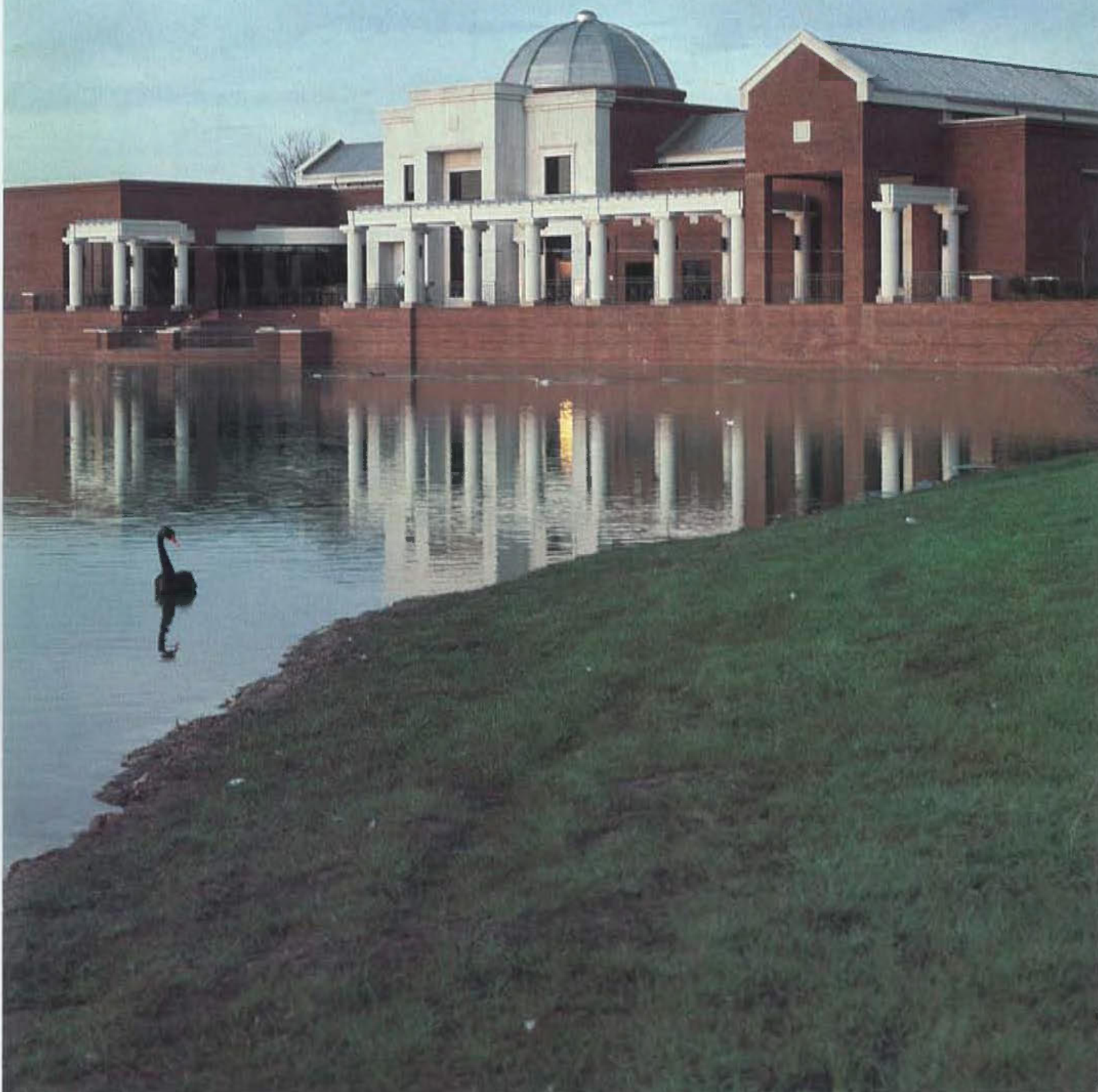


The Alabama Lawyer

Vol. 50, No. 2

March 1989



Union Bank Heads The List Of Alabama's Safest Banks.

