustees of the Julius T. Wright School for Girls, Inc. (vice-chair from 1987-88); and a member of the senior bowl association since 1975 (captain from 1990-91).

He is married to the former Austill Samford and they have two children, Mary Austill Lott, 19, and Margaret Walsh Lott, 17.



*Victor H. Lott*





## ABOUT MEMBERS, AMONG FIRMS

### About Members

**A. Leigh Daniel** announces a change of address to 205 Williams Avenue, Huntsville, 35801. Phone (205) 551-0500.

**William H. Robertson**, retired circuit judge, announces the opening of his offices at 2 Court Square, Clayton, 36016. Phone (334) 775-7759.

**Douglas C. Freeman** announces the relocation of his office to 456 S. Court Street, Montgomery, 36104-4102. Phone (334) 264-2000.

**Jeffrey W. Smith**, formerly with Beers, Anderson, Jackson & Smith, announces the opening of his office at 640 S. McDonough Street, Montgomery, 36104. The mailing address is P.O. Box 4486, 36103-4486. Phone (334) 264-1640.

**Steven D. Garrett** announces the opening of his office at 2121 8<sup>th</sup> Avenue, North, Suite 1216, Birmingham, 35203. Phone (205) 322-8100.

**Wendy L. Williams** announces a

change of address to 1027 23<sup>rd</sup> Street, South, Birmingham, 35205. Phone (205) 322-0888.

**W. Terry Travis**, formerly of Beck & Travis, announces the opening of his office at 640 S. McDonough Street, Montgomery, 36104. Phone (334) 262-3338.

**William V. Goodwyn** announces the relocation of his office to 700 Corporate Parkway, Meadowbrook, Birmingham, 35242. Phone (205) 980-5247.

**Richard C. Carter** announces a change of address to 2633 Baccarat Drive, Cooper City, Florida 33026. Phone (954) 436-6768.

**Amardo Wesley Pitters** announces the opening of his office at 100 Commerce Street, Suite 608, Montgomery, 36104. The mailing address is P.O. Box 1973, 36102-1973. Phone (334) 265-3333.

**J. Van Wilkins**, formerly of Robbins, Owsley & Wilkins, announces the open-

ing of his office at 7 S. Broadway Avenue, Sylacauga, 35150-3051. Phone (205) 245-1930.

**Edgar M. Elliott, III** announces a change of address to 7 Baltusrol, Shoal Creek, Alabama 35242. Phone (205) 325-2778.

**John Stuart Gruggel, Jr.** announces a change of address to 11509 Vale Road, Oakton, Virginia 22124-1336. Phone (703) 681-8501.

**Fred Lawton, III** announces the relocation of his office to Suite 1010, AmSouth Bank Building, Anniston 36201. Phone (205) 238-1984.

**Paul Roger Ellis** announces a change of address to 2163 Highway 31, South, Suite 212, Pelham, 35214. Phone (205) 982-9011.

**D. Gregory Dunagan**, formerly with Smith, Spires & Peddy, announces the opening of his office at 127 Cobb Street, P.O. Box 903, Grove Hill, 36451. Phone (334) 275-4255.

**Michael S. Lusk** announces the relocation of his office to 1130 Quintard Avenue, Suite 404, Anniston, 36201. Phone (205) 237-5105.

**Joseph Lenn Ryals** announces a change of address to 3156 Woodfern Drive, Montgomery, 36111. Phone (334) 286-5162.

**James W. Crawford, Jr.** announces a change of address to 1721 Laurel Street, Mobile, 36604. Phone (334) 478-5143.

**Frank B. Angarola**, formerly with Legal Services of North-Central Alabama, announces the opening of his office at 213 S. Jefferson Street, Athens, 35611. Phone (205) 233-0403.

**Dorothy J. Collier** announces the opening of her office at 5000 Highway 280, Suite F, Alexander City. The mailing address is P.O. Box 2097, 35011. Phone (205) 234-4696.

**William Brent Dodd** announces that he will continue his practice of **Dodd & Dodd**. His office will remain at the Frank Nelson Building, Suite 519, 205



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### Among Firms

**John Caddell Bell**, formerly with Lyons, Pipes and Cook, announces his new position as general counsel for **Pilot Catastrophe Services, Inc.** The office is located at 1055 Hillcrest Road, Suite D-3, Mobile, 36695. The mailing address is P.O. Box 91206, Mobile, 36691-1206. Phone (334) 607-7800.

**Judge Pamela Willis Baschab** announces a change of address to **Court of Criminal Appeals**, State of Alabama, Judicial Building, 300 Dexter Avenue, P.O. Box 301555, Montgomery, 36130-1555. Phone (334) 353-4241.

**Taylor Ward** of Deerfield Beach, Florida has been named vice-president and general counsel for **Southeast Toyota Distributors**. Offices are located at 100 N.W. 12<sup>th</sup> Avenue, P.O. Box 1160, 33433. Phone (954) 429-2000.

**Lisa Huggins**, formerly with the Birmingham City Attorney's Office, announces her move to **Office of Counsel for the University of Alabama System**. Offices are located at the Administration Building, Suite 820, Birmingham, 35294-0108. Phone (205) 934-3474.

**William G. Nolan**, formerly in private practice, has joined **Birmingham-Southern College** as the director of planned giving.

**Bryan, Nelson, Schroeder, Castigliola & Banahan** announces that **H. Benjamin Mullen** has become a partner. Offices are located at 1103 Jackson Avenue, P.O. Box 1529, Pascagoula, Mississippi 39568-1529. Phone (601) 762-6631.

**Sintz, Campbell, Duke & Taylor** announces that **William Kyle Morris** has joined the firm. Offices are located at 3763 Professional Parkway, Mobile, 36609. Phone (334) 344-7241.

**Cory, Watson, Crowder & Petway** announces a change of address to Magnolia Plaza, across from Magnolia Park in Five Points, South, 2131 Magnolia Avenue, P.O. Box 55927, Birmingham, 35255-5927. Phone (205) 328-2200.

**Powell, Peek & Weaver** announces that **Abner Riley Powell, IV** has become a member of the firm. Offices are located at 201 E. Troy Street, Court Square, Andalusia, 36420. The mailing

address is P.O. Drawer 969. Phone (334) 222-4103.

**Connie L. Glass** and **Carol J. Wallace** announce the formation of **Glass & Wallace, P.C.** Offices are located at 303 Williams Avenue, Suite 221-A, Huntsville, 35801. Phone (205) 536-9494.

**Kerrigan, Estess, Rankin, McLeod & Hightower** announces the opening of offices at 63 S. Royal Street, AmSouth Center, Suite 1109, Mobile, 36602. Phone (334) 433-1133.

**Frank S. Buck** and **Patrick Patronas** announce a change of address to P.O. Box 55089, Birmingham, 35255-5089. Phone (205) 933-7533.

**Massey & Stotser** announces that **Richard A. Bearden** and **J. Anthony Salmon** have become associates. Offices are located at 1100 E. Park Drive, Suite 301, Birmingham, 35235. Phone (205) 836-4586.

The **Law Offices of Blake A. Green** announce that **Amy N. Bledsoe** has become an associate and **Howard A. Green** continues as *of counsel*. Offices are located in Suite 101, Foster Corner, 188 N. Foster Street, Dothan, 36301. Phone (334) 794-8865.

**Leitman, Siegal & Payne** announces that **Sidney T. Philips** has joined as a shareholder. Offices are located at 400 Land Title Building, 600 N. 20<sup>th</sup> Street, Birmingham, 35203. Phone (205) 251-5900.

The **Law Offices of David H. Marsh** announce that **Nat Bryan** has joined as a partner and **Irene T. Grubbs** has joined as *of counsel*. Offices are located at Two Chase Corporate Drive, Suite 460, Birmingham, 35244. Phone (205) 733-1000.

**Bell Richardson** announces a change in firm name to **Bell, Richardson, Smith & Callahan**. Offices are located at 116 S. Jefferson Street, P.O. Box 2008, Huntsville, 35804-2008. Phone (205) 533-1421.

**Kirby D. Farris** and **David T. Puckett** announce the formation of **Farris & Puckett**. Offices are located at The Massey Building, Suite 200, 290-21<sup>st</sup> Street, North, Birmingham, 35203. Phone (205) 324-1212.

**Walston, Wells, Anderson & Bains** announces that **Emily Sides Bonds** has become a partner in the firm and that **Arthur C. Brunson, III** has joined as

an associate. Offices are located at 500 Financial Center, 505 20<sup>th</sup> Street, North, Birmingham, 35203. Phone (205) 251-9600.

**Johnstone, Adams, Bailey, Gordon & Harris** announces that **Tracy P. Turner** has become a member. Offices are located at Royal Street Francis Building, 104 St. Francis Street, Mobile, 36602.

**Marcel E. Carroll** and **Mark D. Mullins** announce the formation of **Carroll & Mullins**. Offices are located at 2800 Zelda Road, Suite 100-7, Montgomery, 36106. Phone (334) 277-4112.

**Pauline W. McIntyre** and **Ava F. Tunstall**, formerly with Dean, Ringers, Morgan & Lawton, announce the formation of **McIntyre & Tunstall**. Offices are located at 540 E. Horatio Avenue, Suite 101, Maitland, Florida 32751. Phone (407) 599-9171.

**Capell, Howard, Knabe & Cobbs** announces that **Constance S. Barker**, **Jim B. Grant, Jr.**, **Christopher W. Weller**, **Chad S. Wachter**, **Ellen M. Hastings**, and **Debra Deames Spain** have become members, **William T. Carlson, Jr.** has become *of counsel*, and



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## About Members, Among Firms

(Continued from page 137)

**R. Brooke Lawson, III, R. Eric Powers, III, Barbara J. Gilbert, Raymond L. Jackson, Jr., and Robert D. Rives** have joined the firm as associates. Offices are located at 57 Adams Avenue, Montgomery, 36104-4045. Phone (334) 241-8000.

**Adams & Reese** announces that **Patrick D. McMurtry** has joined the firm. Offices are located at M'tel Centre, Suite 900, 200 S. Lamar Street, P.O. Box 24297, Jackson, Mississippi 39225-4297. Phone (601) 353-3234.

**Lange, Simpson, Robinson & Somerville** announces that **C. Paul Cavender** and **Nancy D. Lightsey** have become partners in the firm, and **Lisa C. Cross** has become an associate. Offices are located at 417 20<sup>th</sup> Street North, Suite 1700, Birmingham, 35203-3272. Phone (205) 250-5000.

**Charles F. Carr, Russell Q. Allison, Bennett L. Pugh, Thomas L. Oliver,**

**II, Glenn E. Ireland, Thomas C. Logan, Donald B. Kirkpatrick, II, and Sarah J. Carlisle**, formerly of Rives & Peterson, and **William H. Sisson**, formerly of Brown, Hudgens, announce the formation of **Carr, Allison, Pugh, Oliver & Sisson**. Offices are located at 400 Vestavia Parkway, Suite 400, Birmingham, 35216.

**Hardins & Hawkins** announce that **W. Lee Gresham, III** has become a partner. Offices are located at 2201 Arlington Avenue, Birmingham, 35205. Phone (205) 930-6900.

**Hand Arendall** announces that **Gregory R. Jones**, formerly vice-president and general counsel of QMS, Inc., and **Mark T. Waggoner** have become members, and that **Jerry J. Crook, II** and **Frederick G. Helmsing, Jr.** have become associates. Offices are located at 900 Park Place Tower, 2001 Park Place, North, Birmingham, 35203. Phone (205) 324-4400.

**Gregory A. DaGian and Gwenett Hillestad DaGian** announce the establishment of **DaGian Law Offices** located at 406 Dothan Road, Suite B, Abbeville, 36310. Phone (334) 585-1394.

**Olen & McGlothren** announces that **Steven L. Nicholas** has become a member. The new firm name is **Olen, McGlothren & Nicholas**. Offices are located at 63 S. Royal Street, Suite 710, Mobile, 36602. The mailing address is P.O. Box 1826, 36633. Phone (334) 438-6957.

**Johnson, Trippe & Brown** announces that **Harry O. Yates** has become an associate. Offices are located at 2100 Southbridge Parkway, Southbridge Building, Suite 376, Birmingham, 35209. Phone (205) 879-9220.

**Rosen, Cook, Sledge, Davis, Carroll & Jones** announces that **Joseph W. Cade** has become a shareholder. New offices are located at 2117 River Road, Tuscaloosa, 35401. The mailing address is P.O. Box 2727, 35403. Phone (205) 344-5000.

**Ben Stokes & Associates** announces that **Walter H. Honeycutt** has become an associate. Offices are located at 1000 Downtowner Boulevard, Mobile, 36609. Phone (334) 460-2400.

**Cassidy, Fuller & Marsh** announces that **R. Rainer Cotter, III** has become a partner and that **J.P. Sawyer** is an associate. Offices are located at 203 E. Lee

Avenue, P.O. Drawer 780, Enterprise, 36331. Phone (334) 347-2626.

**William B. Matthews, Jr. and William H. Filmore** announce the formation of **Matthews & Filmore**. Offices are located at East & Reynolds, Ozark, 36360. The mailing address is P.O. Box 1145, 36361.

**Richard R. Klemm and Brent H. Gourley** announce the formation of **Klemm & Gourley**. Offices are located at 220 C. Lakeview Road, Ozark, 36360. Phone (334) 774-3840.

**Elliott & Elliott** announce that **D. Curt Lee** has become an associate. Offices are located at 2<sup>nd</sup> Floor, Blanton Building, 1810 Third Avenue, Jasper, 35501. The mailing address is P.O. Box 830, Jasper, 35502-0830. Phone (205) 221-9333.

**Pitts, Pitts & Thompson** announces that **Rickman E. Williams, III** has joined the firm. Offices are located at 9 Broad Street, Suite 201, AmSouth Bank Building, Selma, 36702-0537. Phone (334) 875-7213.

**Wilson, Pumroy, Turner & Robinson** announces that **Lori Ann Brown-James** has become a partner and that **Rodney S. Parker** has become an associate. Offices are located at 1431 Leighton Avenue, Anniston, 36207. Phone (205) 236-4222.

**Rogers, Young, Wollstein & Hughes** announces that **Polly E. Russell** has become an associate. Offices are located at 801 Noble Street, Anniston, 36201. Phone (205) 235-2240.

**William G. Werdehoff** announces that his wife, **Stephanie W. Werdehoff**, has rejoined him in the practice under the firm name **Werdehoff & Werdehoff**. Offices are located at 602 Madison Street, Huntsville, 35801. Phone (205) 539-5122.

**Constangy, Brooks & Smith** announces that **Lisa Narrell-Mead** has become a member and **David T. Wiley** has become an associate. Offices are located at 1901 Sixth Avenue, North, Suite 1410, Birmingham, 35203. The firm also maintains offices in Columbia, South Carolina; Nashville, Tennessee; Washington, D.C.; and Winston Salem, North Carolina.

**Broad & Cassel** announces that **Dawn Lankford Bowling** has become a partner in the Miami office. Offices are

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located at Suite 1100, 390 N. Orange Avenue, Orlando, Florida 32801. Phone (407) 839-4200.

**Huie, Fernambucq & Stewart** announces that **Walter J. Price, III** has become a partner. Offices are located at 800 Regions Bank Building, Birmingham, 35203. Phone (205) 251-1193.

**J. Calvin McBride** announces that **Douglas R. Bachuss, Jr.** has become an associate. Offices are located at 202 Grant Street, Southeast, Decatur, 35601. Phone (205) 350-4100.

**Graddick, Belser & Nabors** announces that **John C. Williams**, formerly deputy district attorney in Montgomery, has become an associate with the firm in Mobile. Offices have relocated to One St. Louis Centre, Suite 2000, Mobile, 36602. Phone (334) 690-9300.

**The Wright Law Firm** announces that **W. Benton Gregg** has joined the firm. Offices are located at 400 River Hill Tower, 1675 Lakeland Drive, P.O. Box 5003, Jackson, Mississippi 39296. Phone (601) 366-8090.

**Corbett, Crockett & Leckrone** announces that **Katherine McKenzie Thomson** has become an associate. Offices are located at 3100 West End Avenue, Suite 1050, Nashville, Tennessee 37203. Phone (615) 385-2400.

**Lanier, Ford, Shaver & Payne** announces that **Phillip A. Gibson, Janice H. Johnson** and **John E. Whitaker** have become associates. Offices are located at 200 West Side Square,

Suite 5000, Huntsville, 35801.

**Vincent, Hasty, Elliott & Tidmore** announces that **G. Thomas Sullivan** has joined as a shareholder, and the firm name has changed to **Vincent, Hasty, Sullivan, Elliott & Tidmore**. Offices are located at 2090 Columbiana Road, Suite 4400, Birmingham, 35216.

**Donald L. Dionne** and **Melinda Murphy Dionne**, formerly a partner with Schoel, Ogle, Benton and Centeno, announce the formation of **Dionne & Dionne**. Offices are located at 2101 Lurleen B. Wallace Boulevard, Northport, 35476. Phone (205) 349-5911.

**Dominick, Fletcher, Yeilding, Wood & Lloyd** announces that **John W. Dodson** has become a member. Offices are located at 2121 Highland Avenue, Birmingham, 35205. Phone (205) 939-0033.

**Rives & Peterson** announces that **Ahrian Davis Tyler, Sharon Donaldson Stuart** and **Eric J. Breithaupt** have become shareholders. Offices are located at 1700 Financial Center, 505 N. 20<sup>th</sup> Street, Birmingham, 35203. Phone (205) 328-8141.

**James T. Gullage**, Lee County circuit judge, has retired from the bench and will be entering private practice with **J. Michael Williams, Sr.** They announce the formation of **Gullage & Williams**. Offices are located at 2400 Frederick Road, Opelika, 36801. The mailing address is P.O. Box 1068, Auburn, 36831-1068. Phone (334) 705-0200. ■

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## BAR BRIEFS

• Law professor **Lawrence W. Iannotti** was recently named recipient of the George Macon Memorial Award for



teaching at Samford University. The award goes annually to a Samford faculty member "for outstanding performance as a teacher, a counselor and friend to students as well as one who possesses the ability to inspire students to greatness."

Iannotti joined Samford's Cumberland School of Law faculty in 1990 following a distinguished 24-year career in private law

practice with the New Haven, Connecticut firm of Tyler, Cooper & Alcorn.

• **David Chip Schwartz**, shareholder of Najjar, Denaburg, was recently elected to the Executive Council of the Southern Region for the Commercial Law League of America. The League is a national organization consisting of attorneys, law list publishers and collection agencies that specialize in commercial collections.

• **Ferrell S. Anders** of the Mobile firm of Hamilton, Riddick, Tarlton & Sullivan, recently was elected as a Fellow of the American College of Mortgage Attorneys. The college recognizes outstanding

lawyers skilled and experienced in the field of mortgage banking.

• The National Elder Law Foundation, the only organization approved by the American Bar Association to offer certification in the area of elder law, has been recognized as an approved certifying agency in Alabama. Certification in elder law, one of the fastest growing fields in the legal profession, will provide a measure of assurance to the public that the attorney has an in-depth working knowledge of the legal issues that have an impact on the elderly. The only certified elder law attorney in Alabama is **Carol J. Wallace** of Huntsville. ■

## Local Bar News

### Lee County Bar Association

Newly-elected officers for the **Lee County Bar Association** are:

President: Mike Williams

Vice-President: Roger Pierce

Secretary/Treasurer: Gail S. Meek

Meek is the first woman officer in the history of the Lee County Bar Association. She is an assistant prosecutor in the district attorney's office and assistant prosecutor for the municipal court of Opelika.



Newly-elected officers for the Lee County Bar Association are Williams, Meek and Pierce.

### Tallapoosa County Bar Association

Officers for 1997 for the **Tallapoosa County Bar Association** are:

President: Faye Edmondson, Dadeville

Vice-President: Tom F. Young, Jr., Alexander City

Secretary/Treasurer: Mark Allen Treadwell, III, Dadeville



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## BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.

### Choctaw County

Choctaw County was named to memorialize the history of the Choctaw Indians in Alabama.

The Choctaws lived in present-day southwest Alabama and south and central Mississippi. They were a peaceful, friendly people. They were master farmers and such successful traders that the Choctaw language was used as a trading language among all the Southern Indian tribes.

According to Choctaw Indian legend, the Choctaw people originated in the far west. As they migrated, their leaders carried a sacred pole which was used to determine where they would end their journey. This pole was placed in the ground each night wherever the tribe camped. In whatever direction it leaned in the morning, the tribe would travel that way. Each morning the pole leaned eastward and the tribe continued its long journey. Finally, when the tribe camped at Nanih Waiya, near Noxapater, Mississippi, the pole stood straight and did not lean when morning came. Thus, their travels ended and that place became their home. Today a great mound still stands there in the heart of Choctaw country marking the site.

Hernando De Soto led his expedition through Choctaw territory in 1540. He met the great Choctaw chief, Tuscaloosa, and demanded that he furnish the Spaniards a guide plus at least 400 burden bearers. When Chief Tuscaloosa refused De Soto's demand, fighting broke out at the Indian town of Maubila. In this bloody battle the Indians lost as many as 5,000 braves. The town of Maubila was destroyed. Its exact location has been sought throughout the years, but it is still a mystery today.

Over 150 years passed before the

Choctaws encountered Europeans again. Around 1700, French traders moved into the region and became neighbors to the Choctaws. Bienville built Fort Tombecbe on the Tombigbee River in the Choctaw territory near present-day Epes in Sumter County in 1735. Besides being a fort, it was also an important trading post for commerce between the French and the Choctaws. After 1763, the fort was turned over to the British and became Fort York. It was later abandoned. In 1780, the Spanish took over the fort, rebuilt it, and named it Fort Confederation. Throughout the years of European occupation, the Choctaws remained friendly and were able to live in peace with whatever group shared their land.

The Choctaw Indians were sympathetic to the Americans in their struggle for independence. Choctaws fought under Generals Washington, Morgan, Wayne, and Sullivan during the American Revolution. After the war, in 1786, the Choctaw nation and the United States signed a treaty at Hopewell, South Carolina in which the United States promised to protect the tribe, to set boundaries for hunting lands, and to establish trading posts throughout their territory.

As the United States expanded, settlers kept moving southwestward even though the United States had promised to protect Indian lands. Shortly after 1800, the United States entered into a series of new treaties with the Choctaws in return for land. In the first, the 1801 Fort Adams Treaty, the Choctaws ceded a portion of land in present-day southwestern Mississippi to the United States. In an 1802 treaty, the Choctaws ceded a portion of land in present-day southwestern Alabama to the United States. Then, in 1805, through the treaty of Mt. Dexter, more land in southern Mississippi came under United States control.



### Choctaw County

Established: 1847

*The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. If you have any photographs of early or present courthouses, please forward them to: Samuel A. Rumore, Jr., Miglionico & Rumore, 1230 Brown Marx Tower, Birmingham, Alabama 35203.*



Despite the erosion of their land holdings, the Choctaws pledged perpetual peace and friendship to the Americans. When the Creek Indian War erupted in 1813-1814, the Choctaws under Chief Pushmataha sided with the United States and General Andrew Jackson. The Choctaws fought against the British and their Creek Indian allies. Pushmataha was even given the honorary title of general.

