

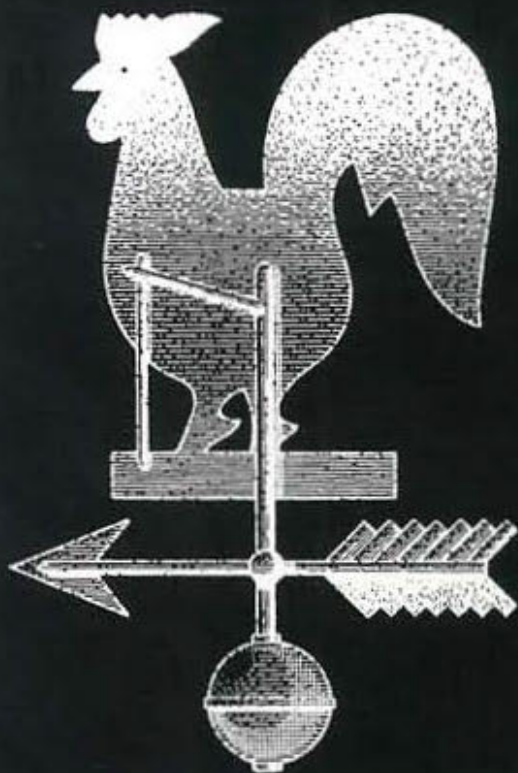
The Alabama Lawyer

Vol. 53, No. 1

JANUARY 1992

ENVIRONMENTAL LAW - AN EXPANDING FIELD OF PRACTICE

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IN BRIEF

JANUARY 1992

Volume 53, Number 1

ON THE COVER: Blue skies, clean water and a healthy environment for this state are common goals shared by environmentalists and industry.

Photo by Chris Grimshaw

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PRESIDENT'S PAGE

These remarks were delivered at the October 1991 admissions ceremony of the Alabama State Bar.

On behalf of more than 9,500 lawyers of this state, I welcome you as new members to the State Bar of Alabama. This is a day that celebrates an achievement. In my opinion, there are only a few days in a person's lifetime that can equal the feeling of accomplishment that you and members of your family have today attained upon your becoming a member of our state bar. Those of you who are being admitted today have worked long and hard to attain this goal. However, I am also sure this is a proud day for your parents, your husbands and wives, and your children. Without the collective effort and sacrifice of family and friends this day might not have been possible. My remarks today will be brief.

First, I want to tell you a little bit about the State Bar of Alabama. Our bar is a mandatory bar. You cannot practice law in Alabama if you are not a member of our bar. Our state bar is unique in the nation because of its power, duties and responsibilities to promulgate and enforce rules relating to admissions, ethics, education, and discipline of lawyers. The powers of the state bar are administered by 57 commissioners elected by all lawyers in the 40 judicial circuits of our state.

The lion's share of the real work done in our bar is performed by over 900 members of sections, committees and task forces. All of these members are volunteer lawyers working for the betterment of the public and our profession.

There are many opportunities available to the young lawyer for service to our bar. This year, there are more than 45 committees and task forces operating in areas such as (a) access to legal services, (b) alternative methods of dispute resolution, (c) insurance programs, (d) mentor programs, (e) specialization, and (f) substance abuse in society, to name a few. I know that Keith Norman intends to talk with you about membership in the Young Lawyers' Section, and this is most important. However, I urge you not to limit your activities with the bar to work in the Young Lawyers' Section. Each of you should become a member of a committee, task force or section in which you have an interest and in which you feel your service may be of some betterment to our profession and society. Is the bar important? I want to talk with you about the

answer to this. In asking the question, I do not necessarily mean the State Bar of Alabama, because as I have previously told you, it is most definitely important. What I mean when I use the term bar is the community of lawyers in our state, our region and our nation. Our profession . . . its role . . . its scope . . . its responsibility.

Since I am president of the Alabama State Bar, you could hardly expect me to say, "No, I don't feel the bar is important." The bar is important and it is important to everybody in society, not just lawyers. I believe the bar plays a critical role in the establishment and maintenance of a free society. As you look back through the history of this country, it is easy

to see the accomplishments and benefits that the community of lawyers, or the bar, have made. However, in my judgment, no time in the history of the world rivals the present or future days for the bar to be of service in establishing and maintaining a free society.

The events of the past year and a half in eastern Europe and other parts of the world have drawn a very clear distinction between the value of an active, viable, adversarial, independent legal system and a system that acts as a puppet for totalitarianism.

Good thoughts and words on paper are not enough to make people free. How effective would the Bill of Rights in this country be without lawyers? Lawyers breathe life into the words and ideas of a free people and legal system. Lawyers are

at the very center of every facet of a person's life. It seems that every time I turn on the television or radio or read a newspaper the story is about some legal issue and lawyers.

The law has been and is now so woven into the fabric of our country that our system will not withstand the stress, tension and strain placed upon it without independent, aggressive, professional lawyers.

As you begin your legal career, I want to talk with you a little bit about professionalism. I am not talking about professionalism in the sense of ethical canons. While it is important to be ethical and to abide by the *Code of Professional Responsibility*, professionalism is a broader term, it is a state of mind, it is an attitude, it is a higher standard expected of all lawyers.

We all want lawyers and the legal profession to be respected and admired for the role we play in society. This is not to say that our actions and activities should be done to suit public opinion. Everybody knows that lawyers cannot be governed by public opinion. However, the public has respect for lawyers who conduct themselves in a responsible, professional way, even if the position taken by the lawyer disagrees with majori-



Phillip E. Adams, Jr.

ty opinion. I urge you to be professional in your day-to-day activities. I suggest that we can all improve in our professionalism if we focus and try to remember several basic ideas. They are:

1. Remember those things that you were taught about right and wrong when you were young. Those things like honesty and courtesy and respect that your parents and grandparents told you were right are still right; those things like lying and cheating and stealing that your parents and grandparents told you were wrong are still wrong. Do not think that because you are a lawyer you have some different set of rules and that right and wrong are different than they have always been.
2. Do not be afraid or reluctant to seek advice from older, more experienced lawyers. This year we formed a task force to establish a mentor program in this state. The idea of the program is to assist young lawyers to obtain from older, more experienced lawyers advice on the basic courtesies, customs and practices of our profession. However, do not wait on the program to be established. My experience has been that lawyers respect other lawyers who say, "I don't know the answer to this question" or "I need help in this area" and are always happy to be of assistance.
3. Give back to the public and to the less fortunate. This year is the organizational year of the voluntary pro bono pro-

gram in Alabama. If we are to be professionals, we must realize that it is our responsibility as custodians of the justice system to make it better each day. Our system cannot exist if a significant number of citizens are denied access or are locked out or prevented from seeking justice because of their lack of money. Give of your time and talents to help those persons who are less fortunate. Our profession and the less fortunate will be better because of your efforts. More importantly, you will gain more than you give.

4. Do not neglect your family. While it is certainly important to attain professional goals, the most important goal one can attain in life is to make time to participate and enjoy family and friends. Do not ever allow the profession to consume you. It can exact a terrific toll if you lose your sense of balance and perspective. Take time to "pause and smell the roses". Participate in activities like Girl Scouts, Boy Scouts, Little League and school functions. Give to your community and to your church. Make your voice heard. Be multi-dimensional and balanced.

Again, I congratulate you for your accomplishment. Be proud! Enjoy your achievement. Make our state bar better because you are a member. Leave our profession better than you found it.

Thank you for letting me be here with you on this special occasion. ■

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EXECUTIVE DIRECTOR'S REPORT

Legislative initiatives, 1992

The board of commissioners has approved the introduction of legislation in the 1992 Regular Session of the Alabama Legislature which will have a significant impact on the annual licensing procedures for members of the Alabama State Bar.

The first of these pieces of legislation will be an amendment to Section 40-12-49 of the *Code* which governs the manner in which the annual license is currently purchased. Presently, licenses are sold in the offices of the probate judges or license commissioners in the 67 counties of Alabama. This is the annual business license which is purchased each year between October 1 and October 31. The only things uniform in the current purchase process are the time frame in which the purchase should be made and the amount of the license, which is presently \$150.

In some of the counties, lawyers are sent a bill for their license in advance of October 1, while in others it is the responsibility of the lawyer to go to the courthouse and purchase the license without any reminder. Also, the license can be purchased in any county, regardless of residence or office location.

Under the proposed legislation, the licenses will be purchased through the Alabama State Bar headquarters and each lawyer will be sent a bill annually in advance of the October 1 license date.

This will provide for some uniformity in notification while, at the same time, give the bar the information it needs with respect to who is and who is not holding a current license. Under the present system, while the lawyer is required to pay for the license in the month of October, the bar and the courts are not notified of the purchase of the license until well into the next calendar year, usually in March or April.

The bar is frequently asked to confirm a person's eligibility to practice. In the past, the bar has presumed those who held licenses in a preceding year have complied with the licensing statute until notified otherwise. It is not unusual when we receive our list from the revenue department to find well over 1,000 lawyers who have failed to purchase their license. In 90 percent of these instances, this is an oversight or a breakdown in the bookkeeping system within the lawyer's office. Often, this breakdown is a result of lawyers moving in and out of various firms and not being included in the listing update when license purchases are made.

Under the new legislation, the monies would be paid to the secretary of the Alabama State Bar who then would remit them in accordance with the revenue procedures of the State of Alabama. The state bar secretary will also be responsible for providing the presiding circuit judges with a list of those

lawyers in their circuits who have purchased the license within the requisite timeframe.

It is my belief that this will be a service to the members of the bar, and we have been asked on occasion why the licenses were not sold by the bar. Not only will we be able to afford every member of the bar adequate notice of their license requirement, but we will also be able to monitor any oversights that can result in significant penalties for failure to purchase the license in a timely manner. The legislation will not eliminate the penalties for failure to purchase a license.

This action has been taken following discussions over a number of years with the state treasurer's office, the revenue department and the Probate Judges' Association. If the Legislature approves the amendment to 40-12-49, the lawyers of Alabama will have a central registration point for the first time in modern history. The legislation, if passed, will be effective with the license year commencing October 1, 1992.

The second piece of legislation having an impact on licensing will be an increase in the annual license fee from the present \$150. The last increase in the license fee occurred in 1985. Until recently, the bar has been able to meet its responsibilities in spite of the increase in number of lawyers, the increase in general office expense and the significant increase in

program activities, not to mention postage and communication costs. The license fee in the state of Alabama is currently 15th among the unified bars in the country. (Unified bars are those bars which still maintain responsibility for the licensing and regulation of the profession under the direction of the Legislature and/or supreme court of the jurisdictions.)

License fees currently range from \$428 in California to a low of \$75 in the District of Columbia. These fees, in many instances, do not represent the total outlay of the lawyer for the privilege of practicing on an annual basis in the jurisdiction. In addition to the license/membership fee, there are additional charges for discipline in some jurisdictions, additional costs for annual client security fund assessments and admission activities paid to other court-mandated agencies. Likewise, many of these bar associations do not have the total responsibility for the licensing and registering process. Some also have additional revenue sources when the bar itself is permitted to operate a continuing legal education program from which the bar can derive a direct and significant revenue source.

The legislation to be introduced will call for an increase in the annual license fee of Alabama lawyers from \$150 to \$250. This increase, however, will be phased in over a two-year period.



Reginald T. Hamner

If the legislation is approved, the annual license fee for the 1992-93 fiscal year will be \$200, with the additional \$50 being phased in during the 1993-94 fiscal year.

The board recently approved the submission of its budget for FY '93 to the Legislature. It is an extremely conservative budget with minimal increases in operating costs. This budget will provide for the efficient operation of the new bar headquarters which, for many years, has been in dire need of expansion and which has desperately needed additional personnel. Because of the lack of physical space, some needed positions have not been filled and much-needed work of the bar has had to be delayed.

The 1993 budget of \$1,997,729 does provide for two clerical employees at an entry level salary and does provide additional funding to support the work of the various committees engaged in bar work. The budget also contemplates the addition of one investigator to assist with the increasing workload in the Center for Professional Responsibility. It also reduces the bar's reserve balance 64 percent; higher than usual interest rates have also had an adverse impact on bar finances in the recent past.

Without the increase in the license fee, the bar will not be able to meet its responsibilities and perform in a manner that will reflect credit on the profession and ensure the continuation of the privilege currently enjoyed by the bar to regulate its own professional activities.

I hope that you will be supportive of these efforts, since our profession and our association will be the sole beneficiary of this effort. ■

In the November 1991 "Executive Director's Report", the following panel of the Disciplinary Board of the Alabama State Bar was omitted. The editors apologize for the oversight and hope no harm or inconvenience was caused by this.

Panel V: Richard S. Manley, Demopolis
Abner R. Powell, III, Andalusia
J. Tutt Barrett, Opelika
Larry U. Sims, Mobile
William D. Melton, Evergreen

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David P. Broome of the firm of McDonough & Broome in Mobile recently became board certified in civil trial law by the National Board of Trial Advocacy.

Requirements for certification include: documentation of at least 15 trials to verdict or judgment; 40 additional contested matters; 45 hours of continuing legal education in the three years preceding application for certification; submission of a legal brief for review; provision of six references (three lawyers and three judges); proof of good standing in the legal profession; and a day-long examination on trial techniques, evidence and ethics.

Judicial Conference of the Eleventh Circuit

The meeting of the Judicial Conference of the Eleventh Circuit will be May 3-6, 1992 at Hilton Head, South Carolina. The conference is being convened by the judges of the circuit to consider business of their respective courts (the court of appeals and the district and bankruptcy courts in Alabama, Florida and Georgia) and to devise means of improving the administration of justice in those courts.

Any attorney admitted to practice before the court of appeals or any of the district courts of the Eleventh Circuit may attend the meeting. Attorneys who wish to attend must advise the circuit executive, Norman E. Zoller, in writing, at 56 Forsyth Street, NW, Atlanta, Georgia 30303.

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Gender issues for women lawyers enough to fill new magazine: *Perspectives*

Perspectives, a newsletter for and about women lawyers, is a new product designed by the American Bar Association Commission on Women in the Profession to fill a gap in national publications. Its inaugural edition, which premiered November 1, is aimed at covering the gamut of women lawyers' interests, from the national precedent set by Minnesota in having a female majority on a state supreme court to a consent decree in a sexual harassment complaint against a law firm.

Perspectives is edited by Marena McPherson, assistant staff director of the commission. For more information, write 750 N. Lake Shore Drive, Chicago, Illinois 60611.

ABA commission updates directory of women's bar associations

The 1991-92 Directory of Associations of Women Lawyers is now available from the American Bar Association.

The directory shows that growth in the number of women's bar associations has leveled off, after significant progres-

sion in the previous eight years. The number of groups listed remains steady at 178; the first directory, in 1982, listed only 47 organizations.

For information about prices, call (312) 988-5555 or write ABA Order Fulfillment Department, 750 N. Lake Shore Drive, Chicago, Illinois 60611.

Managing attorney sought for Mobile regional office, LSCA

The Legal Services Corporation of Alabama is seeking applications for managing attorney of the Mobile regional office.

Under the supervision of the executive director, the managing attorney shall have the general responsibility for management of the regional, satellite and part-time offices in the Mobile region and supervision of staff attorneys, paralegals and support staff. Specific duties and responsibilities include, but are not limited to:

- Case management — Supervise staff with respect to case review, case acceptance/rejection and case management. Supervise staff to insure balanced and manageable caseloads.
- Client eligibility — Interpret eligibility and make decisions of eligibility of particular clients.

- Participate in complex litigation as lead and co-counsel.
- Work with local bar in region.
- Oversee the case intake and acceptance process to ensure the selection of priority and eligible cases.

Applicants must have three years of litigation experience. Minimum starting salary is \$27,669.

Please submit resume, writing sample(s) and references to Sylvia Sankey, Legal Services Corporation of Alabama, 500 Bell Building, 207 Montgomery Street, Montgomery, Alabama 36104.

Lawyers honored for outstanding public service

Five lawyers, a law firm and a law school legal services clinic have been selected to receive the John Minor Wisdom Public Service and Professionalism Award, conferred annually by the American Bar Association Section of Litigation.

The award was established by the 64,000-member trial lawyer group to recognize "high standards of professionalism and outstanding contributions in promoting an open profession and an open system of justice".

Among the recipients honored at the October fall meeting of the Litigation Section in Chicago was Bryan Steven-

son, director of the Alabama Capital Representation Resource Center in Montgomery. He is a graduate of Harvard Law School. According to the ABA, Stevenson "spurned offers of high-paying jobs with prestigious law firms to follow a calling in the deep South. A product of a system that discriminated against him and other African-Americans, he is particularly sensitive to the question of racism as capital punishment is applied in Alabama."

Court TV's "In Practice" airs at new time

Courtroom Television Network's Continuing Legal Education program, "In Practice", started airing at a new time last month. The program now will be televised each Saturday and Sunday from noon to 3 p.m. (EST).

"In Practice" airs seminars from the Practising Law Institute, The Professional Education Group, The Rutter Group and state and local bar associations.

During its five months on the air, "In Practice" has covered such topics as bankruptcy, family law, estate planning, federal court motion practice, S&L regulation, legal ethics, counseling troubled companies, trial techniques, and modern law firm management. ■

NOTICE

1991-92 Occupational License or Special Membership Dues Were Due October 1, 1991

This is a reminder that all 1991-92 Alabama attorney's occupational license and special memberships **EXPIRED** September 30, 1991.

Sections 40-12-49, 34-3-17 and 34-3-18, *Code of Alabama*, 1975, as amended, set forth the statutory requirements for licensing and membership in the Alabama State Bar. Licenses or special membership dues are payable between October 1 and October 31, without penalty. These dues include a \$15 annual subscription to *The Alabama Lawyer*.

The occupational license (for those engaged in the active practice of law and not exempt from licensing by virtue of a position held, i.e., judgeships, attorneys general, U.S. attorneys, district attorneys, etc.) should be purchased from the probate judge or revenue commissioner in the city or town in which the lawyer has his or her principal office. The cost of this license is \$150 plus the nominal county issuance fees.

Special membership dues (for those not engaged in the active practice of law but desiring to maintain an active membership status) should be remitted directly to the Alabama State Bar in the amount of \$75. The special membership does not entitle you to practice law.

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

LEGISLATIVE WRAP-UP

By *ROBERT L. McCURLEY, JR.*

Twenty-five years ago on January 1, 1967 the Uniform Commercial Code became effective in Alabama. The UCC was initially drafted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws to bring "uniformity throughout American jurisdictions". The national study began in 1942 with a 1952 draft and ultimately culminated with the 1962 final draft, which was adopted by Alabama on August 23, 1965.

This is the first act which was accompanied by extensive commentary. An Alabama Comment follows the Official Comment to the Uniform Text where appropriate. In order to maintain uniformity with statutes in the other 49 states, the numbering of sections corresponds with the Official Text.

Alabama was the 37th state to adopt the UCC. All 50 states and the District of Columbia have enacted the code.

Since the national uniform draft is 30 years old, the Permanent Editorial Board for the Uniform Commercial Code has an ongoing revision of each section. To keep the commercial laws uniform in the United States, we in Alabama must constantly revise our UCC as each section is modernized.

Professor Fred Miller, a member of the

UCC Permanent Editorial Board and executive director designate of the Commissioners on Uniform State Laws, reports the following revisions and editions have been made or are under study:

Article 1-General Provisions —

This article is being studied by a task force of the American Bar Association.



The first provision being studied is the obligation of good faith — the proper standard, whether it should be subjective or subjective/objective. The recommendation of this committee will be worked into future revisions of other articles with the probable completion for this study being in 1993.

Article 2-Sales — A drafting committee has been formed which held its first meeting in December 1991. It is expected that this study will take two or three years. There is a special committee on computer software contracts that will work with this committee looking at Article 2. It is anticipated that computer software contracts will either be incorporated into Article 2 or possibly a new complete article drafted just for computers. A recommendation from this committee is not expected until 1995.

Article 2A-Leases — This is a new article to the Uniform Commercial

Code which deals with personal property leases. There is a bill pending in the Alabama Legislature drafted by the Alabama Law Institute which will add this section to our current UCC. Already enacted in 19 states, this revision defines leases to sharpen the distinction between leases and security interests disguised as leases.

Article 3-Commercial Paper —

This article has recently been revised to take into account the automation in check processing through the use of magnetic ink characterization and the wide use of debit cards. To keep pace with the modern technology and practices, the law of negotiable instruments was updated. This revision improves uniformity and resolves ambiguities as a result of this technological change. Articles 3 and 4 were revised together. Now completed, this revision has been already adopted in ten states.

Article 4-Bank Deposits and Collections — See reference in Article 3.

Article 4A-Funds Transfers — A

new article to the Uniform Commercial Code to make uniform the law which now deals with over one trillion dollars' worth of wholesale funds transfers that occur intra- or interbank and within the United States. The Law Institute is preparing for introduction in the 1991 session a bill to cover funds transfers in Alabama. Already enacted in 30 states, as well as adopted in "Fedwire" operated by the Federal Reserve System and the

— BAR — DIRECTORIES

Bar directories will be mailed this month. Extra copies are \$15 each. Send checks or money orders to:

Alabama Bar Directory
P.O. Box 4156
Montgomery, AL 36101



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.

Clearing House Interbank Payment System (CHIPS) operated by the New York Clearing House, this revision is being rapidly adopted in all the states. This is the first comprehensive body of law defining the rights and obligations that arise from wire transfers.

Article 5-Letters of Credit — A national committee is revising this article. The first draft is not expected to be completed until 1993.

Article 6-Bulk Transfers — This article has been revised and four states have enacted the revision. Nine states, however, have repealed this article.

Article 7-Warehouse Receipts, Bills of Lading and Other Documents of Title — Currently there is no national revision taking place with reference to this article.

Article 8-Investment Securities — This article was revised in 1977. After the endorsement by the securities industry in 1983, 45 states have now adopted revised Article 8. The Federal Securities Exchange Commission has threatened to pre-empt states from regulation of investment securities unless all the states have adopted the revisions to this article. It is expected that a revision for Alabama will be ready in 1993.

Article 9-Secured Transactions; Sales of Accounts and Chattel Papers — This article was revised by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. After such a revision, the Alabama Law Institute conducted a study that resulted in a revision of this law in 1981. This is the only revised article Alabama has adopted since the enactment of the UCC. The Permanent Editorial Board of the Uni-

form Commercial Code is now looking at a second revision but it is not expected to be completed until 1996.

The Alabama Legislature is expected to consider new Articles 2A "Leases" and 4A "Funds Transfer" in the 1992 Regular Session of the Legislature. Upon the acceptance of these articles by Alabama, a study committee will be formed later this spring to review articles 3 and 4 and Article 8.

The Alabama Legislature goes into Regular Session Tuesday, February 4, 1992 and is expected to stay in session until May 18. During that time, the Legislature is expected to take up reapportionment of Congress, worker's compensation, the general fund and special education budgets, as well as some degree of tax reform.

For further information, contact Bob McCurley, Alabama Law Institute, P.O. Box 1425, Tuscaloosa, Alabama 35486, (205) 348-7411. ■

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REMARKS BY HON. ALBERT P. BREWER AT OPENING OF COURT CEREMONY 1991-1992 TERM

October 7, 1991

The following is the memorial address given during the opening of courts ceremony marking the beginning of the new court term.

May it please the courts - Mr. Chief Justice, Justices of the Supreme Court, judges of the courts of appeals, members of the clergy, members of the Alabama State Bar, members of the staffs of the courts, honored guests:

I thank you for the high honor and privilege of addressing you today. The first Monday in October has long been the traditional day for formal opening of court of the Alabama appellate courts. In years past, this day customarily marked the return of the courts from their summer recess to begin a new term. Now only a weekend separates the conclusion of one term from the beginning of the next term, a fact which attests to the onerous caseload of our courts.

But it is beneficial to mark the ending and the beginning, a time to conclude the pending work and the starting point for a new work year, a time to review and assess the previous term and to anticipate the next term.

And it's appropriate that this is also a time when we pause to honor the memory of our 41 colleagues who departed this life since the last opening of court ceremony. Among their members are government lawyers, general practitioners, judges and teachers. Some resided in small towns, others in teeming cities, some were involved in politics and public service, others in finance and industry. Their practices varied from the court room to the board room to the probate record room. Some were young, less than two score years, and had barely scratched the surface of the mysteries of the law, while others were old by the world's time scale, four score and ten or more, and had probed deeply the questions the law ever presents to the practitioner. Their common thread is that all were lawyers in the finest tradition of our profession.

As I looked over the names of these departed, and thought about what I should say today, I was overwhelmed with the cumulative loss which we, corporately and personally, have experienced.

Each of us identifies in various ways with numerous of these whose lives and contributions we memorialize today.

Among these I number a niece, Melea Rodgers; two former law partners; three of my law school professors; three law school classmates; four colleagues with whom I served in government; two distinguished jurists before whom I was privileged to practice; and several lawyer friends who trod the political trails with me.

Two of these law professors, Harry Haden and Ralph Williams, served in Judge Patterson's cabinet; Hugh Kaul was a four-term member of the legislature; Richard Belser served as reading clerk of the House of Representatives for almost 20 years; and Hubert Taylor served with distinction in the state legislature before becoming a judge on the Alabama Court of Criminal Appeals.

Judges James Avary, Thomas Huey and Murray Battles graced the circuit bench while judges John Harris and Hubert Taylor served with distinction on the court of criminal appeals of our state. Judge Battles also served as legal advisor to Governor Folsom. Judge H.H. Grooms brought to the United States District Court for the Northern District of Alabama that measure of judicial temperament, demeanor

and intellectual capacity and insight which serves as a model for trial judges.

It's not surprising that these would have been so involved since it has been forever true that lawyers are on the cutting edge in public service.

In his *Democracy in America*, Alexis de Tocqueville observed:

I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people.

And he commended the role of lawyers in public service in these words:

As the lawyers constitute the only enlightened class which the people do not mistrust, they are naturally



Hon. Albert P. Brewer

called upon to occupy most of the public stations. They fill the legislative assemblies, and they conduct the administration; they consequently exercise a powerful influence upon the formation of the law, and upon its execution.

These whom I have named are but examples of this concept of public service which I have mentioned. Indeed all of these whom we memorialize have invested a significant part of their lives in our society. Their imprint is prominent in the social, religious and cultural fabric of our state. They are a part of all that is enduring and eternal. Daniel Webster expressed it this way:

Whoever labors upon the temple of justice with usefulness and distinction; whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself in name and fame with that which is and must be as durable as the frame of human society.

These who served as judges observed the mandate of the scripture in Deuteronomy 1:17:

There shall be no difference of persons, you shall hear the little as well as the great . . . And if anything seem hard to you, refer it to me, and I will hear it.

And when I think of law professors or teachers, I think of Perry Hubbard. His course when I was in law school was titled "Trial and Appellate Practice". He used Whit McCoy's book. He would come into the well of the tiered classroom, sit down at the desk, lean back in the wooden swivel chair, prop his feet on the desk, cross his legs at the ankles, and proceed in a one-hour lecture to cover writs of mandamus, writs of prohibition and writs of certiorari without seeming to pause for breath. There are several in this room today who can attest to this experience.

But most of these, as most of us, thought of themselves as "just lawyers" or just "country lawyers". And there's something noble about this appellation. Perhaps Justice Robert H. Jackson described the practicing lawyers best in his *Tribute to Country Lawyers* when he observed:

He loved his profession, he had a real sense of dedication to the administration of justice, he held his head high as a lawyer, he rendered and exacted courtesy, honor and straightforwardness at the Bar. He respected the judicial office deeply, demanded the highest standards of competence and disinterestedness and dignity, despised all political use of or trifling with judicial power, and had an affectionate regard for every man who filled his exacting prescription of the just judge. The law to him was like a religion, and its practice was more than a means of support; it was a mission. He was not always popular in his community, but he was respected. Unpopular minorities and individuals often found in him their only mediator and advocate. He was too independent to court the populace — he thought of himself as a leader and a law-giver, not as a mouthpiece.

Often his name was in a generation or two forgotten. It was from this brotherhood that America has drawn its statesmen and its judges. A free and self-governing republic stands as a monument for the little known and unremembered as well as for the famous men of our profession.

How fitting and how descriptive of these our departed colleagues are the words of Justice Jackson.

Julian Harris of Decatur once commented, "There are more lawyers teaching Sunday School in Decatur than any other profession." Indeed, these colleagues served as trustees, elders, deacons and stewards in the churches of the respective faiths; on school boards, hospital boards, library boards and industrial development boards; they represented cities and towns and counties; they led United Way campaigns and numerous other worthy philanthropic endeavors; they were upstanding, respected citizens who will be sorely missed.

Professionally, they handled the causes of the upper class and of the underclass. They accepted appointments to represent the indigent and devoted the same intensity to that assignment as to their more affluent clients. Pro bono work to them was not a duty but a privilege. What an example they leave for all of us!

And these shall not be forgotten. Reginald Hine tells us:

There is the blessed assurance that, as a lawyer, his "works do follow him," not into the grave, but into the work-a-day lives of his clients. Long after he is dead and gone, men and women will be acting upon his advice, will be carrying out his directions, will be ordering their affairs in strict observance of his written word. Estates will go on devolving under the settlements he drew. Husbands, wives, children will go on being protected by the trusts he created. Beneficiaries will rise up and bless him for the wills he made. Year after year, clients will occupy or trade or farm, relying on the agreements and the leases he approved.