MONEY MAGAZINE, FALL 1988

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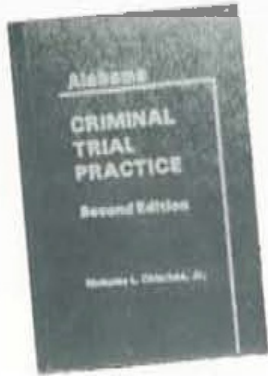
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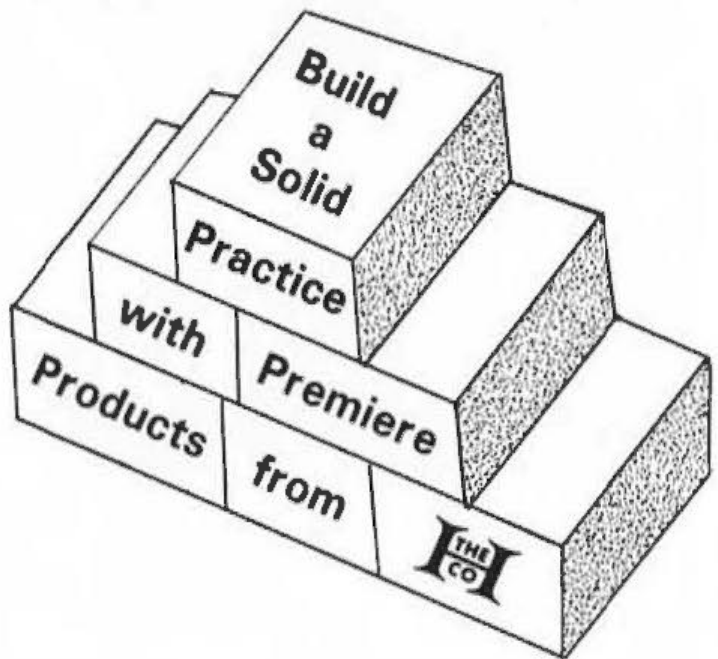
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ALABAMA...