In 1816, following the Creek Indian War, the Choctaws entered into another treaty negotiation with the United States. At this meeting the three district tribal chiefs, including Pushmataha, agreed to give up all of their tribal lands east of the Tombigbee River, thereby opening up more of present-day Alabama for settlement.

In 1820, another meeting took place, this time at Doak's Stand in Mississippi. General Jackson represented the United States government which was under great pressure to open up new lands to its ever increasing population. Even though the Choctaws had never fought against the United States, but had in fact been among its principal allies, the three district chiefs were compelled to agree to eventually move to the West. When the Choctaws later refused to leave, the state of Mississippi abolished their tribal government and took other measures to force them out.

Finally, in 1830, the United States government passed the Indian Removal Act. Now President Jackson had the power to move all Indian tribes to lands west of the Mississippi River. In September of 1830, the Choctaws signed away the last of their ancestral lands through the Treaty of Dancing Rabbit Creek.

The Choctaws were the first tribal nation to move west to the Indian Territory. During 1831, 1832 and 1833, groups traveling mostly on foot journeyed the 400 miles to present-day Oklahoma. Many people died along the way in this Choctaw version of the "Trail of Tears."

However, not all Choctaws left Mississippi and Alabama. The Treaty of Dancing Rabbit Creek had allowed some individual exceptions. Other Indians hid and refused to leave. Today over 5,000 Choctaws still live in east central

Mississippi near Philadelphia. Many still speak their native language. Other Choctaws live in the Citronelle-McIntosh area in Alabama. In 1979 the Alabama Legislature acknowledged this group as an official tribe. They are recognized as the Mowa Band of Choctaws. The name comes from the first two letters of the two counties in Alabama where they live—Mobile and Washington.

Although the Choctaws no longer occupy a significant portion of present-day Alabama, their presence is remembered in the name Choctaw County. Also, they are memorialized in the Choctaw County village names of Pushmataha, Choctaw City and Naheola. In addition, there are numerous cities, towns and geographic features in other parts of Alabama that have Choctaw names today.

The Alabama Legislature created Choctaw County on December 29, 1847 out of territory taken from Sumter County to the north and Washington County to the south. Two tiers of townships, approximately 12 miles in length from north to south, were taken from Sumter County, and five tiers of townships, approximately 30 miles in length from north to south, were taken from Washington County. Choctaw County's boundary lines have remained

unchanged since its creation in 1847 with the state of Mississippi forming its western boundary and the Tombigbee River forming its eastern boundary. The county has an area of over 900 square miles.

When Choctaw County was established, the county seat of Washington County was at Barryton. Barryton was located in that part of Washington County that was taken into Choctaw County. Thus, the first court sessions in the new county took place at Barryton. However, the Act which created Choctaw County named a five-member commission consisting of Jesse Jackson, John Phillips, Reuben Read, Isaac Horn, and H.J.Y. Moss to select a suitable permanent county seat. They were directed to choose a location within four miles of the center of the county. They also received authorization to purchase 160 acres of land, reserving a site for the courthouse and jail, and then after surveying the rest of the land into lots, to sell the land to defray the cost of erecting public buildings. The Act also authorized a tax if the land sale proceeds were not enough to complete the public buildings.

One unique aspect of the Act creating Choctaw County was that the legislature mandated the name of the county seat before the county seat site was even



*Choctaw County Courthouse*



chosen. Due to the strong South Carolina influence in west Alabama, the new county seat would be named Butler in honor of South Carolina native and Mexican War hero Pierce Butler, who had died in battle on August 20, 1847.

Pierce Mason Butler was born on April 11, 1798 in the Edgefield District of South Carolina. His father had been a Revolutionary War soldier, and the young Butler showed promise for a military career. In 1818 he received an appointment as a lieutenant in the United States Army. By 1825, he was a captain. Shortly after his marriage he resigned from the Army in 1829.

Butler settled in Columbia and became involved in the banking business. In a few years he became president of the state bank of South Carolina. He was also active in public affairs and became a firm supporter of public education. In 1833 he was elected a trustee of the South Carolina College.

During the Seminole War he accepted a commission as a lieutenant colonel in a South Carolina regiment. Upon his return from the war, he was elected

Governor of South Carolina in 1836. During his administration he proposed a public school system for the entire state and he supported the construction of the Louisville, Cincinnati and Charleston Railway. When he left office in 1838, he was named Indian agent to the Cherokees and remained in that position until 1846.

When the Mexican War broke out, Butler volunteered as a Colonel in the Palmetto Regiment. At the Battle of Churubusco he was wounded, but continued to lead his men. Finally, in the same battle, he received a musket ball through the head which instantly killed him.

Butler was honored in his home state and received many fitting tributes. The Alabama Legislature added to the honors by mandating that the county seat of the newly created Choctaw County be named Butler in his memory.

There was apparently some controversy over the selection of the Choctaw county seat site. Barryton had been named the temporary county seat on December 29, 1847. Then, on

January 19, 1848, the legislature passed another act which authorized the five commissioners to select a site within six miles of the center of the county. By February 4, 1848, Commissioners Read and Moss, refusing to act, were replaced by John Price and Thomas S. Parker. On March 1, 1848, another act passed by the legislature required a vote of the people for the selection. The commissioners obtained the services of a "professed mathematician" to determine as closely as possible the geographic center of the county. To be voted on were three places within six miles of the center.

One of the locations was Mount Sterling, which had been established around 1838. When Mount Sterling was officially surveyed, confident residents had requested that a public square be left in the center of town for a courthouse. The second location was Hendrick's Cross Roads, settled around 1845 and named for James Hendrick who donated land for the first church, the masonic lodge, the cemetery and a proposed courthouse. The name of the third location voted on by the citizens of Choctaw County is lost to history. Hendrick's Cross Roads captured the majority of votes. It became the new county seat and was renamed Butler.

Twelve years after this election, an effort was made to change the county seat location. On January 21, 1860, the legislature authorized an election to determine whether the people wanted to move the county seat. The election took place on the second Monday in March 1860. The citizens voted to leave their county seat at Butler where it remains to this day.

In 1848 Choctaw County erected a two-story frame building, painted white, to serve as its courthouse. This structure was used as the courthouse from the time it was constructed until 1906. When the decision was made to build a new courthouse, the wood frame building was moved from the center of the town square to the west side of the square where it remained while the new courthouse was being built. After the new structure was completed, the old courthouse was then moved across the street to the east side of Mulberry Street.



## Real Estate Settlement System

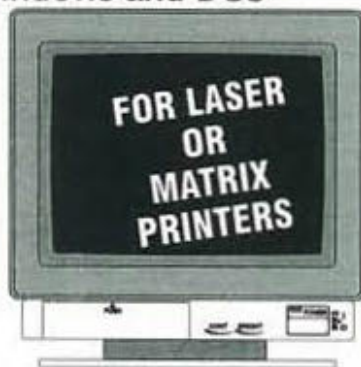
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O. C. Ulmer bought the original courthouse and used it as an office building. It remained in use for 26 more years as the Ulmer Building. Then in September 1932, the building was destroyed in a devastating fire. The pioneering first courthouse of Choctaw County had stood and served for 84 years.

One other fire was even more significant to the history of Choctaw County. Counties in the South during the 19th century often constructed out-buildings for the use of the county at the corners of the town square. Examples of such out-buildings are still seen today in Greene and Sumter counties. Perhaps the idea was to protect public records in case the courthouse burned. Unfortunately for Choctaw County, the probate office and all of the probate records were housed in an out-building that burned to the ground in April 1871. All records were lost, leaving many land titles incomplete to this day.

The citizens of Choctaw County erected the second courthouse in the county's history in 1906. The architect was William S. Hull of Jackson, Mississippi. The contractor was Hugger Brothers of Montgomery. The contract price for building the courthouse was \$28,477.

The structure that Hull designed was of Neo-Classical Revival style. Because of the success of this project, Hull was commissioned to design the neighboring Washington County Courthouse which was completed in 1908. When one views early photos of the Choctaw and Washington County courthouses, the resemblance is striking. The basic design of each building is identical. Perhaps Hull originated the concept of the "cookie cutter" courthouse. In any event, Hull's Washington County Courthouse was razed in 1963.

Additions have been made to the Choctaw County Courthouse over the years. Wings were added to the north and south sides in 1956. The 50-year-old building was cleaned and repaired at the same time.

A two-story addition on the west or rear side of the courthouse was completed in 1965. James F. Hurd was the architect. Dixie Engineering Corporation also played a role in the design. The general contractor was F.B.

Bear Construction Company of Montgomery. The style of the addition and the yellow brick building material blended with the older structure which was renovated and modernized once again. The cost of this project was approximately \$317,000.

Another alteration took place in 1970. Dormer windows located near the four corners of the original building were removed.

On January 6, 1995, a wild winter storm produced a sudden weather change from ice and freezing rain in the morning to temperatures in the 60s by afternoon, causing a series of thunderstorms, heavy rains and winds up to 50 miles per hour. During one of the resulting storms, a communications tower blew over and damaged the roof of the Choctaw County Courthouse. There were no injuries and the building was soon repaired.

Almost every courthouse grounds in Alabama has a marker or monument honoring Confederate soldiers. Choctaw County is no exception. The United Daughters of the Confederacy erected a statue on the courthouse square in 1936. It memorializes the Ruffin Dragoons, which was a cavalry unit mustered into service at the courthouse and which served from 1861 to 1865. The statue is inscribed with the words "Time Cannot Dim The Glory of Their Deeds." ■

**Sources:** *Alokoli, The Choctaw Bicentennial Book*, Choctaw County Bicentennial Commission, 1976; *The World of the Southern Indians*, Virginia Pounds Brown and Laurelle Owens, 1983.



**Samuel A. Rumore, Jr.**

Samuel A. Rumore, Jr. is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the Alabama State Bar's

Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore. Rumore serves as the bar commissioner for the 10th Circuit, place number four, and is a member of The Alabama Lawyer Editorial Board.



On a recent trip through Georgia, "Courthouse" author Sam Rumore spotted an unconventional statue on the grounds of the Putnam County Courthouse in Eatonton. Putnam County was the birthplace of L.Q.C. Lamar, for whom Lamar County, Alabama was named. It was also the birthplace of Joel Chandler Harris. The residents of Putnam County decided to honor their native son, Harris, with a statue of his most famous literary creation. The result was a statue of Br'er Rabbit on the courthouse grounds.





## LEGISLATIVE WRAP-UP

The Legislature will adjourn Monday, May 19, 1997. Most of the legislation generally is passed during the final weeks. The Institute has seven bills pending:

**Multiple Person Accounts**—S. 275 Sen. Steve Windom, H. 375 Rep. Mike Hill

**Uniform Interstate Family Support Amendments**—S. 285 Sen. Roger Bedford, S. 290 Sen. Wendell Mitchell, H. 375 Rep. Wendell Mitchell

**UCC Article 5 "Letters of Credit"**—S. 286 Sen. Roger Bedford, H. 374 Rep. Mike Hill

**Limited Liability Company Amendments**—S. 495 Sen. Steve Windom, H. 662 Rep. Mark Gaines

**Legal Separation**—S. 327 Sen. Chip Bailey, H. 306 Rep. Marcel Black

**Revised Limited Partnership**—Rep. Mark Gaines

**Transfer on Death Security Registration Act**—H. 707 Rep. Charles Newton

The first six bills are reviewed in the March 1997 *Alabama Lawyer*.

**Transfer on Death Security Registration Act:** This bill will allow for

the transfer of stock upon the death of one of the parties without requiring the person's estate to be probated.

Currently, Alabama has a statute which allows checking accounts in banks to be payable to a survivor upon the death of one of the parties. We also have a statute which allows "right of survivorship" for joint owners of real estate.

This act is consistent with those laws by allowing joint tenancy for stock. This is now the law in 28 states.

There are over 1,500 bills pending in the Legislature. Because there are so many major issues before the Legislature, lawyers should be alert to changes in the following areas:

- (1) **Tort reform**—Cap on punitive damages at \$750,000 and on non-economic damages at \$350,000. A civil fraud and criminal fraud statute
- (2) **Welfare Reform**—Uniform Interstate Family Support Act. Suspension of business and other licenses for failure to pay support
- (3) **Durable power of attorney for health care and amendments to living will**
- (4) **Amendments to habitual offender laws**
- (5) **Deeds**—Will require address of grantee and documentation of sales price
- (6) **Revision of jury selection process**
- (7) **Determinate sentencing**
- (8) **Creation of Office of Administrative Hearings** with independent administrative law judge
- (9) **Criminal Law**—Numerous enhanced punishments for criminal laws

In addition to these areas the

Legislature has to deal with two budgets, funding approximately 140 non-state agencies, higher education, reform, abortion, election reform, and approximately 400 local bills.

Most of the bills of interest to lawyers are assigned to the Judiciary Committee. The Senate Judiciary is chaired by Senator Roger Bedford. The Institute has assigned Lewis Gillis, a Montgomery attorney, to serve as counsel to review all the bills for this committee. In the House of Representatives the Judiciary is chaired by Representative Demetrius Newton. The Law Institute lawyer for the House Judiciary is Pam Robinson Higgins, a Montgomery attorney.

Each year the Institute selects capital interns to work in the Senate, House and Governor's office. This year the following college students were selected:

Richard Jason Jordan  
*Governor's Office*

Meagan Bishop  
*Senate Office*

Edward Dean Mott  
*Senate Office*

Frank Jerome Tapley  
*House of Representatives*

Jonathan Scott Evans  
*House of Representatives*

Mahari A. McTier  
*House of Representatives*

For more information concerning the Institute or any of its projects contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013; fax (205) 348-8411 or phone (205) 348-7411. ■



**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.



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The Alabama State Bar is pleased to make available to individual attorneys, firms and local bar associations, at cost only, a series of brochures on a variety of legal topics of interest to the general public.

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...opportunities and challenges of a law career today.

**Lawyers and Legal Fees** \$10.00 per 100 Qty. \_\_\_\_\_ \$ \_\_\_\_\_  
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...covers aspects of estate planning and the importance of having a will

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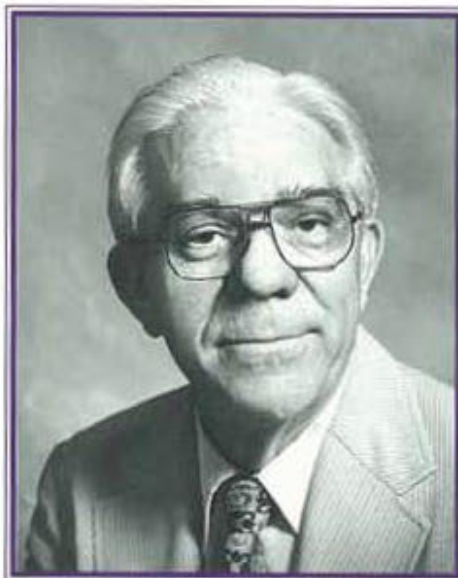




## MEMORIALS

### Judge Noel Baker

A true gentleman of the Lee County Bar Association, Judge Noel Baker passed away on February 8, 1997 at the age of 80. Judge Baker will be remembered by many attorneys for the help he gave them when they were first starting out in practice. He was always available to young lawyers. He assisted many young, "new" attorneys by giving them advice and assistance. Judge Baker served as a municipal court judge in both Auburn and Opelika in the 1970s. He then went on to serve eight years as a Lee County district judge from 1980 through 1988. Over the past several years, Judge Baker had retired but continued to preside over cases in adjoining counties. Judge Baker grew up in this area and attended school in both Lee and Macon counties before entering Alabama Polytechnic Institute (now



Auburn University). He finished his bachelor's degree at the University of Oregon. He later received his law degree from the University of Alabama.

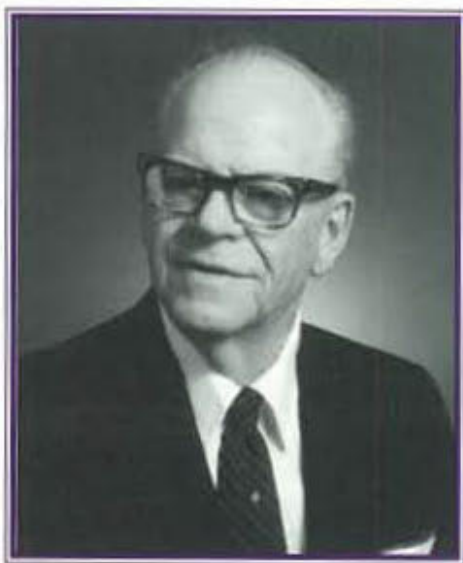
Judge Baker served his country during World War II as a member of the 123<sup>rd</sup> Seabees Unit of the United States Navy.

He received his license to practice law in Alabama in 1949 and was appointed clerk of the Alabama Middle District Court. He later served as an assistant attorney general from 1955 to 1958. He was also admitted to the Fifth Circuit United States Court of Appeals in 1956.

Judge Baker was a member and elder of Trinity Presbyterian Church in Opelika; president of the Genealogical Society of East Alabama; and a former president of the Lee County Historical Society.

Judge Baker is survived by his wife, Elizabeth, three brothers, one sister, and several nieces and nephews.

—Mike Williams  
Lee County Bar Association



### John Terrence Reynolds

Whereas, the Mobile Bar Association wishes to honor the memory of John Terrence Reynolds, Jr., a long-time and distinguished member of the Mobile Bar Association, who died on July 4, 1996

and the Mobile Bar Association desires to remember his name and recognize his contribution both to our profession and to this community; now, therefore, be it remembered.

John Terrence Reynolds, Jr. known to all of us as "Terry," was born in Mobile, Alabama, on the 28<sup>th</sup> day of June 1912. He attended Murphy High School and graduated in 1931. He then attended the University of Alabama and received his Bachelor of Law degree in June 1936.

Terry returned to Mobile in 1936 and began practicing law. He became a member of the Mobile Bar Association in that year. The Mobile Bar Association is the 15<sup>th</sup> oldest bar association in the United States and has been in existence for 127 years. Terry practiced almost half of that time, having practiced law for 60 years as a member of the bar.

During his tenure as a practicing attorney he had the opportunity to see and participate in the evolution of most of the law in the State of Alabama. He was well respected by the Mobile Bar as well as the

Alabama State Bar.

Terry represented his clients in an exemplary manner and treated them as well as his fellow lawyers with dignity and courtesy.

Terry was also known for dressing in all white and was nicknamed "Boss Hog" by his law firm.

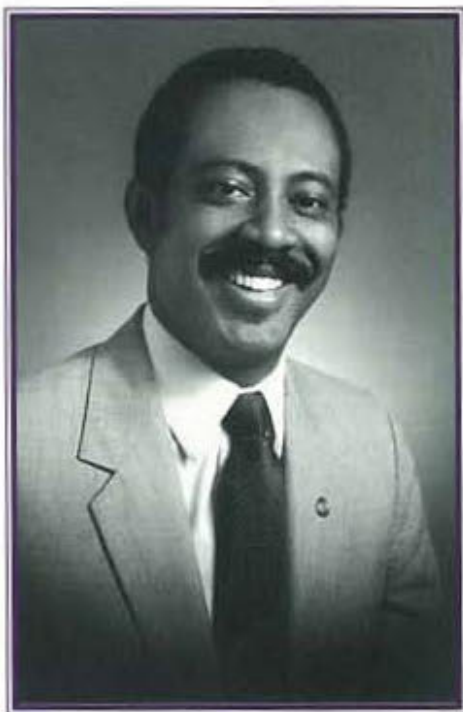
Terry was an avid sportsman and was blessed with the health during his 84 years to continue to hunt and fish, as well as practice law.

Terry was known by his fellow lawyers to be a person of strong will and conviction and a very capable advocate for his clients.

Terry left behind a devoted wife, Marilyn Reynolds, four children, one stepson, three grandchildren, three stepgrandchildren, and immeasurable friends and colleagues who will long mourn his passing. Terry was a treasured and most valuable asset to the Mobile Bar Association.

—William A. Kimbrough, Jr.  
President, Mobile Bar Association





## Michael A. Figures

Whereas, Michael A. Figures, a distinguished member of this association, died on September 13, 1996 and the Mobile Bar Association desires to remember his name and recognize his contributions, both to our profession and to this community.

Whereas, Michael A. Figures was born October 13, 1947 in Mobile, Alabama to Reverend Coleman Figures and the late Augusta Mitchell Figures. He attended the Mobile County Public Schools. He received his Bachelor of Arts degree in history, from Stillman College in

Tuscaloosa, Alabama in 1969; attended the University of Nebraska, 1966-1967 in Lincoln, Nebraska; and received his Juris Doctor from the University of Alabama School of Law in 1972 in Tuscaloosa, Alabama;

Whereas, after graduation from law school, he became an associate in the firm of J.L. Chestnut of Selma, Alabama. In 1975 he returned to his hometown of Mobile, Alabama where he later became a partner in the firm of Vernon Z. Crawford. In 1982 he started his own firm which is now known as Figures, Jackson & Harris, P.C., in Mobile;

Whereas, in 1978, he ran for and was elected state senator for Senate District 33. In 1994, he became the highest ranking state senator when he was elected by his senate colleagues to the position of President Pro Tempore, the third highest ranking constitutional office of the state;

Whereas, Senator Michael A. Figures' achievements were numerous, including sponsoring legislation to change the form of government in Mobile to provide for a super majority vote on the city council;

Whereas, Senator Michael A. Figures was a founding member of the Alabama New South Coalition, having also served as president. Senator Figures also was an elected delegate of the Democratic National Convention for five consecutive conventions;

Whereas, Senator Michael A. Figures' dedication to his profession, to politics and to the community never eclipsed his loyal-

ty and commitment to his family;

Whereas, Senator Michael A. Figures was a devoted member of the Green Grove Missionary Baptist Church and a devoted alumnus and trustee of Stillman College, his undergraduate alma mater;

Whereas, Senator Michael A. Figures was married to Vivian Davis Figures for almost 15 years, and was a loving and dedicated father to Jelani Anthony, Shomari Coleman, Akil Michael and Derrick Demond, and he believed in spending as much time as possible with his family;

Whereas, Senator Michael A. Figures was also survived by his father, the Reverend Coleman Figures, and two brothers, Thomas H. Figures, a member of the Alabama State Bar and the Reverend Willie Figures; and

Now, therefore, be it resolved, by the members of the Mobile Bar Association in this meeting assembled on the 13<sup>th</sup> day of December 1996, that the Association mourns the passing of the Honorable Michael A. Figures and does hereby honor the memory of our friend and fellow member who exemplified throughout his long career the highest professional principles to which the members of this association aspire.