Yes, indeed, blessed assurance, these will not be forgotten. As William Jennings Bryant said:

They are not dead who live
In hearts they leave behind
In those whom they have blessed
They live a life again . . . ■

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Sharon R. Hoiles (1984) and Michael A. Dasinger, III (1991) (mother and admittee)



Joan E. Powers (1991) and Robert F. Powers (1984) (admittee and husband)



Lee M. Pope (1991) and Max C. Pope (1962) (admittee and father)



Ronald Paul Thompson (1970) and Tara Elizabeth Thompson (1991) (father and admittee)



Matt Veal (1991) and D. Evan Veal (1965) (admittee and father)



Naomi Furman (1991) and Howard Furman (1985) (admittee and father)



James A. Wear (1991), David C. Wear (1976) and John C. Wear (1949), (admittee, brother, and father)



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Richard W. Fuquay (1991) and Eugene W. Fuquay (1975) (admittee and father)



John Pierce (1991), Don Pierce (1958), and Katherine Hogue Pierce (1991) (admittee, father/father-in-law, admittee)

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Trudie Anne Phillips (1991) and John R. Phillips (1951) (admittee and father)



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Victoria VanValkenburgh Norris (1991) and John Edward Norris (1991) (co-admittees)



Allen S. Reeves (1991) and Archie T. Reeves, Jr. (1956) (admittee and father)



Rosemary L. Buntin (1991) and Thomas E. Buntin, Jr. (1955) (admittee and father)



Robert Jeffrey Perloff (1991) and Mayer W. Perloff (1957) (admittee and father)



Robert C. Black, Jr. (1991) and Robert C. Black (1961) (admittee and father)

LAWYERS IN THE FAMILY



Judi Mitchell Alexander (1991) and Joel Forrest Alexander, III (1983) (admittee and husband)



Jack Brock Long (1991) and Grady J. Long (1939) (admittee and father)



Robert Spencer Frost (1989), Elizabeth Owens Frost (1991) and J. Connor Owens, Jr. (1951) (husband, admittee, father)



Windell Richard Owens (1991) and Windell C. Owens (1948) (admittee and father)



Warren B. Lightfoot (1964) and Warren B. Lightfoot, Jr. (1991) (father and admittee)



Carol Ann Colvin Clark (1991), Gerald D. Colvin, Jr. (1972), Serena B. Colvin (1950) and Gerald D. Colvin (1950) (admittee, brother, mother, father)



Robert W. Norris (1955) and Nathan Robert Norris (1991) (father and admittee)

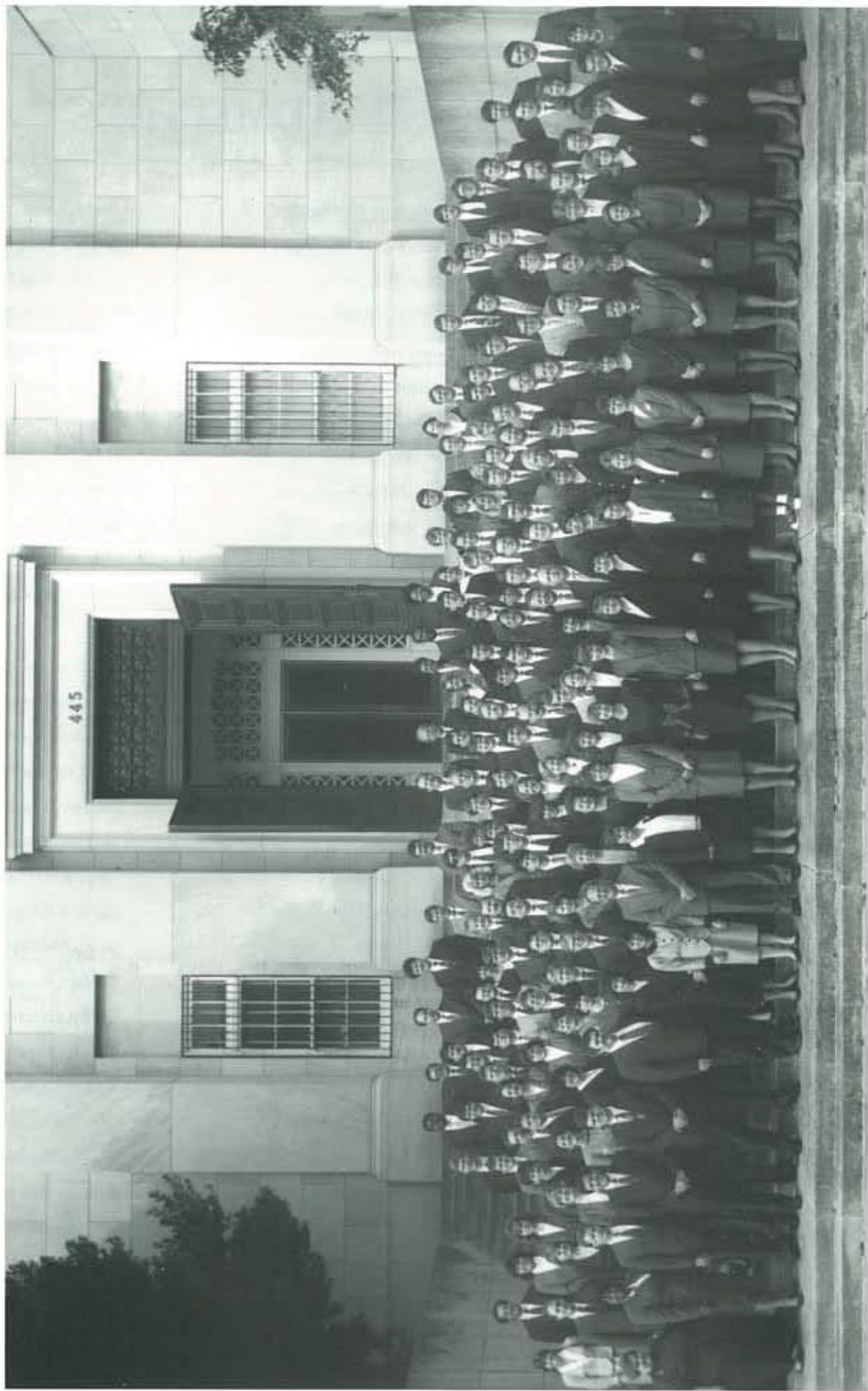
FALL 1991 BAR EXAM STATISTICS OF INTEREST

Number sitting for exam	378
Number certified to Alabama Supreme Court	289
Certification rate.....	76 percent

Certification percentages:

• University of Alabama	92 percent
• Cumberland School of Law.....	80 percent
• Birmingham School of Law.....	42 percent
• Jones Law Institute	60 percent
• Miles College of Law	0 percent

FALL 1991 ADMITTEES



FALL 1991 ADMITTEES

Abel, Luther Dickie
Alexander, Judith Mitchell
Alldredge, Suzanne
Allen, Leslie McCafferty
Amberson, Legrand Hamilton, Jr.
Anderson, Roy Scott
Andrews, Robin Wyatt
Avery, Kelly Denise
Bailey, Carol Glenn
Ball-Walker, Hilary Elizabeth
Barber, Gail Frances
Bauer, Samuel Christopher
Beauchamp, Tracy Hodges
Bell, John Caddell
Bell, John Charles
Bennett, Veronica Lynn
Benson, Grady Douglas
Bishop, Jennifer Lynn
Black, Kerry Dewain
Black, Robert Coleman, Jr.
Blackwood, Ronnie Hugh
Blake, Randy Barnett
Blume, Cheryl Lynne
Bostick, John Jackson
Bragan, Carl Linwood
Brantley, Evelyn Hassinger
Bridges, James Ernest, III
Britnell, Vonda Lou
Brody, David Henry
Browder, Herbert Ervin
Brunson, Paul Westerfield, Jr.
Bucy, Pamela H.
Buntin, Rosemary Leigh

Burke, Peter Harrington
Burke, Warren Hunter, Jr.
Callins, Timothy Roy
Campbell, Melissa Leigh
Campisi, Mary Lynn
Cannady, Teresa Lynn
Carlisle, William Todd
Carr, Clay Richard
Carter, Debra Rene
Cary, Jeffrey Lane
Case, William Earle
Clark, Brian Michael
Clark, Carol Ann Colvin
Clark, Thomas Crawford, III
Clayton, Kelli Andrea
Clum, Jason Edward
Coats, Linda Frances
Coburn, Randy LaVone
Coffey, Fred Lyle, Jr.
Cook, Gregory Carl
Copeland, Stephen Russell
Cosse, Marianne Tipton
Cotter, Ross Rainer, III
Craven, Danile Hosmer, Jr.
Daniel, Tracy Millar
Dasinger, Michael Anton, III
Davies, George Nicholas
Davis, Brent William
Davis, Elizabeth Shepherd
Davis, Eric Clark
Davis, Maria Karos
Davis, Nancy Andrea
Debruge, Marcel Louis

Denny, Gregory Todd
Denson, David Leverett
Deutsch, Elsie Marie
Dever, Steven Mitchell
Dodd, John David
Dodson, John William
Dow, Ginette Allard
Duke, Joey Donald
Dutton, Mark Anthony
Eddins, Katherine Milner
Ellis, Paul Roger
Evans, Karen Brown
Farmer, William Roy
Ferguson, Randy William
Flora, Kathryn Barton
Folmar, David Martin
Frost, Elizabeth Owens
Fuquay, Richard William
Furman, Naomi N'chama
Gamble, William Coleman, Jr.
Gambriel, Gregory Lee
Ganus, Melissa Jill
Gardner, George Dwight
Gentry, Christopher Byron
Gillespy, Gerald Palfrey
Gilliland, Kristy Lynette
Goh, Carolyn Fortner
Gould, Jillian Marie
Graham, John Henninger
Grammas, Peter Alexander
Granger, Roy Wiley, III
Green, Kevin Thomas
Gregory, Steve Paul

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Griffin, Deborah Ann
Griffin, Ricky Edison
Griffith, Carol Lynn
Grimes, James Kevin
Gross, Dwight Milburn, Jr.
Gunnin, Carla Jeanne
Haddock, Blair Mabry
Hardin, Leigh Nobles
Harkins, Mary Abbott
Harmon, Christopher Brame
Harp, Jimmie Gary, Jr.
Harvey, James Stephen
Hayes, James Marland
Haynes, Kenneth Drew
Hembree, Robert Rosson
Herrin, Michael Douglas
Hieronymi, Brent Edward
Hodgens, Melanie Catherine
Hollis, Jeffrey Kramer
Hoover, James Lee
Howard, Barbara McNair
Howard, Beverly Jean
Howard, Christopher Lee
Howard, Howard Edgar
Hughes, Nancy Covington
Hull, Mark McClellion
Hunt, David McDowell
Hunter, Randall Keith
Johnson, Suzanne
Jones, Stephen Hasty
Jones, Wayne Frederic
Katz, Todd Herisson
Kelly, Jeffrey Todd

Kettler, Charles Joseph, III
Khalaf, Nancy Elias
Kilborn, Vincent Fonde, IV
King, Frances Evelyn
King, Kathryn Annette
Klasing, Daniel Raymond
Lambert, Donald Windle
Larson, Lyle David
Lasley, Thomas O'Neal
Lawson, Carolyn Smith
Lawson, Edward Kirby, IV
Lee, Jeffrey Allen
Lembke, Matthew Howard
Lewis, Martin Stotland
Lightfoot, Warren Bricken, Jr.
Locke, Eric Leland
Loftin, Gordon Bartley, III
Long, Jack Brock
Love, James Darnell
Lowe, Wendy Runyan
Luke, Colin Henry
Luke, Kerry Phillip
Lumpkin, Julia Willcox
Lupinacci, Timothy Michael
Macoy, Mark Williams
Madison, Donna Britt
Mann, Robert Carey
Mansell, Donald Ben
Martinson, Abbott McWhorter
Matthess, Denise Anne
McClintock, Charles Allen
McCooley, Tracy Stewart
McCreeless, Paula Melissa

McDonald, Kelly Marie
McGowin, Deborah Diane
McGowin, William Claude
Meadows, Ted Gordon
Michaels, James David
Miles, Philip Earl
Millo, Vickie Marie
Millsaps, Pamela Kirkwood
Mitchell, Joel Shannon
Mitchell, Phillip Dinsmore, II
Mitchell, Sherri Stevenson
Morgan, Thadius William, Jr.
Morrison, Richard Duane
Morrissette, Henry Tonsmeire
Morton, Stephen Porter, Jr.
Moseley, Norwood Bruce
Mouyal, Helen Kohn
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Mulhorn-Smith, Karen Lee
Murphree, David Wayne
Narmore, Rebecca Ann
Neeley, Robert Randolph
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Norris, John Edward
Norris, Nathan Robert
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Owens, Windell Richard
Paines, Peter Lee

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Parker, Debra Bennett
 Parker, Glenda Dale
 Parker, James McCollum
 Peake, Amy Lasseter
 Pena, Richard Calvin
 Perloff, Robert Jeffrey
 Perry, Henry Lawrence
 Petway, Michael Douglas
 Phillips, Trudie Anne
 Pierce, John Charles S.
 Pierce, Katherine Hogue
 Pitts, Melvin Bruce
 Pizitz, Richard Alan, Jr.
 Pope, Lee McWhorter
 Powers, Joan Elizabeth
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 Raines, Kenneth Robert
 Randall, Kenneth C.
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 Reeves, Allen Smith
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 Rich, John Jeffrey
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 Riley, Robert Renfro, Jr.
 Ritchie, Allen Archie
 Robinson, Lisa Carole
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 Rogers, Michael Dennis
 Rosen, Terri Lyn
 Rousseau, David Woodham
 Royston, Robert James
 Rudd, Nickey John, Jr.
 Rudd, Steven Michael

Ruester, Susan Conlon
 Ryder, Brenton Douglas
 Sanders, Rachel Deanna
 Sawyer, William Robert
 Scent, Karen
 Scent, William Eugene
 Schauble, Edith Jane
 Sealy, Michael Stephen
 Seeley, Paul Burton
 Seiter, Lawrence Jean
 Semon, Marsha Lynn
 Shaw, Patricia Swearingen
 Shiver, Jerry Steven
 Simmons, Denise Arden
 Sizemore, Rosemary Vivian
 Slaughter, Julia Melanie
 Smith, George Autry, II
 Smith, Patrick Fitzgerald
 Snow, Terri Murrell
 Spain, Debra Deames
 Spradling, Joseph Edward
 Stabler, Alan Glenn
 Stahl, John William
 Stark, Edith Wilkinson
 Stein, John Stanley, III
 Steles, Nicholas James
 Stewart, Elizabeth Dee
 Stirling, James Larry, Jr.
 Sulzby, William Dobbins, Jr.
 Swagler, Richard Charles, Jr.
 Tampling, Andrew William, Jr.
 Tankersley, Thomas Claude
 Tapscott, Robert Wayne, Jr.
 Thagard, Thomas Werth, III
 Theibert, Richard Wilder

Thomas, John Thornell
 Thomas, Kimberly Cooper
 Thompson, Tara Elizabeth
 Thornton, Glenda LaVon
 Tomlin, Ginger Leona
 Trammell, Bradley Ellis
 Traylor-Wright, Malera
 Truelove, DeeAnn Rainey
 Turner, Ann Louise
 Turner, Jon Keith
 Tyra, Bryan Scott
 Vaughn, Joseph Lamar, Jr.
 Veal, Matthew Ward
 Vreeland, Albert Loring, II
 Walding, James Kevin
 Waters, Daniel Howard, Jr.
 Wear, James Andrew
 Weathers, Mary Elizabeth
 Weed, Edward Martin
 Whiddon, James Gerald, III
 White, Gerald Gregory
 White, Mitchell Drew
 White, Nancy Brooks
 Whitehead, Nicky Chance
 Williams, James Sarven
 Williams, Roger Dale
 Williams, Samuel Douglas, Jr.
 Williams, Walton Eugene, III
 Willoughby, Steven Russell
 Wilson, Gail Lindsay
 Woodhull, Elizabeth Adams
 York, David Preston
 Young, Antia Lynn
 Zundel, Susan Powell

YOUNG LAWYERS' SECTION

By KEITH B. NORMAN, president

A profile of the YLS

With the new year underway, I thought it appropriate to profile the Young Lawyers' Section. YLS members are those lawyers who are 36 years of age and younger or who have been admitted to practice three years or less. There are 3,780 YLS members, representing 39 percent of the bar's entire membership. Three thousand one hundred and forty-three, or 83 percent, reside in this state. Of the state bar's 17 sections, the YLS is by far the largest.

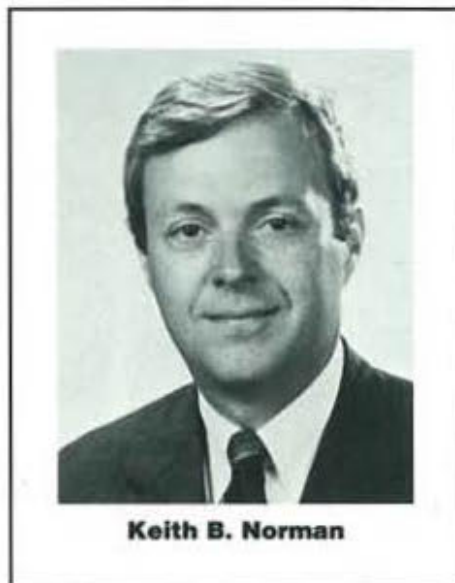
With respect to the location of YLS members in Alabama, the five counties with the largest number of young lawyers are: Jefferson, 1,256 (40 percent of in-state YLS members); Montgomery, 422 (13.4 percent); Mobile, 362 (11.5 percent); Madison, 193 (6 percent); and Tuscaloosa, 151 (4.8 percent). In just these five counties alone are 75 percent of the YLS's in-state members. Counties with the fewest young lawyers include: Choctaw, Coosa, Greene, Henry, Lowndes, and Pickens, with one young lawyer each. Geneva, Lamar, Sumter and Wilcox have two young lawyers each. Finally, Bibb, Bullock, Cherokee, Clay, Crenshaw, Fayette, Hale, Marengo, and Randolph each have three young lawyer members.

Additional analysis reveals that the YLS has 156, or 4.1 percent, black members and 14 members, or less than 1 percent, representing other minorities. Of the total number of black YLS members, 140, or 90 percent, are in-state members. Interestingly, 51 percent of all in-state black bar members are young lawyers. Geographically, the counties with the largest number of black young lawyers are: Jefferson, 62 (44 percent of all in-state black YLS members); Montgomery, 31 (32 percent); Mobile, 12 (8.5 percent); Madison, 6 (4.3 percent); and Tuscaloosa, 9 (6.4 percent). Although black young lawyers are located in 23 Alabama counties, 85.2 percent are located in the five counties noted above.

Female YLS members total 1,082, or 28.6 percent of the section's total membership. By comparison, females account for 17.4 percent of the state bar's total membership. Of all female young lawyers, 871, or 80 percent, are located in-state. Although there are female young lawyers in all but 16 counties, nearly 83 percent reside in Jefferson, Montgomery, Mobile, Madison or Tuscaloosa county. Specifically, 389 (44.6 percent of all in-state female members) are in Jefferson; 130 (15 percent) are in Montgomery; 90 (10.3 percent) are in Mobile; 60 (6.9 percent) are in Madison; and 53 (6.1 percent) are in Tuscaloosa.

Although the minority and gender percentages vary somewhat, the geographic dispersion of young lawyers across the

state is closely patterned after the geographical dispersion of non-YLS members of the bar. Possibly the most significant thing these numbers reveal is that the pattern of legal urbanization continues with the majority of young lawyers choosing to locate in the urban areas. If the pattern as suggested by these numbers continues, we may soon witness the demise of the country lawyer.



Keith B. Norman

Committee focus

Admissions — This year's fall admissions ceremony was the largest ever. More than 750 people, including admittees, family members and friends, attended the ceremony in Montgomery on October 29, 1991. For the first time as a part of the admissions program, new admittees desiring to practice in the Federal District Court for the Middle District of Alabama were admitted to that bar. The Honorable Harold Albritton, federal district judge and immediate past president of the Alabama State Bar, addressed the admittees and the Honorable Thomas C. Caver, clerk for the middle district, administered the oath to more than 30 admittees. Planning is underway to include the northern district and

southern district beginning with the 1992 spring admissions ceremony.

Alyce Spruell of Tuscaloosa and her committee deserve much credit for a very successful fall admissions ceremony and the planning that is underway to include all of Alabama's federal courts. Assisting with this fall's ceremony were Beth Slate Poe, Montgomery, luncheon chairperson; Elizabeth Smithart, Montgomery; Gerald Jones, Montgomery; Gilda Williams, Montgomery; Laura Crum, Montgomery; and Charlie Anderson, Montgomery.

Annual Seminar-at-the-Gulf — May 15-16, 1992, Sandestin Beach Resort. Hal West, Birmingham, and Frank Woodson, Mobile, are planning another outstanding offering of CLE programs and social events for this year's annual seminar at the Gulf. As is always the case, accommodations will be limited so I encourage you to make your reservations immediately. Reservations must be made directly with Sandestin Resort. The telephone numbers are (904) 267-8000 or 1-800-277-0802.

In a related matter, some YLS members have expressed interest in changing the location of the annual seminar. Two alternative locations have been identified. They are the Marriott's Bay Point Resort in Panama City, Florida and the Perdido Beach Hilton in Orange Beach, Alabama. If you have any thoughts or comments about moving the annual seminar at

the Gulf, please drop me a letter at P.O. Box 671, Montgomery, Alabama 36101. The executive committee is interested in hearing from you on this matter.

Kudos — Birmingham Young Lawyers. At the annual meeting of the American Bar Association's Young Lawyers Division in August, the YLS of the Birmingham Bar Association was awarded second place in the "Single Project — Service to the Public" category.

This award recognized the Birmingham YLS for their novel project working with the area's homeless at the Fire House Shelter and Mission. The Birmingham YLS established a business for the shelter residents to manufacture fishing lures. The project provides financial support for the shelter while

providing people at the shelter with an opportunity to learn a skill with which to earn money and to improve their self-esteem. Additionally, the Birmingham YLS established a scholarship program which provides homeless individuals with an opportunity to obtain their high school diploma through a GED program.

The Birmingham YLS deserves much credit and praise for their outstanding work with Birmingham's homeless. Their efforts should be an inspiration to us all—both younger and older lawyers — as well as an example of a true commitment to public service. Service projects like this help us to improve our image with the public and instill pride in our profession. ■

NOTICE OF ELECTION

Notice is given herewith pursuant to the *Alabama State Bar Rules Governing Election of President-elect and Commissioner.*

PRESIDENT-ELECT

The Alabama State Bar will elect a president in 1992 to assume the presidency of the bar in July 1993. Any candidate must be a member in good standing on March 1, 1992. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before

March 1, 1992. Any candidate for this office also must submit with the nominating petition a black and white photograph and biographical data to be published in the May *Alabama Lawyer*.

Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on July 14, 1992.

COMMISSIONERS

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 1st, 3rd, 5th, 6th, place no. 1; 7th; 10th, places no. 3 and 6; 13th, place no. 3 and 4; 14th; 15th, places no. 1, 3 and 4; 25th; 26th; 28th; 32nd; and 37th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices therein. The new commissioner positions will be determined by a census on March 1, 1992 and vacancies certified by the secretary on March 15, 1992.

The terms of any incumbent commissioners are retained.

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 24, 1992).

Ballots will be prepared and mailed to members between May 15 and June 1, 1992. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 9, 1992) to state bar headquarters.

Regulation by the Alabama Department of Environmental Management

By OLIVIA H. JENKINS

Among the powers the legislature has delegated to ADEM are the authority to administer the environmental laws enumerated in the Environmental Management Act and to promulgate rules and regulations to carry out those powers.

Responding to the need for a comprehensive environmental program for the state and for a single agency which would administer the various federally approved environmental programs, the Alabama Legislature enacted Act No. 82-612 which established the Alabama Department of Environmental Management. Codified at *Code of Alabama*, §§22-22A-1 through 22-22A-16, the Alabama Environmental Management Act created ADEM by combining the functions of the Air Pollution Control Commission, Water Improvement Commission, Water Well Standards Board and certain functions performed by the State Health Department. ADEM is designated, pursuant to §22-22A-4(n), as the state environmental control agency for the purposes of federal environmental law, including the Clean Air Act, Clean Water Act, Safe Drinking Water Act and Solid Waste Disposal Act. Since 1982, the Legislature has designated ADEM as the state environmental agency for the purpose of administering subsequently enacted federal programs such as the Resource Conservation and Recovery Act and underground storage tank programs, as well as others.

Among the powers the legislature has delegated to ADEM are the authority to administer the environmental laws enumerated in the Environmental Management Act and to promulgate rules and regulations to carry out those powers. ADEM is charged with developing an environmental policy for the state, it serves as the state agency responsible for administering federally approved environmental programs, and it serves as the state's clearinghouse for environmental data. Enforcement of the laws administered by ADEM is authorized through the issuance of administrative orders which may contain penalties and the filing of civil lawsuits. ADEM is also specifically authorized to issue, modify, suspend or revoke permits, certifications and notices of violation.

Organization of ADEM

ADEM is under the control of its director who is appointed by, and serves at the pleasure of, the Environmental Management Commission. The Office of the Director handles many of ADEM's administrative functions. Included in the Office of the Director are the Office of Public Affairs, the Special Projects Office and the Office of General Counsel. The Special Projects Office is responsible for planning and development of the state Superfund program, federal facilities cleanup and administration of the state's Waste Reduction and Pollution Prevention Program. Within the Office of General Counsel are the department's seven attorneys who are responsible for representing the department in enforcement and defensive litigation, administrative appeals, Board of Adjustment actions and personnel matters. In addition, the Office of General Counsel is responsible for preparation and/or review of legislation and regulations, drafting administrative orders, preparing legal opinions, approving contracts and leases, and providing general legal advice.

Of the department's five divisions, three are primarily involved in administration of regulatory programs. The Air Division is responsible for administering the federally

approved programs under the Clean Air Act and the Alabama Air Pollution Control Act. Included in its responsibilities are the permitting of air pollution control sources, compliance monitoring, ambient monitoring and data analysis and promulgation of air pollution control regulations. The Land Division administers the state Solid Waste Disposal Act and the Hazardous Wastes Management and Minimization Act, as well as portions of RCRA. Among that division's responsibilities are the regulation of solid waste disposal facilities, hazardous waste generators and treatment, storage and disposal facilities, and the management, transportation and disposal of medical waste. In addition, the Land Division is responsible for approval of special wastes for disposal, provision of technical assistance in emergency response situations, and investigation of illegal dump sites.

Responsible for administering the Alabama Water Pollution Control Act, the Safe Drinking Water Act, the Water Well Standards Act, and the Alabama Underground Storage Tank and Wellhead Protection Act, the Water Division is composed of several branches which have both permitting and compliance responsibilities. The Industrial Branch manages the NPDES and SID permit programs for industrial sources and issues water quality certifications for industrial and hydroelectric facilities. The Municipal Branch manages the NPDES program for municipal and non-industrial sources, manages the wastewater operator certification program and manages stormwater permitting for government entities, as well as administering the 205(g) construction grants program and the State Revolving Fund Loan Program. Permitting of mining, coalbed methane and agricultural sources, administration of the Non-point Source Management Plan, issuance of water quality certifications to non-industrial sources, and management of the Agricultural, Silvicultural and Construction Stormwater Permit Program are all responsibilities of the Water Division's Mining/Nonpoint Source section. The duties of the Water Supply Branch include the administration of the chemical/bacteriological monitoring program for water supply systems and enforcement of the Safe Drinking Water Act. Included in the duties of the Groundwater Branch are the management of the underground storage tank program and the tank trust funds, the administration of the underground injection control program, management of underground storage tank corrective actions, administration of the groundwater protection program, and inspections of monitoring well systems. Development of wasteload allocations for NPDES permits, management of water quality grants and water quality programs, including development and revision of the state's water quality standards and development of water quality management plans, are all responsibilities of the Water Quality Branch.

Olivia H. Jenkins

Olivia H. Jenkins, general counsel of the Alabama Department of Environmental Management, graduated from the E.I. White College of Law at Syracuse University. She is a member of the Environmental Law Section and the Administrative Law Section of the state bar. She is also a member of the Litigation, Natural Resources and Administrative Law section of the American Bar Association.

Although its primary responsibilities are not regulatory, the Field Operations Division does administer the Coastal Program, which regulates beach and dune construction. In addition, Field Operations manages the Department's field offices in Birmingham, Mobile and Decatur. Field Office personnel are responsible for conducting investigations of fish kills, emergency response actions, performing compliance evaluations and other investigations, administering the fish tissue monitoring program, conducting water quality surveys and studies, coordinating the Clean Lakes Program, and coordinating coastal consistency reviews. Additionally, the department's environmental laboratories, which are responsible for conducting various analyses on water, sediment and soil samples and for certification of drinking water laboratories, are housed within the Field Operations Division.

Besides handling personnel, physical and fiscal matters for the department, the Permits and Services Division coordinates communications and administrative functions for issuance of permits, serves as a focal point regarding permit applications and information, arranges for conferences with private and/or governmental agencies regarding permit requirements, and is responsible for receipt of permit application fees.

Environmental Management Commission

Along with the creation of ADEM, the Environmental Management Act also created the Environmental Management Commission. The EMC is a seven-member body which has the duty to select ADEM's director, promulgate rules and regulations, develop environmental policy for the state, and hear and determine appeals of ADEM's administrative actions.

Initially appointed by the governor, lieutenant governor and speaker of the house, EMC members are now all appointed by the governor. Appointments are for six years and terms are staggered. The composition of the EMC is set forth in *Code of Alabama* § 22-22A-6 and must include a physician licensed to practice medicine in Alabama, a professional engineer registered in Alabama, an attorney licensed to practice law in Alabama, a chemist or veterinarian, and a biologist or ecologist. In addition, one member must be certified by the National Water Well Association. The seventh slot requires no specialized experience, but the member filling the slot must have been a resident of the state for at least two years.

Rulemaking

There are three basic functions performed by most regulatory agencies such as ADEM: rulemaking, permitting and enforcement. ADEM's rulemaking procedures are governed by the Alabama Administrative Procedures Act, *Code of Alabama*, §§ 41-22-1 through 41-22-27.

Because the majority of the environmental programs which ADEM administers are federally approved programs, most of ADEM's regulations are derived from federal regulations. Pursuant to the federal approvals, ADEM's regulations for those federally approved programs must be at least as stringent as the federal regulations but may be more stringent. In many cases, ADEM's regulations are identical to the federal regula-

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tions. Regulations are generally drafted by appropriate technical division personnel with review by the Office of General Counsel.

Prior to the adoption, amendment or repeal of any rule, notice of the proposed rule is published in the *Alabama Administrative Monthly*, as well as at least three newspapers with the largest circulation in the state. The notice gives a brief summary of the proposed regulations and provides information as to how to obtain copies of the regulations, how to submit comments on the regulations, and sets a time, date and place for at least one public hearing.

At the public hearing, a member of the Office of General Counsel presides as hearing officer. After explaining the purpose of the hearing and the procedures to be used, the hearing officer recognizes an ADEM staff member to explain the department's position on the proposed rule. After the staff presentation, members of the public who have registered to speak make their presentations. While the hearing officer presides over the hearing and is responsible for compiling the record, he is not a part of the decision-making process. Although his advice may be sought if legal questions arise, it is the director, with the advice of the affected division chief, who makes the final decision on regulations to be proposed to the EMC.

Once the hearing has been concluded and the comment period closed, ADEM staff review the comments to determine if revisions are appropriate and prepare a resolution statement addressing all substantive comments. The regulations, as revised, are then presented to the EMC for adoption. After adoption, the regulations are filed with the legislative reference service and become effective 35 days after filing.

The public also has an opportunity to propose rules to the EMC pursuant to *Code of Alabama*, § 41-22-8. The EMC has a standing rulemaking subcommittee which evaluates the merits of rulemaking petitions and makes recommendations on such petitions to the full commission. Procedures for filing rulemaking petitions are found in ADEM Admin. Code Chap. 335-2-2.

Permitting

Although procedures may differ among the various media and program areas because of the diversified requirements imposed by applicable state and federal laws and regulations, the purpose of permitting is uniform: to assure that any source with the potential to have an impact on the environment complies with applicable environmental statutes and regulations and has rigid controls on its operation to prevent detrimental environmental impacts.