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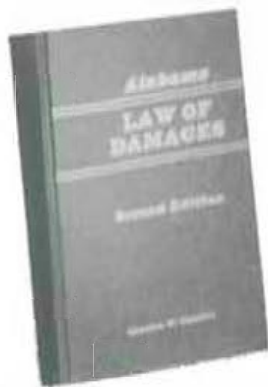
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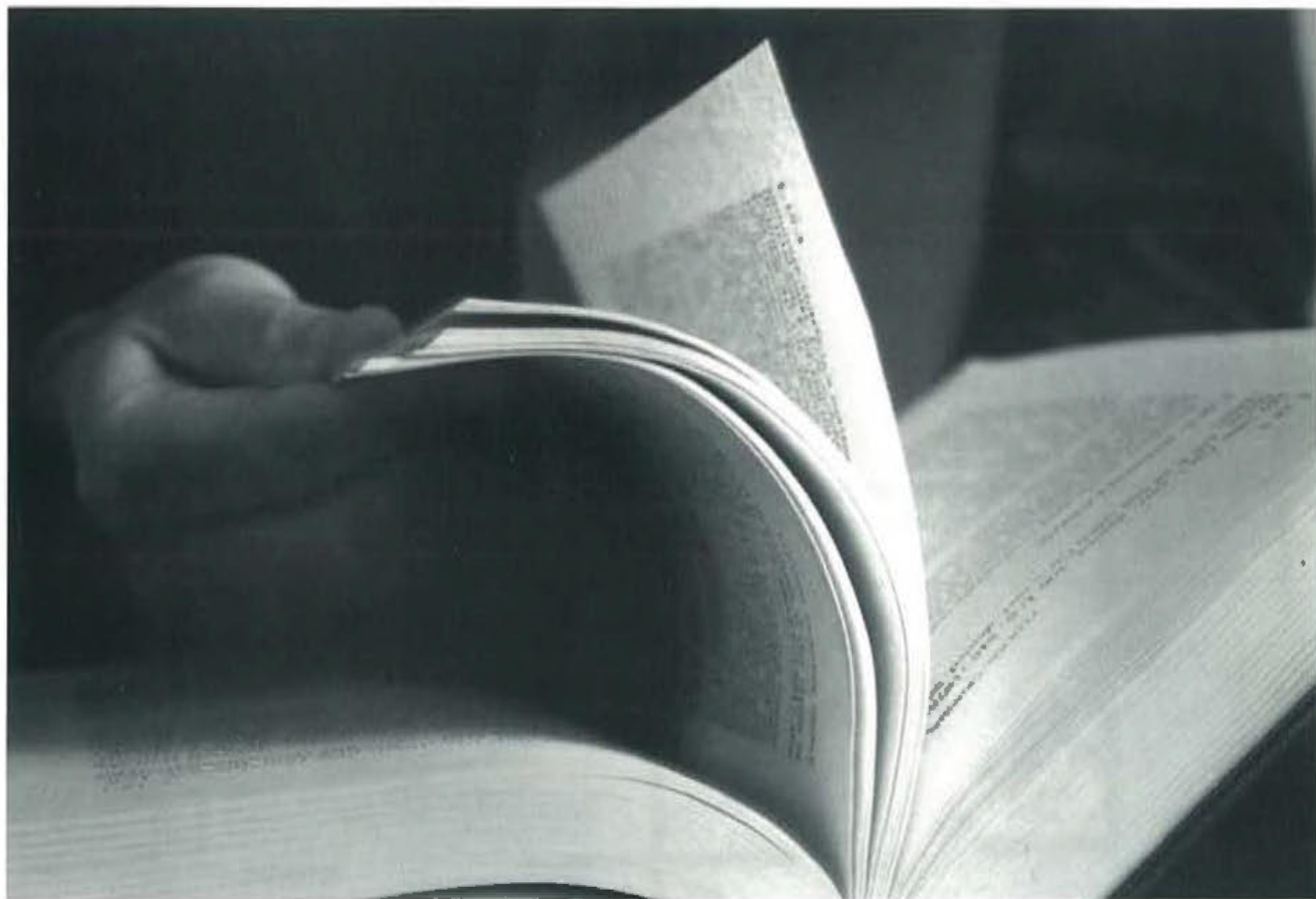
The new Second Edition retains the character of the first edition in its emphasis, and, due to the advent of tort forms, treats the constitutionality of statutes limiting damages.

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The Alabama Lawyer

In Brief

VOL. 50, NO. 2

MARCH 1989

Published seven times a year by The Alabama State Bar
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Phone (205) 269-1515
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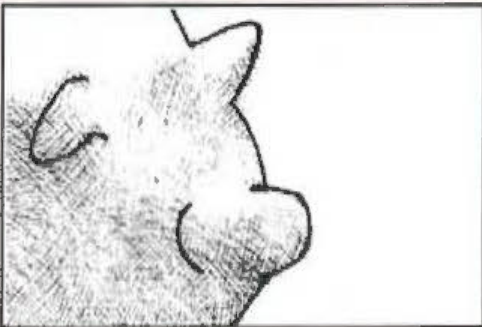
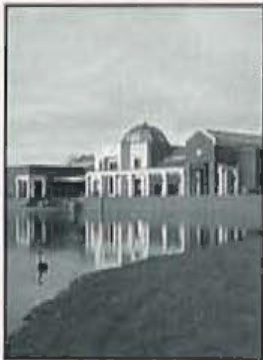
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On the cover—

The Montgomery Museum of Fine Arts opened September 15, 1988, and was designed by the Montgomery firm of Barganier-McKee-Sims.