—William A. Kimbrough, Jr.  
President, Mobile Bar Association

## James H. Dodd

James H. Dodd, age 72, died on January 18, 1997. He was a member of Ridgecrest Baptist Church from 1957 to 1997 and taught Sunday School for many years. A native of Carbon Hill, Alabama, he was born September 8, 1924 to William and Myrtle Dodd and was raised by his stepmother, Bida Dodd, from age seven. He graduated from Walker County High in 1942. He next entered the U.S. Air Corps and did his cadet officer training at the University of Tennessee. As a lieutenant and navigator, he flew 60 missions in the South Pacific during World

War II and earned a number of combat medals. He was discharged from the Air National Guard with the rank of captain in 1962. He received his law degree from the University of Alabama in 1951 and had been a member of the bar since 1951. He was inducted into Alabama's Who's Who during this time and was still practicing law in Birmingham at his death. However, of all his accomplishments, he was most thankful for the fact that his Lord used him in bringing all his children and grandchildren to a saving knowledge of the Lord Jesus Christ.

James H. Dodd is survived by his wife of 50 years, Connie Brazil Dodd;

son William Brent Dodd, who has been his law partner for 22 years; daughters Karen Zito and Cisse Franco; sons-in-law Anthony Zito and Dr. Fernando Franco; daughter-in-law Dee Dodd; grandson Landon Dodd; granddaughters Tara and Samantha Zito and Monica Franco; brother Lewis G. Dodd; stepmother Bida Dodd; and a host of nieces, nephews and cousins. Funeral services were held at Jefferson Memorial Gardens in Trussville, January 21, 1997.

—William Brent Dodd,  
Birmingham



## John Edward Thornton

Whereas, John Edward Thornton, a revered and distinguished member of the Mobile Bar Association, departed this life on January 11, 1997, at the age of 89; and

Whereas, the Mobile Bar Association desires to honor his name and recognize his many contributions to the legal profession, the City of Mobile and the State of Alabama;

Now, therefore, be it remembered that John Edward Thornton, the son of a Baptist minister, was born on November 25, 1907, in Starkville, Mississippi. He graduated from Mississippi College in 1928 and Harvard Law School in 1933. Ed Thornton was admitted to the Alabama State Bar in 1934 and embarked on a legal career that would span 62 years.

Ed Thornton first practiced law in Birmingham and served as deputy prosecutor for Jefferson County from 1936 until 1939, during which time he married the lovely and gracious Mary Belle Quinn, who survives him. He was fond of saying, "It was a whirlwind courtship; we met in 1921 and married in 1938."

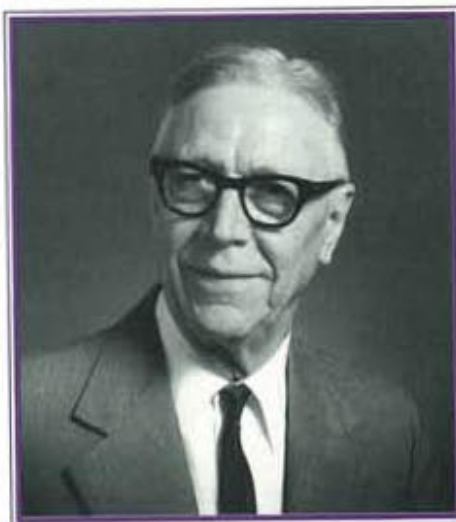
In 1939, Ed Thornton became assistant attorney general with the Alabama Department of Revenue in Montgomery and served in that position until he joined the U.S. Navy in 1942. Upon his discharge from the Navy at the end of World War II, he moved to Mobile and practiced law with Marion R. Vickers. Ed Thornton later formed a partnership with Nicholas S. McGowin in Mobile. In the practice of law, Mr. Thornton would usually agree but worried about young lawyers who asked him to consent to continuing cases so they could go turkey hunting.

Ed Thornton's service to the Mobile Bar Association is unmatched. He was president of the Mobile Bar in 1955. In 1966, he founded the *Mobile Bar Bulletin* and faithfully edited it for 25 years. The *Bar Bulletin* was indeed a labor of love. When, from time to time his strong editorial views would spark lively dissent, he enjoyed it and was known by a cub reporter to privately chuckle. He frequently reminded us in the *Bulletin* that what being a lawyer is all about is representing

clients. He was also known for his guest columns in the *Mobile Press Register* and "Letters to the Editor."

Ed Thornton served as president of the Alabama State Bar during the bar year 1963-64. The Alabama State Bar won an Award of Merit from the American Bar Association during Mr. Thornton's tenure as president. He also served the state bar as an associate editor of *The Alabama Lawyer*, and was a member of the House of Delegates of the American Bar Association.

Mr. Thornton loved the law. He collaborated on articles with renowned Alabama



law professor John C. "Black Jack" Payne, who had the highest regard for Mr. Thornton's scholarship. Mr. Thornton said, "Sometimes the law goes around things, and Jack Payne and I try to find ways to cut through the middle." He twice served as a special justice on the Alabama Supreme Court.

Ed Thornton was a patron of the arts. He served as the first president of the Mobile Arts Council in 1956 and later served as a director and as president of the Mobile Opera Guild in the early 1960s. Ed Thornton and Nick McGowin organized a series of string quartet concerts in Mobile which later evolved into the Mobile Chamber Music Society. Mr. Thornton served that society as president in 1972. He also served as chairman of the Forum Committee of the Mobile Chamber of Commerce in 1960 and has been featured in the *Who's Who in America* ever since 1965. In 1967, Mr. Thornton received the Medical Society of Mobile's Certificate of Merit for outstanding service.

During the 1950s and 1960s, Ed

Thornton was a staunch supporter of state's rights and was an influential member of Alabama's Democratic Party serving on the State Democratic Executive Committee. In 1963, Governor Wallace appointed him to serve on the Constitutional Law and State Sovereignty Committee formed to advise the Governor on questions of constitutional law.

Ed Thornton was a gentleman of the old school. Casual days were not observed at Thornton & McGowin. He always wore a suit with a tie and was never seen on the street without his hat. He had a strict exercise regimen, and his vigorous calisthenics program at the Health Club of the Athelstan Club made much younger men flinch. Mr. Thornton was also a member of the International Trade Club and the Bienville Club.

Ed Thornton was a faithful member of the First Baptist Church of Mobile. Mrs. Thornton is a member of Dauphin Way United Methodist Church, and they alternated between the two churches every other Sunday. Both Dr. James Walters of First Baptist and Dr. Steve Dill of Dauphin Way conducted Mr. Thornton's memorial service.

In addition to Mrs. Thornton, Ed Thornton is survived by his nieces, Peggy Clinton of Mobile, Mary Anne Edwards of Bessemer and Marilyn Reynolds of Meridian; nephews James Menger of Arizona, William Menger of Houston, Texas, and Duke Thornton of Missouri City, Texas; and brothers-in-law Robert Quinn of Silver Hill and Maurice Quinn of Memphis.

Now, therefore, be it resolved by the Mobile Bar Association that the association mourns the passing of John Edward Thornton, a lawyer's lawyer and a gentleman's gentleman, and does hereby honor the memory of our friend and fellow member who exemplified throughout his long career the highest professional principles to which the members of this association aspire. The Mobile Bar further requests that this resolution be spread upon the minutes of this association and of the Alabama State Bar and that copies of this resolution be presented to his family and to the editor of the *Mobile Bar Bulletin*.

—Cooper C. Thurber  
President, Mobile Bar Association



## Justice Oscar W. Adams, Jr.

I remember back in 1980 how pleased I was to hear that Governor Fob James had appointed Oscar W. Adams, Jr. to a vacancy on the Alabama Supreme Court. I applauded that appointment for several reasons. First, we had worked together on the Supreme Court's Advisory Committee on Rules of Criminal Procedure. Next, having known him for several years, I was well acquainted with his abilities as a lawyer. Finally, as an American of African descent who had distinguished himself as a believer in the American dream, he had served and would continue to serve as a role model for those willing to dedicate themselves to excellence and to focus on making a difference as he did.

When he retired in 1993, Justice Adams said: "I would like to be known as a progressive, fair, honest, hardworking servant of the people." With his 33 years of civil rights practice and 13 years on the bench, that is exactly how I remember him.

Justice Adams had a plan for his life and stayed with it. He had decided early on to become a lawyer, against the advice of his grandmother and friends. Moreover, after graduating from law school, he decided to return to his native Alabama in order to practice law, against the advice of some prominent public figures.

Justice Adams, I believe, expressed a lot about himself and about his philosophy about the role of law in our society in a special concurring opinion in *Beck v. Alabama*, 396 So.2d 645 (Ala. 1980), the case upholding Alabama's death penalty statute. Although he had several valid reasons for not participating in that controversial decision, including the fact that the



case had been orally argued and submitted 11 days before he was sworn in, he chose not to resort to any of the avenues of escape. "Escape was impossible," Justice Adams wrote, "because of the commitment I had made at the time of my assumption of this position, that I would place my imprimatur, no matter how perfect or imperfect, on every case that it was my responsibility to participate in. I further promised that I would bring the totality of my 33 years of experience as a practicing lawyer to bear on each decision."

In his special concurrence, Justice Adams alluded to some of the legal battles that he had waged to secure rights for his race, noting that at the time he was waging those battles, few black Alabamians served on juries, in law enforcement, in the legislature, and at all levels of the judicial system. He closed his opinion, noting that the more minorities "become enmeshed in meaningful positions in our society, then the more that society will become non-discriminatory," and that the goals and ideals of every person will

become identical with goals and ideals of the rest of society. "If a black man is allowed to go as far as his talents will carry him, he will not need special protection from the courts," he noted, continuing, "If he is not, the courts will once again be asked for special protection."

When I think of the legacy of Justice Oscar W. Adams, Jr., I focus on saying, "We write our own epitaph." His life shows that he desired no more than the opportunity to work hard, study hard, and achieve as much as his talents would allow. His journey culminated as a member of Alabama's Supreme Court. Each of us, it seems, could best pay tribute to Justice Adams by following his example—working hard, staying focused, and utilizing our own talents to take us just as far as we aspire to go.

—Justice Hugh Maddox  
Supreme Court of Alabama

Oscar W. Adams, Jr. was a remarkable man. If I were limited to one or two words to describe him, I would say that he was totally without bitterness. I once asked him how, as one who had experienced so much that is evil in man, he remained such a believer in the good in mankind. He answered only with a gentle smile, one that all of his family and friends saw so often.

Oscar was not allowed to attend the state colleges and universities, was not allowed to order food in public restaurants, and was not allowed to attend what few cultural events occurred in Alabama. Yet he was better educated than most of us, he had a greater appreciation for the world's finest foods and wine, and his

### Oscar W. Adams, Jr.

Birmingham

Admitted: 1947

Died: February 15, 1997

### James Noel Baker

Opelika

Admitted: 1949

Died: February 8, 1997

### James Willie Baker

Huntsville

Admitted: 1950

Died: September, 1996

### James H. Dodd

Birmingham

Admitted: 1951

Died: January 18, 1997

### Thomas Edward Lewis

Pensacola, Florida

Admitted: 1952

Died: February 14, 1996

### Ludlow Corley Martin

Vienna, Virginia

Admitted: 1964

Died: May 14, 1996

### William F. McDonnell

Sheffield

Admitted: 1932

Died: December 6, 1996

### Arlie Dale Price

Enterprise

Admitted: 1933

Died: October 27, 1996

### John Edward Thornton

Mobile

Admitted: 1934

Died: January 11, 1997

### Malcolm Lynch Wheeler

Birmingham

Admitted: 1940

Died: February 23, 1997



knowledge of music and literature was the envy of many.

Almost every Sunday, all over the world, Episcopalians pray: "Let not the hope of the poor be taken away." Oscar was not poor in any sense of the word. To the contrary, he was rich in family, heritage and friends, and rich in respect of all who knew him, and he never let anything or anybody take away his belief in the good of mankind and that, in the end, good will prevail. He shared this hope with me and I shall always be grateful.

**—Justice Janie L. Shores  
Supreme Court of Alabama**

When Justice Oscar W. Adams, Jr. was appointed to the Supreme Court of Alabama, he continued a course that embodied his life and his work. He was a trailblazer and had broken another barrier, one of many during the course of his life. Paraphrasing the dedication from Carol Rowan's book *Breaking Barriers*: "To that small, brave group of Americans who still chase dreams of racial justice, believing that only a fair sharing of opportunities can keep America healthy and free." Because Justice Adams believed so deeply that our state institutions, including our judiciary, could not reach their fullest potential without the participation of all of its citizens, this belief most likely undergirded his decision to share with his fellow Alabamians a part of his life in his service on the highest court of this state. We are grateful that he did.

Justice Adams brought a sense of quiet dignity to the Supreme Court of Alabama, yet at the same time was not a shrinking violet. He was a person of deep resolve and commitment. He had the abilities that all judges, trial and appellate strive for: to be on an even keel, to apply the law even-handedly, fairly and correctly. We knew him to be a person of quality and depth.

Oscar was an avid golfer. During my son's childhood years he loved to drive Oscar's golf cart while we played a round of golf during the annual circuit and district judges' meeting. He grew up calling Oscar the "Judges' Judge." While my son's reference was to Justice Adams' position on the supreme court, I knew

that intimation to be much, much deeper. Judges are called upon a daily basis to resolve disputes and controversies on a variety of issues, and Justice Adams was no different in that regard. Many times those issues are controversial and many times the decisions affecting those issues are controversial. It is a sought-after attribute among judges to be able to render decisions resolving controversial issues, yet, not to become embroiled in the dispute themselves. Justice Adams was such a judge and aptly referred to as the Judges' Judge.

He was my friend and yours and a friend to all Alabamians. He harbored a deep love for this state and its people and a belief that we should work together to improve the quality of life for all Alabamians. When he retired from the Supreme Court of Alabama, it was reported in the newspapers that he hoped to be remembered as a "progressive, fair, honest, hard-working servant of the people." He did much, much, more.

**—Justice Ralph Cook  
Supreme Court of Alabama**

I remember a lawyer just completing his first oral argument before the Alabama Supreme Court being asked to evaluate the argument. His response: "The only thing I remember is Justice Adams' questions. His voice seemed to roll up the side of the room and fall on me from above with a force like thunder and went straight to my knees. Thank goodness Justice Adams was kind enough not only to ask the question, but also provide the answer." Justice Adams' voice, though now silent, will remain in my mind forever. Truly that sound was what the poet envisioned to pen the title "God's Trombone." His command of the English language, both verbal and written, was incredible. I once saw him reduce an obnoxious, political pretender to a well-mannered wimp with two sentences.

I was fortunate, because of our friendship, on many occasions to listen to Justice Adams. Rarely did our discussions concern legal decisions; more often, we talked about the art of law,

the magnificence of life and the magic of human nature. Justice Adams displayed, admired and expected precision and integrity in thought, word and deed. I can never think of an occasion where he wasted a word. Throughout his life he embraced integrity and abhorred influence.

His love for his God, for his family, for his state, for the law, and for his friends was total. He and his beloved Anne-Marie are love personified.

He believed everyone could and should enjoy the pleasures created in life by gardening, cooking and music. On the other hand, he was adamant that roses, ribs and jazz were art forms not to be attempted by amateurs. I remember his saying, "How can a person be a good lawyer and not know how to cook? Every lawsuit must be prepared according to a recipe. The ingredients and timing are critical to the result."

Intellectually, he would take every issue, expose it to the light of truth and reason, turn it and slowly and carefully view it from every angle. Then, and only then, would he identify what he saw.

The loss of someone close is painful. On those occasions when I suffered such loss, he was my true friend and provided comfort in times of grief. His absence, as we struggle with this loss, makes us ever more mindful of the importance of his presence.

When he retired from the court and joined our firm, a dilemma was presented by the practice in our office of everyone being on a first-name basis. A young woman resolved the dilemma with the observation, "I thought his first name was Justice." It was.

Justice Oscar W. Adams, Jr.—lawyer, judge, friend. No cause could have a better champion; no issue could have a better person to determine resolution; and no person could have a better friend. While his voice is silent, his words, his wisdom, his special justice and his friendship remain forever.

**—J. Mark White  
Birmingham, Alabama**





## DISCIPLINARY NOTICE

### Disability

•Decatur attorney **Robert Foster Tweedy** was transferred to disability inactive status, effective February 7, 1997. Tweedy's transfer was ordered by the Supreme Court of Alabama pursuant to a prior order of the Disciplinary Board of the Alabama State Bar. [Rule 27; Pet. No. 97-01]

### Reinstatement

•Effective January 21, 1997, Midway attorney **Samuel Angus Lemaistre, Jr.** was reinstated to the practice of law. [Pet. No. 96-02]

### Disbarment

•Phenix City lawyer **Ralph Michael Raiford** consented to disbarment based upon his having been convicted of money laundering. Raiford was convicted in the United States District Court for the Middle District of Alabama, and thereafter executed a consent to disbarment. By order of the Supreme Court of Alabama, Raiford was disbarred effective January 24, 1997. [Rule 23(a); Pet. No. 97-02]

### Surrender of License

•Tuscaloosa attorney **James Dee Terry** surrendered his license to practice law in the State of Alabama and his name was stricken from the roll of attorneys in all courts of the State of Alabama by order of the Alabama Supreme Court dated January 24, 1997. Terry surrendered his license as a result of his plea of guilty in the Circuit Court of Tuscaloosa County to a charge of felony possession of a controlled substance in the first degree. [ASB No. 97-022]

### Suspensions

•On January 24, 1997, the Alabama Supreme Court issued an order suspending Mobile lawyer **Richard Russell Williams** for a period of 90 days to be followed by two years' probation. Restitution to three former clients in the total sum of \$12,069.28 was also ordered. This discipline was imposed in connection with three cases to which Williams entered guilty pleas of willfully neglecting legal matters entrusted to him. In ASB No. 95-031, Williams was hired to represent a client in a boundary dispute. An action to quiet title was drafted, but never filed. In the interim, the client was sued by the other party. In ASB No. 95-042, Williams was paid by a federal prisoner to file habeas corpus under Title 18, 2255 USC. The client paid Williams \$1,800 and the documents were drafted and sent to the client. After the documents were returned by the prison stamped "UNABLE TO IDENTIFY", Williams took no further action on the matter, assuming the client had somehow rejected the petition. In ASB No. 96-008, Williams collected \$4,000 from

a client whose disability payments had been stopped because of past overpayment of benefits. After receiving the money from the client nothing was done to resolve the problem. The client was advised by the insurance carrier that they had never been contacted by Williams or anyone in his employ. [ASB Nos. 95-031(A), 95-042(A), 96-008(A)]

•On January 15, 1997, the Supreme Court suspended Decatur attorney **John W. Self** from the practice of law in the State of Alabama for a period of 91 days. The suspension was ordered to be effective November 4, 1996, when the Disciplinary Board of the Alabama State Bar entered its order finding Self guilty of engaging in conduct prejudicial to the administration of justice and conduct that adversely reflects on his fitness to practice law. This finding was based upon Self's conduct during the trial of a case in the circuit court of Jefferson County, Alabama, wherein Self filed several pleadings accusing opposing counsel and the trial court judge of unethical conduct. It was determined that these pleadings were filed in bad faith and without factual support. [ASB No. 91-500]

•Montgomery attorney **Habib Ollah Yazdtchi** was suspended from the practice of law for 90 days and placed on probation for a period of two years for having violated the Rules of Professional Conduct of the Alabama State Bar. Yazdtchi pled guilty to the formal charges filed against him which alleged that during a deposition in a divorce proceeding Yazdtchi took a loaded pistol from his briefcase and pointed it in the direction of his wife and wife's counsel while making certain remarks or threats to them. As a condition of his guilty plea Yazdtchi was required to undergo psychological counseling for a period to be determined by the Office of General Counsel. Yazdtchi has now completed the prescribed counseling and is in compliance with the other terms of his probation. [ASB No. 95-246]

•Columbus, Georgia attorney **Jean Carleen Marcantonio** was intermily suspended from the practice of law by order of the Alabama Supreme Court dated February 13, 1997. Marcantonio was licensed in Georgia and in Alabama. The interim suspension of her Alabama license was imposed reciprocally as a result of Marcantonio's being suspended intermily by the Supreme Court of Georgia. The Georgia court found that Marcantonio had failed to maintain a trust account, failed to keep records indicating the balance held for each client and commingled trust account funds with other funds. The court further found that Marcantonio failed

*(Continued on page 155)*

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or refused to pay over the appropriate governmental entity the monies she withheld from employees for tax purposes. [Rule 20(a); Pet. No. 96-11]

### Public Reprimands

• Alabaster attorney **James Raymond Kramer** was given a public reprimand without general publication on February 7, 1997. Kramer was found to have violated Rule 1.5(A) of the Rules of Professional conduct which provides that, "A Lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee." In July 1994 Kramer was employed by a client to obtain a name change for the client's minor daughter. Kramer charged the client for a greater amount of time than it reasonably should have taken to accomplish the task for which he was hired. Kramer also charged the client for expenses which he had not incurred, including a filing fee which he had previously paid directly to the court. Kramer also charged attorney's fees for clerical functions which should have been performed by a non-lawyer member of his staff. [ASB No. 95-329]

• On February 7, 1997, Huntsville attorney **Carter Alan Robinson** received a public reprimand without general publication. This reprimand was based on a finding by the Disciplinary Commission of the Alabama State Bar that Robinson had violated Rules 1.4(a), 1.16(a)(3) and (d), 8.1(a), and 8.4(a) (c) and (g), Alabama Rules of Professional Conduct. The discipline was imposed in connection with Robinson's representation of a criminal defendant wherein he failed to promptly comply with reasonable requests for information, failed to surrender papers to which the client was entitled upon termination of representation and knowingly made a

false statement of material fact in connection with a disciplinary matter. [ASB No. 96-239]

• On February 7, 1997, Mobile attorney **Lynn Christie Miller** received a public reprimand without general publication. This reprimand was the result of a guilty plea to violating Rule 8.4(b), Alabama Rules of Professional Conduct, which provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on her fitness as a lawyer. On May 2, 1996, Miller pled guilty in the United States District Court for the Southern District of Alabama to tax evasion in violation of 26 U.S.C. 7201. These criminal charges arose from her involvement in certain financial transactions with SAMCO, Inc. during 1990 and her failure to report as income monies received from this company. The Disciplinary Commission determined that her conduct violated Rule 8.4(b), A.R.P.C. and warranted discipline pursuant to Rule 22(a)(2), Alabama Rules of Disciplinary Procedure. [Rule 22; Pet. 96-05]