Permitting procedures are initiated when an applicant approaches ADEM regarding construction plans for a new facility or related to a modification or expansion of an existing industry. The Permit Center Coordinator arranges a meeting of the applicant with ADEM technical staff from the appropriate media. The purpose of the meeting is twofold: to provide permitting authorities with details relative to the scope of the project in order to determine in what case permits would be

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required and to provide the applicant with required permit procedure information to assure compliance with applicable procedures in a coordinated and efficient manner.

The review of pollution control requirements relative to the project is processed by technical personnel in the respective program area, or areas, with continued coordination provided throughout the process by the permit center.

Once the permit application and appropriate fee is received, the appropriate division determines if a permit can be issued and, if so, drafts a proposed permit. Notice of the draft permit is published in the local paper with the largest publication inviting public comment. If a request is received or if there appears to be substantial public interest, a public hearing will be scheduled and notice of that hearing published in the newspaper. The conduct of public hearings is procedurally identical to those for regulations except that a representative of the applicant is given an opportunity at the public hearing to place the applicant's views in the record.

Enforcement

ADEM follows a graduated enforcement strategy, with the response being appropriate for the nature of the violation. An effort is made to achieve compliance with the least amount of regulatory effort in order to conserve resources for the most serious problems. However, even minor problems may require an elevated response when less stringent actions do not result in compliance.

Upon discovery of a violation, the inspector for the facility assesses the violation and makes a recommendation which is forwarded to the appropriate approval level. Informal actions such as telephone calls, personal meetings, or warning letters may be appropriate if the violation is environmentally insignificant or, because of past experience, it is believed that informal action will result in resolution of the problem. Possible formal courses of action include:

A. Notice of violation

The NOV references previous informal actions, if any, states the nature of the violation, states that the violator has failed to respond, establishes a date for response by the violator, and warns the violator that more stringent action may be forthcoming if he does not respond satisfactorily. NOV's are sent certified mail and are approved at the Division Chief level.



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B. Administrative order

The decision to recommend the issuance of an Administrative Order is made by the proponent division chief and normally will be considered only when less formal actions have failed to achieve compliance. A referral is made to the Office of General Counsel, and the drafting of the AO is assigned to one of the OGC's attorneys. A proposed administrative order is sent to the violator and a written response is requested. If the alleged violator wishes, he may request, in his written response, an informal conference to discuss the order. The informal conference is usually chaired by the attorney who drafted the AO, but in some cases by the division chief. The violator is given the opportunity to show cause why the order should not be issued or why it should be modified in some manner. The violator may be represented by an attorney, and it is strongly suggested that he be represented by a professional engineer or other environmental consultant at the conference. The violator is given the opportunity to deny the findings of fact contained in the proposed order, and he is allowed to present any evidence he feels is relevant to the issues. After the informal conference is completed, the staff has evaluated the alleged violator's responses, and, in some cases, conducted follow-up inspections and/or investigations, a recommendation is presented to the ADEM director who makes the final decision based upon the staff recommendation and the evidence presented by the alleged violator.

C. Administrative penalty

Pursuant to *Code of Alabama*, § 22-22A-18, ADEM may assess an administrative penalty ranging from \$100 per day per violation to \$25,000 per day per violation, with a cap of \$250,000. In assessing a civil penalty, ADEM is required to consider the seriousness of the violation, the standard of care manifested by the violator, the economic benefit which delayed compliance may have deferred on the violator, the nature, extent and degree of success of the violator's efforts to minimize or mitigate the effects of the violation on the environment, the violator's history of previous violations, and the violator's ability to pay the penalty. *Code of Alabama*, § 22-22A-5(18)c. Issuance of penalty orders is handled in the same manner as non-penalty orders.

D. Litigation

When all other enforcement responses have failed, litigation may be filed. Criminal violations are referred to the Attorney General's office for prosecution. Civil litigation is handled by ADEM's Office of General Counsel and is filed in the county where the violation occurred or where the violator resides or does business. Where an administrative order with a penalty has been issued and the penalty has not been paid, the case is filed in Montgomery County Circuit Court.

Generally, enforcement responses follow the six steps outlined above. However, each violation is a violation for which the full range of enforcement responses is available. Determining the most appropriate response requires consideration of the severity of the violation in terms of the degree of variance from the standard of compliance, the impact on the environ-

ment, and the integrity of the applicable program; the history of the violator in terms of past violations and good faith; the impact on other facilities; the availability of resources; the importance of the violation in comparison with other violations that must be dealt with by limited resources; and considerations of fairness and equity. Although achieving compliance at the lowest level possible is the preferred course of action, in some cases the severity of the violation may dictate the issuance of an administrative order, or even litigation, without going through the intermediary steps.

Administrative appeals

Pursuant to § 22-22A-7(c), appeals of ADEM's administrative actions may be filed with the EMC within 15 days of receipt of notice of the action or, if no notice was provided, within 30 days of the action. The hearing must be commenced within 45 days of the filing of the appeal request. Generally, the EMC appoints a hearing officer to conduct the hearing and make a recommendation. Limited discovery is available, and the hearing is conducted much like a non-jury trial, with the exception that strict rules of evidence do not apply. Pursuant to Code of Alabama § 41-22-27(f), ADEM is exempt from the contested cases provisions of the Alabama Administrative Procedures Act.

Information requests

With the increase in citizen suits, toxic tort litigation, and other types of litigation dealing with environmental issues, there has been a corresponding increase in the number of information requests and file review requests which ADEM must process. Increasingly, ADEM employees are being subpoenaed to testify in private litigation. These ever increasing demands have severely taxed ADEM's already limited resources. Because of these demands, procedures for obtaining information from ADEM have been developed.

A. File reviews

Like most state agencies, the majority of ADEM's records are public documents and available for inspection. Due to severe space limitations which limit the number of file reviews which ADEM can handle simultaneously and because most of ADEM's files are working files which may be taken out of the office during inspections, walk-in file reviews, without an appointment, cannot be accommodated. If you wish to review files, you should make a written request addressed to the Permits and Services Division, and you will be contacted to set up an appointment. With the exception of coastal permitting records, all files are kept in Montgomery, and information requests should be addressed to the Montgomery office. Sending a request to a field office only slows down the process, as all file review and information requests, other than for coastal records, are forwarded by the field offices to the Montgomery office. Information and file review requests for coastal program records should be addressed to the Mobile Field Office. If copies are desired, the reviewer may indicate which documents he or she wishes copied, and copies will be sent to the reviewer as soon as possible at a rate of \$0.40 per page.

B. Information requests

Requests for copies of documents must be made in writing and should be addressed to the Permits and Services Division. Such requests are honored if the written request states a willingness to pay the copying charge and is specific enough to be easily ascertainable without making lengthy file reviews or making judgments about whether individual documents are within the scope of the request. Thus, a request for "the NPDES permit dated August 8, 1991 issued to Alabama Dischargers, Inc., located in Grovers Corners, Alabama" will be honored, while a request for "all records regarding the compliance status of Alabama Dischargers, Inc." will not. In the case of requests which are vague and overly broad, ADEM invites the requestor either to specifically identify the particular documents he or she wishes or to conduct a file review.

C. Subpoenaing witnesses

It is the long-standing policy of the agency that no ADEM employee will testify in private litigation without a subpoena. Often, employees are subpoenaed when the only need for the testimony is to authenticate documents. If requested, certified copies of ADEM's records can be provided, thereby eliminating the need for the employee to testify. ADEM encourages the use of certified copies as the time employees spend testifying in cases which do not involve ADEM is time taken from regulatory duties.

Often, attorneys seek to use ADEM staff as unpaid expert witnesses. While this may cut down on trial expenses, it is rarely in the client's best interest. Although there is a wealth of technical expertise among the ADEM staff, most employees have very specialized knowledge and are rarely able to provide the comprehensive testimony an expert witness is able to provide. Additionally, ADEM cannot spend its limited resources working with private attorneys to prepare private litigation; staff time cannot be spent reviewing files and/or scientific literature in preparation for testimony in private litigation. Finally, ADEM staff will make no effort to present testimony in a light most favorable to the subpoenaing party.

D. Environmental audits

Now that buyers and lenders are frequently requiring environmental audits prior to consummating a transaction, ADEM is getting an increasing number of requests for certifications of compliance. Frequently, ADEM receives calls from attorneys who state that a closing is scheduled for the next day and certification of compliance is needed immediately. Unfortunately, ADEM does not have adequate staff to provide this service, nor, as a state agency, can it assume the liability attendant to making such certifications. If you anticipate needing an environmental audit, you should contact a reputable environmental consulting firm very early in the process to ensure that all necessary file reviews, tests and inspections are done and an audit report is available at the time of closing.

Representing a client before ADEM

Because violations of environmental laws and regulations, even if accidental, have the potential for almost unlimited liability and because that liability increases exponentially with

time, it is very important that a lawyer representing a violator seek to resolve the violations at the earliest stage possible. Immediate response to violations, both to prevent the violation from recurring and to minimize the impact of the violation on the environment, as well as remediation efforts, will have a positive impact on the agency when making enforcement decisions. Not only will quick action be well received by regulatory agencies, but it will probably also limit the amount of environmental harm done, thereby limiting liability. Promptly responding to warning letters and notices of violations with an explanation of the cause of the violations and the response made by the violator will weigh in the violator's favor. Reporting violations to the agency before they are discovered by inspectors will also be considered favorably.

Conclusion

Given the complexity and technical detail of the environmental laws and regulations administered by ADEM, practice before the agency can seem a bewildering nightmare to the novice. If you are handling an environmental case for the first time, or branching out into a new environmental medium or program, you may find consulting an environmental engineer or other environmental professional who specializes in the particular medium which your case involves will be of enormous benefit. Armed with a good consultant, some basic knowledge of administrative law and a copy of the applicable regulations, any lawyer can represent a client before ADEM. ■

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BUILDING ALABAMA'S COURTHOUSES

FAYETTE COUNTY COURTHOUSE

By SAMUEL A. RUMORE, JR.

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

Fayette County

During 1824 and 1825, General Lafayette, the French hero of the American Revolution, made a triumphant national tour and "Final Farewell" through the United States. Wherever he went, he was met by local officials and greeted by large admiring crowds. It was reported that many babies were named for the venerable general. Also, many place names were selected to honor him. In Alabama alone there are Fayette County, and the towns of Fayette, Fayetteville and Lafayette, the county seat of Chambers County.

Fayette County was created December 20, 1824 during the time of Lafayette's tour. It was made up of territory taken from Tuscaloosa and Marion counties. The Alabama Legislature acted to honor Lafayette who was to visit Alabama in April 1825.

It is remarkable to note that Lafayette, in true aristocratic fashion, had seven names. His full appellation was Marie Joseph Paul Yves Roch Gilbert du



Fayette County Courthouse

Motier the Marquis de Lafayette. Even more remarkable is the fact that the county seat of Fayette County has had more names. At various times it has been called Frog Level, because of the swampy land where the town was located; Alfreda, in honor of the wife of the first postmaster; Icy, in honor of the daughter of the second postmaster; Fayette Courthouse; Fayetteville; Lantona; Depot Town; and, finally, Fayette.

Local tradition claims that Fayette County has had seven courthouses. Little is known of the first two except that the first court was located in a hatter's shop called "Van Hoose's store," and the

second is believed to have been a log structure that burned in 1854. It is known that on May 30, 1854, the Fayette County Commission awarded a contract to John J. Spain and Ira D. Farmer to build a new courthouse on the site of the burned structure. This building likewise burned on April 14, 1866, probably as the result of arson. Most of the records in the courthouse were destroyed.

On June 11, 1866, a building was rented for use as the fourth Fayette County Courthouse. This building was John C. Robertson's tavern for which the county paid \$200 in rent. Later, in

1867, Robertson was awarded a contract to build a fifth courthouse. The contract price was \$4,000 and the structure was completed on November 23, 1868. This building was described as brick with large white columns supporting an extended portico, and surrounded by a fence and hitching posts. This fifth courthouse remained in use until 1892.

On February 4, 1867, a significant event in the life of the county took place: Jones County was created from the western portion of Fayette County. Jones County was abolished later that same year, but was re-established as Sanford County on October 8, 1868. On February 8, 1877, the name was changed to Lamar County. In any event, Fayette was significantly reduced in area, and it no longer bordered the state of Mississippi.

In 1833, another significant event took place: the Georgia Pacific Railroad came to Fayette County. This event ultimately influenced the location of the county seat town. The railroad had built its depot approximately one mile south of the courthouse. Many homes and the business district gradually moved closer to the new "Depot Town". However, the courthouse remained at the old town.

By 1890, the citizens of Fayette County faced a recurring question in the history of Alabama counties. They had to decide whether to build a new courthouse on its existing site, or construct a new courthouse at a new location. There was much support to move the courthouse to the new town because of the number of merchants who had relocated near the depot.

On December 8, 1890, the Legislature passed an act creating a commission which was authorized to select a site

and build a courthouse. The commissioners decided that the people should vote on the location. The choices were the old location of the courthouse at Fayetteville, the new Depot Town nearby, or the geographic center of the county called "Center". In the first election, no choice received a majority. In the second election held in July, Depot Town won. The old town soon passed from importance, and in 1898 by popular vote the citizens finally decided to name their city Fayette, and it remains Fayette to this day.

The sixth structure to serve as Fayette County Courthouse was completed in 1892 at a site near the depot. E.J. Ostting of Montgomery was the architect. In 1906 an annex was added to the courthouse, and Ostting also designed it.

On Friday, March 24, 1911, Fayette suffered its worst disaster. A fire spread through the town and destroyed most of the business district and the courthouse. Many court records were lost forever. A local ordinance was soon passed requiring that all new structures be built of brick.

On April 17, 1911, a contract was awarded to the Little-Cleckler Construction Company of Anniston for the construction of a new courthouse on the same site. The contract price was \$58,347.21. This building was completed in 1912, and serves today as the seventh Fayette County Courthouse.

This courthouse was built in the neo-classical style, and its most noted feature is its columned cylindrical dome. Clock faces are located on each side of the dome. The main entrance to the building has a pedimented portico. The pediment is supported by four two-story Ionic columns. Originally the courthouse was planned to have similar entrances on all sides, but the extra cost made that plan unfeasible. The building is constructed of buff-colored brick.

Modern conveniences have been added to the interior of the building over the years, but its exterior has remained unchanged since 1912. The Fayette County Courthouse and its surrounding business district retains the appearance and architectural character of the first quarter of this century. The district was named to the National Register of Historic Places on April 30, 1976. ■



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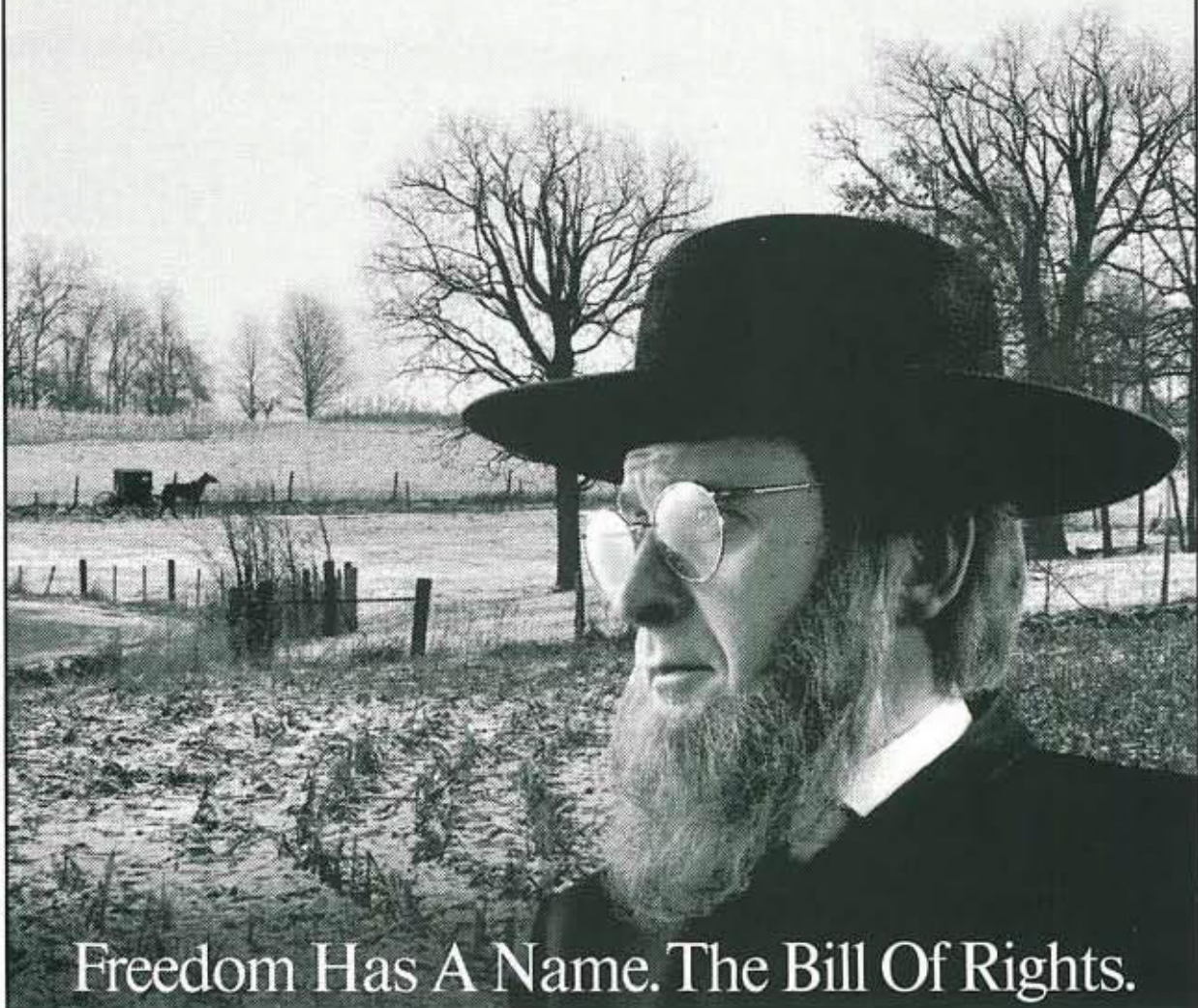
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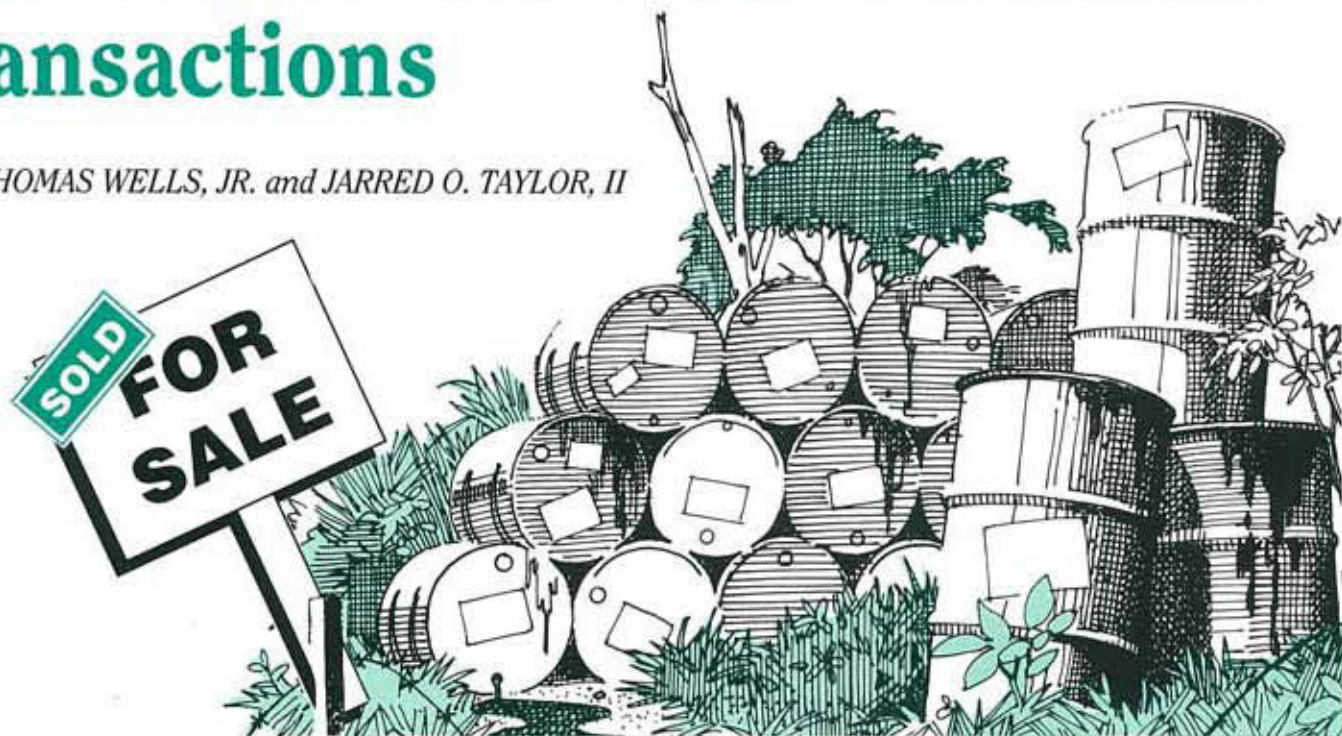
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Environmental Considerations in Real Estate and Other Business Transactions

By H. THOMAS WELLS, JR. and JARRED O. TAYLOR, II



Not so many years ago, real estate sales, asset purchases, and other business transactions were conducted with little or no concern for environmental liabilities associated with the deal. The passage of Superfund and its broad liability provisions, and the even broader interpretation given it by our federal court system, have caused environmental concerns to be expressed before, during and after such transactions. Environmental issues now not only constitute a threshold hurdle for the imaginative lawyer, more often they are becoming the fatal blow to many business transactions.

This article assumes the reader has some familiarity with the primary sources of statutory and common law liability for businesses and financial institutions, including federal and state environmental statutes and common law causes of action. The impact of these environmental laws and liabilities on real estate, banking, and other business transactions is the subject of this article.

REAL ESTATE TRANSACTIONS

A. Due diligence and the innocent purchaser defense

Under CERCLA, the current owner of real estate potentially has liability for cleanup of contamination

even if he did not cause or contribute to the contamination, or even if the disposal was legal at the time (strict liability),

even if there are others "more liable" (joint and several liability), and even if the disposal occurred many years ago, even before CERCLA was enacted (retroactive liability). It is merely his status as current owner that grants him full CERCLA liability.

Congress, however, recognized the unfairness of this liability, particularly with regard to undetectable contamination. Congress, therefore, exempted a purchaser of property from cleanup liability if he could establish that he did not contribute to the contamination and that he did not know or had no reason to know of any contamination. 42 U.S.C. § 9601(35). In order to fulfill this condition, a prospective purchaser must make some effort to determine if any contamination is present on the property *before* consummating the purchase. This investigation is commonly referred to as "due diligence".

Due diligence is defined under CERCLA as "all appropriate

inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." 42 U.S.C. § 9601(35). In order to determine if a purchaser has met the requirements for this defense, CERCLA requires the fact finder to consider how much experience or knowledge he has, if the purchase price for the property in an uncontaminated state is too small, common or ascertainable information about the property and its past uses, the obviousness of the presence of contaminants, and the ability to detect such contamination. 42 U.S.C. § 9601(35). These factors, at a minimum, require some sort of investigation of the property, commonly known as a "Phase I" assessment. Accomplishment of such an assessment is achieved through an independent environmental consultant. This consultant typically reviews public records relevant to the site and conducts an actual investigation of the site.

If there is any indication of an environmental problem in Phase I, the innocent landowner defense may well require parties to the transaction to take further steps, including physical sampling of the air, land or water. This may result in renegotiation of the terms of the transaction or abandonment of the transaction itself. If contaminants are discovered before sale and the purchaser proceeds with the sale, he no longer will be "innocent" as to those contaminants discovered at the site before sale.

Not only have environmental laws had an impact on what parties may do before a sale, these laws also have had an effect on the way business is conducted after the sale. This is true because landowners must also take certain action after purchasing property in order to maintain their qualification for the innocent landowner defense. These actions include not causing any contamination yourself, exercising due care if you learn of contamination, taking reasonable precautions against foreseeable acts of third parties, and when you sell the property you must disclose all knowledge relating to any contamination. 42 U.S.C. §§ 9601(35), 9607(b)(3)(a), (b).

B. Notice to deed



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The hazardous waste regulations in Alabama require notice in the real estate records of a specific type of hazardous waste activity. ADEM Admin. Code R. 335-14-6-.07(10)(b). This regulation requires that no later than 60 days following certification of closure of a hazardous waste unit, an owner or operator must record a notation on the property's deed that will notify any potential purchaser that the land has been used to manage hazardous waste and that its use is therefore restricted. *Id.* For the other requirements of this regulation please refer to the regulation itself.

C. Environmental issues in contract negotiation

Nowhere is the lawyer's imagination and creativity called upon more than in contract negotiation concerning the purchase or sale of real estate or assets, and this is doubly so when environmental issues exist. This part of the article identifies potential areas for negotiation and identifies environmental issues in contract negotiation.

Assume you represent the potential buyer of a piece of property. You will advise your client that an assessment of the property by a qualified consultant is required. How do the seller and potential buyer agree on who performs the environmental assessment? It seems wasteful to have two performed, since they often cost \$5,000-\$10,000 each. Perhaps you allow the broker or financier to choose. Once a consultant is selected, it is best to specifically identify in the purchase agreement or closing document the consultant and exactly what the consultant is to do. You obviously will want to state who pays for the assessment. Should the buyer pay for it since it benefits his innocent purchaser defense, or is it a cost that should be borne by the seller as a cost of selling the property? Like many of these issues, it is simply a matter of negotiation.

What if the assessment cannot be completed prior to closing? Can you close the deal without knowing whether a cleanup must be conducted, how much it will cost and who is going to pay for it? You can close but you must provide for these unknowns or else lengthy and expensive litigation will ensue — good for the lawyers, bad for the clients. Take care of the contingencies ahead of time.

Prior to closing, you may know some sort of cleanup is required, you just do not know how expensive it will be. You could negotiate a maximum set figure for the seller to bear, or provide that the seller will pay for a certain percentage of the cost. You could also insert a provision giving seller or buyer the right to void the transaction in the event the proposed cleanup exceeds a certain sum.

Indemnities are commonplace and fully enforceable against the other party. However, private indemnities are not enforceable against EPA. Thus, a purchaser cannot rely on an indemnity from its buyer as a defense to a CERCLA claim by EPA. The purchaser still has current owner liability and will have to sue the purchaser under the indemnity agreement for recovery of cleanup costs incurred at the direction of EPA. You can also tie the indemnity to the monetary or percentage limitation previously discussed.

A method of limiting a seller's liability after the sale is to provide that his liability is limited to costs or expenses incurred by the buyer only if the cost or expense is required as a result of a governmental action or a third-party claim. Thus,

the buyer would be prevented from conducting, perhaps, an unnecessary cleanup and leaving the seller with the tab. You might even consider providing a mechanism by which the seller could prove that the buyer purposefully instigated, sought, requested or brought about the governmental action or third-party claim or that buyer was not otherwise under a legal obligation to perform the cleanup. The document could provide that, in such event, the seller would have no liability or a limit of liability. Another limit of liability would be a provision reducing the seller's liability by the amount by which the property's fair market value increases after cleanup. In this way a buyer could not have his cake and eat it, too.

TRUSTEES, PARENTS, SHAREHOLDERS, DIRECTORS AND SUCCESSORS

A. Background

Once thought to be a sanctuary from all liability, corporate directors, shareholders, parents, successors, and trustees are finding themselves more and more often defending environmental claims, not only from private parties but from government entities. Courts have been more willing to interpret CERCLA, in conjunction with corporate law, to provide a basis for holding corporate shareholders, directors, parent companies and successor corporations liable for cleaning up environmental contamination.

B. Shareholder, director and parent liability

Case law on this issue in Alabama is little or non-existent. No doubt these issues will begin to be litigated in our state courts as ADEM continues its increase in enforcement. Most courts finding CERCLA liability for shareholders, directors and parent corporations, however, have done so not merely because of the defendant's identity, but because the defendant participated in the activity causing the environmental problem. See *Mobay Corp. v. Allied Signal, Inc.*, 761 F. Supp. 345 (D.N.J. 1991); *Gopher Oil Co. v. Union Oil Co.*, No. 4-88-18 (D.C. Minn. Nov. 20, 1990); *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956 (W.D. Mich. 1990); *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030 (E.D.N.C. 1989); *State of Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Northeastern Pharmaceutical & Chemical Company, Inc.*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part and rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987). One of the more recent federal circuit court decisions found no liability for officers and former majority shareholders because of the little time spent at the plant and the lack of participation in the contamination in question. *Riverside Market Development Corp. v. International Building Products, Inc.*, 931 F.2d 327 (5th Cir. 1991).

Some courts, however, have found CERCLA liability for these entities with little or no discussion of the defendant's control over or participation in the contamination. See *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 22 (D.R.I. 1989), *aff'd* 910 F. 2d 24 (1st Cir. 1990); *State of Colorado v. Idarado Mining Co.*, 707 F. Supp. 1227 (D. Co. 1989), *rev'd on other grounds*, 916 f. 2d 1486 (10th Cir. 1990), *cert. denied*, 111 S.

Ct. 1584 (1991); *United States v. Mottolo*, 22 Env't. Rep. Cas. (B.N.A.) 1026 (D.N.H. 1984).

Some courts have held that the "corporate veil" must be pierced before corporate shareholders, directors and parent companies can be liable for contamination. See, e.g., *Joslyn Corp. v. T. L. James & Co., Inc.*, 696 F. Supp. 222, 224-25 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 1017 (1991)(parent company held not liable for environmental liability of its subsidiary based upon court's finding that mere ownership of a subsidiary will not lead to parent liability under CERCLA).

C. Successor liability

After a merger or consolidation of two or more corporations, the resulting corporation may be liable for the acts and obligations of the predecessor. Typically, if the successor corporation purchases the assets of another, the successor will not be liable for the predecessor's liabilities unless (1) the successor explicitly assumes those liabilities, (2) the transaction is a de facto merger or consolidation, (3) the successor is a mere continuation of the business, or (4) if the transfer of assets was fraudulently arranged to avoid liability.

In *Anspec Co. v. Johnson Controls, Inc.*, 992 F.2d 1240 (6th Cir. 1991), the court held that since a corporation is a "person" within the meaning of CERCLA, and therefore potentially liable for cleanup costs, a successor corporation under general corporation law can be a potentially responsible party under CERCLA. Similarly, in *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, (3rd Cir.), *cert. denied*, 109 S. Ct. 837 (1989), a successor corporation was found liable under

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CERCLA where there had been a merger. Finally in *In Re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution*, 712 F. Sup. 1010 (D. Mass. 1989), a new corporation purchasing substantially all the assets of a predecessor company, but disclaiming liability from the predecessor's environmental liabilities, was still found liable for cleanup costs because the transaction amounted to a merger. The court held that the new company had merely continued the business with the same equipment at the same site and with the same personnel. *Id.* at 1015-16.