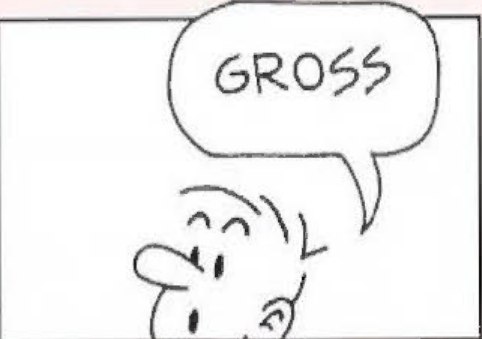
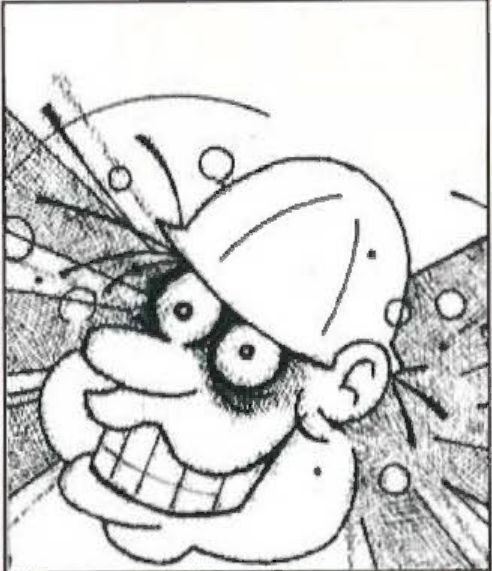
The museum houses the Blount Collection, consisting of 41 paintings by such artists as John Singleton Copley and Edward Hopper.

—photograph courtesy of Dr. and Mrs. Jim Vickrey of Montgomery, where he is studying at the Jones School of Law.



Alabama Deceptive Trade Practices Act by Michael A. Bownes . . . 78

In Alabama, the Deceptive Trade Practices Act has been used by the Attorney General's Office as a means of enjoining unfair trade practices. The Act also affords an injured consumer certain civil relief.



Interference with Business Relations: the Unified Tort Since *Gross v. Lowder Realty* by Andrew P. Campbell . . . 86

Since the Alabama Supreme Court merged the torts of interference with contract and intentional interference with business relations into a single tort concept, there has been a marked increase in litigation in this area.

Drug Testing in Employment: a Legislative Proposal for Alabama by James P. Alexander and John W. Hargrove . . . 70

Drug usage in the work place has sparked legislative action in sanctioning drug-testing procedures.

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GENERAL INFORMATION The Alabama Lawyer, (ISSN 0002-4287), the official publication of the Alabama State Bar, is published seven times a year in the months of January, March, May, July, August (bar directory edition), September and November. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Subscriptions: Alabama State Bar members receive The Alabama Lawyer as part of their annual dues payment; \$15 of this goes toward subscription for The Alabama Lawyer. Advertising rates will be furnished upon request. Advertising copy is carefully reviewed, but publication herein does not necessarily imply endorsement of any product or service offered.
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The Alabama Lawyer is published seven times a year for \$15 per year in the United States and \$20 outside the United States by the Alabama State Bar, 415 Dexter Avenue, Montgomery, AL 36104. Single issues are \$3, plus postage for the journal, and \$15, for the directory. Second-class postage paid at Montgomery, AL.

Postmaster: Send address changes to The Alabama Lawyer, P.O. Box 4156, Montgomery, AL 36101.

President's Page



HUCKABY

Last chance for creation of captive insurance company

It is not an overstatement to say that we are approaching a crisis with the bar's captive insurance company. At the time of this writing we are \$800,000 short of the 2.5 million dollars required for capitalization of the Attorneys Insurance Mutual of Alabama, Inc. (AIM), the company organized to offer liability coverage for Alabama lawyers. To raise the balance of capital needed the company must sell an additional 550 subscriptions at the current unit cost of \$1,500. If the company has not been successfully capitalized in the very near future, I am going to recommend that the effort be discontinued. If such should occur, I would predict that it will be a very long time before the bar again will undertake such a project. If the bar wants a captive company, this likely will be its only chance in the foreseeable future.

The bar did not undertake this effort without very careful study. As you recall, a survey was conducted, and the requisite number of lawyers responded that they would purchase subscriptions for capitalization. There has been no group of lawyers who has given any greater service to the bar in terms of time and effort on this project than the

Insurance Committee, the board of directors of the company and the bar commissioners. It would be a shame to see these efforts go to waste.