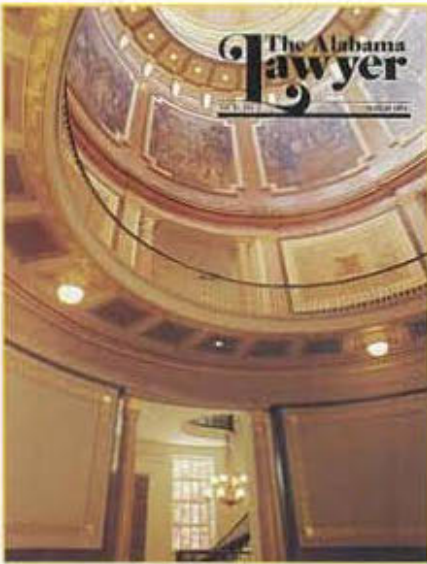
• On March 14, 1997, Greenville attorney **Edward Spurgeon Brown** received a public reprimand without general publication. In the 15 months that Brown represented a divorce client, he billed her for over \$11,000 in fees and expenses. While the agreement had been for an hourly rate of \$85, Brown billed her \$100 an hour. An amount of \$1,500 was billed for time in meetings and conversations with an investigator who had been hired and paid directly by the client. The investigator states that he only met or talked with Brown on two occasions. The disciplinary commission determined that Brown had collected an excessive fee. In addition to the reprimand, Brown was ordered to make restitution in the amount of \$2,000 which he has paid. [ASB No. 95-183(A)] ■

## NEW IOLTA PARTICIPANTS

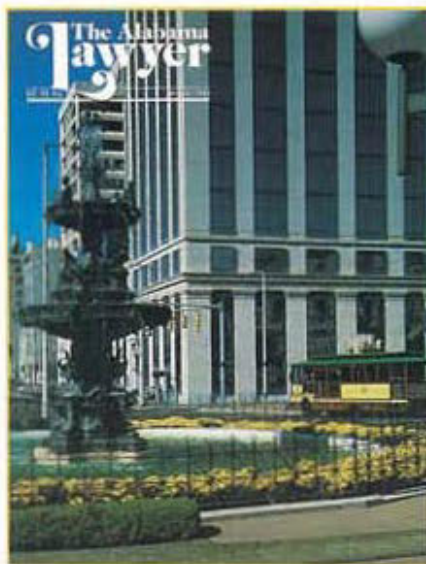
### January

Bell Richardson, Huntsville  
Stephen Parmly Brown, Birmingham  
Brown & Reeves, Decatur  
Burgess & Hale, Birmingham  
Velma D. Carr, Birmingham  
Dawson, McGinty & Parker, Scottsboro  
Robert C. King, Monroeville  
Catherine C. Love, Auburn  
A. Gregg Lowrey, Pelham  
Honorable Hartwell B. Lutz, Brownsboro  
Greg Morris, Fultondale  
William H. Robertson, Eufaula

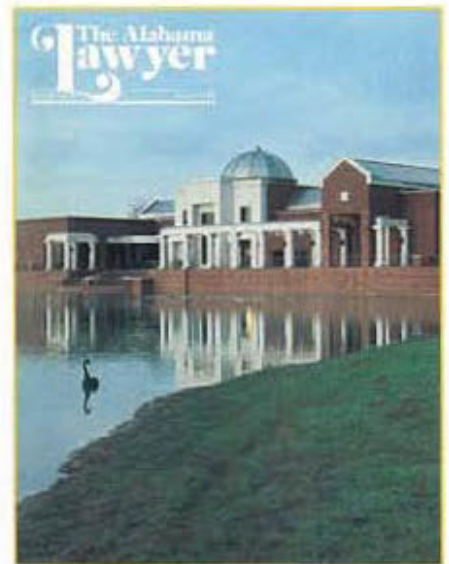




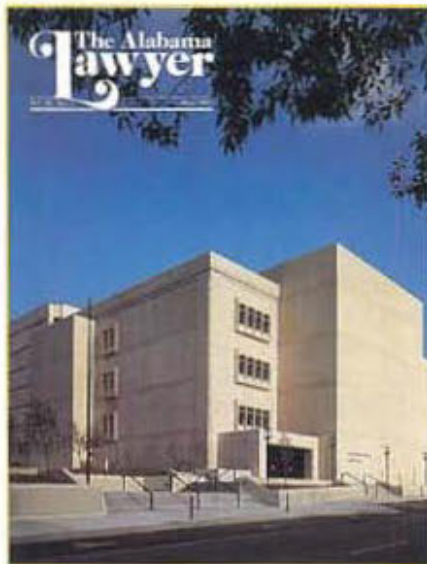
*The Alabama Capitol rotunda*



*The Court Street Fountain*



*The Montgomery Museum of Fine Arts*



*The Montgomery County Courthouse*



*The Alabama State Capitol*



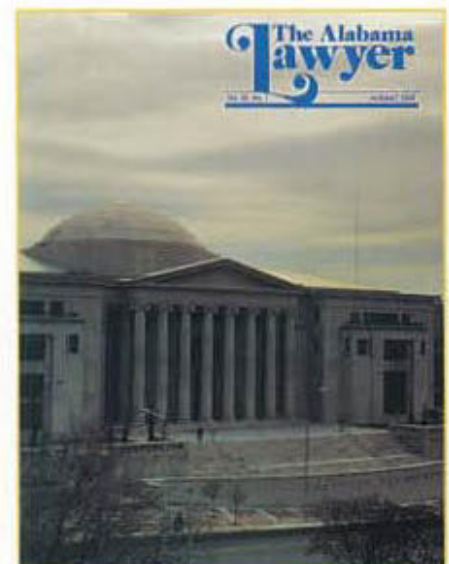
*The Supreme Court of Alabama*



*The Alabama Shakespeare Festival*



*The Civil Rights Memorial*



*The Judicial Building*



ALABAMA STATE BAR



COMING HOME TO  
MONTGOMERY

Alabama State Bar  
120th ANNUAL MEETING

July 16-19, 1997 • Montgomery







## Celebrate the Past — Welcome the Future

*Members of the Alabama State Bar "come home" to the capital city of Montgomery for this year's annual meeting — after an absence of 30 years. As site of the bar exam and location of state bar headquarters, Montgomery is a familiar place to Alabama attorneys. In the last 30 years, many changes have occurred — and certainly more are on the way. The Alabama State Bar strives always to encourage, motivate and prepare its members for the legal profession of today — and tomorrow. Perhaps this is also the time to remember the great lessons of the past as well, for it has been said that "unless you know where you have been, you cannot know where you are going." From "nuts and bolts" to stress management techniques to law office technology and cutting edge ideas, innovative CLE programming and outstanding speakers offer each ASB member the opportunity to join colleagues from across Alabama to "celebrate the past and welcome the future" together!*

**WELCOME HOME!**

## A Capitol Evening

It will be a perfect evening to walk or take a trolley down Dexter Avenue and make three stops to see the differences that 30 years have made in the beautifully restored capitol, the impressive new judicial building and the spacious



remodeling of the Alabama State Bar headquarters. Each location will feature one of Montgomery's finest caterers showcasing their culinary creations and entertainment will range from jazz to classical.

## An Evening Of The Arts

### MONTGOMERY MUSEUM OF FINE ARTS

The exquisite Montgomery Museum of Fine Arts provides the perfect setting for this year's membership reception. You'll enjoy the art, the artistry of "New South Jazz", the creative cuisine and the captivating charm of the complete Alabama Shakespeare Festival complex. After the reception, wander through the



sculptures and statuary of the grounds or attend a performance at one of the world-famous Alabama Shakespeare Festival theaters.

### ALABAMA SHAKESPEARE FESTIVAL

**ASF**

A limited number of ASF tickets are avail-

able for ASB Annual Meeting attendees for Friday, July 18, 1997. Tickets are available for "GHOSTS" (in the Octagon) or "MACBETH" (on the Festival Stage). Special group rates of \$20 (plus \$1.75 tax) apply only if you identify yourself as an ASB MEMBER. RESERVATIONS MUST BE MADE DIRECTLY WITH ASF AT 1-800-841-4273 or (334) 271-5353. Curtain time is 8 p.m., following the ASB reception at the Museum of Fine Arts. No exchanges or refunds can be made.





# PROGRAM HIGHLIGHTS

The following is a partial list of topics that will be incorporated into the two-day program.  
A final schedule will be mailed to the membership at a later date.

## SECTION PROGRAMS

- Updates/Developments in Workers' Compensation Issues
- Updates in Disability Law
- Administrative Due Process: "Hold 'Er, Newt, She's Headed for the Barn"
- Meet the Environmental Regulators: ADEM
- Avoid Malpractice in Criminal and Employment Practice: The Immigration Act of 1996
- The Dog That Caught the Car: "The Realities of Arbitrating Employment Discrimination Claims"

## TECHNOLOGY ISSUES

- *law practice.com*: "A Practical Guide to the Internet"
- Let's Get Technical: Cyberspace Law
- Incorporating Technology in Your Practice

## SOLO AND SMALL FIRM ISSUES

- Practice Management for Solo and Small Firms
- Fourteen Things I Wish I Had Learned During My First Year of Practice
- Pay Up: Getting Clients to Pay Your Fees Without Suing Them
- Rx for Trouble

## NUTS AND BOLTS TOPICS

- **BACK BY POPULAR DEMAND: "Law—The Basics"**  
Presented by the Committee on Access to Legal Services.  
Topics include Divorce and Custody, Guardianship and Conservatorship, Bankruptcy (Chapter 7), Debt Collection, Powers of Attorney and Will Drafting, and Estate Administration. (3.0 hours CLE)

- **A NEW SEMINAR: "A-Z: Nuts and Bolts of State Court Practice"**  
Presented by the Alabama Lawyers Association, featuring Supreme Court Justice Ralph Cook and former Circuit Judge Kenneth Simon (2.0 hours CLE)

## TENTATIVE SCHEDULE

**WEDNESDAY: July 16, 1997**

1:00 - 5:15 P.M.

**CLE Summer School for Attorneys**  
Topics include updates and trends both of substantive and practical nature (4.0 CLE hours)

**THURSDAY: July 17, 1997**

8:30 - 12:30 P.M.

Plenary, Break-out and Section Meetings

2:00 - 5:00 P.M.

Break-out and Section Meetings

**Thursday, 12:30 - 2:00 P.M.**

Bench and Bar Luncheon

**FRIDAY: July 18, 1997**

8:30 - 12:30 P.M.

Plenary, Break-out and Section Meetings

2:00 - 5:00 P.M.

Break-out and Section Meetings

**Friday, 7:30 - 9:00 A.M.**

Rise and Shine, Early Bird CLE Workshops

**Friday, 12:30 - 2:00 P.M.**

Alumni Luncheons

**SATURDAY: July 19, 1997**

8:30 - 9:15 A.M.

Annual Committee/ Task Force Breakfast

9:30 - Noon

Grande Convocation and Annual Business Meeting

## LEGAL EXPO '97

Visit with vendors  
and register to win  
outstanding prizes.



## CUTTING-EDGE TOPICS

- **Update: Fraud and Punitive Damage Issues in Alabama**
- **"Deflection" of Cases to the Court of Civil Appeals**
- **Updates in Federal Law and Practice**
- **At a Crossroads: The First Amendment, Title VII and EEOC Regulations**
- **An Interplay of First Amendment Clauses: Free Speech, Free Exercise and Establishment**
- **The Challenge of Counsel at Homewares Corporation, USA**  
*Interactive video discussion concerning problems faced by practicing lawyers*
- **Rita's Case: The Lawyer as a Problem-Solver**  
*Video and panel discussion: comparison of two different styles of lawyer counseling in a complex custody case*
- **Looking for a Normal Lawyer: The Slippery Slope Toward Impairment — Where Are You?**  
*Clinical psychologist discusses the profile of a well-adjusted professional.*

### PROGRAMS AND SPEAKERS

#### BENCH & BAR LUNCHEON

Myron H. Thompson, chief judge,  
U.S. District Court, Middle District of  
Alabama, Montgomery, Alabama

#### PLENARY SESSIONS:

##### MIRTHMAKING — The Relationship- Enhancing, Stress-Busting, and Psychological Value of Humor

Mark Mayfield, national motivational  
speaker, Kansas City, Missouri

##### A LOOK BACK...A LOOK AHEAD

Warren B. Lightfoot, ASB president,  
moderator

Former Supreme Court Chief Justices:  
Howell Heflin; C.C. "Bo" Torbert;  
Ernest C. "Sonny" Hornsby

##### GRANDE CONVOCATION

Officer installations, bar recognitions  
and more . . .

### ALTERNATIVE DISPUTE RESOLUTION

- Divorce Mediation
- Tips for Seasoned Mediators
- Update '97: ADR in Alabama and National Trends



# REGISTRATION



## Alabama State Bar 120th ANNUAL MEETING July 16-19, 1997 • Montgomery

### ADVANCE REGISTRATION

Mail registration form and check to:  
1997 Annual Meeting, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101.

**ADVANCE REGISTRATION FORMS MUST BE RECEIVED  
NO LATER THAN JUNE 16, 1997.**

For information on registration, call (334) 269-1515.

### HOTEL RESERVATIONS

Hotel room reservations for  
**Embassy Suites are to be made through the Alabama State Bar.**  
(All sessions of the annual meeting will be held  
at the Embassy Suites or Montgomery Civic Center.)

Hotel reservations for the  
**Holiday Inn of Montgomery should be made DIRECTLY with Holiday Inn**  
by calling 1-334-264-2231.



# Alabama State Bar 120TH ANNUAL MEETING

July 16-19, 1997 • Montgomery, Alabama

## HOTEL RESERVATION FORM

PLEASE PRINT



### MONTGOMERY HOTEL RESERVATIONS

Hotel room reservations for **Embassy Suites** are to be made through the **Alabama State Bar**. (All sessions of the annual meeting will be held at the Embassy Suites or Montgomery Civic Center.) Hotel reservations for the **Holiday Inn of Montgomery** should be made **DIRECTLY** with **Holiday Inn** by calling 1-334-264-2231.

### EMBASSY SUITES HOTEL RESERVATION REQUEST

THE HOTEL RESERVATION FORM MUST ACCOMPANY YOUR ANNUAL MEETING REGISTRATION FORM.

To ensure that you receive the guaranteed room rate, you must reserve your room **no later than June 16, 1997**.

Name \_\_\_\_\_

Address \_\_\_\_\_

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

Firm \_\_\_\_\_ Daytime Telephone \_\_\_\_\_

Arrival Day/Date \_\_\_\_\_ Departure Day/Date \_\_\_\_\_

Number of Rooms \_\_\_\_\_ Number of Adults \_\_\_\_\_ Number of Children \_\_\_\_\_

Rate includes a complimentary cooked-to-order breakfast each morning as well as a complimentary Manager's Reception each evening. The special rate is for single or double occupancy and applies to double or king suites. All rooms are suites and are \$99. Although specific room type cannot be guaranteed, every effort will be made to accommodate special requests.

#### CHECK THE ROOM TYPE PREFERRED:

☐ Double ☐ King  
☐ Smoking ☐ Non-smoking

In order to confirm this reservation request, a deposit equal to one night's room rate is required.  
Please enclose your check or money order, or provide credit card information below:

#### PLEASE BILL MY CREDIT CARD:

☐ VISA ☐ MasterCard ☐ American Express ☐ Diner's Club ☐ Carte Blanche ☐ Discover

Card No. \_\_\_\_\_ Expiration Date \_\_\_\_\_

Cardholder's Signature \_\_\_\_\_

PLEASE MAKE CHECKS PAYABLE TO EMBASSY SUITES. Do not send currency.

#### CANCELLATION POLICY:

You will be charged for the first night if reservations are not canceled 48 hours prior to arrival.

CHECK-IN TIME: 3:00 p.m.

CHECK-OUT TIME: Noon



# Alabama State Bar 120TH ANNUAL MEETING

July 16-19, 1997 • Montgomery, Alabama

## ADVANCE REGISTRATION

PLEASE PRINT



NAME (as you wish it to appear on name badge) \_\_\_\_\_

Check categories that apply: ☐ Bar Commissioner ☐ Local Bar President ☐ Justice/Judge

OFFICE PHONE \_\_\_\_\_

ADDRESS \_\_\_\_\_

CITY \_\_\_\_\_ STATE \_\_\_\_\_ ZIP \_\_\_\_\_

SPOUSE/GUEST NAME \_\_\_\_\_

### REGISTRATION FEES

#### Advance Registration

	By June 16	After June 16	Fees
<input type="checkbox"/> Alabama State Bar Members .....	\$130.00 .....	\$175.00 .....	\$ .....
<input type="checkbox"/> Full-time Judges .....	\$ 65.00 .....	\$ 87.50 .....	\$ .....
<input type="checkbox"/> Attorneys admitted to the bar five years or less .....	\$ 65.00 .....	\$ 87.50 .....	\$ .....
<input type="checkbox"/> Non-Member (does not apply to spouse/guest of registrant) .....	\$300.00 .....	\$300.00 .....	\$ .....
<b>TOTAL REGISTRATION FEES .....</b>			<b>\$ .....</b>

### OPTIONAL EVENT TICKETS

#### Thursday, July 17, 1997

	No. of Tickets	Cost
Bench & Bar Luncheon .....	@ \$16.50 each .....	\$ .....
"A Capitol Evening" .....	@ \$30.00 each .....	\$ .....

#### Friday, July 18, 1997

Christian Legal Society Breakfast .....	@ \$15.00 each .....	\$ .....
Farrah Order of Jurisprudence/Order of the Coif Breakfast .....	@ \$12.00 each .....	\$ .....
University of Alabama School of Law Alumni Luncheon .....	@ \$20.00 each .....	\$ .....
Cumberland School of Law Alumni Luncheon .....	@ \$15.00 each .....	\$ .....
Jones School of Law Alumni Luncheon .....	@ \$14.00 each .....	\$ .....
Birmingham School of Law Alumni Luncheon .....	@ \$15.00 each .....	\$ .....
"Evening of the Arts" Reception .....	@ \$35.00 each .....	\$ .....

**TOTAL EVENT TICKETS .....** \$ .....

**TOTAL FEES TO ACCOMPANY FORM \$ .....**

Appropriate payment must accompany registration form.  
Payment by check is requested.

Mail registration form and check to: 1997 Annual Meeting,  
Alabama State Bar, P.O. Box 671, Montgomery, AL 36101.

**ADVANCE REGISTRATION FORMS MUST BE RECEIVED  
NO LATER THAN JUNE 16, 1997.**

Cancellations with full refunds may be requested  
through noon, Wednesday, July 9, 1997.

For information on registration, call (334) 269-1515.

### MONTGOMERY HOTEL RESERVATIONS

Hotel room reservations for **Embassy Suites** are  
to be made through the Alabama State Bar.  
(All sessions of the annual meeting will be held  
at the Embassy Suites or Montgomery Civic  
Center. Hotel reservations for the **Holiday Inn  
of Montgomery** should be made **DIRECTLY**  
with **Holiday Inn** by calling 1-334-264-2231.





# A Look Back... A Look Ahead...

## THE PLACE

### Then . . .

- 90th Annual Meeting
- July 20-22, 1967
- Whitley Hotel, Montgomery

### Now . . .

- 120th Annual Meeting
- July 16-19, 1997
- Embassy Suites, Montgomery

## THE SCHOOLS

### Then . . .

- Alabama School of Law
- Cumberland School of Law

### Now . . .

- Alabama School of Law
- Cumberland School of Law
- Birmingham School of Law
- Jones School of Law
- Miles College of Law

### Then . . .

#### Young Lawyers' Section Birthday Party

"After the convention adjourned, the rugged youth of our association took themselves to the country for a late evening and night affair. A blaring orchestra disquieted the sylvian scene with sounds hideous to me but music to the ears of the young, who were driven by it to all sorts of contortions, hopping and gyrations, which some referred to as dancing."

— John B. Scott  
1967 Annual Convention Report

## THE PEOPLE

### Then . . .

- **President:** Robert E. Steiner, III, Montgomery
- **President-elect:** James E. "Red" Clark, Birmingham
- **Secretary:** John B. Scott
- **General Counsel:** William H. Morrow, Jr.
- **Director, CLE:** Douglas Lanford
- **Young Lawyers' President:** Bert S. Nettles
- **Montgomery County Bar President:** Harry D. Cole

### Now . . .

- **President:** Warren B. Lightfoot, Birmingham
- **President-elect:** S. Dagnal Rowe, Huntsville
- **Secretary:** Keith B. Norman
- **General Counsel:** J. Anthony McLain
- **Director, CLE:** Edward M. Patterson
- **Young Lawyers' President:** Andy D. Birchfield, Jr.
- **Montgomery County Bar President:** William R. Blanchard, Jr.

### Some Things NEVER Change . . .

*"The times demand adjustment and change as we seek to serve . . . in this age of technology and specialization."*

— Editor's Page,  
*The Alabama Lawyer*, Vol. 28, No. 4, 1967

## THE EVENTS

### Then . . .

- **Reception Location:** Whitley Hotel
- **Showing of Outstanding Film:** ABA's "The Revocable Trust — An Essential Tool"
- **Section Meetings**  
**Humorous Speaker:** Shearenus Elebashus "Dominus Musarum"

### Now . . .

- **Reception Location:** Museum of Fine Arts
- **Showing of Outstanding Film:** ASB's "To Serve The Public"
- **Section Meetings**  
**Humorous Speaker:** Mark Mayfield  
"Reduce Stress In Your Life — LAUGH!"





1997  
ANNUAL  
MEETING

JULY  
16 - 19  
1997

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Fellow State Bar Members:

On behalf of the MCBA membership, let me be the first to welcome our neighbors in the state bar back to Montgomery. Speaking as a native Montgomerian I can tell you from personal experience that you and your family will not lack for things to do and see while you are here with us.

For starters, Montgomery is a city with a proud history and many links to the past. While downtown you can visit the historic State Capitol Complex, Archives and History Museum, and the "Little White House" of the Confederacy. Walk just a few blocks, and you find yourself in Old Alabama Town, where you can get a sense of how people lived and worked in the Alabama of the 1800s. Just a short walk from the new Embassy Suites Hotel, you will find historic Union Station and an expanding riverfront area. You may want to cruise the Alabama River on the riverboat "Betsy Ann".

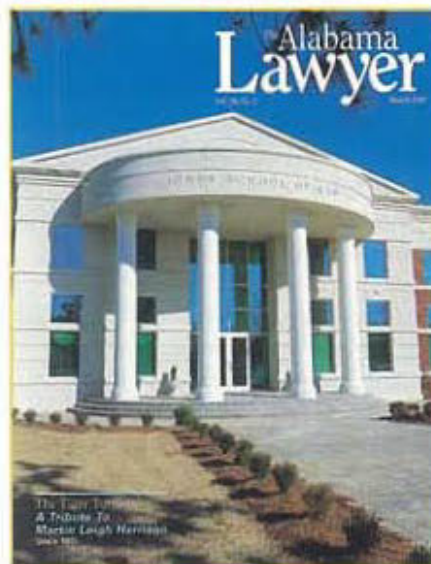
As you all know, Montgomery was also the hub of Civil Rights activity in this century. A short distance down Dexter Avenue from the State Capitol you will find the Dexter Avenue King Memorial Baptist Church. Just a few blocks away from the church there is a stirring memorial to the Civil Rights Movement designed by Maya Lin, who also designed the Vietnam Memorial Monument in Washington, D.C.