D. Trustee liability

What happens to a bank or other fiduciary or trustee holding contaminated property as part of a trust estate? Can the bank or fiduciary be held liable for cleanup as the legal owner of the trust property? Is liability limited to the entity in its fiduciary or trustee capacity or can assets of the bank or corporation itself be reached for such liability? Some courts have found such trustees liable under CERCLA when they meet the definition of owner or operator of contaminated property.

In *United States v. Burns*, 16 Chem. Waste Lit. Rptr. 1058, 1988 LEXIS 17340 (D.N.H. 1988), the defendant was the sole beneficiary and trustee of a trust owning contaminated property. In denying his motion to dismiss him from personal liability, the court recognized his liability as trustee and therefore record owner of property. "Congress did not intend for a responsible party to be able to avoid liability through the use of a trust or other forms of ownership." *Id.*

In addition to liability as an owner of the property, a trustee may also be subject to liability under CERCLA as an "operator". 42 U.S.C. § 9607(a). Such liability would be premised on the trustee's management and control over the trust assets. Although most cases in which liability is imposed on an operator of a facility involve defendants who are directly involved in the facility's waste management practices, the statutory language is not limited as such. The counter argument to liability under these circumstances is, of course, that the trustee's "control" over the property is strictly limited to financial involvement and does not involve any actual operational management.

A trust or trustee can assert various defenses to claims for environmental liability. CERCLA provides that no liability shall exist for a person who can establish that the contamination was caused solely by a third party. The third party cannot be an employee or agent, or one whose act or omission occurs in connection with a contractual relationship with the person. The operative term in this defense is "contractual relationship", which is defined to include "land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility . . ." 42 U.S.C. § 9601(35). The defense also requires a defendant to prove he "did not know and had no reason to know" of the hazardous substance, or that he acquired the facility by inheritance or bequest. *Id.*

Does the legal instrument creating the trust constitute a "contractual relationship"? While it is clear that certain documents, such as deeds or leases, are considered sufficient to link the current owner to the wrongdoer for purposes of liability, it

is not clear that a trust agreement falls into this same category. Section 9607(b)(5) of CERCLA provides that the defense is not available if the acts of the third party occurred "in connection with" a contractual relationship. Arguably, the contamination of the property by the transferor has no relationship to the legal document setting up the trust. Nevertheless, the definition of "contractual relationship" expressly includes "other instruments transferring title or possession," which potentially could include a trust relationship. There are no reported cases which address this issue, and as such, it is an unsettled area in CERCLA litigation.

Even if the trust agreement is a contractual relationship under Section 9601(35), the trustee may still escape liability if he can establish that he acquired the property *after* disposal of the hazardous substances, *and* that he had no knowledge or reason to know that any hazardous substance was disposed of at the facility. 42 U.S.C. § 101(35)(A)(i).

A third potential defense is also available under the "contractual relationship" definition, if the property was acquired after disposal of the hazardous substances *and* the property was acquired by inheritance or bequest. 42 U.S.C. § 9601(35)(A)(iii). Although this defense looks promising for a trustee who acquires property by way of a decedent's will, commentary suggests that there are some potential obstacles. First, the trustee is not actually a devisee, i.e., beneficiary, and may not be within the scope of this provision. Second, and more importantly, the legislative history of CERCLA appears to recognize a duty to make a reasonable inquiry into the condition of the property. Accordingly, the Phase I discussed above could make this defense unavailable in the case of land should such a duty be expressly recognized. Again, it is not entirely clear how this provision will be interpreted, as no reported decisions have addressed this issue.

LENDER LIABILITY

A. Background

CERCLA provides an exemption from the definition of "owner" for a lender who "without participating in the management of a facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." 42 U.S.C. § 9601(20)(A). Prior to 1990, only a few cases had been decided on lender liability in the environmental area, in particular on this exemption. Two courts had held that foreclosure on real estate transformed a lender into the owner of property fully liable for cleanup. *Guidice v. BFG Electroplating and Manufacturing Co.*, 732 F. Supp. 556 (W.D. Pa. 1989); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986). One court, however, held that because foreclosure had been performed merely to protect the security interest, the mortgagee was not transformed into the status of an owner. *United States v. Mirable*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,000, 994 (E.D. Pa. 1985).

These cases, particularly the *Mirable* case, distinguished financial management from operational management. A bank involving itself in the financial management of the debtor was acceptable, but participating and directing the day-to-day operational decisions was felt to be stepping over the line, incurring liability.

B. Fleet Factors

On January 14, 1991, the United States Supreme Court declined to review the Eleventh Circuit of Appeal's decision in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 59 U.S.L.W. 3481, 112 L. Ed.2d 772 (1991). The *Fleet Factors* decision by the Eleventh Circuit was the first federal circuit court opinion interpreting the "lender's exclusion". The court held that "a secured creditor will be liable [for the cleanup liabilities of its borrower] if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." 901 F.2d at 1558 (emphasis added). The court further noted "generally, the lender's capacity to influence a debtor facility's treatment of hazardous waste will be inferred from the extent of its involvement of the facility's financial management." *Id.* n.13. The court acknowledged that its comment poses a risk that innocent borrowers will now find it difficult, if not impossible, to obtain credit because of the nature of their business, but stated that such a result is acceptable because it is consistent with CERCLA's public policy seeking to spread the cost of hazardous waste cleanup industry-wide.

The Eleventh Circuit rejected the standard previously set forth that "participation in management" means participation in the day-to-day operational aspects of a facility. The Eleventh Circuit found that standard "too permissive toward creditors who are involved with toxic waste facilities." 901 F.2d at 1557. Under *Fleet Factors*, a lender may be liable under CERCLA if its involvement in its borrower's management is broad enough to support an inference that it "could effect hazardous waste disposal decisions if it so chose". *Id.* at 1558 (emphasis added).

This decision has imposed a new burden upon lenders either to refuse to deal with businesses whose operations involve hazardous waste or to become adept at handling the hazardous waste problems for which they will ultimately be liable. The court indicated that its ruling should encourage lenders to monitor the hazardous waste systems and policies of their debtors and to insist upon compliance as a prerequisite to continued and future financial support. However, such a finding places lending institutions in a "Catch 22". If lending institutions monitor the systems and policies of their debtors in an effort to determine the risk of contamination or cleanup at a given facility, it therefore risks stepping over the line and becoming an owner or operator.

The Eleventh Circuit, therefore, not only rejected earlier cases requiring *operational* management, but went so far to say that a lender does not even have to participate in *financial* management, as long as the lender "could have, if it so chose". Activities of banks and their loan officers that, before *Fleet Factors*, were standard and routine, now are suspect. Considering the *average* cleanup cost of a Superfund site is now approaching \$30 million, many banks simply will not get involved and will opt to lose the loan or mortgage rather than incur CERCLA liability.

C. Post-Fleet Factors developments

- 1. Legislative** — Several bills have been introduced into the last two sessions of Congress to deal with this issue, but, to date, none have passed.
 - 2. Judicial** — On August 9, 1990, the Ninth Circuit Court of
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Appeals issued its opinion in *In Re Bergsoe Metal Corp. v. East Atheistic Corp.*, 910 F.2d 668 (9th Cir. 1990). The Ninth Circuit became the second federal circuit court to consider the meaning of the phrase "participation in the management of a facility". The court said that some actual management must occur before the exemption is lost.

- 3. Regulatory** — EPA has also reacted to the *Fleet Factors* decision by issuing a draft rule. The draft rule sets out what lenders can do to still fit within the lender's exemption, at least in EPA's interpretation of the exemption. The rule is under consideration by the White House Office of Management and Budget. The draft rule includes guidelines for lenders in different stages of the loan process, including making the loan, policing the loan, loan workout, and foreclosure and liquidation. The rule defines "participation in the management of a facility" as "actual operational participation by the lender, and does not include mere capacity or ability to influence facility operations". The rule suggests that a pre-loan audit (Phase I) be conducted but such an audit is not required.

In addition, the draft rule includes a list of activities consistent with "protecting a security interest" for purposes of the lender's exclusion. These activities include requiring the borrower to comply with environmental laws, monitoring the business or financial condition of the collateral, cleaning up the collateral, giving financial or operational advice to the borrower, and foreclosing on the property. The draft rule also states that if property is held after foreclosure for less than six months there will be a presumption that the holding of said property is solely for the purpose of protecting the security interest. If the property is held for longer than six months, the lender's exemption is not lost, however, the lending institution will bear the burden of proving that the holding of the property for more than six months was not for a reason other than to protect the security interest.

CONCLUSION

The environmental considerations in real estate and other business transactions are many and varied. Dealing with them often requires the assistance of a competent environmental consultant. Solving them always requires an abundance of creativity, imagination and patience. If this article at least has alerted the reader to some of the issues to consider when advising a client involved in a real estate or business transaction, the authors will be satisfied. ■

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Thomas, Means & Gillis announces that **Donald Maurice Jackson** has become associated with the firm. Offices are located at 3121 Zelda Court, and the mailing address is P.O. Drawer 5058, Montgomery, Alabama 36103-5058. Phone (205) 270-1033. The firm also has offices in Birmingham.

Rives & Peterson announces that **Eugenia Hofammann McGill, Russell Q. Allison, Susan Scott Hayes, Valrey W. Early, III, Peggy C. Hooker, Frank I. Brown, Charles J. Kelley, Elizabeth H. Shaw, Glenn E. Ireland, Julia Jordan Weller, and Leigh N. Hardin** have become associates of the firm. Offices are located at 1700 Financial Center, 505 North 20th Street, Birmingham, Alabama 35203-2607. Phone (205) 328-8141.

Pittman & Pittman announces the relocation of its Mobile office to 1111 Dauphin Street, 36604. The firm also announces that **Richard Fuquay** has become an associate. The mailing address is P.O. Box 40278, Mobile, Alabama 36640-0278. Phone (205) 433-8383.

Vowell & Meelheim announces that **James E. Vann**, formerly of Morris & Vann, has joined the firm and that **C. Stephen Alexander** has become a member of the firm. The name of the firm has changed and is now **Vowell, Meelheim & Vann**. Offices are located at 1900 SouthTrust Tower, Birmingham, Alabama 35203-3200. Phone (205) 252-2500.

The firm of **Dominick, Fletcher, Yeilding, Wood & Lloyd** announces that **Victoria VanValkenburgh Norris** has become an associate. Offices are located at 2121 Highland Avenue, Birmingham, Alabama 35205. Phone (205) 939-0033.

Mark G. Montiel and **Algert S. Agricola, Jr.** announce the relocation of their firm, **Montiel & Agricola**, to Interstate Park Center, 2000 Interstate Park Drive, Suite 204, Montgomery, Alabama 36109. Phone (205) 272-3003. They also announce that **Daniel H. Autrey**, former staff counsel to U.S. Representative Sonny Callahan in Washington, D.C., has become associated with the firm.

McCord, Feld & Hoffman announces the relocation of its offices to The Massey Building, 290 21st Street, North, Suite 500, Birmingham, Alabama 35203. Phone (205) 252-2100.

Escuredo, Garayo, Perez de Vargas & Villanueva announces that **William H. Oliver** has become a member. The address is C/ Jose Abascal 58, Madrid, Spain 28003.

Leitman, Siegal, Payne & Campbell announces that **Suzanne Johnson, K. Phillip Luke** and **Daniel H. Waters, Jr.** have become associated with the firm. Offices are located at The Land Title Building, 600 North 20th Street, Suite 400, Birmingham, Alabama 35203. Phone (205) 251-5900.

Robert P. Reynolds, Christopher Lyle McIlwain and **W. Marcus Brakefield**, formerly with Hubbard, Waldrop, Reynolds, Davis & McIlwain, announce the formation of **Hubbard, Reynolds, McIlwain & Brakefield**. Offices are located at 808 Lurleen Wallace Boulevard, North, P.O. Box 2427, Tuscaloosa, Alabama 35403. Phone (205) 345-6789. **E. Kenneth Aycock** and **R. Cooper Shattuck** have become associates of the firm.

Blume & Blume announces that **Cheryl L. Blume** has become associated with the firm. Offices are located at 2300 East University Boulevard, Tuscaloosa, Alabama 35404-4136. Phone (205) 556-6712.

Maumenee & Latour announces that **James C. Powell** is now an associate. Offices are located at 23 North Section Street, Fairhope, Alabama 36532. The mailing address is P.O. Box 966, Fairhope 36533. Phone (205) 928-1492.

Clifford M. Spencer, Jr. announces the association of **Jennifer Bishop**. Offices are located at 1010 Commerce Center, 2027 First Avenue, North, Birmingham, Alabama 35203. Phone (205) 322-4477.

Watson, Gammons & Fees announces that **Charles H. Pullen**, former law clerk and staff attorney to Alabama Supreme Court Justice Reneau P. Almon, and **Brent E. Hieronymi** have become associated with the firm. Offices are located at 200 Clinton Avenue, West, Suite

800, Huntsville, Alabama 35801. Phone (205) 536-7423.

Loveless & Banks announces that **Beth Marietta-Lyons** has joined the firm, which will now be known as **Loveless, Banks & Lyons**. Offices are located at 28 North Florida Street, Mobile, Alabama 36607. **N. Bruce Moseley** has become associated with the firm.

Stites & Harbison announces that **J. Scott Greene** has joined the firm as an associate in the Louisville, Kentucky office. He was formerly associated with Gordon, Silberman, Wiggins & Childs and Bishop, Colvin & Johnson in Birmingham. Stites & Harbison has offices in Louisville, Lexington and Frankfort, Kentucky and Jeffersonville, Indiana.

Harbert Corporation of Birmingham announces that **William W. Brook** has joined the firm as vice-president and general counsel.

Baker & Jett announces the relocation of its Huntsville office to 300 E. Clinton Avenue, Suite 4, 35801. The firm also announces that **David L. Rawls** has become an associate.

Tanner & Guin announces the association of **J. Marland Hayes** and **Herbert E. Browder**. Offices are located at 2711 University Boulevard, Suite 700, Tuscaloosa, Alabama 35401. Phone (205) 349-4300.

Booker & Lassiter announces that **Kevin T. Green** has become an associate, with offices located at 105 South Section, Fairhope, Alabama 32532. Phone (205) 928-2658 or 1-800-544-3568.

Lightfoot, Franklin, White & Lucas announces that **Sarah Bruce Jackson**, former law clerk for Judge Sam C. Pointer, Jr., **William H. Brooks**, former law clerk for Judge Truman M. Hobbs, **S. Douglas Williams, Jr.**, former law clerk for Judge R. Lanier Anderson, III and **John Banks Sewell, III**, former law clerk for Judge Boyce F. Martin, Jr., have joined the firm as associates. Offices are located at 300 Financial Center, 505 20th Street, North, Birmingham, Alabama 35203-2706. Phone (205) 581-0700.

Najjar, Denaburg announces that **Jennifer P. Dent**, former deputy clerk for the U.S. Bankruptcy Court, Northern District of Alabama, has joined the firm as an associate. Offices are located at 2125 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 250-8400.

Hand, Arendall, Bedsole, Greaves

& Johnston announces that **Henry T. Morrissette**, **Allen S. Reeves** and **J. Stephen Harvey** have become associated with the firm. Offices are located in Mobile, Alabama and Washington, D.C.

Martinson, Beason & Hooper announces that **A. Mac Martinson** has joined the firm as an associate. Offices are located at 115 North Side Square, Huntsville, Alabama 35804. Phone (205) 533-1666.

Andre M. Toffell announces that **Martin S. Lewis** has become associated with his firm. Offices are located at Brown Marx Tower, 2000 First Avenue, North,

Suite 804, Birmingham, Alabama 35203. Phone (205) 252-7115.

Lange, Simpson, Robinson & Somerville announces that **Nancy C. Hughes**, **Robin W. Andrews** and **Nancy A. Davis** have become associated with the firm at its Birmingham office, 1700 First Alabama Bank Building, 35203. Phone (205) 250-5000.

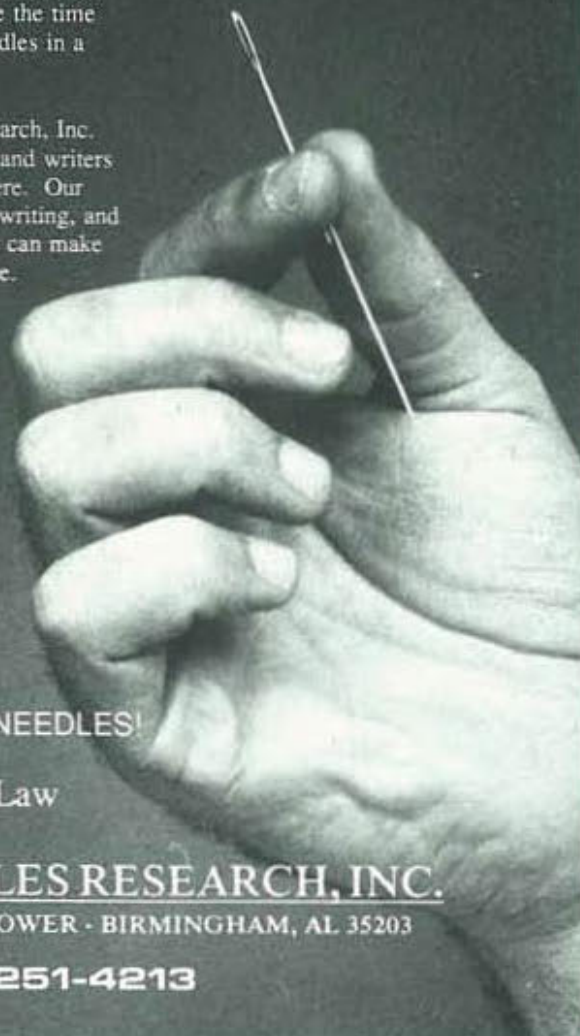
Farmer, Price, Smith, Hornsby & Weatherford announces that **D. Lewis Terry, Jr.** has become an associate. The mailing address is P.O. Drawer 2228, Dothan, Alabama 36302. Phone (205) 793-2424. ■

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SILVICULTURE PRACTICES and ENVIRONMENTAL LAW

By NEIL C. JOHNSTON and HARRY SEARING POND, IV

Private ownership and management of timberland is part of our national heritage. Forestry, logging, silviculture management, and harvesting procedures have evolved with the industrial age and are now the focus of environmental regulations. Economics, education and environmental law must be considered in any silviculture-related transaction. This paper will address some of the silviculture-related environmental issues which have an impact on private ownership, management and production of timberland.

A. Silviculture exemption under Clean Water Act:

For the private landowner to fully utilize property for the production of forest products, an understanding of the Clean Water Act is imperative. Section 404 of the Federal Water Pollution Control Act (known as the Clean Water Act), 33 U.S.C. § 1344, prohibits the discharge of dredged and fill material into "navigable waters," defined as "waters of the United States", without a permit from the United States Army Corps of Engineers. The Environmental Protection Agency has general oversight authority. In 1977, Congress amended the Clean Water Act to exempt the discharge of dredged and fill material associated with normal silviculture activities from permit requirements:

... The discharge of dredged or fill material . . . from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices . . .

33 U.S.C. § 1344(f)(1).

The silviculture exemption is subject to a recapture provision, found at 33 U.S.C. § 1344(f)(2), which states:

Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

For a discussion of the legislative history of 33 U.S.C. § 1344(f)(1) and (2), see Sara Schreiner Kendall, *The Silvicultural Exemption after Bayou Marcus*, 5 Natural Resources and Environment, pages 13, 58 (winter 1991).

The exempt activities, including nor-

mal silviculture operations, have been construed to include activities which are part of a continuous, ongoing and established operation which (a) do not convert wetlands to dry land, (b) do not convert wetlands to a new use, (c) do not impair the flow of waters of the United States or reduce the reach of such waters, and (d) do not modify the hydrology of the land although the property may, as part of a conventional rotation cycle, have lain idle or fallow for a time. 40 C.F.R. § 232.3; 33 C.F.R. § 323.4. Other activities which are incidental to or part of an established silviculture operation are also exempt. These activities include (a) construction and maintenance of forest roads utilizing best management practices, (b) cultivation and soil treatment to improve growth, quality and yield, (c) certain harvesting methods, (d) minor drainage which is incidental to planting, cultivation or harvesting operations, and (e) plowing which does not redistribute surface material. 40 C.F.R. § 232.3(c).

Although there have been several decisions construing the 33 U.S.C. §

1344(f)(1) normal farming operation exemption, *United States v. Larkins*, 852 F.2d 189 (6th Cir. 1988), *cert. denied* 109 S.Ct. 1131 (1989); *United States v. Akers*, 785 F.2d 814 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986); *United States v. Huebner*, 752 F.2d 1235 (7th Cir. 1985), *cert. denied*, 474 U.S. 817 (1985), there has been little judicial interpretation of the exemption relating to normal silviculture operations. The first and, to date, the only opinion examining the scope of the silviculture exemption was made in *Bayou Marcus Livestock & Agricultural Company v. U.S. Environmental Protection Agency & U.S. Army Corps of Engineers*, No. 88-30275 (N.D. Fla. 1989).

In *Bayou Marcus* the Court rejected claims of Bayou Marcus that its operations were entitled to exempt status. Bayou Marcus purchased property in Florida and conducted certain operations on the property including the clear-cutting of timber, the filling of wetlands, the installation of drainage ditches and the

construction of permanent roads. The Court found Bayou Marcus to be in violation of 33 U.S.C. § 1344 by determining that (a) the operations did not qualify as normal silviculture operations because Bayou Marcus failed to show any history of planting, site preparation or other silviculture activities, and failed to conduct any investigation of prior use, suitability or site conditions of the property, and therefore, the operations were not part of an established, ongoing tree farming operation; (b) even if the exemption applied, the operations, clear-cutting timber to establish an even-aged plantation, constituted a new use prohibited under the recapture provision of 33 U.S.C. § 1344(f)(2) (see also 40 C.F.R. § 232.3 and 33 C.F.R. § 323.4) which had a substantial effect on the wetland hydrology and adjacent navigable waters; and (c) the activities altered the flow of the channel of navigable waters of the United States without a permit in violation of Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403.



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The *Bayou Marcus* Court suggested that the recapture provision, 33 U.S.C. § 1344(f)(2), would apply, and, therefore, a discharge permit would be required for any new or additional activity that *affected*, as opposed to "impaired," the waters of the United States. The court apparently failed to realize that both elements of the recapture provision, changes in use and impairment of the flow of water, must be present to trigger the recapture provision.

The requirement that both elements be present has been previously noted by one commentator:

To trigger the recapture clause, an activity must (1) involve disposal of dredged or fill material, (2) into navigable waters, (3) for the purpose of bringing the site into a new use, (4) with the effect of impairing the flow and circulation or reducing the reach of navigable waters.

Kendall, 5 Nat. Res. and Envir., at 58. Likewise, the fact that both requirements must be met for the recapture provisions to apply has been recognized by the Corps of Engineers. MEMO OF GENERAL COUNSEL, EPA, Issues Concerning the Interpretation of 404(f) of the Clean Water Act, February 1985; REGULATORY GUIDANCE LETTER CORPS OF ENGINEERS, *Section 404(f)(1)(C) Statutory Exemption for Drainage Ditch Maintenance* No. 87-7 (August 17, 1987).

Bayou Marcus directly affects private silviculture operations by implying a requirement of substantial investigation of the operational history of property and restricting any operation different in degree from the historical use or uses which existed prior to 1972. *Bayou Marcus* may also be read as requiring a dredge and fill permit for incidental activities such as construction of roads, drainage, bedding, site preparation, even-aged cultivation and use of fertilizers and herbicides, which may be construed as "new" or "additional" activities.

The limited applicability given the silviculture exemption in *Bayou Marcus* should cause special concern for landowners harvesting timber in hardwood

bottomland or mixed hardwood/pine areas and replanting pine only. The practice usually requires some drainage of water, bedding and other actions which may "affect" the flow of waters. However, an activity is still exempt if it elevates the bottom of the waters without converting the wetland to dry land and does not alter the flow or circulation of the waters. 40 C.F.R. § 232.3. Some support for cultivation of pine plantations in wetland areas is given by EPA Region IV in its draft guidance letter on silviculture exemptions. Draft, *Region IV Guidance on Silviculture Exemption of § 404(f) of the Clean Water Act*.

The limited applicability given the silviculture exemption in Bayou Marcus should cause special concern for landowners harvesting timber in hardwood bottomland or mixed hardwood/pine areas and replanting pine only.

Although no reported cases have dealt with the exact issue mentioned above, there is at least one case presently in litigation where the central question is whether a conversion from hardwood bottomland and mixed hardwood/pine site to a pine plantation is an exempt activity. *Environmental Defense Fund, et al v. Tidwell, et al*, Case No. 91-467-Civ-5-D (E.D.N.C. July 22, 1991). In *Tidwell*, a citizen suit filed by environmental organizations, the plaintiffs challenged an EPA determination that ongoing silviculture operations of Weyerhaeuser, involving such a conversion, constitute exempt activities. The plaintiffs claim that the Weyerhaeuser's silviculture activities are not exempt and thus constitute the unlawful discharges of dredged and fill material. The plaintiffs claim (a) that the harvesting of timber in the privately owned East Dismal Swamp and the planting of pine plantations constitute a new use subject to the recapture provision of 33 U.S.C.

1344(f)(2), (b) that land clearing and site preparation methods and use of bedding constitute unlawful discharges of dredged and fill by redistribution of surface materials (see also REGULATORY GUIDANCE LETTER U.S. CORPS OF ENGINEERS, *Land Clearing Activities Subject to Section 404 Jurisdiction*, No. 90-5 (July 18, 1990)), and (c) that the conversion of a hardwood or mixed hardwood/pine site to a pine plantation does not constitute an exempt normal silviculture operation.

If the court determines that Weyerhaeuser's operations are not exempt, restoration and/or mitigation for current and past activities may be ordered. Weyerhaeuser may be ordered to pay the plaintiffs' attorneys' fees and restrictions on the use of the even aged regeneration may be made. Such restrictions appear to contradict the Congressional intent behind the silviculture exemption. See Kendall, *supra*, 5 Nat. Res. and Envir., at 15.

We have not discussed the definitions of "waters of the United States" or "wetlands", or the delineation process for wetland classification. Each term is now the subject of review and Congressional debate. It is expected that the statutory silviculture exemption will remain unchanged through the Clean Water Act reauthorization process, and, therefore, any evolution of the scope of the exemption will be made by administrative and judicial interpretation.

B. Endangered Species Act

Private, as well as federal, timber sales and silviculture activities can be severely limited by the prohibitions of the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* The ESA is designed to protect listed endangered and threatened species and their ecosystems. *Id.* at § 1531(b). Two sections of the ESA cause particular concern for private landowners and timber operations, (1) 16 U.S.C. § 1538(a)(1)(B) which prohibits the *taking* of protected species by private action; and (2) 16 U.S.C. § 1536(a)(2) which requires federal agencies to insure that their actions, and those of private parties whose activities depend on federal action (permits, licenses, funding, easements, etc.), are

not likely to jeopardize the continued existence of a listed species.

"Take" is defined in the ESA as:

To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

16 U.S.C. § 1532(19).

Regulatory definitions of "harass" and "harm" include intentional or negligent acts or omissions, annoying wildlife to such an extent that their normal behavior patterns of breeding, feeding or sheltering are disrupted, and acts which significantly modify or degrade their habitat in a manner which actually kills or injures the wildlife. 50 C.F.R. § 17.3.

Judicial construction of the words "harm" and "harass" have broadened the scope of "take". The injury need not be direct or necessarily cause death or injury to a listed species, but may merely affect the species' habitat. *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991); *Palila v. Hawaii Dept. of Land and Natural Resources*, 649 F. Supp. 1070 (D.Ha. 1986), *aff'd* 852 F.2d 1106 (9th Cir. 1988). In shooting actions, courts have held that actual knowledge or intent to injure a listed species is not necessary. *United States v. St. Onge*, 676 F. Supp. 1044 (D. Mont. 1988); *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987). In a pending case, *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*, Civil No. 91-1468, (D.Ct. D.C., June 14, 1991), private individuals, communities and timber industry organizations have filed suit against the U.S. Fish & Wildlife Service challenging the regulations which extended the definition of "take" to habitat modification and to all species listed as threatened, 50 C.F.R. § 17.

The U.S. Fish & Wildlife Service has applied the ESA prohibitions to actions which affect species whose presence is only suspected. For example, timber harvesting operations on the Sumner Tract in Emanuel County, Georgia, a privately held tract, have been delayed to investigate the suspected presence of red-cockaded woodpeckers. In a letter written by the USFWS referring to the

Sumner Tract, the USFWS made reference to draft guidelines stating, in part:

... A landowner who has a plan or project that may affect an endangered species has a responsibility to have a qualified person document its presence or absence. In this case the species is the red-cockaded woodpecker. Current guidelines, based on scientific research on the species, have determined that five years of documented inactivity is needed to show that red-cockaded woodpeckers have abandoned the colony site. Then we would revisit the site and make a final determination for the landowner....

Pursuant to the ESA, "any person" found in violation will be subject to civil and criminal penalties and prosecution, including citizen suits. 16 U.S.C. § 1540. "Any person" includes individuals, partnerships, corporations, associations, trusts and any other private entity, as well as any officer, employee or agent of federal, state and municipal agencies. 16 U.S.C. § 1532(13).

An example of the broad definition of "any person" is found in *USFWS v. James M. Vardaman & Co., Inc. and The Water Works and Sewer Board of the City of Birmingham, Alabama*, INV 7997AF (U.S. Office of Solicitor, S.E. Region May 1988) where civil penalties were assessed against a timber consultant who directed and supervised harvesting operations in an area known, arguably, to contain a red-cockaded woodpecker colony. Although the action brought against the consultant was ultimately settled, it appeared that the parties with potential liability included not only the consultant, but also the landowner and the logger.

The USFWS, as the primary enforcement agency for the ESA, is considering the adoption of management area guidelines for use on federal and private lands. Guidelines were adopted for the northern spotted owl, entitled *Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl*, U.S. Fish & Wildlife Service

Region I, July 1990, which suggested procedures that federal and private parties could utilize to avoid prosecution for the unlawful taking or habitat modification of the northern spotted owl. These guidelines were challenged because USFWS failed to comply with regulatory procedures such as proper notice and public comment rulemaking. *Sweet Home Chapter of Communities for a Great Oregon v. Turner*, Civil No. 91-2218 (D.Ct. D.C. Aug. 30, 1991). In response to the suit, USFWS rescinded the owl guidelines.

Similar guidelines have been proposed by EPA Region IV and are now in draft. These draft guidelines address the red-cockaded woodpecker and provide suggested silviculture procedures (best management practices) for federal and private lands which may host red-cockaded woodpecker colonies and habitat.

In light of potential ESA violations, a landowner may consider defensive alternatives such as implementing a conservation plan and applying for an incidental taking permit. An application is made by showing the impact on the species, steps taken to mitigate such impact, and alternative actions considered by the applicant. 16 U.S.C. § 1539(a). While conservation plans can be utilized as a defense to a takings action, the process can be very time-consuming and expensive.