There are many, many, other areas of interest in Montgomery, such as the Hank Williams Memorial, The Zelda and Scott Fitzgerald Museum, and our newly renovated zoo, in which many of the animals are housed and displayed in areas approximating their natural habitats. Finally, I would be remiss if I failed to mention the Blount Cultural Park, which contains the Alabama Shakespeare Festival and Montgomery Museum of Fine Arts. Many consider the park to be among Montgomery's crowning jewels.

Of course, Montgomery has a number of fine restaurants and night spots for your dining and evening entertainment. I know that the members of the Montgomery County Bar Association are as proud of their city as I am, and we look forward to this opportunity of sharing it with you.

Yours very truly,

WILLIAM R. BLANCHARD  
President, MCBA



Jones School of Law



The Alabama State Bar Headquarters





## RECENT DECISIONS

By Wilbur G. Silberman

### BANKRUPTCY

#### Eleventh Circuit excludes IRA from debtor's estate

*In re Meehan*, 102 F.3d 1209 (11th Cir. Jan. 8, 1997). In this chapter 7 case, the debtor contended the IRA funds were excluded from her estate under Bankruptcy Code §541(c)(2). The bankruptcy court and district court held for the trustee. The Eleventh Circuit reversed. The debtor had contended that under §541(c)(2) a restriction on transfer of a beneficial interest in a trust, enforceable under non-bankruptcy law, is likewise enforceable in bankruptcy, even if not true as to other restrictions. Debtor argued that under Georgia law, funds from an IRA are exempt from a garnishment. The trustee reasoned that this should not apply in bankruptcy because the restriction was not a part of the trust document, that the debtor had access to the funds for personal use, and that the restriction applied only to creditors.

The appellate court was unwayed. It said that the plain meaning of the words require only that the restriction be "enforceable under applicable non-bankruptcy law." Section 541(c)(2) reads:

A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

It determined that the words "in a trust" modify the words "beneficial interest of the debtor" and do not modify the word "restriction" (see f.n. 5 in the opinion). In relying upon *Patterson v. Shumate*, 112 S.Ct. 2242 (1992), the court disposed of the contention that it would be inequitable to allow the debtor to invade the trust. The Supreme Court in *Patterson v. Shumate* held that even though Shumate exercised considerable control over the trust, a creditor could not attach the fund. Thus, the Eleventh Circuit now holds that under Georgia law, an IRA trust fund is inviolate to a bankruptcy trustee.

**Comment:** The Alabama lawyer should review the opinion of Bankruptcy Judge Stilson in *In re Harless*, 187 B.R. 719 (1995). In his opinion, Judge Stilson referred to the lower court opinion in *Meehan* for authority that §547(c)(1) was not helpful to the trustee, but then ruled the fund was exempt, not under §547(c)(1), but because Alabama Code Section 19-3-1 provides an enforceable exemption. Apparently the Eleventh Circuit saw no reason to distinguish between exemption and restriction. We quote from the opinion in setting out the sections of Georgia law applicable:

Funds or benefits from an individual retirement account as defined in Section 408 of the United States Internal Revenue Code of 1983, as amended, [are] exempt from the process of garnishment until paid or

otherwise transferred to a member of such program or beneficiary thereof. (emphasis supplied)

The Court followed this quotation by referring to the Georgia statute as a *restriction* on alienation of the IRA funds.

#### On fraud exception to discharge, Eleventh Circuit accepts "receipt of benefits" as complying with §523(a)(2)A—Debtor does not have to individually receive fruit in order to have debt excepted from discharge

*In re Paul A. Bilzerian*, 100 F.3d 886 (11th Cir. Dec. 3, 1996). In this first impression case in the Eleventh Circuit, the Court held that it was not necessary for the debtor to obtain directly money or property in question, but that the discharge could be excepted if the debtor received benefits from the transaction.

A fraud case was brought against Bilzerian in the Texas U.S. District Court with an allegation that Bilzerian, by misrepresentations, induced some \$20 million to be invested in a limited partnership. In the Texas district court, the jury decided that Bilzerian was guilty of actual fraud and awarded almost \$27 million in compensatory damages and over \$1 million in punitive damages. Bilzerian then filed chapter 7 in Florida. The bankruptcy court held that the debtor was collaterally estopped from litigating the fraud question even though the money involved in the fraud did not go directly to the debtor but rather to the corporation in which the debtor had a beneficial interest. The debtor argued that he was entitled to a summary judgment because collateral estoppel should not apply since the Texas court did not actually litigate the



**Wilbur G. Silberman**

Wilbur G. Silberman, of the Birmingham firm of Gordon, Silberman, Wiggins & Childs, attended Samford University and the University of Alabama and earned his law degree from the University's School of Law. He covers the bankruptcy decisions.



issue. The bankruptcy court granted the summary judgment in favor of the debtor basing its decision upon the theory that evidence did not show that the debtor individually obtained any money by reason of the alleged fraud. On appeal, the Florida district court reversed the bankruptcy court stating that §523(a)(2)A requires only that the debtor receive a benefit, which may be indirect as well as direct, and further that the issue was litigated in the Texas court, which would allow collateral estoppel to apply.

The Eleventh Circuit affirmed the district court on both issues. It first stated that this was a matter of first impression in the Eleventh Circuit; there was a divergence in the courts as to whether a debtor must personally receive money before the exception to discharge can apply. However, it further stated that three circuit courts had adopted the "receipt of benefits" theory, and that no circuit courts had held otherwise. The Eleventh Circuit, in adopting the "receipt of benefits" theory, said that to hold otherwise would be a dangerous incentive for a sophisticated debtor to evade the provision as a shell corporation could be created to receive the fruits of the fraud. It then commented on the collateral estoppel concept and repeated from prior cases the elements which must be present, to-wit: (1) issues are identical, (2) that the bankruptcy issue actually was litigated in the prior action, (3) that the issue was a critical and necessary part of the judgment in the litigation, (4) that the burden of persuasion in the discharge proceeding in bankruptcy must not be significantly more than that in the initial action. It held that all of these elements were met in this case and therefore, collateral estoppel applied.

**Comment:** The court, in its opinion, admitted that courts should narrowly construe exceptions to discharge against the creditor and in favor of the debtor, but held that the statute in question did not in any way require that the debtor directly receive the benefit.

**Eighth Circuit allows attorney fees to oversecured creditor, (even though prohibited by state law)**

*In re Schriock Construction, Inc.* 104 F.3d 200 (Eighth Cir. Jan. 8, 1997). The secured lender was over-secured by approximately \$600,000. Under Bankruptcy Code Section 506(b) it sought reimbursement of attorneys fees of \$38,052.63. The security agreement did not provide for reimbursement of attorney fees, but did provide for "all costs of collection including expenses." Collection fees are not allowable under North Dakota law, and using this as a basis, the trustee objected to any allowance. The Bankruptcy Court and District Court sustained the objection. The Court of Appeals first referred to *U.S. v. Ron Pair Enters, Inc.*, 109 S.Ct. 1026, 1030 which held that in the absence of agreement, post-petition interest is the only additional recovery allowed—that to obtain attorneys fees under 506(b) the creditor must show (1) it is over-secured in excess of requested fees; (2) the fees are reasonable, and (3) fees are provided for under the agreement. The court in interpreting 506(b) and reviewing legislative history determined that bankruptcy law trumps state law, that there is no need to consider state law,

and that the agreement was broad enough to provide for "recoupment of attorneys' fees in bankruptcy proceedings".

**Comment:** The salient point in this case is that the state law is ineffective to prevent attorneys' fees allowances under 506(b). Conversely it would appear that reasonableness would not be according to state law or precedent, e.g. allowance of stated percentages, but that "reasonableness" would have to be proved in every instance where attorney fees are sought.

**Query:** Does this mean that the fee should be proven in the same manner as required by the attorneys for a debtor or trustee? ■

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# Elder Law: Pitfalls for the Unwary

**D**ick Brown, an attorney with a general practice in a small Alabama town, always looked over the day's appointment schedule the first thing each morning before he left for the courthouse. This morning he noticed that his secretary had scheduled an appointment at 3 p.m. with Elaine Morgan. "Elaine Morgan," Dick thought to himself. "Why, I haven't seen her more than three or four times since we graduated from high school 30 years ago. I wonder what she wants me to do for her."

Dick asked his secretary what Elaine had said when she called. "Something about her mother" was the reply. This certainly didn't give Dick much to go on, but in his busy practice, he often went into appointments without much of a clue what questions were going to be raised. Most people in his community knew he was a general practitioner who did a good bit of probate work, drafted wills, went to divorce court, family court, debtors court, handled simple real estate transactions, and generally tried to handle whatever walked in the door. He certainly would do his best for Elaine, as he had done throughout his more than 20 years of practice.

After a hectic day at court and two earlier appointments that involved rather nasty divorces, Dick finally looked up to see Elaine Morgan, a little plumper than in high school and now graying, walk into his office. He was surprised to see a parade of people with her. He rose to greet her.

"Elaine, it's been a long time since our high school days, hasn't it? How is life treating you?" he said, holding out his hand and shaking hers. "And who have you brought with you here?" He again extended his hand to greet a man probably three or four years younger than himself and the woman who stood closely by his side. Another couple stood behind them. Elaine introduced the two couples, reminding Dick that he knew her younger brother, Billy, and her sister, Evelyn, who had come with their spouses.

"I believe we need to move to our conference room so we'll all have a place to sit," he said as he led the way.



*By Patricia B. Rumore*

After getting the whole crowd situated, he again faced Elaine. "What can I do for you?" he began.

"Well, Dick, My next-door neighbor suggested that we come to an attorney immediately because Mother is in the hospital and it looks like she's going to need to go to a nursing home. He says we should get all her assets transferred out of her name so she can qualify for Medicaid. And I think I should be appointed her guardian or whatever, since I'm the one who takes care of her all the time." This last statement seemed to irritate the others.

Dick was totally unfamiliar with Medicaid. He knew that getting a guardianship was a time consuming and expensive approach to things. Durable powers of attorney were cheaper and more flexible if the person giving the power was competent to give it.

Before Dick could comment, Billy said, "I think Mom should give each of us \$10,000 so there won't be any gift taxes to pay. I also think my name should be added to her checking account since

I'm an insurance agent and know all about business." Dick wondered about Billy's business acumen since he could not imagine that Mrs. Morgan's estate was large enough that either gift taxes or estate taxes were an issue, but perhaps he was jumping to conclusions.

He did know that adding an adult child to a checking account could cause problems if that child got in trouble with creditors, since the account would be subject to creditor claims. It could also be the possible subject of a property division if the adult child should be party to a divorce. So he would not advise this course of action.

"Well, I have three children," said Evelyn, "and I could use her house. I think y'all can take the money and give me the house."

Dick knew that if Mrs. Morgan gave her house away, the person receiving the gift would also get Mrs. Morgan's basis in the house for capital gains tax purposes. It would be better if Mrs. Morgan sold the house so she could use the one-time capital gains tax exclusion of up to \$125,000 available to her because



she was over 55 years old. Or she could leave it to someone in her will; in this way the beneficiary would receive the house with a basis stepped up to current market value.

Before Dick could organize these thoughts into comments, a shouting match started between the siblings, including the spouses, everyone throwing in their opinion about how Mrs. Morgan's assets should be divided.

"What does your mother want to do?" Dick finally asked after he had gotten them to settle down. They all looked at him blankly. "Why, she's too sick to have to think about these things," Elaine responded. "We thought we would handle all of this for her."

"How much money is involved?" Dick asked, starting to take notes vigorously. "We figure that she has certificates of deposit worth \$125,000 and we think she probably has about \$25,000 in cash stashed in her safe deposit box, plus her house, which is paid for and is probably worth about \$100,000. All totaled, she probably has \$250,000 in assets. And she has a monthly income, what with Social Security and her retirement, of \$1,500 each month."

"And you want it all given to you so she can be placed on a welfare program?" Dick asked, wondering if people actually did this and if the Medicaid Agency let them.

"Well, Daddy used to say before he died that he intended that we should inherit and we need the money. Why should the nursing home get it all?" responded Billy, obviously affronted that Dick would even raise the issue.

Something about this situation was making Dick very uncomfortable. All kinds of alarms were sounding in his brain although he couldn't pinpoint the exact reason for his distress. He did know that this situation was one that deserved some thoughtful consideration before he made any suggestions.

"I think I probably need to visit your mother before we take any action involving her assets. You know, she'll have to sign any documents I prepare," he said to all the Morgan children.

"I don't know," responded Elaine, looking at her brother and sister for support. "She's a little fuzzy these days. We'll need to catch her on a good day."

I wonder what "fuzzy" means, thought Dick, more alarms going off.

"Elaine, you need to give me information about where your mother is and how I can get in touch with her. After I've met with her, I'll be able to propose a course of action for you. I'll call you and set up another meeting as soon as I've seen her."

With that, the Morgan children and their spouses, all looking pretty dissatisfied, left Dick Brown's office.

What do I do now? Dick asked himself as he looked over the notes he had hurriedly made. He especially studied the questions he had jotted down each time he had heard a bell of alarm sound in his brain.

Who is my client? Are there any potential conflicts here? Is Mrs. Morgan even competent to enter any financial transactions? What legal tools are available to help the elderly prepare for the issue of long term care? And will Medicaid let you give your money away so you can qualify for what is obviously a welfare

program? Is this moral or ethical? And where can I get help in answering these questions?

The first thing that Dick did was call a friend at the Alabama State Bar to ask if there were any CLE materials on the subject of Medicaid and dealing with older people's assets. He hit pay dirt. His friend told him that not only had there been several continuing education sessions on the subject of elder law, which included Medicaid planning, but that only recently the president of the bar had appointed an Elder Law Task Force whose purpose is to organize an Elder Law Section of the state bar. Soon Dick had the names of the task force members and copies of articles on the very subjects of concern to him written by several of the specialists on the task force.

After reading the articles, Dick at least felt renewed confidence in his own instincts. All those alarms sounding in his brain had prevented him from falling into a deep pit of possible violations of the *Code of Professional Conduct* which stood open before the unwary. He felt like a lamb who had been saved from the slaughter of malpractice. He had gained needed insight into answering the questions still staring at him from his legal pad.

Anne Moses of Birmingham and John Harris of Florence, both task force members, had written separate articles on the issues of representation and competency. Anne argued that our existing legal framework is not geared to dealing with the world of the elderly, because our Codes of Ethics and of Professional Responsibility are directed toward one attorney representing one client. The reality, however, as Dick had seen in his office, was that elder law often deals with the interests of a social unit—the family—as opposed to one individual.

Therefore, the first question that an elder lawyer needs to address is, "Who is my client?" The typical scenario is an appointment attended by a family which perceives itself as a communal whole, not as separate individuals. Although they are seeking what is best for the family unit, not just the elderly person, a lawyer is trained to

know that his or her responsibility is to advocate for only one interest. If he finds that he is representing more than one interest, the lawyer must consider the ethical implications involved.

Further, many times in this scenario, the interests involved may be in conflict. The needs of the elderly parent for long-term care may be different from the needs and wants of the children, who may not want to lose their inheritance to a nursing home or be burdened with Mom or Dad living in their house.

Dick learned that if both the elderly person and the family were to be represented by him, all involved must consent after being fully informed of the implications of the possible conflict and of single representation. Since disenchantment down the road is a significant problem, representation of only one interest from the beginning is by far the most prudent course to follow.

After determining who his client was and what, if any, conflicts there might be, Dick concluded that the next issue would be to be alert to the mental capacity of the elder client, in order to determine if the client would be capable of understanding the process which would occur and if the client was prey to undue influence or duress. He learned that some elderly people really do have "good" and "bad" days, and even are more alert at cer-

## Who is my **CLIENT**?

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tain periods within the day. Further, medication can have an impact on alertness. Therefore, it is a legitimate consideration to pick a time to meet when the elderly client can be expected to be alert, not "fuzzy".

Rule 1.14(a), ARPC, states that the lawyer should, as far as reasonably possible, maintain a normal client-lawyer relationship even when the client's ability to make adequately considered decisions in connection with representation is impaired. Therefore, the attorney is not necessarily obligated by the Rules of Professional Conduct to ascertain a client's mental or physical condition. Still, the attorney needs to be aware that the issue can be an important one when questions of undue influence and lack of capacity are raised by third parties, especially when such documents as a durable power of attorney or a will are being executed.

When it came to considering the legal tools available to help clients plan for maintaining independence and preparing for long-term care, Dick was glad to find extensive articles written by task force members Gary Stanko of Anniston and Andrew Potts of Birmingham. As he had first thought, the durable power of attorney was greatly preferable to a guardianship or conservatorship. A POA can address both financial and health and personal care issues. He also read about living wills and *inter vivos* trusts and when their use is appropriate.

He was interested in comments by Anne Moses and Lynn Campisi of Birmingham concerning the financing of long-term care. He noted especially their comments that any personal financial planning should address the issue of long-term care. He was only vaguely familiar with the new long term care insurance policies that are now in the marketplace and how to evaluate their benefits. Such concepts as viatical settlements and accelerated benefits paid under Living Benefits Riders in life insurance policies were new to him, as was the idea of a reverse mortgage. In any case, he was learning that there were more and better ways to plan for long-term care than to impoverish oneself to qualify for Medicaid.

On the subject of Medicaid, Dick read and reread articles written by Lynn Campisi, the task force chair, and by Carol Wallace of Tuscaloosa, Connie Glass of Huntsville and Chip Durham, legal counsel for the Alabama Medicaid Agency in Montgomery, regarding qualification for Medicaid and the whole issue of transfers of assets for the purpose of qualification. The pitfalls in this area really raised his level of concern.

The first critical fact for attorneys like Dick who do not regularly practice in the elder law area to be aware of is that, as part of the Health Insurance Portability and Accountability Act of 1996, a provision was adopted which criminalizes most asset transfers made for the purpose of qualifying for Medicaid. Although the law is not well drafted and no one admits to authoring it, it still is on the books and must be taken into account. It became effective January 1, 1997.

In addition, there is another provision of the U.S. Code that imposes criminal liability on anyone who "aids, abets, counsels, commands, adduces or procures a commission of an offense by another." Thus, both clients and attorney could be criminally liable for a transfer which falls under these provisions.

Dick concluded that, although there is much to criticize in

the drafting of these statutes and in the fact that no legislators have come forward to acknowledge authorship of the new law, still their appearance in the law can be considered a culmination of the philosophical debate carried on for the past several years on the issue of voluntary impoverishment to qualify for Medicaid. As several authors have noted, Medicaid is a program for the truly impoverished, not for those who merely wish to save their assets for their children rather than planning for and paying for their own long-term care. Regardless what today's elders or their children think, the creators of the program did not have in mind that the general body of taxpayers should pay for long-term care for those who could otherwise pay but who voluntarily impoverish themselves to qualify for Medicaid.

Further, the demographics of the baby boom, compared to the demographics of the baby bust which followed, means that in the near future, our current Medicaid program will not be able to function unless those approaching old age plan to pay for their own long-term care to the best of their ability. For those who are able, that planning needs to begin now and needs to include all sources of income and assets, as well as new vehicles being marketed to pay for long-term care.

Medicaid planning in its purest form involves an assessment of one's resources and income as well as one's cost of care over a given number of years. In essence, it is the foundation of a plan to pay for long-term care during one's final years. Calling it a Medicaid plan probably indicates that the person making the plan doesn't have much time to prepare for their long term care or much money to pay for it. Otherwise it becomes part of their life long financial planning.

Thus, a Medicaid plan will simply indicate how long an asset base may sustain a given set of lifestyle needs. If the outlay is greater than the appreciation, impoverishment will eventually result and Medicaid qualification is the end result. In the situation where the appreciation of assets is greater than the necessary outlay, then the client's long-term care needs can be met from his or her own assets and planning for impoverishment is neither necessary nor ethical for an attorney to undertake.

Dick applied this theory to Mrs. Morgan's situation. First, if all her assets were converted to cash and appreciated at a rate of seven percent, she would have \$17,500 of gain yearly (i.e.  $\$250,000 \times .07$ ). She could add that to her income of \$18,000 per year ( $\$1,500 \times 12$ ). Thus, appreciation plus income would be \$35,500. Planners use a figure of \$3,000 per month as the average cost of nursing home care for planning purposes, which is \$36,000 per year. Mrs. Morgan's assets and income would put her within approximately \$500 per year of fully paying for her own long-term care.

It appeared to Dick that Mrs. Morgan's children's desires to transfer her assets were not appropriate, in light of Mrs. Morgan's self-sufficiency. He was sure that they would agree with him when they learned about the possible criminal penalties. Also, even if there were no possible criminal penalties, if Mrs. Morgan transferred her assets, there was a three-year (and five-year for transfers to trusts) look-back period during which any uncompensated transfers would cause a period of disqualifi-

## Elder Law TASK FORCE



cation from Medicaid benefits.

The period of disqualification would be calculated by dividing the uncompensated value of the transfer by the average monthly cost of nursing home care in the state of Alabama. This average cost changes each year, but is approximately \$2,500 per month. Thus, if in fact Mrs. Morgan had \$250,000 in assets, and transferred it, the disqualification period would be about 100 months, or over eight years. Her children could end up having to pay for any care she received during that eight years, and their costs would probably be higher than \$2,500 per month.

In this scenario, they could end up spending all of the assets Mrs. Morgan transferred plus more before she could qualify for Medicaid. Dick had also noted that the look-back periods and the methods of calculating the period of disqualification had changed and increased several times over the last few years. He could only predict that these changes would continue and would not favor the person trying to qualify for Medicaid.

Dick was sure that given these facts, Elaine Morgan and her brother and sister would probably gain a certain security from knowing that Mrs. Morgan could pay her own way with little more than a modest depletion of the asset base which would pass to them upon her death. Her situation was favorable.

Of course, she would need to convert her house to cash, once she entered the nursing home. She could do this by selling it outright for its full value, or, as Dick had learned from his research, she could consider getting a reverse mortgage.

A reverse mortgage would provide her with a monthly payment that could continue for a term of years or for her life. The proceeds of the loan could be received in a lump sum, in periodic payments or as a line of credit. Repayment could be triggered by her death or the expiration of a term of years. Generally, a borrower had to be at least 62 years of age. The loan amount is based upon the borrower's life expectancy, interest rates and the value of the home.

The possible disadvantages to a reverse mortgage would be that the income payments might be treated as a resource for Medicaid purposes, closing costs are generally much higher than in a regular house financing and typically take longer to arrange. In addition, the house generally must be sold at the point repayment is due, in order to repay the loan.

Mrs. Morgan would need an updated will and a durable power of attorney. And he would talk directly to her to determine how these should be drafted.

Dick could see that there were probably many fact situations in his community where income and appreciation would not cover the monthly costs of nursing care, particularly where there was a spouse in the picture. Dick learned that there are rules in place to protect the spouse who remains at home from impoverishment. There are rules which make certain assets and certain transfers exempt so that there would be no disqualification. And there are hardship waivers that allow the Medicaid Agency to grant benefits even where the rules appear to disallow coverage.

The most important thing that Dick learned from his review of elder law is that the public must be informed of the need to plan for their own long term care, so that they can be in control of their destiny. Just as they need to plan for the financial needs of educating their children and paying for their own retirement,

they must include long-term care planning as part of their planning for old age and death.

Dick also learned that general practitioners, like himself, need to be familiar with the issues of elder law so that they can either guide their clients themselves or call in an expert where that is warranted. He was glad to know that the Alabama State Bar is in the process of creating an Elder Law Section to meet the needs of its members for resources in this area of growing importance. ■

For more information about the Elder Law Section contact Lynn Campisi, 3008 Pump House Road, Birmingham, Alabama 35243, phone (205) 967-1010 or fax (205) 967-9724. Other task force members not mentioned in the article include Ted Greenspan of Mobile, Laura Gregory of Northport, Rick Harris with the Alabama Department of Public Health, Thomas Prickett of Oneonta, Jerome Smith of Montgomery, and the author of this article.



**Patricia B. Rumore**

Patricia B. Rumore received her undergraduate degree from the University of Alabama in 1971 and her J.D. degree from the University in 1975. She is a former corporate counsel at Liberty National Life Insurance Company, and now is in practice in Birmingham with the firm of Miglionico & Rumore.

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# Criminalization of Asset Transfers In Medicaid Planning

By Lynn Campisi

If you have been embarrassed lately by your senior clients asking, "Am I a criminal if I give away any of my assets?", you should read on. A new law now criminalizes any transfers of assets which results in a period of ineligibility for Medicaid benefits.

**A. The "Kassebaum-Kennedy" Amendment**—On August 21, 1996, Congress passed the Health Insurance Portability and Accountability Act of 1996 (H.R. 3103, P.L. 104-191, "Kassebaum-Kennedy" Act). Section 217 of the Act amends Section 1128 B(a) of the Social Security Act, 42 U.S.C. 1320a-7b(a). The language added by the new Section 217 is noted in **bold** with the entire text providing as follows:

**Criminal Penalties for Acts Involving Medicare or State Health Care Programs**

SEC. 1128B. (a) Whoever

(1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a program under subchapter XVIII of this chapter or a State health care program (as defined in section 1320a-7(h) of this title),

(2) at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to such benefit or payment,

(3) having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or

payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized,

(4) having made application to receive any such benefit or payment for the use and benefit of another and having received it, knowingly and willfully converts such benefit or payment or any part thereof to a use other than for the use and benefit of such other person,

(5) presents or causes to be presented a claim for a physician's service for which payment may be made under a program under subchapter XVIII of this chapter or a State health care program and knows that the individual who furnished the service was not licensed as a physician, or

(6) **knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c),**

shall (i) in the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under the program, be guilty of a felony and upon conviction thereof fined not more than \$25,000 or imprisoned for not more than five years or both, or (ii) in the case of such a statement, representation, concealment, failure, or conversion by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than \$10,000

or imprisoned for not more than one year, or both. In addition, in any case where an individual who is otherwise eligible for assistance under a State plan approved under subchapter XIX of this chapter is convicted of an offense under the preceding provisions of this subsection, the State may at its option (notwithstanding any other provision of that subchapter or of such plan) limit, restrict, or suspend the eligibility of that individual for such period (not exceeding one year) as it deems appropriate; but the imposition of a limitation, restriction, or suspension with respect to the eligibility of any individual under this sentence shall not affect the eligibility of any other person for assistance under the plan, regardless of the relationship between that individual and such other person.

**B. Period of Ineligibility**—All transfers, i.e., gifts or transfers for less than value consideration, may result in a period of ineligibility for Institutional Medicaid benefits if the transfer is made within the look back period of 36 months (or 60 months in the case of certain trusts) of a Medicaid application. (Alabama Medicaid Administrative Code Rule No. 560-X-25-.09)

The period of eligibility is calculated by dividing the total uncompensated value of the assets transferred by the average monthly cost of nursing home care in the State of Alabama. The current 1997 average monthly cost of nursing home care in Alabama is \$2,550 and is adjusted in January of each year. The resulting quotient (excluding any fraction) shall be the number of months which the applicant may not be eligible for nursing home benefits. This period begins in the month in



which the transfer is made and runs continuously. Subsequent periods of the ineligibility resulting from additional transfers will begin to run only when the prior period has ended.

**EXAMPLE:** Mrs. Magnolia transferred her \$100,000 certificate of deposit to her daughter in December 1996. The average monthly nursing home cost in Alabama for 1996 was \$2,495.

Calculate Period of Ineligibility:

1)  $\$75,000 \div \$2,495 = 30.06$ ;

2) 30.06 is rounded down to 30;

3) Mrs. Magnolia's period of ineligibility begins December 1, 1996 and ends on May 31, 1999 (30 months total).

In the above example, if Mrs. Magnolia applies for Institutional Medicaid benefits within 36 months of the transfer of the certificate of deposit, the transfer is identified within the 36-month look-back and the 30-month period of ineligibility is imposed. Additionally, Mrs. Magnolia and possibly any legal advisors participating in the transfer may be subject to criminal prosecution under this new Section 217 if the disposition was made knowingly and willfully in order for the individual to become eligible for Medicaid benefits.

**C. Faulty Construction**—There is no applicable language in the penalty section of the act stating that such conduct is in fact a felony or a misdemeanor. The penalty clause applies to a statement, representation, concealment, failure, or conversion, and does not offer a parallel to the disposition of assets and the subsequent period of eligibility.

**D. The Attorney's Exposure**—The terms "knowingly and willfully" pose yet another shadow in the meaning of this new law. Attorneys should be aware that Title 18 U.S.C. Section 2 imposes criminal liability on anyone who "aids, abets, counsels, commands, adduces or procures a commission of an offense by another". If an attorney is aware of the potential impact of any transfer of assets by his client, there is certainly some implication that the attorney also will be held liable under this new statute. Any attorney assisting in any property transfers or practicing in the Medicaid planning and qualification areas should be well versed in the language and the implications of this new law which has become effective as of January 1, 1997.

#### E. Unanswered Questions

1. What transfers are penalized? Must the transfer be for those seeking Medicaid eligibility? What about the transfer completed by an individual with no intention to apply for Medicaid who suddenly finds himself confined to a skilled nursing facility?

2. Who is subject to the penalty? Is the advising attorney also subject to the penalty? Is the advising attorney also facing potential criminal penalties for aiding and abetting?

3. What is the penalty? Is it \$10,000 or \$25,000? A misdemeanor or felony? If committed by a health care provider, then the more punitive provisions apply. Otherwise, for the individual the fine could be \$10,000 with up to one-year imprisonment.

4. Does the imposition of the period of ineligibility for such assistance under Section 1917(c) mean that one should not apply for Medicaid benefits if *any* gifts are transferred during the entire 36-month or 60-month look-back?

5. Does the criminal act so described lack the prerequisite mens rea? Is the act of transfer deemed to be criminal although there may be no intent?

6. Will a determination by the Alabama State Medicaid Agency that a period of ineligibility has been triggered also be the determining entity to determine that a criminal act has taken place?

7. Who will prosecute acts under this new law? This is a federal, not a state crime. The U.S. Attorney's office is the appropriate party to prosecute such crimes. It is likely that an FBI investigation would take place first to determine that a crime has taken place.

#### F. Advising your clients in light of the Criminalization of Transfers

1. The effective date of this new act is January 1, 1997. However, if a transfer has been made *prior* to the effective date of the act, and such transfer results in a period of ineligibility extending into the effective period of the act, one should exhaust the entire period of the look back (36 months or 60 months in the case of transfer to an irrevocable trust) in order to avoid the imposition of a period of ineligibility.

**EXAMPLE:** In Mrs. Magnolia's case, Mrs. Magnolia should not apply for Institutional Medicaid benefits within the entire look back period. Although a period of

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ineligibility may have run its course (30 months), any application within the look back will result in the imposition of a period of ineligibility and thus subject parties to the transaction to criminal liability.

2. Also, any transfer made on or after January 1, 1997 resulting in a period of ineligibility is potentially a criminal act if such transfer is identified within the look back period.

EXAMPLE: A \$10,000 transfer in January 1997 triggers a four-month penalty. Any application within 36 months of the transfer includes the transfer and results in a period of ineligibility. In this example: a) Are you safe to apply in May 1997? or b) Should you wait until January 2000?

The law is not clear on this point. Although Medicaid eligibility will be available by May 1997, you may be committing a misdemeanor if you apply within 36 months. A period of ineligibility is still imposed and the transfer is potentially termed to be a criminal act.

3. Advise all clients in all cases of all

transfers. The current new law poses potential liability for all Medicaid applicants. Proceed with caution.

4. Encourage long-term care planning and consider Medicaid *only* as a last resort.

Will this ambiguous new law stay with us? Already, and as announced by the National Academy of Elder Law Attorneys on January 8, 1997, United States Representative Steven C. LaTourette of Ohio introduced a legislative bill to repeal Section 217 of the Kassebaum-Kennedy Act. Co-sponsors of the bill currently include: Barney Frank (Massachusetts), James Walsh (New York), Gary Ackersman (New York), Gene Green (Texas), and Frank A. LoBiondo (New Jersey).

Congressman Bud Cramer of the Fifth District of Alabama, U.S. House of Representatives, has stated that "there is concern regarding the imprisonment, fining and/or imposition of an additional Medicaid ineligibility period on frail, elderly individuals in need of nursing home care. Many fear the prosecution of individuals will fall disproportionately on those least able to defend themselves."

This new law, although premature and

faulty, has produced its intended effect. Transfers have been *discouraged*. If repealed, we should yet expect to see more legislation discouraging transfers and impeding Medicaid qualification. Let us not forget that Medicaid is a program for the *truly* impoverished. ■



**Lynn Campisi**

Lynn Campisi is a native of Metairie, Louisiana, and is a solo practitioner in Birmingham. She graduated, cum laude, from Loyola University in New Orleans and obtained her law degree in 1991 from Birmingham School of Law. Campisi currently serves as chair of the

Elder Law Task Force. She also established the Birmingham Bar Association's Elder Law Services Committee and currently serves as chair. She is a member of the National Academy of Elder Law Attorneys and the American Bar Association.

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## OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel

### Lawyer Leaves Firm—

#### Obligation of Firm to Deliver Client Files (If separable and not attorney's lien) to Client or Client's Lawyer



J. Anthony McLain

#### Question:

Fact Situation No. 1: A law firm (the "Firm") represents a client (the "Client") and maintains five different files relating to five different matters ("Matter 1, Matter 2, Matter 3, Matter 4, Matter 5") all of which are different. The firm has an account receivable due from the Client relating to work performed on Matter 5, but all amounts due the Firm for previous work performed on Matters 1 through 4, inclusive, have been paid in full. The Client has delivered a letter to the firm directing the transfer of his files to a different firm (the "New Firm"). With respect to the foregoing, please respond to the following questions:

Does the Firm have a lien, pursuant to Section 34-3-61 *Code of Alabama* (1975), on all papers of the Client in its possession, which would include all papers relating to Matters 1 through Matters 5, inclusive, even though Matters 1 through 4 were not in reference to the services rendered creating the purported lien, or

Does the Firm have a lien solely on the papers relating to Matter 5 and thus must release to the new firm, in accordance with the Client's instructions, all files relating to Matters 1 through 4, inclusive?

Fact Situation No. 2: Assume the same facts that are contained in Fact Situation No. 1 except that all the work product of the firm relating to Matters 1 through 5, inclusive, has been maintained and kept in one file of the client. Would the questions set forth in Fact Situation No. 2 be answered in the same manner, and if not, please explain?

Because client matters are now pending and work has been requested on various client files, (much of which is a matter of urgency), the ability to perform services is dependent on your ruling on the above facts. Accordingly, please expedite your response to this ruling request.

#### Answer:

Fact Situation No. 1: As a matter of ethics it would appear that the firm would have a lien only on the papers relating to Matter 5, and must therefore release the client files in accordance with the client's instructions.

#### Discussion:

The Disciplinary Commission has repeatedly held that the files of a client belong to the client absent some fee dispute or attorney's lien. See RO-86-02, RO-91-06, and RO-90-92. Specifically, in RO-86-02, the Commission stated:

"Subject to the attorney's lien provided for in *Code of Alabama* (1975), §34-3-61, the attorney must provide copies of a client's complete file to the client upon request if it is material delivered to the lawyer by the client or if it consists of an original document prepared by the lawyer for the client."

The Commission further opined that: "Where the attorney has received full compensation for his services rendered in connection with a given file, he must surrender these materials to the client upon the client's request." (Emphasis supplied.)

This principle was reaffirmed in RO-87-148 which fully cites the then applicable disciplinary rule, as well as the statutory provision concerning attorney's liens.



#### Answer:

Fact Situation No. 2: If the work product of the firm relating to Matters 1 through 5, inclusive, is so intricately interwoven that it cannot be, with reasonable effort, segregated, the statute would appear to allow the attorney's lien to attach to the entire work product.

#### Discussion:

The work product of the firm relating to Matters 1 through 5, inclusive, may or may not be subject to segregation. If the work product is such that the matters for which the firm has been compensated cannot be, with reasonable effort, separated from the whole, the language of the statute would appear to protect all papers of the integrated file.

If, on the other hand, with the exercise of reasonable effort, such segregation of the work product relating to Matters 1 through 4 can be accomplished, then the answer to Fact Situation No. 2 would be the same as that stated in Fact Situation No. 1, above. ■  
[RO-92-05]



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# PIERCING THE CORPORATE VEIL

## Under Alabama Law:

### *Legal Standards and Evidentiary Factors*

By Walter F. McArdle

#### Introduction

The corporate form has long been recognized as a method for inducing the infusion of capital into corporations and, therefore, the economy by limiting the liability of the directors, officers and shareholders of the corporation and affiliate corporations. The "corporate veil" cloaks these entities with a shield from liability for corporate debts in most instances. These entities will argue that they are not individually liable to the corporate creditor because the debt is owed by another separate, legal entity, the corporation. Such a shield from liability can obviously lend itself to abuse and result in injustices and inequities.

Over the years, the courts have struggled with the development of a standard that will remedy injustices and inequities, while at the same time preserving the valuable attributes of limited corporate liability. The remedies have been given various labels, including "alter ego" theory, "instrumentality" theory, "piercing the corporate veil", etc. However, the courts have often been unsuccessful in developing clear rules for guidance in these cases. Indeed, after analyzing the various theories or labels, the Fifth Circuit stated:

Nevertheless, the mere incantation of the term 'instrumentality' will not substitute for rigorous, tough-minded analysis. Professor Ballantine once described this aspect of the law of corporations as a "legal quagmire"...Moreover, the very term "instrumentality" is a poor one because all corporations are in one sense "instrumentalities" of their stockholders.

*Krivo Ind. Sup. Co. v. National Dist. & Chem. Corp.*, 483 F.2d 1098, 1103 (5th Cir. 1973).

Alabama is no different. Over the years, the Alabama courts have struggled to develop clear and consistent rules to apply in this area. In recent years, with the decisions in *Quick Set Components, Inc. v. Davidson Indus., Inc.*, 411 So.2d 134 (Ala. 1982) and *Messick v. Moring*, 514 So.2d 892 (Ala. 1987), the Alabama Supreme Court began developing a clear rule to apply in these cases, possibly pulling the law out of the "legal quagmire" described by Professor Ballantine. This new rule

has not been consistently embraced, however, and it appears at this point that the practitioner may be better off relying upon a group of evidentiary factors. This article will attempt to address the development of Alabama law and the standards applied in this area, including evidentiary factors to be relied upon by the practitioner and the court in the alter ego case.

#### General Review of the Liability of Other Entities for Corporate Debt

##### A. Liability for Corporate Debts—Some General Rules

In general, Alabama law treats corporations as entities separate and distinct from the corporation's stockholders, directors or officers. See *Cornett v. Johnson*, 578 So.2d 1259, 1261 n.1 (Ala. 1991); *Wright v. Alan Mills, Inc.*, 567 So.2d 1318, 1319 (Ala. 1990); *Co-Ex Plastics, Inc. v. Alapak, Inc.*, 536 So.2d 37, 38 (Ala. 1988). The corporate form will not be "lightly disregarded," because limited liability is one of the principal purposes for the corporation. See *M&M Wholesale Florist, Inc. v. Emmons*, 600 So.2d 998, 999-1000 (Ala. 1992) (quoting *Chenault v. Jamison*, 578 So.2d 1059, 1061 (Ala. 1991)). Stock ownership, by itself, is simply insufficient to impose liability on the stockholder for the corporation's debts. See *Ledlow v. Goodyear Tire & Rubber Co.*, 238 Ala. 35, 37-38, 189 So. 78, 80 (1939); *Brown v. Standard Casket Mfg. Co.*, 234 Ala. 512, 516, 175 So. 358, 361 (1937). The separate identity of parent and affiliate corporations has also long been recognized under Alabama law. See *Ledlow*, 238 Ala. at 37-38, 189 So. at 80.

Substance will prevail over form, however, and the structure and formation of the corporation will be examined to make sure that it was not formed to mislead the public. See *Ledlow*, 238 Ala. at 38, 189 So. at 80; *Cohen v. Williams*, 294 Ala. 417, 420, 318 So.2d 279, 281 (1975). The corporate veil will be disregarded in appropriate circumstances to "serve the ends of justice", or when "justice and equity" require it. See *Cohen*, 294 Ala. at 420, 318 So.2d at 281; see also C. Keating & G. O'Grady, *Fletcher*:



# CORPORATION

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*Cyclopedia of the Law of Private Corporations*, § 41 (rev. perm. ed. 1990). The *Cohen* court also pointed out the importance of the evidence and that each case should be decided on its own facts. See *Cohen*, 294 Ala. at 420, 318 So.2d at 281.

## **B. Piercing the Corporate Veil: The Three Factors or Tests Prior to *Kwik Set***

In the past, the Alabama courts have generally applied one of three factual standards in alter ego cases. These three standards are commonly referred to as "factors" to be considered by the court in piercing the corporate veil and include: "(1) use of the corporate form to evade a just obligation; (2) fraud in the formation or operation of the corporation; and (3) use of the corporation as an instrumentality of its controlling shareholder." Note, *Piercing the Corporate Veil in Alabama: In Search of a Standard*, 35 Ala. L. Rev. 311, 314 (1984). Over the years, however, the application of these three tests or "factors" has not been a model of consistency and, in many cases, it has not even been clear which standard was actually applied.

### **1. Fraud in the Formation or Operation of the Corporation**

As the Alabama Supreme Court has repeatedly stated, it is not necessary for a plaintiff to prove fraud in order to establish that the corporation's separate identity be disregarded and liability imposed on some other actor. See, e.g., *Cohen v. Williams*, 294 Ala. 417, 318 So. 2d 279, 281 (1975); *Forest Hill Corp. v. Latter & Blum, Inc.*, 249 Ala. 23, 29, 29 So. 2d 298 (1947). However, fraud is one of the "factors" to consider in disregarding corporate separateness. As with the other tests or "factors", the cases that have applied the fraud standard appear to consider evidence that would generally be relevant in an instrumentality case. For example, in *Christian & Craft Gro. Co. v. Fruitdale Lumber Co.*, 121 Ala. 340, 25 So. 566 (1899), the plaintiff sought to pierce the corporate veil where one of the incorporators of Fruitdale Lumber incurred the debt on representations that Fruitdale Lumber was a partnership and not a corporation. The supreme court

ruled that the trial court committed reversible error when it refused to admit evidence that the plaintiff dealt with Fruitdale Lumber as a partnership; that Fruitdale Lumber had never been properly incorporated; that the corporation was wholly without capital; that nothing was paid for the shares of the corporation's stock; that no money or property of value was ever paid or transferred to the company for capital; that no corporate function was ever performed; and that no meeting of the directors was ever held. The court stated that this evidence was relevant to show that the corporation was a "fraudulent device" formed to protect the incorporators from liability. See 25 So. at 568.

In *Dixie Coal Min. & Mfg. Co. v. Williams*, 221 Ala. 331, 128 So. 799 (1930), the court expanded on its interpretation of the fraud "factor", stating:

Our judgment on consideration of the evidence is that the court correctly found that the Dixie Company corporation was a mere simulacrum, formed in the image of a corporation, the only possible effect of which, whatever the purpose, was to mislead persons dealing with it away from any idea that the personal responsibility of appellant was involved, thereby avoiding, or intending to avoid, personal liability in any transaction in which he might engage in his corporate name, at the same time reserving to his sole use and benefit any profits that might be earned in transactions concluded in the corporate name, that, in short, to quote the trial court, "the corporation was Ross, and Ross was the corporation," a fraud in law, if not in fact, designed to draw a cloak of deceptive appearance around appellant's business transactions. Appellant could avoid no personal liability by such device. ...The courts will not permit a person, acting under the guise of a corporation formed for that purpose, to evade his individual responsibility.

128 So. at 800. Despite this language, like the court in *Fruitdale Lumber*, the court in *Dixie Coal* appeared to rely more upon evidence that would also be relevant in an instrumentality case,



while only claiming to apply the "fraud" test. See *id.* at 799.

## 2. Avoidance of Just Obligations

It appears that the "avoidance of just obligation" "factor" is applicable where the corporation's sole reason for existence is to evade personal liability. See *Woods v. Commercial Contractors, Inc.*, 384 So.2d 1076, 1079 (Ala. 1980); *Bon Secour Fisheries, Inc. v. Barrentine*, 408 So. 2d 490, 491 (Ala. 1981). Obviously, this test and the fraud test appear to overlap. The cases applying this standard also appear to rely upon evidence that, once again, is relevant to an alter ego or instrumentality theory. See, e.g., *Jefferson County Burial Soc. v. Cotton*, 222 Ala. 578, 133 So. 256 (1930) (citing evidence that two corporations owned by principal had same employees, were both organized by the same individual, one corporation performed contracts for the other, same president and general manager for both corporations, offices in the same location, same telephone, same person hired and supervised employees).

## 3. Instrumentality Theory

As noted, the three major "factors", or tests for liability often bleed together, and do not really appear to be distinct factors in any of the early Alabama cases. The analysis does not become any more consistent when the court appears to invoke the instrumentality "factor". For example, in *C.E. Dev. Co. v. Kitchens*, 288 Ala. 660, 264 So. 2d 510 (1972), the Essmans owned and controlled C.E.D. and a related holding company. The plaintiffs employed C.E.D. to construct a house to be paid for from the proceeds of an FHA loan. Essman, as president of C.E.D., made an affidavit to the mortgage company that all bills for labor and materials had been paid. Of course, all bills had not been paid. The Essmans then transferred numerous parcels of real estate to the holding company. Although it appears that the court applied the instrumentality "factor" in *C.E. Development*, given the facts the decision could have been based upon either the fraud or avoidance of responsibility "factors". See 288 Ala. at 666.

In another case, *Forest Hill Corp. v. Latter & Blum, Inc.*, 249 Ala. 23, 29 So. 2d 198 (1947), it appears that the court

to the Louisiana corporation. When the brokerage firm sought to recover its commission, the Alabama corporation and its principals claimed the Louisiana corporation had purchased the property and that no contract existed between the Louisiana corporation and the brokers. The Alabama Supreme Court rejected these arguments and held the Alabama corporation and its principals liable.