Enforcement of ESA provisions, in the context of private silviculture operations, has been the subject of very little judicial interpretation. However, it should be noted that actions to enjoin and restrict logging and timber harvesting operations may constitute unlawful regulatory takings of private property for which the landowner is entitled compensation. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Florida Rock Industries, Inc. v. U.S.*, 21 Cl. Ct. 161, 31 ERC 1835 (Cl. Ct. 1990); and *Loveladies Harbor, Inc. v. U.S.*, 21 Cl. Ct. 153, 31 ERC 1847 (Cl. Ct. 1990).

C. Silviculture best management practices and water quality

The Alabama Forestry Commission presently has in effect two manuals

describing Best Management Practices for silviculture operations:

1. *Alabama's Handbook of Water Quality Best Management Practices for Silviculture*, ALABAMA FORESTRY COMMISSION (1989); and
2. *Water Quality Management Guidelines and Best Management Practices for Alabama Wetlands*, ALABAMA FORESTRY COMMISSION (1989).

(Collectively referred to as "AFC Guidelines").

The 1991 redraft of the AFC Guidelines defines the parties responsible for the implementation of BMPs as including those parties involved in the "authorization, planning and implementation" of a forestry operation. This may include landowners, professional forestry practitioners, forest resource managers, timber purchasers, loggers, vendors, forest engineers and "others". See also, Don Burdette, *Clean Water and Forest Management*, Alabama's Treasured Forests, spring 1991, at 9, 11.

BMPs are emphatically described and distributed as voluntary guidelines and recommended procedures for certain silviculture operations pertaining to stream management zones, stream crossings, road construction, harvesting and site preparation. Historically, BMPs have related to voluntary, practical and economically feasible silviculture practices. While the emphasis and use of the BMPs remain voluntary, the use of BMPs is increasingly being mandated by statute, administrative actions, court orders and private arrangements.

Certain provisions of the Clean Water Act require BMPs as a part of state waste treatment management programs, 33 U.S.C. § 1288, non-point source programs, 33 U.S.C. § 1314 and 33 U.S.C. § 1329, and dredge and fill permitting, 33 U.S.C. § 1344. Likewise, federal water pollution regulations, 40 C.F.R. § 232.3 and 33 C.F.R. § 323.4, require the use of BMPs for the construction and maintenance of forest roads specifying the minimum baseline criteria to achieve exempt status under 33 U.S.C. § 1344(f)(1).

Failure to implement BMPs has been cited by the Alabama Department of Environmental Management as a violation of the Clean Water Act, the Alabama

Water Pollution Control Act and ADEM Admin. Reg. 335-6-6. In recent administrative actions, ADEM has claimed that certain logging activities violated the Clean Water Act, the AWPCA and ADEM regulations by failing to utilize BMPs, causing erosion and sedimentation, the wrongful placing of tree tops in adjacent streams, and the wrongful use of stream crossings. See *In the Matter of Capital Veneer Works, Inc., Talladega County, Alabama*, ADEM Order No. 91-040-WP (January 31, 1991); Notice of Violation issued March 26, 1991 to U.S. Steel Corporation, Georgia Pacific, Tuscaloosa Forestry Services, Inc. by ADEM; Notice of Violation issued July 3, 1991 to Forest Managers and Consultants, Champion and R. E. Blankenship by ADEM.

Upon finding such a violation, ADEM has required, in addition to monetary fines, that (a) a stream cleanout and restoration plan be prepared and certified by a registered licensed forester, and (b) a BMP plan be prepared and certified by a registered professional forester to permanently control non-point source pollution from silviculture activities by revegetating banks, establishing streamside management zones, and preventing discharges of pollutants into waters of the state. The plans must be submitted to ADEM for approval and must be implemented within the time determined by ADEM.

The revisions to the AFC Guidelines presently under consideration may be considered, in the future, a part of ADEM's non-point source pollution program (which has not yet been developed or approved). Although the guidelines will remain voluntary as far as the AFC is concerned, the guidelines may become mandatory pursuant to ADEM regulations. It is also probable that programs implemented by the Corps of Engineers, the EPA and the U.S. Fish & Wildlife Service will increasingly mandate the use of BMPs.

BMPs are being considered as a part of the Environmental Impact Statement prepared pursuant to an application by private parties for the construction of chip mill terminals on the Tennessee River. In this particular case, the EIS states that the chip mill operator will

require loggers, dealers and other wood sellers to implement and utilize pre-harvesting and post-harvesting BMPs as a requisite to doing business with the chip mills. Although the EIS is at present under consideration by EPA and in draft form, the situation illustrates the increased focus on BMPs.

The use of BMPs will be used more frequently in contracts between landowners and lessors, loggers, consultants and mills. Close attention to operations and contractual drafting must consider these issues.

D. Pesticides and herbicides

Pesticides and herbicides are part of normal silviculture operations. Their use, registration and application is subject to the provisions of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, *et seq.*, and state statutory requirements under the Alabama Pesticide Act of 1971, *Alabama Code* § 2-27-1 (1975). Local governments may now regulate the use and application of pesticides and herbicides, including those utilized in silviculture operations, *Wisconsin Public Intervenor v. Mortier*, 59 U.S.L.W. 4755 (1991). In *Mortier*, the U.S. Supreme Court held that FIFRA does not preempt local pesticide ordinances. Although the preemption issue is presently being debated in Congress, landowners, consultants and applicators should be aware of any state or local laws, ordinances or regulations pertaining to the use or application of pesticides and herbicides. One such local act prohibits aerial spraying of timber in Shelby County, Alabama. 1971 Ala. Acts No. 39, p. 4173, *as amended* by 1986 Ala. Acts No. 86-204, p. 268.

Application of pesticides and herbicides by aerial spraying is a popular and economical method utilized in silviculture operations such as site preparation of clear-cut areas. The method is both cost-effective and alleviates soil disturbance. Utilization of aerial spraying is not without risk. It is important to note that common law causes of action exist in cases involving aerial spraying and drift of the chemicals. In fact, most reported Alabama cases involving aerial pesticide application have involved com-

mon law theories of recovery for injuries allegedly caused by the drift of pesticides and herbicides from agricultural aerial spraying operations. *Cooper v. Peturis*, 384 So. 2d 1087 (Ala. 1980); *Boroughs v. Joiner*, 337 So. 2d 340 (Ala. 1976). For a general discussion of pesticide litigation and liability, see Johnson & Ware, *Pesticide Litigation Manual*, (New York: Clark Boardman 1991); and Annot., *Liability for Injury Caused by Spraying or Dusting Crops*, 37 ALR 3d 833. Those principles and liabilities relate directly to silviculture operations in which spraying is conducted. Common law, as well as statutory causes of action, exist in cases involving aerial spraying and drift of the chemicals.

As discussed elsewhere in this article, a private timberland owner is prohibited from taking, harming, killing, injuring, or harassing a listed endangered or threatened species. The prohibition has not yet been used to restrict *private* use of pesticides or herbicides, but was effectively used to restrict the EPA's approval of a pesticide registration for use on federal lands. *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989).

Although pesticide regulation is enforced by the Alabama Department of Agriculture and Industries, surface and groundwater pollution from pesticides is regulated by ADEM. Federal and state point source and non-point source statutes and regulations apply to the use and misuse of pesticides, herbicides and fertilizers in conjunction with silviculture operations. Responsible parties may include the landowner, forest consultant, logger and the applicator.

Conclusion

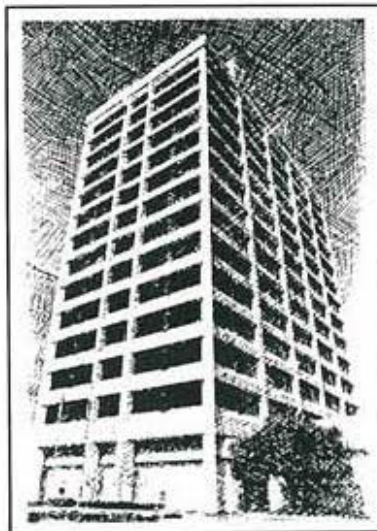
The discussion has touched on several areas of environmental law which affect private timberland owners, silviculture operations and the general practice of forestry. While some of these laws are subject to pending litigation and administrative interpretation, several major federal acts which will directly affect silviculture may be changed through the pending Congressional reauthorization process including the Clean Water Act, the Coastal Zone Management Act and the Endangered Species Act. ■

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*(For a list of those making pledges prior to November 2, please see previous issues of **The Alabama Lawyer.**)*

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THE CLEAN AIR ACT AMENDMENTS OF 1990:

Expensive, Confusing And Possibly Jail Time For Non-compliance

By WILLIAM H. SATTERFIELD and JOHN M. WOOD

Introduction

All of us have heard of the Clean Air Act, and some of us are even familiar with the Clean Air Act Amendments of 1990 ("1990 Amendments"). For the most part, however, the general perception of this law has been that it is of concern only to the steel companies, utilities and manufacturing operations and their attorneys. Unfortunately, under the recent 1990 Amendments, this is no longer the case. Any attorney representing clients such as dry cleaners, print shops, funeral homes and bakeries must now be sensitive to the impact of this legislation. Unfortunately, the Clean Air Act is much more difficult to understand than many other statutes. Indeed, getting a grip on the basic requirements of the 1990 Amendments requires sheer hard work. First and foremost, the practitioner must understand the overall statutory scheme, as well as the interrelationship of the various segments of the statute.

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This article is designed to facilitate that process by presenting a broad overview of the impact of the 1990 Amendments in Alabama. This article will assist those attorneys who are somewhat unfamiliar with the law's provisions by providing a ready-made summary of its general application. From that starting point, those of us who will have to confront the complexities of the Clean Air Act, to keep our "mom and pop" (and larger) clients out of jail, will be, it is hoped, aided in attempting to resolve specific air quality issues.

Background concerning Clean Air Act Amendments of 1990

Recent amendments to the Clean Air Act represent the most complicated and far-reaching environmental legislation ever enacted. President Bush signed into law the Clean Air Act Amendments of 1990 on November 15, 1990. Pub. L. No. 101-549, 101st Cong., 2d Sess. (1990). There are many restrictions and

pitfalls in the new law, and it is difficult to understand any portion of the new law without a thorough knowledge of the entire Clean Air Act.

Much of the criticism surrounding the new legislation is centered on the resulting costs imposed on an already weakened United States economy. The 1990 Amendments will impose enormous costs on businesses and consumers, and, when fully implemented, will cost businesses an estimated \$20-35 billion annually. In turn, affected businesses in Alabama will be forced to pass this expense on to customers through higher prices for goods and services. While large companies will face the agonizing, but unavoidable, process of passing on these costs to consumers, a number of small businesses will not be able to absorb the initial cost of meeting the compliance requirements for the new legislation, and may be forced either out of business or into bankruptcy.

THE ALABAMA LAWYER

Supporters of the 1990 Amendments claim that despite the \$20-35 billion annual cost, the nation's health-care costs will be even higher if the existing air quality is not improved. At the same time, however, the public zeal for "clean air at any cost" may wane over time as the cost of the cleanup is actually passed on to consumers.

The final 1990 Amendments include titles that address, among other topics, the following:

- attainment and maintenance of ambient air quality standards (smog);
- mobile sources of air pollution, including motor vehicles and fuels;
- toxic air pollution;
- acid deposition (acid rain);
- a permitting system for sources of pollution of the stratospheric ozone layer;
- more stringent enforcement provisions; and
- clean air research provisions.

The 1990 Amendments will have a dramatic impact on many Alabama busi-

nesses that have never before had significant emission concerns. Moreover, numerous types of businesses that probably do not view themselves as traditional "air polluters" now will be required to obtain operating permits. For example, businesses such as automobile body shops, bakeries, dry cleaners, printing companies, metal finishers, and gasoline stations may face stringent regulations in the very near future.

As discussed above, this article provides an overview of the 1990 Amendments and the potential consequences for Alabama businesses and industry. Due to the extensive requirements of the 1990 Amendments, each potentially affected business entity should seek individualized technical and legal advice regarding the application of the 1990 Amendments to its specific operations.

The EPA and state implementation strategies for the Clean Air Act amendments of 1990

The 1990 Amendments are forcing the Environmental Protection Agency to develop a large number of regulations and guidelines within a very short time frame. EPA recently released a list of forthcoming proposed rulemakings involving the 1990 Amendments, and this list contained nearly 100 proposed rules. In that regard, EPA has already published proposed acid rain and permit regulations, and is beginning work on the enforcement provisions. In addition, EPA plans to release a list of the source categories to be regulated under the 1990 Amendments in the near future. EPA has conducted frequent discussions with interested parties, including representatives from environmental groups, industry officials, government organizations and other related individuals. In addition to EPA's efforts, the various state air quality divisions will be required to update their procedures to ensure compliance with the 1990 Amendments. For example, in Alabama, the Alabama Department of Environmental Management will be required to develop a regulatory strategy which is adequate to fully im-

plement the operating permit program mandated by the 1990 Amendments.

TITLE V Permit provisions

A. Introduction

Title V of the 1990 Amendments includes provisions which require owners or operators of air pollution sources to obtain operating permits which will address all applicable requirements of the Act. Pub. L. No. 101-549, 501-507. The permit provisions will drastically change the manner in which businesses and industry in Alabama operate because of the overwhelming number of new requirements contained in Title V. As stated earlier, the new operating permits will have an impact on many sources and types of businesses in Alabama that have never considered themselves to be "air polluters". For example, it is doubtful that many of the local dry cleaners or print shops in Alabama ever thought that approval from ADEM in the form of an air permit would be necessary in order to continue operating.

B. Facilities subject to Title V permit requirements

Virtually every source of air pollutants will be subject to the new operating permit provisions contained in Title V. Furthermore, Section 502(a) provides that it will be unlawful for anyone to violate any requirement of a permit issued under Title V.

C. Applicable permit fees

Each source that is required to obtain a permit under Title V must pay the applicable permit fees that are assessed annually for each source. The primary goal of the permit fee is to allow states to recover all direct and indirect costs of administering the air pollution control program. These costs include reviewing and acting upon any application for a permit, implementing and enforcing the terms and conditions of a permit, ambient emissions monitoring, preparing applicable regulations, preparing inventories and tracking emissions. Title V states that the permit fees will not be less than \$25 per ton per year for each regulated pollutant, or



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John M. Wood

John M. Wood, also of the Birmingham office of Balch & Bingham, received his law degree from Georgetown University Law Center. He is a member of the Birmingham Bar Association and the Alabama State Bar.

such other amount determined by EPA to adequately reflect the reasonable costs of the permit program.

D. Early permit fees proposed for Alabama

ADEM recently approved a system of clean air fees to be paid in advance of the requirement to obtain an operating permit under Title V of the 1990 Amendments. The early permit fees will raise approximately \$12 million between 1992-1995 to enhance the resources available to ADEM for implementation of the permit program in Alabama. The early fees will be based on actual emissions of regulated pollutants and will be phased in over the three-year period. Larger sources emitting 1,000 tons per year or more, per pollutant, will be obligated to pay the early fees beginning in 1992 and all sources emitting 100 tons per year or greater, per pollutant, will be obligated to pay beginning in 1993 and 1994.

E. Proposed EPA permit regulations

EPA has already released its proposed permit regulations designed to implement the permitting provisions of the 1990 Amendments. 56 Fed. Reg. 21,712 (May 10, 1991). The regulations address the specific sources that will be required to obtain an operating permit under the requirements of the 1990 Amendments. It should be noted that under the proposed regulations, EPA is considering deferring the requirement for most non-major sources to obtain a permit for five years from the effective date of the permit program. EPA based its decision to provide for such a deferment, in part, on the fact that it did not believe the state permitting programs would initially be able to handle the task of issuing permits for both major and non-major sources. Moreover, EPA does not believe the deferment will have a substantial impact on air quality progress initially.

F. Additional, more stringent, state permitting requirements

Title V specifically provides that a state can establish additional, more stringent, permitting requirements. Any requirements that a state develops, however, must be consistent with the national permitting requirements of the Act.

TITLE I

Attainment and maintenance of national ambient air quality standards

In response to the failure of certain urban areas to meet the 1970 and 1977 Clean Air Act's national ambient air quality standards, Title I of the 1990 Amendments mandates the control of criteria pollutants, which are emitted from numerous and diverse mobile and stationary sources. Pub. L. No. 101-549, 101-111 (1990). The six criteria pollutants for which EPA has established NAAQS are ozone, lead, sulfur dioxide, particulates, nitrogen dioxide, and carbon monoxide. Each air quality control region must be classified as a nonattainment area if a violation of the air quality standards occurs within the region. States are required to develop State Implementation Plans to control sources emitting the pollutants within the designated areas.

Title I establishes the framework for addressing ozone nonattainment by creating five pollution categories: marginal, moderate, serious, severe, and extreme, with attainment deadlines of three, six, nine, 15, and 20 years, respectively. Birmingham is the only nonattainment area in Alabama and is classified as a marginal nonattainment area. The required air quality standard for the Birmingham area must be achieved by November 15, 1993 or the area will have to satisfy the more stringent requirements for a moderate nonattainment area. Nearby, Atlanta is listed as a serious nonattainment area.

The primary goal of Title I is to reduce urban smog which is formed in the atmosphere from a reaction caused by emissions of volatile organic compounds ("VOCs") and oxides of nitrogen ("NO_x"). Under the 1990 Amendments, smaller sources, emitting as little as ten tons per year of a VOC or NO_x, will be required to install stringent controls. Specifically, in a marginal nonattainment area such as Birmingham, any source actually emitting or having the potential to emit more than 100 tons per year of a VOC or NO_x will be required to install reasonably available control technology to reduce its emis-

sions. Title I also contains stringent permit requirements for sources regulated by the nonattainment provisions which are in addition to the general permitting provisions of the 1990 Amendments. An affected source may also fall under additional regulations if it expands or modifies its existing operations due to the new source review regulations being triggered. In addition, each state in which a nonattainment area is located will also be required to submit SIP revisions to comply with the requirements of the 1990 Amendments.

Title I also contains numerous other control measures mandated for specific nonattainment areas. These controls include tighter standards on motor vehicle emissions, additional industrial source controls, use of alternative clean fuels, and other control measures depending on the severity of the problem. For example, in areas ranked serious, severe or extreme, gas stations must install hose and nozzle controls on gas pumps to capture fuel vapors.

TITLE III

Hazardous air pollutants

Title III of the 1990 Amendments focuses on hazardous air pollutants, or air toxics, as opposed to the six criteria pollutants regulated under Title I. Pub. L. No. 101-549, 301-306. Toxic pollutants controlled under this section tend to be less widespread than the six criteria pollutants controlled under the nonattainment provisions, but often are associated with more serious health issues such as cancer, neurological disorders and reproductive dysfunctions. For example, according to its sponsors in the Congress, a study by Tulane University which dealt with pollutant-related health problems reported the lung cancer rate for residents living within a mile of major chemical plants is four times the national average.

By virtue of their emission of the following hazardous air pollutants, several common industries will be affected by the limiting provisions of Title III:

- printing shops (Toluene and Xylene)
- dry cleaners (Tetrachloroethylene and Perchloroethylene)
- gasoline stations (Benzene)

- funeral homes (Formaldehyde)
- hospital and laboratory sterilizers (Ethylene oxide)
- metal finishers (Chromium compounds)
- bakeries (Hydrocarbon ethanol)
- auto body finishers and painters, furniture painters (Hydrocarbons)

The low threshold on emissions of these substances and others ensures that many small businesses now will be forced to address clean air limitations with an unprecedented degree of specificity. One example of an industry that may face enormous costs for installing compliance equipment is the automobile body shop industry, where compliance costs for individual body shops may be as high as \$100,000. McKee, "Clean-Air Rules Affect Small Firms," *Nation's Business*, July (1991).

A. Regulated pollutants

The act establishes an initial list of 189 hazardous pollutants for regulation through technology and health-based standards. EPA is required to periodically review the list, publish the results of the review, and revise the list by adding pollutants, when appropriate. Pollutants that may be added to the list include those that present a threat of adverse effects on human health or the environment. The 1990 Amendments mandate a two-phase strategy for reductions in emissions of hazardous pollutants, involving the use of Maximum Achievable Control Technology and additional health-based emission standards.

B. Major source definition

The act defines a major source of air toxics as any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit ten tons per year or more of any hazardous air pollutant, or 25 tons per year or more of any combination of hazardous air pollutants. EPA may recognize a threshold lower than ten tons if a particular pollutant is deemed extraordinarily hazardous in smaller amounts. Therefore, depending on the approach

taken by EPA, many industries within Alabama may fall under these new stringent regulations even though they emit considerably less than ten tons of a particular pollutant.

C. List of source categories

In addition to the list of 189 pollutants, EPA must publish a list of all categories of sources of the listed pollutants that will be subject to the Title III regulations. EPA proposed to publish a final list of source categories by November 1991, but as of this writing, EPA has not done so. EPA also must list categories of seven specific pollutants to

ensure that sources that account for at least 90 percent of the aggregate emissions of each pollutant are subject to technology-based standards by November 15, 2000.

D. Area source programs

Under the act, special attention is to be given to area sources of hazardous air pollutants present in urban areas. EPA must conduct a study to identify at least 30 hazardous air pollutants that present the greatest health hazard in the largest urban areas and ensure that those industries representing 90 percent of the area emissions of the 30

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hazardous pollutants are subject to regulation no later than November 15, 2000. Therefore, numerous businesses not regulated under the other provisions of the 1990 Amendments may face additional regulations if they fall under the area source controls. An "area source" is basically any source of hazardous air pollutants, excluding automobiles, that is not a major source. Preliminary results of research on area source controls are to be reported by EPA no later than November 15, 1993, and a comprehensive national strategy for control of area source emissions of hazardous air pollutants in urban areas based on information gathered through the research program is to be submitted to Congress no later than November 15, 1995.

Title IV Acid deposition control

Acid deposition, or acid rain, is covered in Title IV of the bill. This title significantly limits emissions of sulfur dioxide (SO₂) which is a precursor of acid rain. Title IV provides for an innovative "market-based" approach to allocating and enforcing the acid rain reduction program through the use of an allowance trading program recommended by President Bush. An allowance is a federal authorization to emit one ton of SO₂ in a specified calendar year or a subsequent year, if it is not used in the specified year. Holders of the allowances are prohibited from emitting SO₂ unless they hold an equivalent number of allowances.

Title VII Enforcement

Title VII includes a number of provisions that significantly increase the enforcement authority of the federal government under the Clean Air Act. Pub. L. No. 101-549, 701-711. This title strengthens the available criminal and civil sanctions and enhances EPA's existing authority to impose administrative penalties for violations of Clean Air Act provisions or State Implementation Plans. The new sanctions include: longer jail terms for company officials, greater authority to assess administrative penalties, wider application of available sanctions, and increased citizen

involvement in enforcement and administrative decision-making. All of the new penalties are designed to make noncompliance with the 1990 Amendments much more expensive than compliance.

Administrative penalties have been increased to \$25,000 per day (with a limit of \$200,000 per violation), but this cap does not preclude EPA from seeking recovery of any economic benefit that may have been realized as a result of the violator's failure to comply with the Clean Air Act. For sources that fail to comply with the 1990 Amendments' provisions, the severity of penalties available to the government has been increased significantly (particularly for offenses deemed to be "knowing"), and

*By any estimate, the
1990 Amendments will be
the most sweeping and
costly set of environmental
laws the United States
has ever adopted.*

the allowable fines and prison terms double after the first offense. Even reporting and recordkeeping violations are included in the broader range of activities now subject to criminal sanctions. Other new administrative penalties include a "field citation" program that will allow EPA to issue a "ticket" for minor violations of the 1990 Amendments. Each ticket will be in the amount of \$5,000 per day for each minor violation, and a hearing, if requested, will be an informal hearing before the EPA rather than an administrative record reviewable by a court. Further, Section (f) of Title VII, often called the "bounty hunter provision", states that an award of up to \$10,000 will be paid to anyone who furnishes information that leads to a conviction or civil penalty under the 1990 Amendments. This award does not apply to reports by government employees acting in the course of duty.

Title VII also provides for stringent criminal penalties, including fines and jail terms up to 15 years for a range of

violations. The criminal sanctions that can be handed down by EPA are separated into five categories under Section 701(c) based upon whether the criminal actions were knowing or negligent violations. The government also has enhanced authority to impose administrative, civil or criminal sanctions for the failure to pay a required fee due under the 1990 Amendments.

Section 707 of Title VII also revises Section 304 of the 1977 Clean Air Act with respect to citizen suits. Citizen suits are now expressly authorized to enforce a wide range of actions required under the new 1990 Amendments. For example, citizen suits may now be utilized to enforce the provision which requires a person to obtain an operating permit under Title V of the 1990 Amendments and can also be utilized to enforce compliance with the conditions of an operating permit. Citizen suits are also authorized to compel EPA to take action when the suit alleges that an action has been "unreasonably delayed". Additionally, beginning in November 1992, penalties may be imposed for past violations if it can be shown that the violations have been repeated. Citizen suits may now also be brought in the federal courts of appeal to challenge deferrals of action "where a final decision by the EPA Administrator defers performance of any non-discretionary statutory action to a later time".

Conclusion

By any estimate, the 1990 Amendments will be the most sweeping and costly set of environmental laws the United States has ever adopted. Estimated annual costs do not even begin to take into account the costs that companies may face in providing input into the regulatory process. In addition, if experience is any guide, there will also be tremendous costs for judicial regulatory challenges. The tremendous costs associated with the 1990 Amendments will cause an increase in the cost of goods and services across the country, along with a reduction in numerous types of jobs. In all, there is probably no segment of the economy that will not bear some direct or indirect cost of the 1990 Amendments. ■

ALABAMA STATE BAR VOLUNTEER LAWYERS PROGRAM

ACCESS TO JUSTICE - Establishing a Pro Bono Project

By MELINDA M. WATERS

During the past two years, the provision of pro bono civil legal services to the poor has become a high priority issue for the Alabama State Bar. In 1989, the board of bar commissioners, in cooperation with the Alabama Law Foundation and Legal Services Corporation of Alabama, commissioned a survey of the legal needs of indigent Alabamians. This survey revealed that though federally funded legal services programs do much to help, the need for civil legal services still exists among some of our low-income citizens.

In response to the survey results, the board of bar commissioners created the Volunteer Lawyers Program during the state bar presidency of Judge W. Harold Albritton, III. Its purpose is twofold: first, and most important, to assist local bar associations with establishing well-organized pro bono projects through which attorneys can volunteer their professional services to meet the needs of less fortunate Alabamians for civil legal services; and, second, to determine with some degree of accuracy the present level of pro bono activity in our state.

There are currently fewer than ten programs sponsored by local bar associations in Alabama through which attorneys represent indigent clients. However, a number of local associations are now considering organizing a project for their membership. Establishing such a program is not a difficult task. All that is needed is a motivated bar association, a pro bono committee from that bar, and a small amount of time. There are many options for delivering pro bono legal services to the poor; deciding which format would be most appropriate for a particular local bar association and surrounding community is probably the most time-consuming matter involved in starting a program.

Attorneys interested in beginning a pro bono project need not do this alone. The Volunteer Lawyers Program is available to assist with each stage of organizing and administering a pro-

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Hon. Harold Albritton, immediate past president of the Alabama State Bar, and Phil Adams, the current president, were among the first bar members to enroll in the Volunteer Lawyers Program. Both are shown here as they officially volunteered for the project during the Annual Convention in July.

gram. Through the resources of the Alabama State Bar, the Volunteer Lawyers Program can provide technical assistance, recruitment and enrollment materials, information on successful pro bono projects, speakers, certificates, and other items for recognition of volunteers, and publicity.

Additional assistance is available through local offices of a federally funded legal services program. Relying on legal services personnel to administer a portion of a project enables the bar membership to devote its valuable time to policy-making and actual representation of indigents. For example, client intake and screening for income eligibility is best performed by the trained professional staff of the legal services office. Referral and monitoring of cases also can be handled by legal services personnel, or, if local attorneys prefer, by the office of the Volunteer Lawyers Program in Montgomery. Further-

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ALABAMA STATE BAR VOLUNTEER LAWYERS PROGRAM

more, malpractice coverage is provided by legal services programs to cover attorneys for work performed on cases processed through a legal services office.

Whether and to what extent a local bar association chooses to work with the local legal services program, the Volunteer Lawyers Program can provide all assistance necessary to begin, or expand, a pro bono project. If you or your bar association is interested in investigating the possibilities for activating a program in your area, please contact the director of the Volunteer Lawyers Program in Montgomery at 269-9242 or 269-1515, or write for information at P.O. Box 671, Montgomery 36101.

For those attorneys considering participation in an organized pro bono effort, the following is reprinted with permission from the September 15, 1991 issue of the Dallas Bar Association "Headnotes". Its author, Mary L. Murphy, is an attorney with the Dallas office of Jenkins & Gilchrist and serves on the Dallas Bar Association Legal Aid and Legal Services Committee.

Pro Bono: Why Me?

Sick of hearing about "pro bono" services? We talk about it at bar meetings, we read about it, and we get unsolicited mail about it.

At least ten reasons can be argued for not having to provide pro bono services:

1. Lawyer jobs are becoming scarce, and I have to worry about whether I even have a job.
2. Clients do not pay their bills, so I am already performing involuntary pro bono services.
3. Doctors make more money than lawyers and no one is threatening to make them provide free services.
4. I do not like family law, which is all that is needed.
5. I am incompetent to perform legal work on anything but antitrust and international matters.
6. It would take hours to figure out what forms to use.
7. I bill 3,000 hours a year and need to spend what little waking time I have left with my family.
8. How can I bring in business, bill enough hours to keep my job, and still have enough time for pro bono work?
9. I give money to worthwhile organizations and, therefore, am already serving my community.
10. I just don't want to.

Why should we help?

1. As members of the legal profession, we pursue a common calling in the spirit of public service. As such, we are responsible to assure that all persons have access to competent representation regardless of wealth or position in life. We should be committed to an adequate and effective pro bono program.
2. If we do not voluntarily choose the type and manner of pro bono service to provide, we may be forced into something truly distasteful.
3. A mountainous need for pro bono legal help exists.
4. The existing need includes human survival issues — such as preventing family violence and child neglect.
5. They (Volunteer Lawyers Program and legal services

offices) have manuals, forms, computer disks, and assistance from family law specialists and jurists to help minimize time and alleviate feelings of insecurity. Pro bono work does not have to be hard or time-consuming.

6. We can gain community and bar recognition for ourselves and our firms, no matter how large or small, if each of us gives only an hour or two a month. At the same time, we would be meeting the majority of pro bono needs.
7. We can participate in pro bono services through varied groups and functions.
8. Lawyers need advancements in the public relations departments and providing voluntary pro bono services can only help.
9. If we do not help, no one else can or will.
10. We'll feel better about ourselves and our profession.