In *Forest Hill*, the court appears to rely upon the instrumentality theory, but also mentions the fraud and avoidance of liability theories almost interchangeably. In fact, much of the evidence that would generally be considered in imposing liability in an alter ego or instrumentality case was not discussed, or was not present in *Forest Hill*. The *ad hoc* approach taken by the Alabama Supreme Court under the three "factors" beckoned for a clearer test for determining liability for corporate debts. That clearer test was seemingly supplied in the case of *Kwick Set Components, Inc. v. Davidson Indus., Inc.*, 411 So.2d 134 (Ala. 1982).

## Development of the Kwick Set Rule

In 1973, the Fifth Circuit Court of Appeals set the stage for development of the *Kwick Set* rule when it decided the case of *Krivo Indust. Sup. Co. v. National Dist. & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973). In *Krivo*, the Fifth Circuit noted that the Alabama Supreme Court had failed to delineate a precise test for determining corporate liability. The court then went on to delineate a test. This test was first enunciated by Professor Powell in his 1931 treatise on corporations; see F. Powell, *Parent And Subsidiary Corporations*, § 1 (1931); and was later adopted in the seminal 1936 New York case of *Lowendahl v. Baltimore & Oh. Rr. Co.*, 247 A.D. 144, 287 N.Y.S. 62, *aff'd.*, 272 N.Y. 360, 6 N.E. 2d 56 (1936). The Fifth Circuit stated that test as follows:

...[T]wo elements are essential for liability under the "instrumentality doctrine". First, the dominant corporation must have controlled the subservient corporation, and second, the dominant corporation must have proximately caused plaintiff harm through misuse of this control....

## KWICK SET

applied the "instrumentality" theory, but any one of the three factors could probably have been used to impose liability. In *Forest Hill*, the defendants organized corporations to develop residential real estate in New Orleans. The defendants retained a brokerage firm to locate real estate, which the brokerage firm did, and the defendants' Alabama corporation was given an option to purchase. However, under Louisiana law, a foreign corporation could not hold title to real estate. Therefore, a Louisiana corporation was formed to obtain title to the property. The president of the Alabama corporation was also the president of the Louisiana corporation. The defendants began to deal directly with the owners after assuring the brokers they would be paid a commission. The option to purchase expired and, immediately thereafter, the property was purchased by the corporate president's son, who then conveyed the property

*Id.* at 1103-04 (citations omitted). In analyzing this test, the court acknowledged that stock ownership in the subservient corporation did not *per se* resolve the question of control. After analyzing the cases, the Fifth Circuit concluded that the control necessary was actual, participatory, *total control* of the subservient corporation. See *id.* at 1105. The subservient corporation must exist only to further the purposes of the dominant corporation and have no real separate, independent existence of its own. See *id.* at 1106. The court noted, however, that total domination and control alone were not enough to impose liability. The misuse of control by the dominant entity must cause harm to the plaintiff. See *id.* at 1106.

The *Krivo* decision established the beginnings of a test that can be applied in all situations and under all three factors or theories. That test requires the establishment of the following elements: (1) complete domination and control of the



finances, policy and business practices of the subservient corporation; (2) the domination and control was used by the defendant to commit a wrong on the plaintiff; and (3) the control proximately caused the injury, or loss complained of. See *id.*; see also Note, *Piercing The Corporate Veil: In Search Of A Standard*, 35 Ala. L. Rev. 311, 324 (1984). In *Kwick Set Components, Inc. v. Davidson Indus., Inc.*, 411 So.2d 134 (Ala. 1982), the Alabama Supreme Court adopted the test enunciated in *Krivo*, stating:

The liability of [the defendant] was obviously predicated upon the rule that, when one corporation controls and dominates another corporation to the extent that the second corporation becomes "the mere instrumentality" of the first, the dominant corporation becomes liable for those debts of the subservient corporation attributable to an abuse of that control.... Two elements are essential, however, for liability under the "instrumentality doctrine." First, the dominant corporation must have control of the subservient corporation, and second, the dominant corporation must have proximately caused plaintiff harm through misuse of this control.

*Id.* at 136 (citations omitted).

The *Kwick Set* court also stressed that *total* domination of the subservient corporation was required for liability to exist. The court noted that, although the stockholders and management in that case were identical, this did not, in and of itself, destroy the corporate identity and merge one corporation into the other. See *id.* at 137. However, when those factors were combined with the apparent scheme in *Kwick Set* of the dominant corporation to avoid payment of the subservient corporation's debts while benefiting from use of goods giving rise to the debts, there was evidence indicating the lack of separate corporate purpose or existence. See *id.* at 137. In other words, the subservient corporation's only purpose was as a vehicle to avoid the dominant corporation's liabilities to creditors.

At first glance, the *Kwick Set* rule would appear to apply only in cases invoking the instrumentality "factor" due to its emphasis on domination and control. However, as later cases have indicated, the *Kwick Set* rule can also be applied in avoidance of just responsibility, or fraud factual scenarios. Indeed, it could be argued that was the case in *Kwick Set*, which clearly involved an avoidance of liability scenario.

In the case of *Messick v. Moring*, 514 So.2d 892 (Ala. 1987), the Alabama Supreme Court reiterated and clarified the *Kwick Set* test and also indicated that the test should apply in all three "piercing the corporate veil" situations. The court stated:

In an attempt to circumvent some of the difficulties in applying conclusory terms such as "instrumentality," "alter ego" and "adjunct," we announced in *Kwick Set*... a standard to be applied in order to determine whether the corporate entity should be disregarded when excessive control is the ground.... (1) the dominant party must have complete control and domination of the subservient corporation's finances, policy and business prac-

tices so that at the time of the attacked transaction, the subservient corporation had no separate mind, will or existence of its own; (2) the control must have been misused by the dominant party. *Although fraud or the violation of a statutory or other positive legal duty is misuse of control, when it is necessary to prevent injustice or inequitable circumstances, misuse of control will be presumed*; (3) the misuse of this control must proximately cause the harm or unjust loss complained of.

*Id.* at 894-95. (emphasis added) (citing *Lowendahl v. Baltimore & Oh. Rr. Co.*, 247 A.D. 144, 287 N.Y.S. 62 (1936)); see also *First Health, Inc. v. Blanton*, 585 So.2d 1331 (Ala. 1991); *Simmons v. Clark Eqpt. Cred. Corp.*, 554 So.2d 398 (Ala. 1989); *Duff v. Southern Ry. Co.*, 496 So.2d 760 (Ala. 1986); *Cahaba Veneer, Inc. v. Vickery Auto Supply*, 516 So.2d 670 (Ala. Civ. App. 1987). This language from *Messick* not only reiterates and clarifies the *Kwick Set* rule, but it also appears to broaden the rule to cover all situations, including the fraud and avoidance of just responsibility theories, where misuse of control may even be presumed in some cases. Nonetheless, application of the *Kwick Set* rule by the courts has been inconsistent. On the one hand, some cases have cited and applied the *Kwick Set* rule, thereby establishing its viability and, on the other hand, some cases have disregarded both *Kwick Set* and its rule.

The cases that appear to show the court's unqualified adoption of the *Kwick Set* rule include *Simmons v. Clark Eqpt. Cred. Corp.*, 554 So.2d 398 (Ala. 1991), where the court noted that evidence showing domination and control by the defendant was not sufficient to establish liability without proof that the domination and control proximately caused the plaintiff's injuries. In *First Health, Inc. v. Blanton*, 585 So.2d 1331 (Ala. 1991), the court found evidence of domination and control, but the plaintiff failed to establish that the parent corporation had misused its control or that the misuse of control was the proximate cause of any injury to the plaintiff. See *id.* at 1335.

In other cases, however, the Alabama courts have not always adhered to or even acknowledged the *Kwick Set* standard. For example, in the case of *Barrett v. Odom, May & Debuys*, 454 So.2d 729 (Ala. 1984), substantial evidence was introduced showing that the principal of the corporation misused his control of the corporation. However, it was never clearly established that his misuse of that control caused the alleged damage. Indeed, the issue of causation was totally ignored in that case, as was the *Kwick Set* test. In *Thorn v. C & S Sales Group, Inc.*, 577 So.2d 1264 (Ala. 1991), the Alabama Supreme Court upheld a jury verdict piercing the corporate veil where there was clear evidence of domination, control and misuse of control. However, the court once again failed to cite *Kwick Set* and also failed to state the *Kwick Set* rule.

In *Econ Marketing, Inc. v. Leisure American Resorts, Inc.*, 664 So. 2d 869 (Ala. 1995), the defendant failed to keep complete and correct records of all transactions of the corporation, including minutes of the shareholders and board of directors meetings, contracts and financial records. The court initially held that the failure of the stockholder to maintain the records of the business was a disregard of the corporate form and made the defendant liable as a matter of law. See *Econ Marketing, Inc. v. Leisure American*



*Resorts, Inc.*, 28 A.B.R. 31 at 3559, 3563 (August 12, 1994). This holding appeared to establish a new standard of strict liability in situations where the corporate form had been disregarded by the failure to properly maintain corporate records, regardless of causation, misuse of control, etc., even though the Alabama Supreme Court had decided on other occasions that the failure to follow corporate formalities alone was insufficient to pierce the corporate veil. See, e.g., *Co-Ex Plastics, Inc. v. Alapack, Inc.*, 536 So. 2d 37, 39 (Ala. 1988); *Goldman v. Jameson*, 290 Ala. 160, 275 So. 2d 108 (1973). On rehearing, the Alabama Supreme Court modified its decision, adding emphasized language that the shareholder would be held personally liable for the debt "under the particular facts of this case" and deleting the language that failing to keep corporate records would result in personal liability as a matter of law. See *Econ Marketing, Inc. v. Leisure American Resorts, Inc.*, 664 So. 2d 869, 871 (1995). However, the court still did not clearly follow or address the *Kwick Set* rule and failed to state exactly how the failure to follow corporate formalities caused the plaintiff's harm in that case. Indeed, the *Kwick Set* case was not even cited in *Econ Marketing*. See also *Ex Parte AmSouth Bank (AmSouth Bank, N.A. v. Holland)*, 669 So.2d 154 (Ala. 1995) (court cited both the *Kwick Set* and *Messick* cases, but ignored the importance of *Kwick Set's* ruling).

Given its apparent disregard for the *Kwick Set* test and the inconsistency of its rulings in this area, the Alabama Supreme Court appears to still be trapped in the legal quagmire described by Professor Ballentine many years ago. *Kwick Set* and *Messick* establish a clear test, or at least a guiding principle in this area of the law. This test can be used to accomplish justice under any of the three previous "factors" or tests set forth in the Alabama case law. However, given the inconsistent application of this test since 1982, the only clear guidance that a practitioner still has in these cases is the evidence that has been relied upon to pierce the corporate veil for decades.

### Evidentiary Factors to be Applied in Piercing the Corporate Veil Cases

Over the years, the Alabama courts have consistently considered certain types of evidence in corporate veil piercing cases. This evidence will generally be relevant in any alter ego case, whether or not the *Kwick Set* rule is applied or ignored, and regardless of whether the case is decided under the rubric

of "instrumentality", "fraud" or "avoidance of just responsibility". In the case of *Duff v. Southern Ry. Co.*, 496 So.2d 760 (Ala. 1986), the Alabama Supreme Court set forth a non-exclusive list of these evidentiary factors:

"(a) The parent corporation owns all or most of the capital stock of the subsidiary.

"(b) The parent and subsidiary corporations have common directors or officers.

"(c) The parent corporation finances the subsidiary.

"(d) The parent corporation subscribes to all of the capital stock of the subsidiary or otherwise causes its incorporation.

"(e) The subsidiary has grossly inadequate capital.

"(f) The parent corporation pays the salaries and other expenses and losses of the subsidiary.

"(g) The subsidiary has substantially no business except with the parent corporation, or no assets except those conveyed to it by the parent corporation.

"(h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.

"(i) The parent corporation uses the property of the subsidiary as its own.

"(j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary, but take their orders from the parent corporation in the latter's interest.

"(k) The formal legal requirements of the subsidiary are not observed."

*Id.* at 763 (quoting *Taylor v. Standard Gas & Elec. Co.*, 96 F.2d 693, 704-05 (10th Cir. 1938)).

In *Simmons v. Clark Equip. Cred. Corp.*, 554 So.2d 398 (Ala. 1989), the court reiterated and expanded on the factors set forth in *Duff*, stating:

The corporate veil may be pierced where a corporation is set up as a subterfuge, where shareholders do not observe the corporate form, where the legal requirements of corporate law are not complied with, where the corporation maintains no corporate records, where the corporation maintains no corporate bank account, where the corporation has no employees, where corporate and personal funds are intermingled and corporate funds are used for personal purposes, or where an individual drains funds from the corporation.

*Id.* at 401. Other evidence that has been considered in other cases includes:

(1) The parent and subsidiary corporation use the same offices or mailing address and the same office equipment. See *Jefferson County Burial Soc. v. Cotton*, 222 Ala. 578, 133 So. 256 (1930).

(2) Failure to complete or properly incorporate the corporation. See *Christian & Craft Gro. Co. v. Fruitdale Lumber Co.*, 121 Ala. 340, 25 So. 566 (1899).

(3) Failure of the shareholders to pay for their shares of the corporation's stock. See *id.*

(4) Failure to conduct meetings of the shareholders or board of directors and to record minutes of same. See *id.*

(5) Failure to properly maintain the books and records of the corporation. See *Econ Marketing, Inc. v. Leisure Am.*

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*Resorts, Inc.*, 664 So.2d 869 (Ala. 1995).

(6) The dominant corporation or individual owns, controls and operates other corporations in a similar manner. See *Dixie Coal Min. & Mfg. Co. v. Williams*, 221 Ala. 331, 128 So. 799 (1930).

(7) Dissolving a corporation or creating a corporation to avoid liability. See *C.E. Dev. Co. v. Kitchens*, 288 Ala. 666, 264 So.2d 510 (1972); *Forest Hill Corp. v. Latter & Blum, Inc.*, 249 Ala. 23, 29 So.2d 298 (1947).

(8) Use by the dominant individual or corporation of the subservient corporation's property. See *Kwick Set Components, Inc. v. Davidson Indus., Inc.*, 411 So.2d 134 (Ala. 1982).

(9) Payment of the corporation's debts from another corporation's accounts where both corporations are owned, or controlled by the same entity. See *First Health, Inc. v. Blanton*, 585 So.2d 1331 (Ala. 1990).

(10) Heavy subsidization of the corporation by the defendant. See *Thorn v. C&S Sales Group, Inc.*, 577 So.2d 1264 (Ala. 1991).

(11) Failure to pay the primary shareholders, who are also employees, adequate salaries, or failure to disburse dividends to shareholders. See *id.* And,

(12) Failure of the subservient corporation to obtain a business license, open bank accounts or conduct other ordinary business activities. See *Ex parte AmSouth Bank (AmSouth Bank, N.A. v. Holland)*, 669 So.2d 154 (Ala. 1995).

Although some of these evidentiary factors may be present in a particular case, that does not, by itself, establish liability. As the court stated in *Duff*: "No one of these factors is dispositive; nor does the list exhaust the relevant factors." 496 So.2d at 763. Furthermore, the plaintiff must keep in mind that, under *Kwick Set*, these evidentiary factors are to be considered in determining whether there has been complete domination and control by the party charged, and whether that domination and control was misused. The plaintiff must still present evidence to establish that the misuse of control was the proximate cause of the plaintiff's injuries. In any event, these factors represent the type of evidence that has consistently been considered by the courts in veil piercing cases. The more evidence a

plaintiff can produce supporting these evidentiary factors, the stronger his case will be and the more likely he will prevail in piercing the corporate veil.

### Conclusion

When *Kwick Set* and *Messick* are read together they appear to create a test that can be applied in all situations where a plaintiff seeks to pierce the corporate veil. The test requires the plaintiff to show domination and control of the subservient corporation, misuse of the control and a showing that the misuse of control proximately caused the injuries of the plaintiff. Misuse of control can be established through the non-exclusive evidentiary factors set forth in *Duff*, *Simmons* and the other cases discussed in the preceding section. In some cases, where the wrongdoer has been careful to follow the corporate form, then misuse of control may be presumed where fraud, avoidance of just liability, or other inequitable circumstances exist. In any event, proof of the evidentiary factors discussed in the preceding section will

be important and many courts may be reluctant to pierce the corporate veil, unless such evidence is presented. It is hoped, however, that the Alabama Supreme Court will continue to clarify the *Kwick Set* rule, thereby providing a clearer path for the practitioner to follow in future cases. ■



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# electronic Evidence:

*By Susan J. Silvernail*

## DISCOVERABILITY

A small change in Rule 34 of the Federal Rules of Civil Procedure ushered in the computer age for litigators. The original rule spoke only of documents and tangible things. As modified in 1970, Rule 34(a) defines documents as including "other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into readable, usable form".<sup>1</sup> This will usually be a printout, but is not required to be. The rule also puts the burden on the respondent to make the printout or otherwise put the data into reasonably usable form. The Advisory Committee Note to the amendment states:

The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a printout of computer data. The burden that's placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of this records, confidentiality of non-discoverable matters, and costs.

Committee Note 48 F.R.D. 487, 527 (1970)

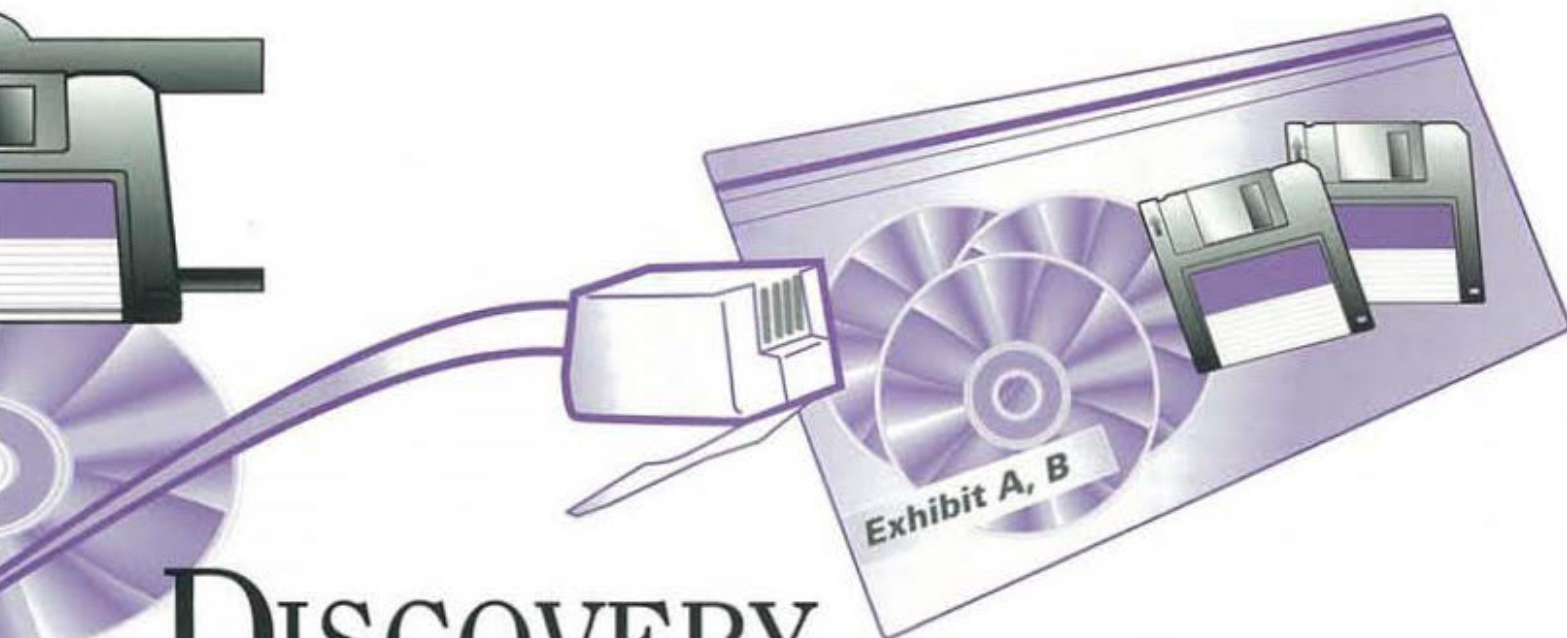


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# DISCOVERY *in the* Computer Age

After 1970, access to computer printouts became fairly routine, however, the discovery of information in various data storage devices or inspection of the respondent's computer system itself has gained only recent acceptance. This is easily explained. Only recently has computer use become so widespread that it can be expected that the discovering party will have the capacity to process the data. Discovering parties can now be expected to have their own computers with compatible software on which to conduct their own analysis. Today, the *Manual for Complex Litigation* recognizes the value discovery of computerized data in complex cases:

The potential benefits that may be derived from computerized data—as well as the problems such data may create—are substantial both in the discovery process and at the trial. At the outset of the litigation, the court should inquire into the existence of computerized data and processes for its retrieval. . . . Accordingly, a party may be required not only to furnish pre-existing hard copies of computerized data, but also to provide new printouts of pertinent items or of data bases. Sometimes a party should be required to provide its information in machine-readable form, so that the data may be stored by the discovering parties for later analyses on their own computers without the time, expense, and potential for errors that would result if data from a print-out were re-entered manually.

*Manual for Complex Litigation* 2nd, Section 21.446

Today, we must be concerned with discovering information that is readable electronically and found in data storage devices such as floppy disks, hard disks, magnetic tapes and optical disks. In document requests and subpoenas, most attorneys now typically include in their definition of "document" phrases like "including, but not limited to, computer-readable media, machine sensible, electronic, or any other form of information".<sup>1</sup> By limiting discovery to traditional paper documents, attorneys may well miss significant and meaningful information: For example, it has been estimated that as much as 30 percent of the information that goes into business computers never appears at all in paper form.

The federal case most frequently cited for the proposition that discovery requests of this type can and should be granted is *National Union Electric Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1257 (D. Pa. 1980). See also *Daewoo Electric Co. v. United States*, 650 F. Supp. 1003 (Ct. Int'l Trade 1986) (concluding that the burdens of producing electronic data with those of producing ordinary files are comparable). In *National Union*, the discovering party sought information about National Union's annual and monthly sales and production of television receivers. The respondent had already produced this information by computer printout. The discovering party then asked for a computer-readable tape. The court interpreted F.R.Civ.P. Rule 34 to allow for the production of computer tapes even after the printouts were made available. *National Union*, F. Supp. at 1262. In this case, it was somewhat important that the discovering party was willing to



meet any additional costs incurred by the production. *Id.* The court also predicted that computerized files will soon be the norm in pretrial discovery:

It may well be that Judge Charles E. Clark and the framers of the Federal Rules of Civil Procedure could not foresee the computer age. However, we know we now live in an era when much of the data which our society desires to retain is stored in computer disks. This process will escalate in years to come; we suspect that by the year 2000 virtually all data will be stored in some form of computer memory. To interpret the Federal Rules which, after all, are to be construed to "secure the just, speedy and inexpensive determination of every action", F. R. Civ. P. 1, in a manner which would preclude the production of material such as is requested here, would eventually defeat their purpose.