The variety of pro bono activities available through local bar associations is expansive. We continuously argue (especially with the benefit of hindsight) that people should not try to make a contract or affect other relationships without the help of a lawyer. Lawyers are expensive even for those who can pay. We all make it through law school, somehow. Many of us started with no money and many of us still do not have a mass of it. We do have, however, a mass of wealth to those needing legal help: we can provide the access to a judicial system that no one else can provide. ■



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DISCIPLINARY REPORT

Reinstatement

• **William David Vaughn**, formerly of Birmingham, Alabama, now residing in Jacksonville, Florida, was reinstated to the practice of law by order of the Supreme Court of Alabama, effective October 28, 1991. [Pet. No. 91-07]

Disbarments

• Birmingham lawyer **Edward Minor Coke** was disbarred from the practice of law by order of the Alabama Supreme Court effective October 3, 1991. Coke was previously suspended from the practice of law for a period of six months effective January 29, 1990.

Coke was found guilty on April 5, 1991 by the Disciplinary Board of the Alabama State Bar of 11 complaints involving 39 charges of violations of the *Code of Professional Responsibility*.

In ASB Nos. 89-103, Coke represented plaintiffs in a civil suit filed September 29, 1987. Subsequent to the filing, Coke failed to appear in court for a number of scheduled hearings which resulted in the dismissal of all six defendants. In another case, Coke filed an appeal to the Alabama Court of Civil Appeals and, thereafter, failed to file an appellate brief, thus causing the appeal to be dismissed. In addition, Coke was found guilty of failing to cooperate with the Birmingham Bar Association Grievance Committee in their investigation after being requested to do so on five separate occasions.

In ASB No. 89-326, a client paid Coke \$500 to file a civil section. Summary judgement was granted for the defendants, and Coke failed to inform his client of this fact. Thereafter, Coke informed his client that the case was still pending and he would notify her when a court date was set. Coke also failed to cooperate with the Birmingham Bar Association's investigation in this matter.

In ASB No. 89-643(A), a client paid Coke \$500 to file a civil action. Subsequent to filing this action, Coke filed a motion to dismiss on behalf of his client without approval or prior knowledge of

his client. On demand of his client, Coke filed a motion to set aside dismissal. The court gave Coke ten days to file "a succinct statement as to the nature of each claim against each party". Coke did not comply with this order and the motion to reinstate was denied.

In ASB No. 90-34(B), the circuit court clerk was ordered to pay an individual all funds held by the court belonging to that individual, an amount in excess of \$36,500. Coke obtained this check and refused to turn it over to the individual. He, thereafter, negotiated the check without the authority or consent of the client. Coke deducted one-third of the proceeds as his fee but failed to immediately pay the remaining amount to the individual. This was done only after the individual obtained the services of another lawyer. Coke also failed to cooperate with the investigation of this complaint.

In ASB No. 90-261, Coke, while suspended from practice, became involved in a divorce matter on behalf of a client. Coke also failed to cooperate with the Birmingham Bar Association in investigating this complaint.

In ASB No. 89-869, Coke, while suspended from practice, accepted a fee to obtain a divorce for a client and, thereafter, performed no legal service for the client. Coke also failed to cooperate with the investigation of this complaint.

In ASB No. 90-920, Coke, while suspended from practice, assisted a client in the preparation and filing of a civil complaint.

In ASB No. 89-309, Coke failed to appear before the board of bar commissioners to be disciplined after being ordered to do so. [ASB Nos. 89-103, 89-326, 89-643(A), 90-34(B), 90-261, 89-869, 90-920, and 89-309]

• Former Birmingham lawyer **William Sidney Underwood, Jr.** consented to disbarment, which was effective October 2, 1991.

Suspensions

• The Supreme Court of Alabama, on

October 3, 1991, suspended from the practice of law Russellville lawyer **H. Neil Taylor, Jr.** for a period of 91 days. Taylor was found guilty by the Disciplinary Board of the Alabama State Bar of violating Disciplinary Rules 1-102(A)(4), DR 1-102(A)(6), DR 2-111(A)(3), and DR 2-111(B)(2) of the *Code of Professional Responsibility* of the Alabama State Bar. Said suspension to become effective October 3, 1991. [ASB No. 89-366 (A) & (B)]

• On November 6, 1991, the Supreme Court of Alabama entered an order suspending Eutaw lawyer **William Sidney Underwood, Jr.** from the practice of law effective July 15, 1991, for noncompliance with the Alabama State Bar Rules for Mandatory Continuing Legal Education. [CLE No. 91-38]

Public Reprimands

• On November 15, 1991, **Wesley Thomas Neill** of Birmingham was given a public reprimand without general publication. The reprimand was the result of Neill's engaging in conduct that adversely reflects on his fitness to practice law under former Disciplinary Rule 1-102(A)(6) [now Rule 8.4(g)]. Neill was representing a female client during 1990. On September 19, 1990, he showed up at her home in an intoxicated condition. He told the client that his own wife had thrown him out of their home, and that he needed a place to spend the night. The client allowed Neill to stay in her basement. The following morning Neill bought beer with money he had borrowed from the client. He stayed at her home drinking and talking on the telephone most all the morning. The client's daughter was also at home. When the client got home from work she found Neill asleep in his car. Ultimately, another lawyer represented the client at trial. [ASB No. 91-164]

• On October 4, 1991, Mobile attorney **William Edwin May** was publicly reprimanded by the bar for engaging in conduct involving dishonesty, fraud,

deceit, misrepresentation, and willful misconduct, which conduct adversely reflected on his fitness to practice law. May was advanced an attorney's fee to handle a matter for a client. However, prior to May's conclusion of representation, the client terminated him, whereupon May promised to return a portion of the unearned fee. However, May failed to make such refund. [ASB No. 87-539]

- On October 4, 1991, Centre lawyer **Gary Edwin Davis** was publicly reprimanded by the Alabama State Bar. Davis was retained to represent the interest of a certain client but failed to keep that client informed as to the status of those matters for which he had been hired. The client filed a complaint against Davis who failed to respond to the request of the bar concerning said complaint. Davis' conduct was found to have constituted a violation of DR 6-101(A), willfully neglecting a legal matter entrusted to him, DR 7-101(A)(1), failing to seek the lawful objectives of his client, and DR 7-101(A)(3), prejudicing or damaging his client during the course of the professional relationship. [ASB No. 91-01]

- On October 4, 1991, Albertville attorney **James Radford Berry** was publicly reprimanded for making threatening statements to witnesses and/or complainants who were opposed to Berry's client. It was found that Berry's actions served merely to harass or maliciously injure another, were prejudicial to the administration of justice, and adversely reflected on his fitness to practice law. (Disciplinary Rules 7-102(A)(1), 1-102(A)(5) and 1-102(A)(6), respectively). [ASB No. 90-946]

- On October 4, 1991, Daphne lawyer **James Harold Sweet** was publicly reprimanded by the Alabama State Bar for having engaged in conduct that adversely reflected on his fitness to practice law in that he continued multiple employment whereby the exercise of his independent professional judgement on behalf of his client was adversely affected by his representation of another client, thereby involving him in representing differing interests. Sweet, in handling certain matters for a client, failed to disclose to other clients he was representing at that same time of con-

flicts between respective clients, thereby causing prejudice to certain of the multiple clients being represented by Sweet. [ASB No. 89-837]

- On October 4, 1991, the Alabama State Bar publicly reprimanded Birmingham lawyer **Charles E. Clark** for willfully neglecting a legal matter entrusted to him (DR 6-101(A)), for failing to seek the lawful objectives of his client (DR 7-101(A)(1)), and for prejudicing or damaging his client during the course of the professional relationship (DR 7-101(A)(3)). Clark filed a lawsuit on behalf of a client. However, due to Clark's failure to attend scheduled docket calls in this matter, the case was dismissed for want of prosecution. [ASB No. 90-973]

- On October 4, 1991, Montgomery lawyer **Jesse Eldridge Holt** was publicly reprimanded by the bar for engaging in conduct that adversely reflected on his fitness to practice law. A former client of Holt's filed a complaint against him. Holt's failure to cooperate with the grievance committee's investigation of the complaint was found to have constituted a violation of Disciplinary Rule 1-102(A)(6). [ASB No. 89-492]

- On October 4, 1991, **James Arthur Tucker, Jr.** of Jackson, Alabama was publicly reprimanded for engaging in conduct which adversely reflected on his fitness to practice law under DR 1-102(A)(6). Tucker handled a sale for division and deposited \$15,785 in proceeds to his trust account. He failed to make disbursement of the sale proceeds for several weeks, despite frequent demands that he do so. When he did disburse the proceeds, some of the checks were dishonored by his bank for insufficient funds in his trust account. He ultimately borrowed money and paid the checks. Tucker also failed to cooperate with the Office of the General Counsel during the period when the matter was being investigated. [ASB No. 88-272]

- On October 4, 1991, **Carnella Greene Norman** of Birmingham, Alabama received a public reprimand for willfully neglecting a legal matter entrusted to her under DR 6-101(A) and for intentionally failing to carry out a contract of employment for professional services

under DR 7-101(A)(2). The clients' complaint arose out of Norman's failure to follow through with completion of the client couple's uncontested divorce for five months. Norman ceased communicating with the clients and would not refund their money. The clients went to another attorney and had their divorce within three weeks. [ASB No. 90-868]

- On October 4, 1991, Birmingham lawyer **Richard Larry McClendon** was publicly reprimanded for willfully neglecting a legal matter entrusted to him in violation of DR 6-101(A). McClendon agreed to file an action on behalf of a client in January 1990. He did not file the complaint until September 1990. In the interim period, McClendon was not responsive to his client's request for information about the status of the case and, at times, led the client to believe that certain actions had been taken when, in fact, they were not. The client (who was out-of-state) had a lawyer there try to obtain information and documents from McClendon. That lawyer also had no success in dealing with him. McClendon had no contact with his client after July 1990, but did not withdraw. The first time the client learned that his case had been filed was when the General Counsel's Office provided the information. [ASB No. 90-950]

Transfer to Disability Inactive Status

- Huntsville attorney **William R. Self, II** has been transferred to disability inactive status pursuant to Rule 27, Rules of Disciplinary Procedure (interim), effective September 3, 1991.

Petitions for Reinstatement Denied

- On November 15, 1991, the Disciplinary Board of the Alabama State Bar denied the petition for reinstatement of **Cecil Wilbur Elledge, Jr.** [Pet. No. 91-04]

- On October 24, 1991, the Disciplinary Board of the Alabama State Bar denied the petition for reinstatement of **Lloyd Earl Taylor.** [Pet. No. 91-03] ■



Uniform Guidelines for Attorney Fee Declarations Recommended by the Indigent Defense Committee of the Alabama State Bar

Preface

The following guidelines were promulgated by the Indigent Defense Committee of the Alabama State Bar, and adopted by the Board of Bar Commissioners of the Alabama State Bar on November 2, 1990 to assist and guide lawyers throughout the state with respect to billing procedures in cases in which they are appointed by the court to represent persons accused of crimes who have also been determined to be indigent. It is the hope of the Alabama State Bar that these guidelines will provide guidance to lawyers and serve as a standard by which questionable conduct can be judged.

Those lawyers who follow the letter and spirit of these guidelines will be protected from charges of impropriety; those who do not will have no added protection from charges to the contrary. In short, these guidelines, though designed chiefly to aid and assist members of the bar, also stand as this association's self-policing mechanism for questionable fee practices.

The Alabama State Bar expresses its sincere appreciation to those who dedicate themselves to the representation of those who do not have the means to hire a lawyer. At the same time, it cautions anyone who attempts to take advantage either of their clients or the State of Alabama (by practices such as double billing), that abuses of this honorable system will not be tolerated.

THE ALABAMA LAWYER

Activities are to be separately listed

All activities for which compensation is claimed shall be separately listed on contemporaneous time records. In order to receive payment, activities must be listed in the appropriate spaces in the Fee Declaration Form or, if contemporaneous time records are kept in a manner that conforms to the Fee Declaration Form, the contemporaneous records themselves may be attached to the Fee Declaration Form.

Standard time reporting

All time shall be declared increments of 0.1 hour (six minutes). Counsel may bill for time spent under six minutes at a minimum rate of 0.1.

Telephone calls

The purpose, *not substance*, of telephone calls should be briefly specified, for example, "Telephone call to defendant's brother re: raising bail" or "Telephone call to defendant re: trial date."

Each call should be separately listed (on the contemporaneous time records, not on the Fee Declaration Form).

Mileage

The rate for mileage shall conform to § 36-7-22, *Code of Alabama* 1975. This rate is 25 cents per mile.

January 1992 / 55

Expenses

Certain expenses must be approved by the appointing judge prior to the time they are incurred. Section 15-12-21(d), *Code of Alabama* 1975. A general definition of expenses is impractical. Therefore, a definition is given by way of what is and what is not an expense which requires approval prior to being incurred. Counsel should file the appropriate motion in cases of uncertainty. In cases where court approval is required, counsel *shall* file a copy of the court's pre-trial order along with the Fee Declaration Form in order to obtain reimbursement.

The following are examples of expenses which do require approval prior to being incurred:

- A. Private investigators;
- B. Expert witnesses;
- C. Transcripts of trials or hearings not otherwise available;
- D. Interpreters;
- E. Scientific tests.

The following are examples of expenses which do not require approval prior to being incurred:

- A. Copying (limited to 25 cents per copy, except in extraordinary circumstances);
- B. Long distance telephone calls;
- C. Travel.

Opening and closing case files

Counsel may bill for this activity, but the maximum time which may be billed (for opening and closing combined) is 0.5 hour (30 minutes).

Travel time to and from court

Travel time to and from court appearances should be billed as out-of-court time, except under the following circumstances where it may not be claimed:

- A. Travel time to arraignment when counsel is not assigned a defendant prior to arraignment; and,
- B. Travel time to arraignment when counsel is not assigned a defendant prior to arraignment, but counsel fails to file a waiver of arraignment (where "waiver" is provided by local law or otherwise) without just reason. Examples of just reasons for failing to file a waiver are that the client refused to waive arraignment or that counsel could not locate client prior to arraignment, etc.

If travel time involves more than one case, it should be divided equally among the cases, e.g., if two cases are involved, one-half of the travel time should be billed to each case.

Arraignment

Only the actual time spent arraigning a defendant is compensable unless counsel is assigned a client prior to arraignment and counsel is required to wait due to circumstances beyond his control. Such waiting time may be billed as in-court time and should be noted as such on the Fee Declaration Form.

Hearings and trials of co-defendants or directly related cases

Attendance at the hearings and trials of co-

defendants or cases directly related to your clients should be billed as out-of-court time, and your attendance should be justified by an attachment to the declaration. However, in cases where a co-defendant's case has been consolidated with your case, in-court activities may be billed as in-court hours. Attendance at a trial in which a client is called as a witness against another person charged in the same or related case may be billed as in-court hours, provided that the period of time billed is for the period of client testimony only.

Preliminary hearings

An appearance at your client's preliminary hearing should be billed as in-court time even in the event you are proffered the State's witnesses for interview and the preliminary hearing is thereafter waived. However, interviewing witnesses after your client's preliminary hearing is concluded should be billed as out-of-court time. Waiting time required by circumstances beyond counsel's control may be billed as in-court time and should be noted as such on the Fee Declaration Form.

Law clerks, paralegals and associates

Time spent by qualified law clerks and paralegals working at your direction should be billed at one-half the hourly out-of-court rate, and the name of the law clerk or paralegal should be noted on the declaration. Time spent by qualified associates working at your direction should be billed at the statutory rate, provided that (a) the associate's assistance was required by circumstances beyond your control and (b) the name of the associate is noted on the declaration. An associate will not be permitted to serve as lead counsel without prior approval from the court.

Actual time records

Actual time records, notations, or memorandums shall be maintained contemporaneously.

Total billing is required

A declaration should not be filed until the case has reached conclusion, e.g., it is not permissible to file a declaration after preliminary hearing where the defendant has been bound over and been indicted.

When, however, a client fails to appear or absconds, a declaration may be filed 60 days thereafter. Similarly, if new counsel is appointed or retained, a declaration may be filed immediately. However, the continuity of counsel provided by statute is to be strictly adhered to and should be departed from only in those cases in which it is absolutely necessary to have new counsel.

Separate declarations are required in multiple charge cases

In the past, it has been the normal practice to file a separate Fee Declaration Form for each separate case number in cases involving multiple counts, defendants, and/or indictments. That was prior to joinder and consolidation under the new Temporary Rules of Criminal Procedure. These cases

should no longer be treated separately, but rather should be billed in the following manner.

All cases arising out of the same transaction shall be billed as one case. For example, if a client is charged with breaking and entering and burglary of the same dwelling, and the cases are joined, they shall be treated as one case. If, at the initiation of the proceedings, the cases were listed separately, simply list the additional case number on the Fee Declaration Form with an explanation that the cases were consolidated.

In contrast, if cases arise out of separate transactions, they may be billed individually; even if they have been consolidated, they may be billed separately.

Double billing will not be tolerated under any circumstances. Therefore, if you are billing for more than one case, be careful not to charge for the same work more than once.

Finally, though payment will be permitted for new trial motions and like proceedings, including sentencing, all such billing shall be treated as trial billing rather than post-conviction billing.

"In-court" versus "out-of-court" time

Consistent with sections VIII and X, *supra*, all

waiting time at the courthouse for a scheduled court appearance caused by circumstances beyond counsel's control may be billed as in-court time and should be noted as such on the Fee Declaration Form, i.e., that portion of the total in-court hours which reflects necessary waiting time should be specifically noted as "waiting time" on the Fee Declaration Form.

Fees collected from the client

Any fees or expense money collected from the client (or from anyone on the client's behalf) before, during, or after working the case for which the counsel has been appointed, shall be reported. All amounts received shall be deducted from the amount finally paid to the lawyer.

In the event of changed circumstances (i.e., the client becomes able to retain counsel or secures outside assistance to retain counsel), counsel shall immediately notify the court that he/she has been retained, and the appointment shall be withdrawn. Retained counsel will not be required to file a Fee Declaration Form, because no state funds will be paid.

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NOTICE

JUDICIAL AWARD OF MERIT NOMINATIONS DUE

The Board of Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through **May 15**. Nominations should be prepared and mailed to **Reginald T. Hamner, Secretary, Board of Bar Commissioners, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101**.

The Judicial Award of Merit was established in 1987, and the first recipients were Senior U.S. District Judge Seybourn H. Lynne and retired Circuit Judge James O. Haley.

The award is not necessarily an annual award. It may be presented to a judge whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation.

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

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

RECENT DECISIONS

By WILBUR G. SILBERMAN

BANKRUPTCY

New value exception to preference claim—evidence required

In re Arrow, Inc., Debtor; Official Unsecured Creditors' Committee v. Airport Aviation Services, Inc., 940 F.2d 1463 (11th Cir. September 4, 1991), 22 B.C.D. 131. The debtor made nine rent payments to Airport Aviation Services, Inc. in the 90-day period before bankruptcy. The Eleventh Circuit overruled the bankruptcy and district courts' findings that the payments were contemporaneous exchanges for new value. The appellate court said that as there were substantial balances which had accrued prior to the payments being made during the 90-day period, the Creditors' Committee had not met the contemporaneous-exchange for new value exception which is an affirmative defense to §547, and that the case would be remanded.

It held that a party relying upon the exception must prove with specificity the measure of new value given the debtor in the exchange transaction, and the challenged payment is protected only to the extent of the specific measure of new value shown.

Bankruptcy court's authority to treat tax payment as trust fund payments

In re Kare Kemical, Inc.; U.S.A. v. Kare Kemical, Inc., 935 F.2d 243 (11th Cir. July 10, 1991). This was a Chapter 11 liquidation proceeding. The IRS had

assessed approximately \$90,000 in unpaid employment (trust fund) taxes, plus interest and penalties. The sale of assets by Kare Kemicals did not bring enough to pay the tax debt in full, and the debtor sought approval of a liquidation plan requiring the IRS to first satisfy principal of the taxes and, thereafter, the interest and penalties. Upon approval by the bankruptcy court, the United States appealed and the Eleventh Circuit reversed, stating that the holding in *In re Energy* applies only to Chapter 11 reorganization cases. The Eleventh Circuit stated that the reasons for allowing payment allocation in Chapter 11 reorganizations, regardless of whether such payments are properly characterized as "voluntary", are not present in liquidation cases.

Substantive consolidation of Chapter 7 cases

Eastgroup Properties v. Southern Motel Association, Ltd., 935 F.2d 245 (11th Cir. July 11, 1991). The appellants contended that the bankruptcy court and district court erred in a factual finding for consolidation of two entities, and, further, that there was no legal basis for consolidation. One of the debtors was a limited partnership formed for holding title and leasehold interest in motel properties. The other debtor was a corporation formed to operate the motel. The debtors were commonly owned; the appellants claimed that the unsecured claims would not be paid if the estates were consolidated. The appellate court held that the purpose of substantive consolidation is "to ensure the equitable treatment of all creditors". It involves the pooling of assets and liabilities of the related entities, and in a Chapter 11, creditors are combined for the purpose of voting on reorganization plans.

The Eleventh Circuit concluded that the basic criterion is to determine whether the economic prejudice of being separate outweighs the economic prejudice of consolidation—in other words, whether

the benefits offset the harm. The Court adopted the standard that the proponent must show substantial identity between the debtor and that consolidation is necessary to avoid harm or to realize benefit, but, once this is shown, the burden shifts to that of the objecting creditors.

Obligation of debtor to continue to pay health benefits to retirees after termination of wage agreement

In re Chateaugay Corporation, Debtor; LTV Steel Company, Inc. v. United Mine Workers of America, F.2d, 22 B.C.D. 149 (2nd Cir. September 17, 1991). The debtor was obligated to pay health benefits to retirees as long as the wage agreements remained effective. These agreements terminated after the debtor filed its petition. The Second Circuit affirmed the lower court's holdings that the Bankruptcy Protection Act is not applicable if the wage agreement has expired. However, the court did hold that the Pension Benefit Trust then becomes responsible for the continued provision of these health benefits.

Right to seek hazardous waste cleanup costs against reorganized debtor

Matter of Penn Central Transportation Company, F.2d, 22 B.C.D. 154 (3rd Cir. Ct. App. September 19, 1991). Under the old Bankruptcy Act, a consummation order had been entered in 1978. In 1986, under CERCLA, there was a suit brought by the United States for cleanup of a railroad yard. The U.S. District Court held that the 1978 order and applicable bankruptcy law would not, after consummation, allow CERCLA to be later asserted against the debtor. The Third Circuit reversed, stating that the consummation order was not a bar because CERCLA did not exist at the time of the order. However, the court did distinguish between reorganization and liquidation, and appeared to hold that if there had been a liquidation, its determination would have been different.



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.

Imputation to innocent partner of fraud committed by law firm

In re Calhoun, (1991) WL 191303, Bky. District of Columbia. In all probability, this case will be appealed, but the bankruptcy court followed the U.S. Supreme Court in *In re Strang v. Braudner*, 114 U.S. 555, 5 S.Ct. 1038 (1884) which held that fraud of one partner could be imputed to another partner on the issue of dischargeability, regardless that the other partner had no knowledge of the fraud. The debtor based his defense on the 8th C.C.A. case of *Matter of Walker*, 726 F.2d 452, holding that unless the other partner knew or should have known of the fraud, fraud could not be charged against him. The bankruptcy judge held that the language of the U.S. Supreme Court controlled, and there was no reason to believe Congress intended to make substantive changes in the 1978 Code.

Bankruptcy judge allows current rather than billing rates at time of performance of services

In re Commercial Consortium of California, Bankr. No. L.A. 86-10794 (October 22, 1991). Legal services were incurred during the first four years of the case. The attorney for the trustee had been paid nothing. Regular billings at the time of performance were approximately \$3,000 less than at the time of the application. The bankruptcy judge in an extended opinion relative to fees, particularly interim fee applications, in which she said the four-month intervals are unfair to attorneys as being unreasonably long intervals, held that when there is a delay in payment, counsel should not have to bear the full brunt of the resulting financial impact. One way to prevent this is to allow current hourly rates. As a basis for her holding, she cited *In re Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 107 S.Ct. 3078 (1987) and *In re Lawler*, 807 F.2d 1207, 1212 (5th Cir. 1988).

State exemptions laws are not preempted by ERISA

In the Matter of Marshall J. Dyke, F.2d B.C.D. 233 (5th Cir. October 15, 1991). The U.S. Supreme Court undoubtedly must solve the legal question of state exemption statutes and their tensions with federal law. In this case,

the Court concluded that the statute exempting retirement benefits from creditors was not subservient to ERISA but that the pension plan was exempt for the bankruptcy estate. (Actually, two cases with similar facts were appealed to the Fifth Circuit). Issues raised in the appeals were:

1. Whether the anti-alienation provision of ERISA is "applicable bankruptcy law" under §541(c)(2) of the Bankruptcy Code.
2. Whether the anti-alienation provision of ERISA is "other federal law" under §522(b)(2)(A) of the Bankruptcy Code (§522 is the exemption section in the Bankruptcy Code).
3. Whether ERISA preempts the Texas exemption statute.

As to the first issue above, the Fifth Circuit panel determined that the ERISA anti-alienation provision does not seclude pension funds from the bankruptcy estate unless the pension plan qualified under state law as a "spendthrift trust", and that under Texas law, it would not so qualify.

As to the second issue above, the Fifth Circuit agrees with the Eleventh Circuit holding in *In re Lichstrahl*, 750 F.2d 1488, 1491 (1985), that the ERISA anti-alienation provision is not "other federal law".

As to the third issue above, the Court first said that ERISA will not preempt unless the state law refers to an employee benefit plan, but that in *In re Shaw v. Delta Airlines*, 103 S.Ct. 2890, 2900, it was held there is enough relationship "if it has a connection with or reference to such a plan", and that ERISA preempts the state law "insofar as" the law applies to benefit plans in particular cases, thus unless there be an applicable exception. The Fifth Circuit then held that ERISA does not exempt state laws which (1) assist in the implementation and enforcement of other federal laws, and (2) are consistent with other federal laws; the Texas statute assists in the implementation and enforcement of the spirit of the Bankruptcy Code to give a debtor a fresh start, and, thus, *ERISA does not preempt it.* (emphasis supplied) ■

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Consultant's Corner



The following is a review of and commentary on an office automation issue that has current importance to the legal community, prepared by the office automation consultant to the state bar, Paul Bornstein, whose views are not necessarily those of the state bar.

This is the 23rd article in our "Consultant's Corner" series. We would like to hear from you, both in critique of the article written and for suggestions of topics for future articles.

Strategy for the '90s

As the '90s come of age, the question naturally arises: "What is the strategy, if any, for the '90s?" I feel very strongly that:

-Everyone must have some strategy, and

-Every viable strategy must include focus, efficiency and a wary approach to expansion.

Need for strategy

Strategy is not just for soldiers, politicians and corporate moguls. It even applies to law firms; in fact, it applies particularly to law firms since so few have a well-defined strategy. Consider the following definition of "strategy" as it applies to law firms:

"Strategy is the sum of the practice-sensitive decisions intended to insure that the firm reaches the end of the decade as a viable entity in a posture at least as healthy as the firm's posture at the beginning of the decade."

Do not mistake strategy for goals, such as make more money, have a more enjoyable life-style, spend more time with my family, etc. These are laudable in themselves, but they are not a strategy. A (well-developed) strategy merely enables one to have a chance at reaching one's goals. In a sense, a strategy is a road map laying out the route to one's objective, but the route and the objec-

tive are not one and the same. Another view is that of a strategy as a set of behaviors that can lead to certain rewards.

Focus

Except for urban mega-firms and rural sole practitioners, no one these days should attempt to represent himself as a generalist in the classic tradition. Law has become increasingly complex, and the spectre of certification looms as an uncertain cloud. Will lay people seek to identify with only certified practitioners, as they generally do with doctors?

The prudent strategy would seem to suggest that small- and medium-sized firms seek to focus their practice. The focus need not be limited to a single practice area, such as patent law or labor law. The focus, however, ought to be on a group of related practice areas that at least have the appearance of synergism. There is a payoff in this strategy beyond mere client identification. Think of the economies of library purchases, associate cross-training, secretarial utilization, business development, and marketing. Lay people have a primary care physician, yet regularly see other specialists. Lay people (and corporations) may well be on the way to a similar set of relationships, and only the megas and the solos will have exclusive "ownership" of clients.

Efficiency

No matter your focus, even if you have none, all lawyers will have to learn to practice more efficiently. This efficiency must be reflected in both individual practice and firm management. The key to individual efficiency is time management and the key to time management is thorough, scrupulous-to-a-fault recordkeeping on a daily basis. The documentation of non-billable time must

be as rigorous as that of billable time. Utilization, the ratio of billed hours to hours worked, must be 80 percent or better. How can you pace yourself if you do not record all your hours?

Firm meetings for purposes of decision-making and mutual enlightenment must be rigorously controlled. Mutual enlightenment meetings (everyone present) can be controlled by the use of agendas and scheduling them for 7:15 a.m. with a planned end time of 8:45 a.m. Decision-making can be simplified by assigning various functional areas to different partners who are authorized to make decisions within certain parameters. A decision once made can be announced to the other partners with a memo of the form "I have directed". Partners objecting, or seeking amplification, can meet with the action partner prior to the effective date outside of normal working hours.

Expansion

The uncertainties of the economy, the overcast of further state and federal involvement in law practice, and the continuing oversupply of law school graduates to the private sector all suggest extreme caution when it comes to the significant growth. This applies equally to internally generated growth, as well as to merger. The caution applies both to professional and support staff.

Having to lay off someone (generally a person with a family to support) is much more painful than passing on that person in the first place. Before considering any expansion, make sure everyone is at or near capacity and the prospects for future work are at least modest to good. By capacity, the professional staff, on average, should have a utilization factor of 80 percent and a realization factor (ratio of effective rate to budgeted rate) of 90 percent. ■

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Mail this request for service to the Alabama State Bar for scheduling.

Send to the attention of Margaret Boone, executive assistant, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.

SUMMARIES OF GENERAL LAWS ENACTED AND CONSTITUTIONAL AMENDMENTS PROPOSED

by the Legislature of Alabama at the
FIRST SPECIAL SESSION, 1991

September 9 through September 24, 1991

*Prepared By LEGISLATIVE REFERENCE SERVICE
Alabama State House • Montgomery, Alabama 36130 • (LRS91-1725A)*

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Act No. 91-734, H. 18, proposes an amendment to the Constitution relating to the compensation of the judge of probate and other county officers of Macon County.

Act No. 91-735, H. 53, proposes an amendment to the Constitution to provide for the election of the members of the Board of Education in the City of Tallassee.

Act No. 91-736, S. 12, repeals sec-

tion 36-15-5, *Code of Alabama* 1975, relating to the Office of Deputy Attorney General. It provides for additional personnel and further duties of the Office of Attorney General and establishes an additional means of funding such office.

Act No. 91-737, S. 13, provides for the appointment of investigators for the Office of the Attorney General. It also provides for the hiring, salaries, expenses, authority and duties of such investigators.

Act No. 91-738, H. 8, is the general fund budget. It makes appropriations for the ordinary expenses of the executive, legislative and judicial agencies of the state.

Act No. 91-750, S. 3, amends section 9-11-236, *Code of Alabama* 1975, relating to the hunting or taking of certain protected birds or animals during closed hunting season, so as to prohibit further the possession thereof and pro-

SUMMARIES OF GENERAL LAWS ENACTED AND CONSTITUTIONAL AMENDMENTS PROPOSED

vide further for certain prohibitions and penalties. It also repeals section 9-11-239, *Code of Alabama* 1975.

Act No. 91-786, H. 47, provides for a transfer of funds from the Abandoned Property Trust Fund to the state general fund.

Act No. 91-788, H. 76, amends sections 35-12-22, 35-12-23, 35-12-25, 35-12-27, 35-12-29, 35-12-31 and 35-12-39, *Code of Alabama* 1975, the "Uniform Disposition of Unclaimed Property Act," so as to reduce the seven-year dormancy period to a five-year dormancy period, provide for a single additional reporting and remitting date, and provide further for the deposit of funds to the general fund.

Act No. 91-789, S. 35, amends section 36-27-15.2, *Code of Alabama* 1975, relating to credit for out-of-state service in the retirement systems, so as to provide further for the cost of purchasing such credit.

Act No. 91-790, S. 55, amends section 34-3-2.1, *Code of Alabama* 1975, relating to graduates of certain law schools being authorized to take the bar examination, so as to change the name of Jones Law Institute to Jones School of Law and to provide further for teachers at such law schools.

Act No. 91-791, S. 60, amends section 34-3-3, *Code of Alabama* 1975, relating to admission fees for applicants to the state bar, so as to increase such fees.

Act No. 91-792, S. 70, amends section 36-6-11, *Code of Alabama* 1975, relating to longevity pay for state employees, so as to clarify that longevity pay shall be paid on the first payday in December of each year. It also repeals section 36-21-3, *Code of Alabama* 1975, relating to lump sum payments made to law enforcement officers which are in conflict with this act.

Act No. 91-793, S. 46, amends section 22-20-3, *Code of Alabama* 1975, providing for neonatal testing for certain diseases, so as to authorize certain other tests and the collection of a fee for the newborn screening program.

Act No. 91-794, S. 62, amends section 32-6-150, *Code of Alabama* 1975, relating to the issuance of personalized license plates for colleges and universities, so as to include Athens College within the colleges and universities authorized to have such license plates.

Act No. 91-795, S. 52, reopens the judicial retirement fund to allow certain active and contributing circuit judges to claim and purchase credit for certain service in the executive department of the state, as a full-time assistant district attorney, deputy district attorney or as an assistant attorney general.

Act No. 91-797, H. 17, amends Act No. 91-252, H. 556, 1991 Regular Session, relating to an annual appropriation from the Public Road and Bridge Fund of the Highway Department to the Department of Public Safety for the purchase of equipment for traffic law enforcement, so as to provide that for fiscal year 1991-92, the purposes for which said appropriation shall be expended shall be the enforcement of state traffic and motor vehicle laws.

Act No. 91-798, H. 62, amends sections 40-20-4, 40-20-5 and 9-17-26, *Code of Alabama* 1975, relating to the filing of oil and gas privilege tax returns, so as to provide further for such filing.

Act No. 91-804, S. 59, repeals Act No. 631, S. 722, 1977 Regular Session, relating to the compensation of the Director of Legislative Reference Service.

Act No. 91-805, H. 37, amends section 41-9-249, *Code of Alabama* 1975, relating to the powers and duties of the Alabama Historical Commission, so as to provide further therefor.

Act No. 91-807, S. 43, makes an appropriation from the Special Educational Trust Fund to the Blackbelt Human Resources for the fiscal year ending September 30, 1992.

Act No. 91-808, S. 44, makes an appropriation from the Special Educational Trust Fund to the Alabama League for the Advancement of Education for the fiscal year ending September 30, 1992.

Act No. 91-809, S. 2, proposes an amendment to the Constitution to provide that every mayor, sheriff and elected county official shall be entitled to participate in the Employees' Retirement System.

Act No. 91-811, S. 47, makes an appropriation from the general fund to the Department of Conservation and Natural Resources, Alabama Animal Damage Control Program for the fiscal year ending September 30, 1992.

Act No. 91-812, H. 75, makes appropriations from the Special Educational Trust Fund for certain public education functions performed by the State Department of Education for the fiscal year ending September 30, 1992. The appropriations are conditioned on determination by the courts that the attempted line-item veto in Act No. 91-732, 1991 Regular Session, is constitutional.

Act No. 91-813, H. 36, makes an appropriation from the general fund to the Alabama's Young Woman of the Year Program and to the America's Young Woman of the Year Program for the fiscal year ending September 30, 1992.

Act No. 91-814, H. 6, makes an appropriation from the Special Educational Trust Fund to the Attalla City Board of Education for the fiscal year ending September 30, 1991, for repairs to any city school damaged by fire.

Act No. 91-815, H. 16, makes an appropriation from the general fund to the Shoals Entrepreneurial Center for the fiscal year ending September 30, 1992.

Act No. 91-824, H. 38, amends sections 12-19-171, 12-19-172, 12-19-179, 12-14-14 and 32-5-313, *Code of Alabama* 1975, relating to court costs, so as to increase certain costs on traffic infractions and to provide for the distribution of the increase.

Act No. 91-828, H. 10, gives certain former employees of the Department of Public Safety all rights, benefits and privileges given to other retired state law enforcement officers including a retired badge, a retired commission card and a pistol.

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Act No. 91-94, H. 144, amends section 5-13A-3, *Code of Alabama* 1975, relating to the acquisition of an Alabama bank holding company or an Alabama bank by a regional bank holding company, so as to provide further for any such acquisition.

Act No. 91-120, S. 79, establishes the requirements for informed consent for human immunodeficiency virus (HIV) testing and provides for counseling, referral to health care services and an explanation of individual responsibility for any individual testing HIV positive.

Act No. 91-121, H. 466, amends sections 24-7-2 and 24-7-3, *Code of Alabama* 1975, providing for the Mowa Choctaw Housing Authority, so as to provide further for the appointment of members of the Authority and for the duties and powers of the Authority.

Act No. 91-122, S. 110, amends sections 34-24-80 and 34-24-83, *Code of Alabama* 1975, relating to the evaluation by the State Board of Medical Examiners of colleges of medicine located outside of the United States and the District of Columbia, so as to provide further for such evaluation and the licensing of graduates of such schools.

Act No. 91-124, H. 374, imposes a privilege tax upon certain providers of pharmaceutical services to provide further for the availability of indigent health care; the operation of the Medicaid program; and the maintenance and expansion of medical services thereunder.

Act No. 91-125, H. 375, establishes the Alabama Health Care Trust Fund in the state treasury for the purpose of providing further for the operation of the Medicaid program and the maintenance and expansion of medical services available thereunder.

Act No. 91-126, H. 376, imposes a privilege tax upon certain nursing facilities to provide further for the availability of indigent health care; the operation of the Medicaid program; and the maintenance and expansion of medical services thereunder.

Act No. 91-127, H. 377, imposes a privilege tax upon every disproportionate share hospital in the state to provide further for the availability of indigent health care; the operation of the Medicaid program; and the maintenance and expansion of medical services thereunder.

Act No. 91-129, H. 145, requires timely investment of idle funds by bank and trust company fiduciaries.

Act No. 91-152, H. 159, continues the existence and functioning of the Board of Examiners of Landscape Architects. It also amends sections 34-17-5, 34-17-20, 34-17-21 and 34-17-25, *Code of Alabama* 1975, so as to provide further for such Board.

Act No. 91-153, H. 547, proposes an amendment to the Constitution relating to Jefferson County, so as to provide further for the collection of municipal business license taxes on cer-

tain real estate operations and transactions in the county.

Act No. 91-154, H. 63, proposes an amendment to the Constitution relating to Escambia County, so as to provide further for the distribution of oil and gas severance tax revenues in the county.

Act No. 91-155, H. 130, proposes an amendment to the Constitution to allow the Legislature to provide by local act for the election of the members of the Board of Education of the City of Attalla in Etowah County.

Act No. 91-157, H. 160, continues the existence and functioning of the Board for Registration of Architects. It also amends sections 34-2-33, 34-2-34, 34-2-39 and 34-2-40, *Code of Alabama* 1975, so as to provide further for such Board.

Act No. 91-162, H. 14, proposes an amendment to the Constitution relating to Geneva County, so as to require or authorize the county commission to levy additional county license taxes and registration fees on motor vehicles and to provide for the distribution of the proceeds of such taxes.

Act No. 91-163, H. 687, proposes an amendment to the Constitution relating to Class 2 municipalities, so as to authorize certain investments of the assets of any Class 2 municipality police and firefighter pension plans.

Act No. 91-164, H. 162, continues

SUMMARIES OF GENERAL LAWS ENACTED AND CONSTITUTIONAL AMENDMENTS PROPOSED

the existence and functioning of the Polygraph Examiners Board. It also amends sections 34-25-36 and 34-25-29, *Code of Alabama* 1975, so as to provide further for such Board.

Act No. 91-165, H. 163, continues the existence and functioning of the State Board of Occupational Therapy. It also amends sections 34-39-14, 34-39-16 and 41-20-3, *Code of Alabama* 1975, so as to provide further for such Board.

Act No. 91-169, H. 428, amends section 11-43C-52, *Code of Alabama* 1975, relating to certain procedures under the mayor-council form of government for Class 5 municipalities, so as to provide further for the vote to override a line item veto of the mayor.

Act No. 91-171, H. 429, amends section 11-43C-21, *Code of Alabama* 1975, relating to the powers of the council under the mayor-council form of government for Class 5 municipalities, so as to provide that the council may appoint certain employees to serve the council.

Act No. 91-187, H. 366, amends numerous sections of chapter 65 of Title 11, *Code of Alabama* 1975, relating to horse racing and pari-mutuel wagering thereon in Class 1 municipalities, so as to provide further for horse racing and greyhound racing and pari-mutuel wagering thereon. It also repeals sections 11-65-45 and 11-65-46, *Code of Alabama* 1975.

Act No. 91-196, H. 164, continues the existence and functioning of the Board of Funeral Service. It also amends sections 34-13-70 and 34-13-90, *Code of Alabama* 1975, so as to authorize the Board to establish a reasonable examination fee for preparing and administering examinations of the Board's applicants.

Act No. 91-197, H. 161, continues the existence and functioning of the State Licensing Board for General Contractors. It also amends sections 34-8-2,

34-8-4 and 34-8-25, *Code of Alabama* 1975, so as to provide further for such Board.

Act No. 91-198, H. 165, continues the existence and functioning of the Hearing Aid Dealers Licensing Board. It also amends sections 34-14-1 through 34-14-4, 34-14-6 through 34-14-11 and 34-14-30, *Code of Alabama* 1975, so as to provide further for such Board.

Act No. 91-199, H. 166, continues the existence and functioning of the State Board of Registration for Professional Engineers and Land Surveyors. It also amends sections 34-11-8, 34-11-9 and 34-11-36, *Code of Alabama* 1975, so as to provide further for such Board.

Act No. 91-209, S. 40, authorizes municipalities and counties to provide assistance to the governing body of any other municipality or county when such municipality or county has been declared a disaster area by the Governor or the President.

Act No. 91-210, S. 44, allows certain handicapped persons to use cross-bows for hunting game and unprotected wildlife.

Act No. 91-211, S. 81, amends sections 28-3-1 and 28-3-187.1, *Code of Alabama* 1975, relating to alcoholic beverages, so as to define the term "brandy" and to exempt brandy from certain labeling requirements.

Act No. 91-212, S. 82, amends sections 8-20-4, 8-20-5, 8-20-7 and 8-20-9, *Code of Alabama* 1975, relating to the Motor Vehicle Franchise Act, so as to provide further for unfair and deceptive trade practices, terminations and nonrenewals of franchise relationships and the warranty obligations to dealers.

Act No. 91-217, H. 833, proposes an amendment to the Constitution to authorize the incorporation of the Tom Bevill Reservoir Management Area Authority in Fayette County for the purposes of water conservation and supply,

dam construction and reservoir development, for industrial development, flood control, navigation, irrigation, public recreation and related purposes.

Act No. 91-218, H. 956, proposes an amendment to the Constitution to provide for the election of the members of the Board of Education in the City of Decatur.

Act No. 91-219, H. 301, proposes an amendment to the Constitution to provide for the acquisition, maintenance and protection of lands and water areas having unique ecological systems, plant and animal life, geological formations, wildlife habitats, recreational value and scenic beauty. It also establishes the Alabama Forever Wild Land Trust.

Act No. 91-223, H. 789, makes an appropriation from the general fund to the Board of Pardons and Paroles for the fiscal year ending September 30, 1991.

Act No. 91-250, H. 135, amends section 1-3-8, *Code of Alabama* 1975, relating to legal holidays in the state, so as to provide that national Memorial Day shall be a legal holiday; Thomas Jefferson's birthday shall be observed in conjunction with George Washington's birthday; Mardi Gras shall be a holiday in Mobile and Baldwin counties; and certain state employees shall be granted one personal leave day each year.

Act No. 91-251, H. 555, amends section 23-6-8, *Code of Alabama* 1975, relating to the bonds of the Industrial Access Road and Bridge Corporation, so as to increase the amount of bonds such corporation can have outstanding at any one time.

Act No. 91-252, H. 556, provides for an annual appropriation from the Public Road and Bridge Fund of the Highway Department to the Department of Public Safety for the purchase of equipment for traffic law enforcement.

Act No. 91-254, H. 907, proposes

an amendment to the Constitution providing for the election of the members of the Board of Education in the City of Tallassee.

Act No. 91-255, H. 72, is the "Alabama Safety Belt Use Act of 1991".

Act No. 91-268, S. 321, amends sections 4-3-41, 4-3-45, 4-3-47 and 4-3-59, *Code of Alabama* 1975, relating to airport authorities, so as to provide for the reincorporation of existing airport authorities.

Act No. 91-319, H. 294, amends sections 13A-9-13.1, 13A-9-13.2, 8-8-15 and 12-17-224, *Code of Alabama* 1975, relating to restitution for the negotiation of a worthless check or other negotiable instrument, so as to increase the service charge on such worthless checks or instruments.

Act No. 91-320, H. 664, amends sections 8-6-10, 8-6-11 and 8-7-6, *Code of Alabama* 1975, relating to the Alabama Securities Commission, so as to provide further for funding said Commission and to provide for an appropriation to the Alabama Securities Commission from monies deposited in the Alabama Securities Commission Fund.

Act No. 91-321, H. 120, amends sections 40-1-33, 40-12-390, 40-12-391, 40-12-392, 40-12-394, 40-12-396, 40-12-398 and 40-12-414, *Code of Alabama* 1975, relating to automotive vehicle dealers, so as to exclude certain license information from general confidentiality provisions and to provide further for such automotive vehicle dealers. It also repeals section 40-12-52, *Code of Alabama* 1975, which requires a privilege license for automobile salesmen.

Act No. 91-322, H. 348, proposes an amendment to the Constitution authorizing the tax assessors, tax collectors, revenue commissioners, license commissioners and other ad valorem tax officials to elect to participate in the State Employees' Retirement System or the county retirement system, if available.

Act No. 91-323, S. 459, is "The Alabama Education Improvement Act of 1991". It also amends sections 16-23-3, 16-3-16, 16-23-14, 16-23-15, 16-3-15, 16-35-1 and 16-28-4, *Code of Alabama* 1975, relating to schools and certification of teachers and it specifically repeals sections 16-40-2, 16-40-3, 16-40-4, 16-40-5.1, 16-40-5.2, 16-40-5.3, 16-40-5.4, 16-40-6 and 16-40-7, *Code of Alabama* 1975, effective August 1, 1992.

Act No. 91-324, H. 55, exempts certain rescue service organizations from all state, county and municipal sales and use taxes.

Act No. 91-347, H. 389, amends section 29-2-51, *Code of Alabama* 1975, relating to the Permanent Legislative Committee on Reapportionment, so as to provide further for additional at-large members.

Act No. 91-356, H. 597, provides for the employment, powers and duties of police officers of the University of Montevallo.

Act No. 91-432, S. 27, amends section 33-4-38, *Code of Alabama* 1975, providing for the levy, payment and disposition of ship pilot's license tax, so as to increase the amount thereof.

Act No. 91-433, H. 736, amends section 32-5-313, *Code of Alabama* 1975, relating to penalties for traffic infractions to provide funding for the driver education and training fund, so as to increase the penalty and provide further for distribution of the funds collected.

Act No. 91-438, H. 27, amends sections 12-19-171, 12-19-172, 12-19-175, 12-19-178 and 12-19-179, *Code of Alabama* 1975, relating to fees in traffic infraction and misdemeanor cases in district and circuit courts, so as to increase the fees and to provide for distribution of the fee increase.

Act No. 91-439, H. 85, is "The Volunteer Service Act". It provides

immunity from civil liability while in volunteer service without compensation for a nonprofit organization or corporation or a governmental entity.

Act No. 91-440, H. 423, amends sections 22-52-2, 22-52-3, 22-52-4, 22-52-6, 22-52-7, 22-52-8, 22-52-9, 22-52-11, 22-52-12, 22-52-13 and 22-52-15, *Code of Alabama* 1975, relating to mental health and mental retardation, so as to provide further for the involuntary commitment, discharge and transfer of persons in state institutions. It also specifically repeals sections 22-52-1 and 22-52-10, *Code of Alabama* 1975.

Act No. 91-441, H. 34, is the "Alabama Community Punishment and Corrections Act of 1991". It provides for community punishment and corrections programs and procedures as alternative punishment for eligible offenders.

Act No. 91-442, H. 748, prohibits the Library Enhancement Fund in the education appropriations from receiving less than 70 percent of its appropriation in any fiscal year in which proration is declared.

Act No. 91-443, H. 678, allows all full-time employees and executive officers of the Developing Alabama Youth Foundation to become eligible to participate in the Teachers' Retirement System.

Act No. 91-444, H. 706, expands the purposes for which the Alabama Youth Services Board may expend certain funds appropriated in Act No. 90-764, 1990 Regular Session.

Act No. 91-445, H. 11, repeals Act No. 81-153, S. 392, 1981 Regular Session (Acts 1981, p. 176), which consolidated the administration of Athens State College and John C. Calhoun Community College. This act re-establishes two autonomous administrations and provides for the appointment of presidents of the colleges, the jurisdictions and operations.

Act No. 91-446, H. 29, provides a means whereby any insurer organized under the laws of any other state may become a domestic insurer.

Act No. 91-447, H. 35, amends section 13A-12-231, *Code of Alabama* 1975, relating to the offense of trafficking in illegal drugs, so as to include amphetamine and methamphetamine within the offense.

Act No. 91-448, S. 534, authorizes certain state instrumentalities or agencies to purchase and pay for group health, accident or hospitalization insurance coverage for its officers and employees and to contract with the State Employees' Insurance Board to provide such insurance coverage.

Act No. 91-460, S. 629, relates to Class 2 municipalities and provides for the payment of assessments to any such municipality for local improvements.

Act No. 91-466, H. 311, proposes an amendment to the Constitution to authorize the operation of bingo games by certain nonprofit organizations for charitable or educational purposes in St. Clair County.

Act No. 91-470, H. 279, is the "Alabama Act Regarding Liability for Persons Responding to Oil Spills". It provides immunity for certain persons responding to certain oil spills.

Act No. 91-471, H. 509, amends section 12-17-81, *Code of Alabama* 1975, relating to salaries of the circuit clerks and registers, so as to increase the amount of the annual salaries.

Act No. 91-472, H. 658, authorizes certain employers to purchase workers' compensation insurance with a deductible provision.

Act No. 91-473, H. 280, requires an additional fee for licensure and renewal of licenses as a general contractor.

Act No. 91-474, H. 183, is the

"Alabama Preschool Special Education Act." It establishes special education services for children ages three through five with disabilities.

Act No. 91-475, H. 292, amends sections 34-23-1 and 34-23-32, *Code of Alabama* 1975, relating to the annual registration of drug manufacturers with the State Board of Pharmacy, so as to require wholesale distributors of drugs to register annually with the Board and to increase the fee for permits and renewals of permits.

Act No. 91-476, H. 326, prohibits nonresident fishing pursuant to sport fishing licenses provided for in sections 9-11-55 and 9-11-56, *Code of Alabama* 1975, from taking or attempting to take fish from the public waters by means of one or more trotlines having a combination of more than 100 hooks.

Act No. 91-478, H. 170, amends section 40-16-6, *Code of Alabama* 1975, relating to the payment and distribution of financial institution excise taxes, so as to permit all incorporated municipalities to levy privilege license taxes on financial institutions.

Act No. 91-479, H. 325, amends sections 12-17-220 and 36-26-10, *Code of Alabama* 1975, relating to certain employees within the district attorneys' offices and the Merit System, so as to provide that assistant district attorneys, investigators, clerical, secretarial and other personnel employed in a district attorney's office serve at the pleasure of the district attorney and are in the exempt service of the state. The provisions of this Act are retroactive to May 18, 1977.

Act No. 91-480, H. 420, amends section 40-18-19, *Code of Alabama* 1975, relating to exemptions from state income taxes, so as to exempt all payments made to a retiree or beneficiary of a "defined benefit plan" as defined under the Internal Revenue Code.

Act No. 91-481, H. 819, amends

section 11-43C-35, *Code of Alabama* 1975, relating to the compensation of the mayor of Class 5 municipalities, so as to increase the compensation.

Act No. 91-482, H. 132, amends section 11-81-21, *Code of Alabama* 1975, relating to investment of municipal or county funds, so as to permit municipal and county funds to be invested in certain open-end or closed-end investment trusts which are invested in direct obligations of the U.S. or repurchase agreements respecting such U.S. obligations.

Act No. 91-483, H. 57, amends section 27-8-10, *Code of Alabama* 1975, relating to life and disability insurance representatives, so as to reduce the waiting period for a person who failed to pass two examinations for licensing as a life or disability insurance agent and for a person being examined for licensing as a property and casualty agent. It specifically repeals section 27-7-16, *Code of Alabama* 1975, relating to reapplication or reexamination upon denial for licensing as a property or casualty insurance representative.

Act No. 91-545, H. 396, is the "Council-Manager Act of 1991". It authorizes and provides the procedure for any Class 2, 3, 4, 5, 6, 7 or 8 municipality operating under a council-manager form of government, or under a mayor-council-city manager form, to establish a council-manager form of government.

Act No. 91-546, H. 596, amends sections 40-23-2, 40-23-4, 40-23-61 and 40-23-62, *Code of Alabama* 1975, relating to exemptions from sales and use taxation, so as to provide further for tax exemptions on certain ships and vessels and commercial fishing vessels of over five tons load displacement. It is retroactive to August 1, 1987.

Act No. 91-547, H. 319, provides for the appointment of a private nonprofit corporation by the courts to serve as guardian or conservator or both for

SUMMARIES OF GENERAL LAWS ENACTED AND CONSTITUTIONAL AMENDMENTS PROPOSED

persons who are developmentally disabled.

Act No. 91-548, H. 95, amends sections 22-21-20 and 22-21-27, *Code of Alabama* 1975, relating to licensing of hospitals, nursing homes and other health care institutions, so as to include hospices and to provide further for the composition of the Advisory Board.

Act No. 91-549, H. 146, relates to motor vehicles and provides that a transaction does not create a sale or security interest merely because the transaction provides that the rental price may be adjusted by reference to the amount realized upon sale or other disposition of the motor vehicle.

Act No. 91-550, H. 458, amends further section 11-3-4, *Code of Alabama* 1975, relating to the compensation of county commissioners, so as to change the amount allowed for mileage to the amount allowed by the Internal Revenue Code for income tax deductions.

Act No. 91-551, H. 953, authorizes each public corporation which is authorized by law to operate a water system and to borrow money for use for one or more of its corporate purposes to sell and issue bonds of such public corporations; specify the use of proceeds of such bonds and the source of payment thereof; and to make other provisions for such bonds.

Act No. 91-552, H. 99, amends section 22-21-5, *Code of Alabama* 1975, relating to hospitals and other health care facilities, so as to provide further for the powers of health care authorities.

Act No. 91-553, H. 100, adopts and incorporates into the *Code of Alabama* 1975 those general and permanent laws enacted during the 1989 Special Session and the 1990 Regular Session of the Legislature.

Act No. 91-554, H. 153, allows a

licensed pharmacist to refill a prescription for up to a 72-hour supply when unable to obtain refill authorization from the prescriber.

Act No. 91-556, H. 401, amends section 2-27-9, *Code of Alabama* 1975, relating to the registration of pesticides, so as to raise the annual registration fee from \$50 to \$100.

Act No. 91-557, H. 419, makes a supplemental appropriation from the Farmers' Market Authority Fund to the Farmers' Market Authority for the fiscal year ending September 30, 1991.

Act No. 91-559, H. 593, amends sections 30-3-61 and 30-3-62, *Code of Alabama* 1975, relating to child support withholding orders, so as to require the employer to remit the child support withheld within ten days of the date the obligor is paid and to provide for withholding by employers. It also amends section 30-3-94, *Code of Alabama* 1975, relating to the Interstate Income Withholding Act, so as to provide for immediate wage withholding on interstate child support cases.

Act No. 91-560, H. 870, makes an appropriation from the Agricultural Fund to the Department of Agriculture and Industries for the fiscal year ending September 30, 1991.

Act No. 91-561, H. 412, is the "Alabama State Employee Combined Charitable Campaign Act". It provides further for payroll deductions for public officers and employees. It also specifically repeals section 36-1-4.1, *Code of Alabama* 1975, relating to local United Way agencies and certain other health charities and payroll deductions.

Act No. 91-562, H. 694, provides for a "pilot project" for the Secretary of State to establish specifications for a uniform system of electronic voting and for the electronic transfer of election totals from counties to the Secretary of State's office.

Act No. 91-563, H. 959, authorizes the governing body of a municipality to exempt the homesteads of residents over 65 years of age, or who are retired due to permanent and total disability, or who are blind, from any ad valorem tax increase levied for public school purposes.

Act No. 91-564, H. 109, amends sections 36-7-20 and 36-7-22, *Code of Alabama* 1975, relating to per diem and mileage allowance for persons traveling on state business, so as to provide further for such allowance.

Act No. 91-565, H. 136, authorizes and provides the procedure for certain full-time employees of Soil and Water Conservation Districts to be covered under the State Employees' Health Insurance Plan.

Act No. 91-566, H. 380, amends Section 2C, item 111, of Act No. 90-764, 1990 Regular Session, relating to the general appropriations, so as to provide for the retention of inspection and supervision fees to meet the financial responsibilities of the Public Service Commission.

Act No. 91-567, H. 572, provides that all procedures, protections and remedies afforded to a motor vehicle dealer shall also be available to a motor vehicle distributor whose distributor agreement is terminated, canceled, not renewed, modified or replaced by a manufacturer or an importer.

Act No. 91-568, H. 295, amends section 36-21-8, *Code of Alabama* 1975, relating to certain law enforcement officers retaining their badge and pistol as part of retirement benefits, so as to include certain officers who are employees of the Forestry Commission.

Act No. 91-569, H. 488, amends sections 36-21-60, 36-21-61 and 36-21-63, *Code of Alabama* 1975, relating to the Peace Officers' Annuity and Benefit Fund, so as to provide for additional

members to the Board and to provide further for a quorum.

Act No. 91-570, H. 477, authorizes state agencies an administrative option to require the timely electronic remittance of immediately available funds by any person, corporation or partnership required to satisfy an obligation due any agency of the state amounting to \$100,000 or more effective January 1, 1992; \$50,000 or more effective January 1, 1993; and \$25,000 or more effective January 1, 1994.

Act No. 91-571, H. 258, makes an appropriation from the general fund to the Retired Senior Volunteer Program for the fiscal year ending September 30, 1992.

Act No. 91-572, H. 266, amends Act No. 90-556, 1990 Regular Session, concerning the repayment of funds transferred from Fund No. 305735.

Act No. 91-573, H. 265, amends section 41-4-17, *Code of Alabama* 1975, relating to rent in state-owned buildings, so as to eliminate the State Capitol building from exception of rent.

Act No. 91-574, H. 267, amends Section 2C, item 52, of Act No. 90-764, 1990 Regular Session, relating to general appropriations, so as to eliminate the requirement for a transfer to the general fund from the Capitol Complex Maintenance and Repair Fund.

Act No. 91-575, H. 370, amends sections 40-18-52 and 40-1-33, *Code of Alabama* 1975, and repeals sections 40-23-29, 40-23-84, 40-14-57 and 40-17-202, *Code of Alabama* 1975, relating to the Revenue Department, so to provide further for crimes and offenses committed by employees for violations of revenue and taxation statutes, regulations and procedure requiring confidentiality of information and certain exclusions therefrom.

Act No. 91-576, H. 371, amends section 40-23-68, *Code of Alabama*

1975, relating to use tax, so as to require out-of-state businesses with Alabama nexus to collect and report Alabama use tax on their sales to Alabama customers.

Act No. 91-577, H. 372, provides a statutory basis for the recovery of unclaimed property from out-of-state holders when such holders did not originate the unclaimed property and are merely intermediaries.

Act No. 91-578, H. 217, makes an appropriation from the Special Educational Trust Fund to the Department of Youth Services for the fiscal year ending September 30, 1992.

Act No. 91-579, H. 84, amends sections 32-6-270 and 32-6-272, *Code of Alabama* 1975, relating to motor vehicle licenses and registration, so as to define further "firefighter" and to provide further for firefighters distinctive motor vehicle license plate.

Act No. 91-580, H. 794, amends sections 9-11-141, 9-11-142 and 9-11-143, *Code of Alabama* 1975, relating to commercial fishing, so as to provide further for the regulation of commercial fishing.

Act No. 91-581, H. 79, amends section 11-43-80, *Code of Alabama* 1975, which authorizes a municipal governing body to employ the mayor as superintendent of the municipal utility system, so as to authorize the municipal governing body to establish the mayor's compensation for serving in such position.

Act No. 91-582, H. 197, amends section 34-32-9, *Code of Alabama* 1975, relating to the qualifications for registration as professional soil classifiers, so as to provide further for such qualifications.

Act No. 91-583, H. 352, amends section 17-8-25, *Code of Alabama* 1975, relating to the number of ballots to be provided for each voting place, so as to decrease the required number.

Act No. 91-584, H. 180, provides that persons who are required to register with the U.S. Selective Service System may not enroll in institutions of higher learning nor be offered employment or advancement or promotion by the state unless such persons offer proof that they have so registered.

Act No. 91-585, H. 469, provides that certain members of the Retirement Systems may purchase credit for up to eight years of previous service rendered as a county solicitor.

Act No. 91-586, H. 584, amends sections 37-2-41, 37-4-23 and 37-4-116, *Code of Alabama* 1975, relating to the inspection and supervision fees paid by transportation, utility and radio utility companies, so as to provide further for such fees.