*Id.*

Another leading federal case illustrates the folly of ignoring computerized data, *Crown Life Insurance Co. v. Craig*, 995 F.2d 1376 (7th Cir. 1993). See also *American Bankers Insurance Co. v. Caruth*, 786 S.W. 2d 427 (Tex. Ct. App. 1990) (wherein default judgment was entered against defendant who failed to produce computerized files). In *Crown Life*, the discovering party sought information about the amount of money he alleged was owed him in renewal commissions by the respondent. The respondent produced written summaries of year-end computer printouts of total renewals. The discovering party repeatedly asked for the "raw data" on which the summaries were based, presumably so he could compute himself the amount of renewal commissions due. Counsel for respondent represented to the court that it had no further responsive documents. During trial, the existence of a database was confirmed. The respondent tried to justify its lack of production by arguing that the data was never put into "document" form and so it had been impossible to obtain a printout; besides, the respondent argued, the discovering party requested "written documents" only. The trial court found that the respondent had willfully violated discovery orders. As one sanction, the respondent was not allowed to present or rely upon at trial its own calculations of renewal commissions. The Seventh Circuit felt the punishment just and scoffed at respondent's argument:

Crown Life also argues that the data is not "documents" because it was never in any hard copy form

and Craig requested "written documents". However, the Advisory Committee notes to the 1970 amendment of the Federal Rules of Civil Procedure 34 make clear that computer data is included in Rule 34's description of documents. Therefore, Crown Life's failure to make the raw data available amounts to a violation of discovery orders.

*Crown Life*, 995 F.2d at 1382-3.

Apparently, the sole Alabama precedent on this front is an unpublished opinion styled *Birmingham News Co., v. Perry, et. al.*, 1993 WL 528446 (Ala. Cir. Ct.). In this case, the Circuit Court of Montgomery County enjoined the Alabama Department of Public Safety from refusing to copy and deliver to the plaintiff "an electromagnetic media of appropriate capacity and suitability for use, all, or so much as may be

requested by the plaintiff of the computer databases"

maintained by the department. Note that this

court also ordered the *Birmingham News* to pay any costs incurred by the department

"to create any new computer program required to comply with any such request". This decision does not

rely upon nor interpret A.R.Civ.P.

Rule 34, but rather, it interprets

the language "public writing"

in Alabama Code §36-12-40

(1991), which states "every cit-

izen has the right to inspect

and take a copy of any public

writing of this state, except as

otherwise expressly provided by

statute". The department argued

that it was only required to pro-

vide abstracts of motor vehicle

records and not the computer tapes

themselves, implying that MVRs are

public writings and computer tapes them-

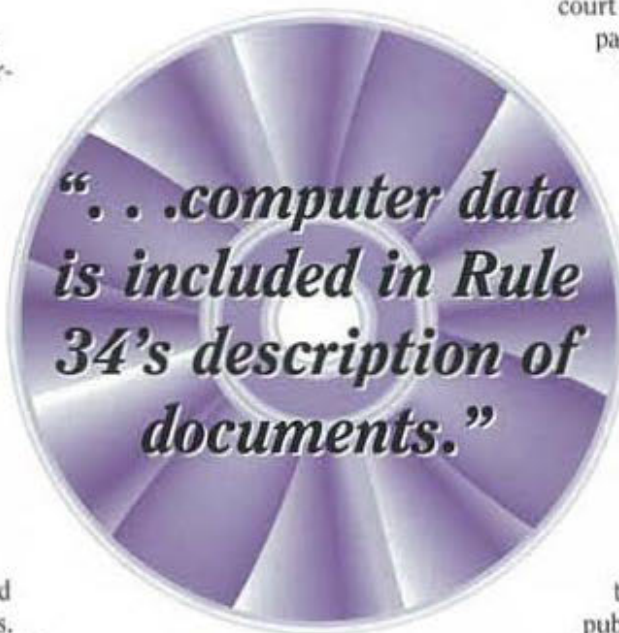
selves are not. The court found that the com-

puter tapes themselves are "public writings", a

record "reasonably necessary to record" the required business and activities of a public officer:

The question still remains whether or not the computer tapes are "reasonably necessary to record" the business of the Department. Certainly, the Department was able to carry out its business without the aid of computers before such technology was available. However, the Court recognizes that computers have added a great amount of value to our public records, and that currently the Department generates the MVRs by computers. Therefore, without the aid of the computer data base, citizens would not, as a practical matter, have access to all of the information compiled.

*Birmingham News*, 1993 WL 528446 at 2.





## LIMITS ON DISCOVERABILITY

Discovery of electronically stored data will be limited by these familiar and traditional concepts: trade secrets, attorney-client privilege, and the work product doctrine. It can be argued, however, that the courts have not yet fully explored their application to computerized files.

A trade secret is information that: (a) is used or intended for use in a trade or business; (b) is included or embodied in a formula, pattern, compilation, computer software, drawing, device, method, technique, or process; (c) is not publicly known and is not generally known in the trade or business of the person asserting that it is a trade secret; (d) cannot be readily ascertained or derived from publicly available information; (e) is the subject of efforts that area reasonable under the circumstances to maintain its secrecy; and (f) has significant economic value. Ala. Code §8-27-2 (1975). The protection must "yield when necessary to avoid injustice". Discovery problems are frequently circumvented by careful drafting of protective orders.

The contents of confidential communications between an attorney and a client are privileged. *Ex parte Alfa Mutual Insurance Co.*, 631 So.2d 858 (Ala. 1993). See also Ala. Code §12-21-161 (1975) which contains the statutory definition of attorney-client privilege. A communication within the ambit of the attorney-client privilege is any act by which information is conveyed. *Alfa Mutual*, 631 So. 2d at 858.

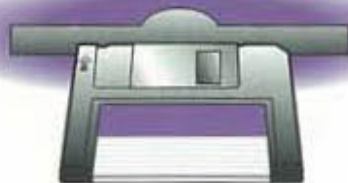
To invoke the protection of the work product privilege, it must be shown that the materials sought to be protected were prepared "in anticipation of litigation". The primary motivating purpose behind the creation of a document or investigative report must be to aid in possible future litigation. *LaMonte v. Personnel Bd.*, 581 So.2d 866 (Ala. Civ. App. 1991). The protection can be lost "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means". A.R. Civ. P. Rule 26(b)(3).

Of course, the difficulties arise when it is argued by the discovering party that a privileged has been waived. Any privilege may be waived either directly or constructively. Disclosure of part of privileged communications constructively waives the privilege. *Ex parte Great American Surplus Lines Insurance Co.*, 540 So.2d 1357 (Ala. 1989). For example, in *Swain v. Terry*, 454 So.2d 948 (Ala. 1984), the defendant's failure to object to the testimony of a guardian *ad litem* was held to constitute a constructive waiver of the attorney-client privilege. *Swain*, 454 So.2d at 954.

In *International Business Machines Corp. v. Comdisco*, 1992 WL 52143 (Del. Super.), IBM built and owned a highly sophisticated and computer system that it leased to a third party. IBM alleged that Comdisco sold and further subleased components of the computer system during the lease period. Millions of documents were produced during the discovery phase of this case, including an electronic mail communication from an IBM executive to an IBM account representative. IBM contended that the e-mail message reflected the executive's synthesis of legal advice he received from IBM's corporate counsel on a particular issue and thus, asserted attorney-client privilege. Comdisco contended that the communication reflected business advice, not legal advice. More important to the Superior Court of Delaware, however, was the extent to which "it contains information meant to be distributed to persons other than the corporate 'client'".

*International Business Machines*, 1992 WL 52143, at 1. The court found that only part of the e-mail message was intended to be private and subject to protection. *Id.* at 2. Arguably, the attorney-client privilege will be upheld, even if an attorney's advice or opinion is communicated to the client through electronic mail. It must be understood, though, that electronic mail represents a very real threat to the attorney-client privilege simply because it is frequently disclosed to persons "outside the circle of confidentiality".

It is no longer unusual for attorneys, particularly in complex cases, to use computerized litigation support systems. The system would consist of a computer program, documents (full or selected text), notes (including the attorney's mental impressions, conclusions, and theories), and summaries. Arguably, such a litigation support system would fall under the trade secrets and/or work product umbrella. Yet, litigation support systems were the target of discovery in at least two cases, *Fauteck v. Montgomery Ward & Co.*, 91 F.R.D. 393 (N.D.Ill. 1980), and *Hoffman v. United Telecommunications, Inc.*, 117 F.R.D. 436 (D. Kan. 1987). In *Fauteck*, the system itself had been developed with input from counsel, so it was protected, but the data was to be relied upon by a testifying expert and could not be withheld as attorney work-product. *Fauteck*, 91 F.R.D. at 398. In *Hoffman*, the discovering party sought information about the setup of the litigation support system itself. The court held that the information should be protected as work product with the understanding that if information from the system was used for expert reports, then it would have to be produced. *Hoffman*, 117 F.R.D., at 439.



***"Discovery of electronically stored data will be limited by these traditional concepts: trade secrets, attorney-client privilege, and the work product doctrine."***

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## "DOCUMENT" RETENTION OR DESTRUCTION

The preservation of electronically stored data presents unique challenges to the discovering party. Only an immediate request for a mirror-image copy of the computer's storage or access to the computer itself by an expert will preserve all the computer-based evidence. For so long as the computer system remains in everyday business use, new files are being created, old files may be overwritten, deleted or altered, in part or in whole, or back-up tapes recycled. And this presumes no purposeful or wrongful destruction. It can be argued that the temptation to delete computer files is great because most everyday users assume that once files, or parts of files, are "deleted" that they can never be recovered. This is simply not true.

In Alabama, "proof may be made that a party purposely and wrongfully destroyed a document which he knew was supportive of the interest of his opponent whether or not an action involving such interest was pending at the time of the destruction". Gamble, *McElroy's Alabama Evidence*, Section 190.05 (4th ed. 1991). Any party who destroys material evidence will suffer adverse inferences and/or monetary penalties. See e.g., *May v. Moore*, 424 So.2d 596 (Ala. 1982) (medical malpractice action involving missing hospital records wherein adverse inferences were drawn against defendant physician).

Clearly, the duty not to destroy begins before the filing of a complaint. In *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984), the court held "sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents". *Thompson*, 593 F. Supp. at 1454 (emphasis added). The court determined that "notice was provided by the pre-litigation correspondence between counsel for the parties". *Id.* at 1445. Besides destroying or discarding hard copies of documents, the defendant had erased certain key computer files. *Id.* The court stated:

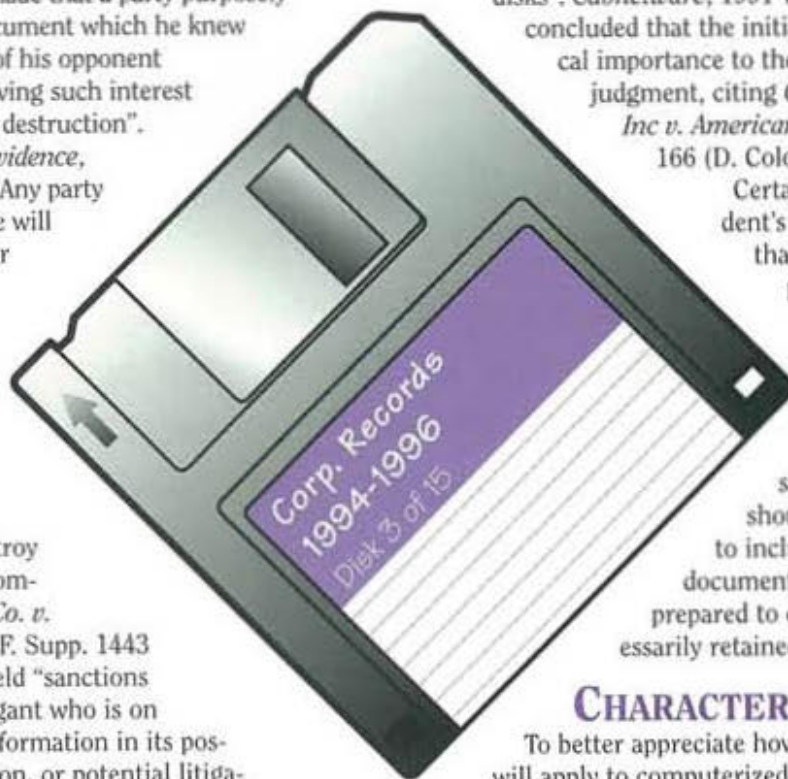
GNC could have preserved and retained on computer tape or disk all of the purchase, sale and inventory information and data which was on the now-destroyed records described in Findings 7 and 9 above without undue burden. GNC admits that it already possesses a computer tape and disk library

of over 2,000 tapes. The information contained on those remaining library tapes, however, cannot replicate the documents destroyed by GNC.

*Id.* at 1446-7. The defendant's continued destruction of evidence, both hard and electronically stored, led the court to impose monetary sanctions and a default judgment against the defendant. *Id.*

A default judgment was also entered against a defendant in a copyright case involving software used to design cabinets, *Cabnetware, Inc. v. Sullivan*, 1991 WL 327959 (E.D. Cal.). In *Cabnetware*, the defendant destroyed an initial version of the "source code" used to write the software at issue while a request for production of the source code had been pending. The defendant explained "that he destroyed the evidence by writing over the floppy disks because he needed more disks and did not want to bother to go out and buy additional disks". *Cabnetware*, 1991 WL 327959, at 2. The court concluded that the initial "source code" was of critical importance to the case and entered a default judgment, citing *Computer Associates Int'l, Inc. v. American Fundware, Inc.*, 133 F.R.D. 166 (D. Colo. 1990). *Id.* at 4.

Certainly, it behooves respondent's counsel to advise clients that to preserve existing computer data and, if necessary, disable any automated procedures on the computer that will destroy relevant evidence on the computer's storage. Further, counsel should advise corporate clients to include electronic data in its document retention program or be prepared to explain why data was unnecessarily retained or inadvertently destroyed.



## CHARACTERISTICS

To better appreciate how these traditional concepts will apply to computerized discovery, it is necessary to understand a few key differences between paper records and electronically stored records.

Electronically stored records are far more portable and accessible than paper records. An individual electronic file may be found on one personal computer or on several personal computers. The electronic file may be found on one or several floppy disks. If a party is "networked", i.e., uses a system of interconnected computers that can communicate with each other through a file server, then the number of people who can access the electronic file or the number of copies that could exist is expansive.

Electronically stored records are not as easily destroyed as paper records. Contrary to conventional wisdom, when a user strikes the "delete" key, the data is *not* physically removed



from the hard drive—only its “address” has changed. The data remains undisturbed until more space is needed on the hard drive and then, the file may be overwritten. The difficulty is that no user can predict when or if a deleted file will be overwritten. So, at least for an undetermined time, the deleted files can be recovered for the purposes of discovery. Certainly, those “deleted” files may also exist on back-up devices, such as magnetic tape or optical disk.

To proceed with the discovery of electronically stored data, a discovering party must familiarize himself with his or her opponent's computer system. Interrogatories and depositions can help to identify whether an opponent uses computers and if so, what sort of information they are likely to contain. The thrust of interrogatories, and later depositions, should be to identify all possible locations where information may be stored. This includes on-site and off-site locations. Beyond this, a discovering party must learn (1) who operates or uses computers; (2) what software is used; (3) what are the back-up methods, procedures and schedules; and (4) whether there are any privileged, password protected and/or encrypted files. This information should lay the ground work for an effective request for production and/or inspection of premises under Rule 34.

**“electronic mail. . .**

**. . . is frequently disclosed to persons ‘outside the circle of confidentiality.’”**

## ELECTRONIC MAIL

Special mention must be made of electronic mail.<sup>3</sup> With an estimated 40 million e-mail users expected to be sending 60 billion messages by the year 2000, the power and speed of e-mail to communicate is easily recognized. It has quickly become a substitute for telephonic and printed communications, as well as a substitute for direct oral communications, but if e-mail has become an indispensable tool in the work place, it has also become the “digital smoking gun” in more and more lawsuits.

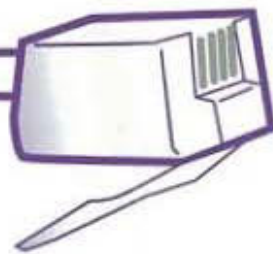
The federal courts are enforcing e-mail discovery requests in a wide variety of cases. In *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 WL 360526 (N.D. Ill. June 15, 1995), a district court in Illinois upheld an e-mail discovery request even though it meant turning over roughly 30 million pages of e-mail. In this complex price-fixing case, a defendant drug manufacturer protested that it would cost the company \$50,000 to \$70,000 to compile, format, search and retrieve e-mail responsive to the request. The drug man-

ufacturer argued that the plaintiff class, which consisted of retail drug stores, should bear these production costs. In considering whether the costs should be shifted, the court stated that the issues of “undue burden” become complicated in the context of the retrieval and production of computer-stored information:

On the one hand, it seems unfair to force a party to bear the lofty expense attendant to creating a special computer program for extracting data responsive to a discovery request. On the other hand, if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk.

1995 WL 360526, at 1. The court concluded that the plaintiff class need not bear costs caused by the defendant's choice of electronic storage.

As more businesses use e-mail as part of their daily communications routine, it is not surprising that e-mail evidence is turning up in more and more employment law cases. For example, in *Strauss v. Microsoft Corp.*, 856 F. Supp. 821 (S.D.N.Y. 1994) the plaintiff sued Microsoft for sexual dis-



crimination. The district court in New York held that several sexually explicit e-mail messages were admissible at trial, 1995 WL 326492 (S.D.N.Y., June 1, 1997) (denying Microsoft's motion *in limine* to exclude e-mail evidence), and further, that they “could lead a reasonable jury to conclude that, not only was Microsoft's reason for its [firing] pretextual, but also that it failed to promote Strauss as a result of gender discrimination.” *Strauss*, 856 F. Supp. at 825. Similarly, the plaintiff in *Aviles v. McKenzie*, 1992 WL 715248 (N.D. Cal., March 17, 1992), was able to support his claim that he was fired for being a whistleblower by offering as evidence e-mail messages in which he reported “unsafe and illegal practices” to his supervisors. See also *Knox v. State of Indiana*, 93 F.2d 1327 (7th Cir. 1996) (e-mail messages in which supervisor propositioned female employee were key evidence in sexual harassment and hostile work environment harassment case); *Meloff v. New York Life Ins. Co.*, 51 F.3d 372 (2nd Cir. 1995) (employment discrimination and defamation case brought by ex-employee after explanation was sent through corporation's e-mail system that she was fired for defrauding the



company); *Harley v. McCoach*, 928 F. Supp. 533 (E.D. Penn. 1996) (e-mail messages as evidence in a case involving claims of racially hostile work environment).

## CONCLUSION

If a litigator does not pursue electronically stored data, he or she cannot be confident of complete discovery. Key evidence may await discovery on floppy disks, hard drives, magnetic tapes and/or optical disks. Electronic mail, in particular, is an attractive source of discovery. E-mail messages tend to be informal and revealing. People communicate by e-mail what they would not commit to paper or even say out loud. E-mail, indeed all electronically stored data, is more permanent than paper. Paper can be shredded or thrown away but electronically stored data is much harder to destroy. Long after memories have faded or an employee has been fired, electronically stored data, in part or in whole, remains stored on mainframes, personal computers, file servers, back-up tapes and optical disks, and can be retrieved by the resourceful attorney who frames a request for the discovery of electronically stored data. ■

## Endnotes

1. Alabama Rules of Civil Procedure, Rule 34, mimics the language of the Federal Rule and includes "other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably, usable form". The Committee Comments, however, do not provide any instruction on this point.

2. A standard definition of "document" is: "When used in this request, the term 'document' means the original (or an identical duplicate if the original is not available, and any non-identical copies (whether non-identical because of notes made on copies or attached comments, annotations, marks, transmission notations, or highlighting of any kind) of any writings of every kind and description that are fixed in any form of physical media. Physical media include, but are not limited to, paper media, phonographic media, photographic film media (including pictures, film slides and microfilm), magnetic media (including but not limited to computer memory, hard disks, floppy disks, compact disks, and magnetic tapes of any kind), optical media, magneto-optical media, and other physical media on which notations or marking of any kind can be affixed."

3. A formal definition of electronic mail is "electronic communication of text, data, or images between the sender and designated recipient(s) by systems utilizing telecommunications links". Johnson and Podesta, *Access To and Use and Disclosure of Electronic Mail on Company Computer Systems: A Tool Kit For Formulating Your Company's Policies* 36 (September 1991).

# United States Bankruptcy Court for the Northern District of Alabama

Notice is hereby given that Local Rules of the United States Bankruptcy Court for the Northern District of Alabama, as adopted by the Court, will be effective March 1, 1997, and, except as they provide otherwise, govern all actions, cases, and proceedings thereafter commenced and so far as just and practicable all actions, cases, and proceedings then pending wherever the revised rules shall apply.

William C. Redden, clerk



# **Notice and Opportunity for Comment on Proposed Amended Rules**

## **United States District Court, Middle District of Alabama**

After consultation with the Court's Advisory Committee on Local Rules, amendments to the Local Rules of the United States District Court, Middle District of Alabama, are now finalized and will be considered for adoption after considering any written suggestions and comments from the bar and public received in the clerk's office by June 1, 1997. The Local Rules are available for review at the clerk's office, 15 Lee Street, Montgomery, Alabama 36104.

Most of the proposed amendments are prompted by statutory changes, by changes in the Federal Rules of Civil Procedure or Federal Rules of Criminal Procedure, by recommendations contained in this district's Civil Justice Expense and Delay Reduction Plan, by the practices of this court, by the 1988 "Local Rules Project" Report on the Local Rules of Civil Practice of the Committee on Rules of Practice and Procedure of the Judicial Conference (hereinafter referred to as the 1988 LRP Report), by the 1996 "Local Rules Project" Report on the Local Rules of Criminal Practice of the Committee on Rules of Practice and Procedure of the Judicial Conference (hereinafter referred to as the 1996 LRP Report), by Model Local Rules of both the 1988 LRP Report and 1996 LRP Report (hereinafter all references to model local rules are to these model rules), and by a critical review of this district's existing local rules and local rules of other districts.

The proposed amendments to this district's local rules also incorporate a uniform numbering system for local rules that parallels the rule numbering of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. See Fed. R. Civ. P. 83(a) and Fed. R. Crim. P. 57(a). The local rules are now divided into two parts: (1) rules applying to civil cases and to proceedings generally and (2) rules applying to criminal cases. Local rules applying to civil matters and to general provisions should be cited as "M.D. Ala. LR," and local rules applying to criminal matters should be cited as "M.D. Ala. LcrR."





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