Act No. 91-587, H. 356, allows employees of regional and local legislative delegation offices to participate in the Employees' Retirement System.

Act No. 91-588, H. 392, permits a domestic limited partnership to merge with one or more domestic limited partnerships, corporations or certain other business entities.

Act No. 91-589, H. 155, requires that the State Board of Pharmacy establish and periodically update a published list of precursor chemicals which are essential to the manufacture of unlawful controlled substances.

Act No. 91-590, H. 314, amends section 11-45-2, *Code of Alabama* 1975, relating to ordinances and resolutions, so as to provide that in all towns and in cities of less than 12,000, no ordinance or resolution, intended to be of permanent operation shall be valid unless, on its final passage, a majority of the members elected to the council, including the mayor, shall vote in its favor.

Act No. 91-591, H. 505, amends section 9-11-244, *Code of Alabama* 1975, relating to the taking of certain

SUMMARIES OF GENERAL LAWS ENACTED AND CONSTITUTIONAL AMENDMENTS PROPOSED

protected birds or animals by bait, so as to provide for an exception for certain hunting of migratory birds.

Act No. 91-592, H. 440, makes an appropriation from the general fund to the State Highway Department for the operations and maintenance of the Gulf Breeze Amtrak Passenger Train Service for the fiscal year ending September 30, 1991.

Act No. 91-593, H. 787, amends section 7-9-403, *Code of Alabama* 1975, relating to the filing of financing statements under the Uniform Commercial Code, so as to provide further for such filing.

Act No. 91-594, H. 88, creates the Catastrophic Trust Fund for special education to be administered by the State Department of Education for the purpose of assisting local education agencies in providing special education and related services to children with disabilities in catastrophic cases.

Act No. 91-595, H. 296, requires any insurance company, health maintenance organization, employer or other organization that provides a pharmaceutical program to their employers or members to obtain written proof that the provider pharmacies are registered with the State Board of Pharmacy.

Act No. 91-596, H. 497, authorizes the Medicaid Agency to make financing available for addressing liability insurance costs for family practitioners, pediatricians and obstetricians who provide obstetrical services in rural or under served areas.

Act No. 91-597, H. 531, authorizes the Secretary of State to employ an additional employee.

Act No. 91-598, H. 128, requires persons engaged in the business of purchasing and receiving or collecting waste grease and animal by-products for rendering or recycling from businesses located in various cities to pay a license tax in each such city.

Act No. 91-599, H. 357, amends section 11-88-5, *Code of Alabama* 1975, relating to the authorization and procedure for amendment of the certificate of incorporation of water, sewer and fire protection authorities with a service area that lies solely within one determining county, so as to permit changes in the number of directors, to provide the minimum and maximum number of directors allowed and to validate the membership of all boards presently in existence.

Act No. 91-600, H. 437, requires all persons 16 years of age or older to present certification of completion of an approved hunter education course prior to obtaining a hunting license.

Act No. 91-602, H. 330, authorizes and provides for the establishment of watershed management authorities.

Act No. 91-614, H. 579, authorizes state departments and agencies to prepay to officers and employees necessary travel expenses for authorized official state business.

Act No. 91-615, H. 580, authorizes the State Comptroller with the approval of the Chief Examiner of Pub-

lic Accounts to establish procedures for the prepayment of travel expenses of state officers and employees.

Act No. 91-616, H. 287, provides for loans for books, tuitions, fees and other educationally-related expenses incurred by employees of the Department of Public Health attending nursing school on a part-time or full-time basis. It allows forgiveness of some loans and guarantees employment for recipients while attending school.

Act No. 91-617, H. 324, amends section 36-26-36.1, *Code of Alabama* 1975, relating to sick leave for state employees and teachers, so as to provide further for the accumulation and use of such sick leave in determining years of creditable service in the Employees' or Teachers' Retirement System.

Act No. 91-618, H. 231, makes an appropriation from the general fund to the Lighthouse Counseling Center for the fiscal year ending September 30, 1992.

Act No. 91-619, H. 251, makes an appropriation from the general fund to the Alabama Council for Parenting and Protecting Children, Inc. for the fiscal year ending September 30, 1992.

ALABAMA BAR DIRECTORY

The 1991-92 Alabama Bar Directory will be mailed within the next month.

Each member in good standing of the Alabama State Bar will receive one free copy. Additional copies are \$15 each.

Please mail checks, made payable to Alabama Bar Directory, to P.O. Box 4156, Montgomery, AL 36101.

SUMMARIES OF GENERAL LAWS ENACTED AND CONSTITUTIONAL AMENDMENTS PROPOSED

Act No. 91-620, H. 233, makes an appropriation from the general fund to the Elyton Recovery Center for the fiscal year ending September 30, 1992.

Act No. 91-621, H. 243, makes an appropriation from the general fund to the Commission on Aging for the Care Assurance System for the Aging and Homebound for the fiscal year ending September 30, 1992.

Act No. 91-622, H. 244, makes an appropriation from the general fund to the Beacon House-Jasper for the fiscal year ending September 30, 1992.

Act No. 91-623, H. 416, amends section 40-23-2, *Code of Alabama* 1975, relating to taxes levied on certain gross receipts, so as to provide that athletic events conducted by a primary or secondary public school shall be exempted from said tax but shall continue to be collected and retained by the collecting school.

Act No. 91-624, H. 857, amends section 40-23-68, *Code of Alabama* 1975, relating to use taxes, so as to provide that the use taxes shall be paid on a monthly basis beginning October 1, 1991.

Act No. 91-625, H. 211, makes an appropriation from the Special Educational Trust Fund to the Department of Education for the fiscal year ending September 30, 1992.

Act No. 91-626, H. 234, makes an appropriation from the Special Educational Trust Fund to the East Alabama Child Development Center for the fiscal year ending September 30, 1992.

Act No. 91-627, H. 246, makes an appropriation from the Special Educational Trust Fund for the support and maintenance of Camp ASCCA in Jackson Gap for the fiscal year ending September 30, 1992.

Act No. 91-628, H. 281, makes an appropriation from the Special Educa-

tional Trust Fund to the State Department of Education for the fiscal year ending September 30, 1991.

Act No. 91-629, H. 653, is the "Alabama Public Livestock Marketing Business Act". It establishes a board to promote the marketing of livestock.

Act No. 91-630, H. 227, makes an appropriation from the Special Educational Trust Fund to the United Cerebral Palsy of Alabama, the United Cerebral Palsy Development Center for East Central Alabama, the Simpson-May Cerebral Palsy Center, the Cerebral Palsy Housing Foundation, the United Cerebral Palsy of Mobile and the United Cerebral Palsy of Huntsville for the fiscal year ending September 30, 1992.

Act No. 91-631, H. 228, makes an appropriation from the Special Educational Trust Fund for the support and maintenance of the Special Schools for Special Education for the fiscal year ending September 30, 1992.

Act No. 91-632, H. 672, amends numerous sections of chapter 25 of Title 2 of the *Code of Alabama* 1975, relating to insect and disease control of plants and trees, so as to provide further for such control. It also repeals sections 2-25-7, 2-25-17 and 2-25-19, *Code of Alabama* 1975, relating to such control.

Act No. 91-633, H. 752, amends section 22-30B-2, *Code of Alabama* 1975, relating to fees paid by operators of commercial sites for the disposal of hazardous wastes or substances, so as to extend the time period in which exempted businesses may petition the Department of Revenue to qualify for such exempted status.

Act No. 91-634, H. 141, amends section 12-15-61, *Code of Alabama* 1975, relating to certain facilities used for detention and shelter care of children, so as to provide further for such detention and shelter care and to provide for subsidy by the state of certain costs.

Act No. 91-635, H. 367, authorizes the State Industrial Development Authority to sell and issue from time to time its bonds.

Act No. 91-637, H. 194, amends section 14-9-41, *Code of Alabama* 1975, relating to the computation of incentive time deduction(s), so as to allow an inmate who has been sentenced to a term of 15 years or less in the state penitentiary to earn correctional incentive time.

Act No. 91-638, H. 548, amends Section 2C, item 113, of Act No. 90-764, 1990 Regular Session, the general fund budget, so as to increase the appropriation from the "Earmarked Funds" to the Department of Revenue and to provide for a transfer of funds from the Department of Revenue to the Departmental Emergency Fund for the fiscal year ending September 30, 1991.

Act No. 91-640, S. 343, creates and provides for new circuit judgeships in the tenth, 15th, and 19th judicial circuits.

Act No. 91-641, S. 412, amends section 12-18-87, *Code of Alabama* 1975, relating to probate judges' retirement benefits, so as to provide further for such benefits.

Act No. 91-642, S. 558, amends sections 24-5-31, 24-5-32 and 24-5-33, *Code of Alabama* 1975, relating to anchoring of mobile homes and manufactured buildings, so as to provide further for anchoring such structures.

Act No. 91-652, S. 535, creates a Permanent Joint Legislative Committee on Finances and Budgets to study the financial condition of the state.

Act No. 91-654, S. 96, amends sections 7-1-201, 8-25-1 and 8-25-3, *Code of Alabama* 1975, relating to rental-purchase agreements under the Uniform Commercial Code, so as to exclude such agreements from coverage of the Uniform Commercial Code provi-

SUMMARIES OF GENERAL LAWS ENACTED AND CONSTITUTIONAL AMENDMENTS PROPOSED

sions relating to security interests and to authorize certain practices by rental-purchase merchants.

Act No. 91-655, S. 512, amends section 36-27-23, *Code of Alabama* 1975, relating to the Board of Control of the Employees' Retirement System, so as to provide for representation from local units.

Act No. 91-656, S. 193, authorizes football coaches of public four-year institutions of higher learning to participate in the American Football Coaches Retirement Trust 401(K) plan.

Act No. 91-657, S. 75, amends sections 32-6-250, 32-6-251 and 32-6-254, *Code of Alabama* 1975, which provide distinctive motor vehicle license plates for Medal of Honor Recipients and Prisoners of War, so as to include recipients of the Purple Heart Medal.

Act No. 91-658, S. 51, provides for the sale or disposal of tangible personal property and standing timber owned by the Alabama Institute for Deaf and Blind.

Act No. 91-659, S. 400, is the "Alabama Fair Housing Law". It prohibits discrimination in the selling, renting, leasing and financing of housing.

Act No. 91-660, S. 466, amends sections 38-10-9 and 38-10-12, *Code of Alabama* 1975, relating to child support, so as to authorize the Department of Human Resources to conduct investigations to locate absent parents and to exclude federal and state offset collections and disregard payments from the requirement that child support collections be disbursed within five days of receipt.

Act No. 91-661, S. 443, provides certain remedies for courts exercising juvenile jurisdiction in dependency cases.

Act No. 91-662, S. 97, authorizes the Department of Human Resources to enter into interstate adoption assistance compacts to provide for medical and

other necessary services for special needs children.

Act No. 91-663, S. 47, amends sections 27-26-5 and 34-24-56, *Code of Alabama* 1975, relating to the reporting of medical malpractice judgments and settlements, so as to provide further for the reporting of judgments and settlements entered against professional corporations.

Act No. 91-664, S. 508, amends section 36-27A-4, *Code of Alabama* 1975, relating to the investments of the Public Employees' Individual Retirement Account Fund, so as to provide that all investments shall be made pursuant to the same authority and restrictions that govern the investment of funds of the Retirement Systems.

Act No. 91-665, S. 684, exempts all Class 2 municipalities from the payment of any and all oil, gasoline and diesel fuel taxes.

Act No. 91-666, S. 333, amends sections 35-15-1, 35-15-2 and 35-15-3, *Code of Alabama* 1975, relating to the

duty of care owed persons on premises for sporting or recreational purposes, so as to provide further that sporting or recreational activities include exploring caves and rock climbing.

Act No. 91-667, S. 432, provides for the organization and operation of a public corporation to be known as the Alabama International Airport Authority.

Act No. 91-669, S. 29, establishes and provides for the Alabama Legislative Compensation Commission.

Act No. 91-670, H. 117, amends sections 9-13-196 and 9-13-197, *Code of Alabama* 1975, relating to failure to pay certain assessments on forest lands, so as to provide further for the sale and redemption of said land and to provide further for the retroactive repeal of certain local laws levying an acreage assessment

Act No. 91-671, H. 333, amends section 38-2-6, *Code of Alabama* 1975, relating to the duties, powers and responsibilities of the Department of

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Human Resources, so as to provide for establishing rules and standards for inspection and approval of adult foster care homes and adult day care centers and homes.

Act No. 91-672, H. 354, amends sections 40-17-31 and 40-17-240, *Code of Alabama* 1975, relating to gasoline and oil taxes, so as to provide an exemption for gasoline, motor fuel and oil purchased by city and county boards of education, the Alabama Institute for Deaf and Blind, and the Department of Youth Services School District.

Act No. 91-673, H. 237, makes an appropriation from the Special Educational Trust Fund to the Marion Military Institute for the fiscal year ending September 30, 1992.

Act No. 91-674, H. 646, makes an appropriation from the Special Educational Trust Fund to the Commission on Physical Fitness for the fiscal year ending September 30, 1992.

Act No. 91-685, H. 785, provides for the reopening of the Employees' Retirement System for certain active members who had employment with the Legislature prior to 1979.

Act No. 91-686, H. 247, makes an appropriation from the Special Educational Trust Fund to the Children's and Women's Hospital in Mobile for the fiscal year ending September 30, 1992.

Act No. 91-687, H. 872, makes an appropriation from the Special Educational Trust Fund to the Helen Keller Eye Research Foundation for the fiscal year ending September 30, 1992.

Act No. 91-688, H. 240, makes an appropriation from the Special Educational Trust Fund to Tuskegee University for the fiscal year ending September 30, 1992.

Act No. 91-689, H. 270, makes an appropriation from the Special Educational Trust Fund to Lyman Ward Military Academy for the fiscal year ending September 30, 1992.

Act No. 91-690, H. 219, makes an appropriation from the Special Educational Trust Fund to the Central Alabama Opportunities Industrialization Center for the fiscal year ending September 30, 1992.

Act No. 91-691, H. 242, makes an appropriation from the Special Edu-

cational Trust Fund to the Walker County Junior College for the fiscal year ending September 30, 1992.

Act No. 91-692, H. 208, makes an appropriation from the Special Educational Trust Fund to the Children's Hospital in Birmingham for the fiscal year ending September 30, 1992.

Act No. 91-693, H. 271, makes an appropriation from the Special Educational Trust Fund to the Coosa Valley Medical Center School of Nursing for the fiscal year ending September 30, 1992.

Act No. 91-694, H. 659, amends sections 40-7-1, 40-12-255, 40-12-252, 40-11-1, 40-8-1 and 32-8-2, *Code of Alabama* 1975, relating to mobile homes, so as to redefine mobile homes as manufactured homes and to provide for registration and issuance fees for manufactured home decals; provide further for ad valorem taxes on manufactured homes; provide penalties for certain violations; provide for distribution of the fees and provide for certain exemptions from the registration fees.

Act No. 91-697, H. 645, makes a supplemental appropriation from the Alabama Liquefied Petroleum Gas Board Fund to the Alabama Liquefied Petroleum Gas Board for the fiscal year ending September 30, 1991.

Act No. 91-707, H. 282, amends section 2-5-14, *Code of Alabama* 1975, relating to the Farmers' Market Authority, so as to authorize such Authority to make grants for the benefit of agricultural markets and other agricultural oriented facilities.

Act No. 91-709, H. 101, amends section 29-1-18, *Code of Alabama* 1975, relating to legislative affairs, so as to provide further for the number of members on a standing committee of the House for the quadrennium ending January 1995.

Act No. 91-712, H. 253, makes an appropriation from the general fund to the Alabama Travel Council for the fiscal year ending September 30, 1992.

ALABAMA BAR DIRECTORY

The 1991-92 Alabama Bar Directory will be mailed within the next month.

Each member in good standing of the Alabama State Bar will receive one free copy. Additional copies are \$15 each.

Please mail checks, made payable to Alabama Bar Directory, to P.O. Box 4156, Montgomery, AL 36101.

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Act No. 91-713, H. 232, makes an appropriation from the Special Educational Trust Fund to the Exploreum Museum of Discovery for the fiscal year ending September 30, 1992.

Act No. 91-714, H. 272, makes an appropriation from the Special Educational Trust Fund to the Alabama YMCA Youth and Government and the Cleveland Avenue YMCA for the fiscal year ending September 30, 1992.

Act No. 91-715, H. 241, makes an appropriation from the Special Educational Trust Fund to the Alabama Humanities Foundation for the fiscal year ending September 30, 1992.

Act No. 91-716, H. 463, makes an appropriation from the Special Educational Trust Fund to the Bevill Center for Advanced Manufacturing Technology in Gadsden and to the Bevill Advanced Electronics Center at Sparks Technical College for the fiscal year ending September 30, 1992.

Act No. 91-717, H. 238, makes an appropriation from the Special Educational Trust Fund to the Kate Duncan Smith DAR School for the fiscal year ending September 30, 1992.

Act No. 91-718, H. 439, makes an appropriation from the Special Educational Trust Fund to the Constitution Mall Village at Huntsville for the fiscal year ending September 30, 1992.

Act No. 91-720, H. 121, amends sections 5-21-2, 5-21-3, 5-21-4 and 5-21-11, *Code of Alabama* 1975, relating to the George Wallace, Jr., linked deposits plan, so as to expand the plan to include discretionary emergency interim deposits to support loans made for property loss due to natural or man-made disasters and to extend the plan to September 30, 1995.

Act No. 91-721, H. 911, is "The Tractor, Lawn and Garden and Light Industrial Equipment Franchise Act". It provides for the fair regulation of tractor, farm equipment, lawn and garden and light industrial equipment manu-

facturers, distributors, wholesalers, dealers and their representatives. It also repeals sections 8-21-1 through 8-21-14, *Code of Alabama* 1975.

Act No. 91-722, H. 830, provides an exemption from the certificate of need requirement for any kidney disease treatment center that is located in a Class 4, 5, 6, 7 or 8 municipality and that contains no more than ten hemodialysis units.

Act No. 91-725, H. 248, makes an appropriation from the general fund to the Coalition Against Domestic Violence for the fiscal year ending September 30, 1992.

Act No. 91-726, H. 264, makes an appropriation from the Special Educational Trust Fund to the Department of Public Health for the fiscal year ending September 30, 1992.

Act No. 91-730, S. 505, amends section 37-3-32, *Code of Alabama* 1975, relating to motor carrier fees paid to the Public Service Commission, so as to provide further for such fees.

Act No. 91-731, S. 411, amends section 2-3-22, *Code of Alabama* 1975, relating to agricultural markets, so as to allow the Commissioner of Agriculture and Industries to employ one person in the unclassified service of the state for each market owned, controlled or managed by the Department of Agriculture and Industries.

Act No. 91-732, H. 203, is the education budget. It makes appropriations for the support, maintenance and development of public education and for debt service and capital improvements for the fiscal year ending September 30, 1992. ■

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ALABAMA SUPREME COURT JUSTICE ROBERT B. HARWOOD (1902-1991)



I have, on several occasions, recounted a story from the time of my initial application to take the Alabama bar exam and for the Character and Fitness

submission, on both of which I had listed "Judge" Harwood¹ as a reference. Because I had grown up living only a few blocks from him, and because his son was one of my earliest and best friends, so that the Harwood house was a kind of second home to me, Judge had been able to watch, fortunately with great patience and good humor, all of our youthful and teenage behavior. When the request for a character reference went to him, Judge wrote to me in law school, "I am glad to see your application, and I shall be glad to perjure myself to the fullest on your behalf."

When the bar gave me the sad privilege of writing on the occasion of Justice Harwood's death, I thought how easy it would be to talk of his many great achievements and his remarkable character, all without the slightest need to "perjure myself" in any degree. The task proved hard only because of the inadequacy of trying to capture some of the special nature of his life and personality, and because of the sadness that any such reflection brings. Biographical details cannot do that, and I promised only to write a remembrance, not a curriculum vitae.

Because I had the privilege from the time of my earliest memory to know Judge and his wife, Mary Lee, and because he was so quiet and unassuming about himself and his achievements, I am not sure that I fully appreciated the unique distinction of

his career in Alabama government, until I became a member of the bar. There cannot be many public careers to match Judge Harwood's: high academic honors in college and law school, private law practice, assistant U.S. Attorney, professor of law (University of Alabama), Attorney General of Alabama, major in the U.S. Army in WW II, and judge on the court of appeals and Alabama Supreme Court. His judicial service spanned the time from 1946 until his retirement from the supreme court. Even after retirement, he served the legal profession as a lecturer and adviser at the University of Alabama School of Law. His father was a circuit judge in Tuscaloosa, and now his son holds that same position: three generations of judicial service in one family itself holds a special place in history.

But even a long, honored and honorable career at the highest levels of his profession does not come close to capturing the wisdom, the wit, the warmth and the worth of Justice Harwood. His personal modesty and commitment to the bench as a service rather than a source of personal glorification were such that, in growing up in and around his home, I was almost unaware of the high office and the great position of power he held. Even less, because of my lack of experience in the world, was I aware that, by any standard of intelligence, character, honor, service and wisdom, he not only held great office, but he was a great man.

Looking back over the range of his judicial opinions, it is easy to see the same sense of balance, moderation, tolerance, wisdom, and good humor that characterized his personality. He was, in a sense, without a judicial or political "agenda", deciding cases simply from a neutral middle ground based on the law, on the facts, on logic and on careful scholarship.

The identity, status or personality of the parties and attorneys in the cases

before him played no role in his decisions at all. When the Judge authored an opinion reversing an early successful verdict in a case of mine, I may have been "surprised" to lose on the law (since, like all trial attorneys, I had no clients or victories that were not "right"), but I was not at all surprised that Judge would simply call it as it fell out, and that no degree of affection and friendship would affect his decision.

After Judge rendered a decision that caught his son's eye, Bernard, Jr. wrote his father a long, detailed and researched letter, taking highly offended issue with the decision (academically, as opposed to as a litigant or advocate), and concluded the letter, "So you see, Dad, what you held is simply not the law."

Judge, with characteristic realism and brevity, simply wrote back, "It is now."

It is a trite expression to say that someone was a devoted husband, father and grandfather, but Judge was very much that: he and Mary Lee not only were a loving and loyal couple, but it was clear that they took special pleasure and fun in each other's company all their lives. As teenagers, we knew they were our friends, were interested in us, and that they viewed our foibles and foolishness with good-humored tolerance, but we did not think they were *us*—they were parents, and they guided us with that same sense of balance and wisdom that is so visible in Judge's decisions. Judge always seemed genuinely interested to sit on the screened porch on the side of their house and talk to us about all those things that are so desperately important to 12- or 15- or 18-year-old boys. I do not remember his ever "lecturing" us on the right decisions, or the fair answers, or the kind and truthful thing to do or say, but somehow his views, his questions, and, most of all, his example, made those things clear.

Judge lived a long and immensely successful life, saddened in his last years only by the loss of Mary Lee, and by illness. Typical of him, as long as his health would allow, he devoted a great deal of time and caring in his retirement, utterly without bother or self-interest, to continue to help others through the Soup Kitchen program in Tuscaloosa. He lived to see his son become a judge, and I know what Bernard meant when he said at his investiture, that, while he was proud to have his father's robe to wear, it was a very large job to think of filling it. I suspect that many Alabamians today do not know the extent, the length and the quality of service Judge rendered to this state, but the loss of this quiet, wise and honorable man is a very great loss indeed.

He would think that a eulogy was a lot of undeserved fuss, and would, I think, be content to have left behind some of those who knew him as a teacher, a father, a grandfather, a judge or a friend as having gained something in the quality of their lives and character so as not to need anyone to have to perjure himself on our behalf.

*Richard H. Gill
Copeland, Franco, Screws & Gill
Montgomery, Alabama*

He was of course, "Justice" Harwood, but was always referred to by us as "Judge". His wife, Mary Lee, in a wonderfully irreverent way, always just called him "Harwood".

ALABAMA SUPREME COURT JUSTICE PELHAM J. MERRILL (1907-1991)

"He is the type of young man who will undoubtedly achieve high success."

—George H. Denny



These words were penned in 1924 when Pelham Jones Merrill was 16 years old and well into his second year of study at the

University of Alabama, which he had entered at 14 and from which he was graduated with the A.B. degree in 1926 at age 18. President Denny's prophesy was indeed correct when he endorsed a scholarship application of this Cleburne County native. Pelham Jones Merrill did achieve high success—as teacher, lawyer, soldier, and jurist.

Retired Associate Justice Pelham J. Merrill died suddenly at his home in Montgomery November 5, 1991. Justice Merrill served 24 years on the state's highest court and was the senior associate justice when he retired in 1976. Justice Merrill had been very active in the judicial improvement movement in Alabama and had keynoted its Citizens Conference of Alabama State Courts in 1966.

Justice Merrill entered the teaching profession in 1926. He served as teacher and coach at West Blocton in Bibb County. His first team, with 13 players, had not won a game the previous year. That team would lose a single game and win the county championship. He was always "Coach Merrill" in Bibb County. He taught five years and subsequently served as principal of the junior high and elementary schools at Blocton. An accomplishment in which "Judge" took great pride was his work in the Opportunity Schools which taught adults to read. His school was the largest in the state in 1929-30.

His legal studies began in 1931 and he received his law degree in 1934 from the University of Alabama. He worked his way through law school by working in the dining hall and serving as a dorm monitor. He entered the practice of law in Heflin, Alabama in January 1934 and practiced there until 1953 when he moved to Montgomery to serve as an associate justice of the Supreme Court of Alabama. He had previously served as deputy district attorney for Cleburne County from 1935 until 1942.

Judge Merrill was elected three times to represent Cleburne County in the State House of Representatives, first serving in 1936. He was nominated a fourth time in 1942, but resigned the nomination to enter the Army Air Corps. Following his military service, he was elected in 1946

DAHLE, LAURA ANN McDONALD
Fairhope
Admitted: 1987
Died: September 17, 1991

EMERSON, RICHARD BAILEY
Anniston
Admitted: 1939
Died: September 18, 1991

MERRILL, PELHAM JONES
Montgomery
Admitted: 1934
Died: November 5, 1991

GARRISON, ROBERT CARLTON
Birmingham
Admitted: 1926
Died: October 25, 1991

GRIFFITH, JOHN IKE
Mountain Brook
Admitted: 1937
Died: October 14, 1991

SEARCY, EVERETT BRINNON
Birmingham
Admitted: 1968
Died: October 1, 1991

SIMMONS, IRA FRANK
Birmingham
Admitted: 1966
Died: September 23, 1991

Memorials

and re-elected in 1950. He resigned his legislative seat in 1952 following his election to the state's highest court. He was twice elected speaker pro tem of the House of Representatives and honored as its most effective member in 1951.

Judge Merrill remained active in the United States Air Force Reserve following his release from active duty as a major in 1946. He was retired with the rank of colonel in 1967.

Judge Merrill was a leading Baptist layman in Alabama. He was ordained a deacon in the Calvary Baptist Church while a student in college. He was an active Sunday School teacher for over 60 years and asked to address the Alabama State Baptist Convention in 1962. He was a frequent lay pulpit guest throughout the state.

Judge Merrill was inducted into the Alabama Academy of Honor in 1978. He was honored by both Cumberland

and the University of Alabama schools of law. He was also honored by Jacksonville State University and the University of Montevallo. His civic involvement included Lions, Civitan and Exchange club memberships. He was a longtime supporter of YMCA work, having first been elected president of the YMCA at the University of Alabama. He later served as chairman of the YMCA Youth Legislature Board of Directors. He also helped organize and was the first secretary of the Alabama-Georgia Baseball League.

Judge Merrill is survived by his wife of 55 years, the former Gladys Morrison of West Blocton. Also surviving are three brothers: Walter J. Merrill, an Anniston attorney; Carl H. Merrill, an attorney in Heflin; and Fred L. Merrill of Anniston. He is also survived by his sisters: Mary Frances Durst, of Columbia, South Carolina; and Mrs. Clyde M. Maguire and Pearl M. Burns, both of Jacksonville, Florida. His father was the late Judge Walter B. Merrill and his

late mother, Lilla Jones Merrill, was Alabama's 1951 Mother of the Year.

The Montgomery, Alabama Chapter of the University of Alabama National Alumni Association named its endowed scholarship in honor of Judge Merrill. In lieu of flowers, memorials were suggested to the Pelham J. Merrill Endowed Scholarship, P.O. Box 1928, Tuscaloosa, Alabama 35486-1928.

Judge Merrill concluded his 1966 keynote address on Alabama courts as follows:

"I shall be content, if, when my days are numbered, it can be truthfully said of me that with such ability as I possessed, and whenever opportunity offered, I labored faithfully to build this temple (of justice) in my time."

The respect and esteem in which Justice Pelham J. Merrill was held for his many contributions to the justice system of the State of Alabama is proof positive he was a laborer of infinite worth.

—Reginald T. Hamner

NOTICE

To Members of the Bar and the Public Concerning Public Hearing

Notice is hereby given that a public hearing will be conducted by Chief Judge Gerald Bard Tjoflat, United States Court of Appeals for the Eleventh Circuit, on Monday, January 20, 1992 at 9 a.m. in Courtroom A of the United States Courthouse, 611 North Florida Avenue, Tampa, Florida for the purpose of receiving suggestions, proposals and comments concerning the application or enforcement of Eleventh Circuit Rule 46-1(d)(1) and of Section (d)(2) of the Eleventh Circuit Plan under the Criminal Justice Act (CJA). (These provisions became effective April 1, 1991 after public notice and an opportunity to comment had been given in the fall of 1990 and winter of 1990-91, as required by 28 U.S.C. §2071(b).)

Eleventh Circuit Rule 46-1(d)(1) states:

Appellate Obligations of Retained Counsel: Retained counsel for a criminal defendant has an obligation to continue to represent that defendant until successor counsel either enters an appearance or is appointed under the Criminal Justice Act, and may not abandon or cease representation of a defendant except upon order of the court.

Section (d)(2) of the Circuit's CJA plan states:

If a party was represented in the district court by counsel appointed under the Act, such counsel shall be mindful of the obligation and responsibility to continue representation on appeal until either successor counsel is appointed under the Act or counsel is relieved by order of this court. . . . Retained counsel for a criminal defendant has an obligation to continue to represent that defendant until successor counsel either enters an appearance or is appointed under the Act, and may not abandon or cease representation of a defendant except upon order of this court. Unless approved in advance by this court, the district court is not authorized to appoint counsel on appeal to represent a defendant who was represented in the district court by retained counsel without first conducting an *in camera* review of the financial circumstances of the defendant and of the fee arrangements between the defendant and retained trial counsel. Appointment of counsel on appeal may be requested in this court by filing an appropriate motion supported by an affidavit which substantially complies with Form 4 in the Appendix to the FRAP Rules.

Members of the several bars within the Eleventh Circuit and concerned citizens are invited to attend this public hearing. Interested persons may also submit written comments to the Clerk, Eleventh Circuit Court of Appeals, 56 Forsyth Street, Atlanta, Georgia 30303.

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