Twenty-five bars across the nation are now benefitting from successful captive insurance companies. When these companies were established, the availability of coverage usually increased and the cost usually decreased. Even for attorneys who might desire to obtain coverage from carriers other than the captive, the improvements in the general market place should inure to the benefit of all lawyers. Support of AIM therefore can be justified, even if an attorney is not interested in the coverage.

I hope you will not let this opportunity slip from our hands. It is an investment that I believe will insure the availability of reasonable liability coverage for Alabama lawyers in the future. There is still credit available for financing \$1,250 of the subscription costs. Please call the state bar headquarters if you need another subscription package and application. Reggie Hamner or Keith Norman can answer any question you may have about the company.

It is time for action. Let's not "talk" or "consider" this to death. ■

Executive Director's Report

We are bursting at the seams!

Any visitor to state bar headquarters quickly realizes that our facilities no longer can accommodate our association's needs. We are literally bursting at the seams.

We have lost our "visiting lawyer's office" to *The Alabama Lawyer*. The president's office is now our computer operations center. The library is a work station for two employees, and, thus, we have given up a small conference room which was used by lawyers needing to take depositions in Montgomery. The secretarial stations now serve two secretaries instead of the one for which they were originally planned. The large meeting room which was used for bar exam administration and other large meetings now serves as a general purpose work area, and file cabinets line one wall. Much of the original beauty of our building has given way to practical space utilization.

The Center for Professional Responsibility has been modified recently to accommodate the general counsel, his three assistants and the four support personnel in that office. The hearing room, of necessity, has been converted to office space, and the disciplinary hearings again are scheduled in the headquarters large assembly room which, as stated earlier, serves as a general purpose work area most of the time. We also rent storage space at a nearby record storage warehouse. Unfortunately, we have to retrieve many of these records and are required to go to the warehouse almost daily.

Twenty years ago the state bar staff consisted of two lawyers, two secretaries and a printer. We also had approximately 2,300 members. Today we have 8,900 members and a staff of 20 full-time employees. We also use three part-time clerical assistants.

In the last 20 years we have brought the publication of *The Alabama Lawyer* in-house. We now administer a lawyer referral service, a client security fund and a mandatory continuing legal education program. We support 13 sections and 43 committees.

The number of bar applicants has increased ten-fold. The bar commission itself has increased 30 percent in total membership. We also staff the Disciplinary Commission and five disciplinary boards, in addition to the board of bar examiners and three character and fitness committees.

Our bar staff is one of the smallest in the nation that serves a bar with responsibility for the total licensing and regulatory process. There are only three other state bars performing all of the functions which we do. Those bars are of comparable size, yet their staffs are more than twice as large. In most jurisdictions, bar admissions and professional responsibility are independent entities with their own facilities and staffs.

Why am I telling you this? I want to inform you of plans to construct a substantial addition to bar headquarters on Dexter Avenue. During the administration of President Walter Byars, the bar received a deed to the property directly



HAMNER

behind our present building. The Board of Trustees of the Alabama State Bar Foundation, during the administration of President Jim North, authorized the signing of a contract with the architectural firm of Cole and Hill to design the addition (Mr. Hill designed the present building in the early 1960s).

A Facilities Committee under the chairmanship of former President Bill Hairston was appointed by President Huckaby to study the needs and review preliminary plans with the goal of tripling the work space of the present building and, at the same time, provide for future growth. That committee has already met and toured several work areas, as well as reviewed plans of recently

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in 1967



constructed bar centers in other jurisdictions.

The new addition and furnishings will cost approximately \$3 million. It is contemplated that the current Center for Professional Responsibility located on Perry Street will be sold to augment and substantiate fundraising efforts required to raise construction monies. The state bar is a tenant of the state bar foundation, and the rental income will be used to retire a portion of the construction debt. It should be noted that our present facilities were debt-free when they were first occupied in 1964.

The bar requires this much-needed space. Most of us have enjoyed the benefits of those far-sighted bar members who raised the funds to construct our present facility. The late Sam Pipes and John B. Scott, Sr., along with former presidents J. Ed Thornton and Frank Tipler and a host of others, have provided for this cur-

rent generation of lawyers. We can do no less for those who will practice in the next century.

We will publish plans for the new addition when they are finalized. I invite all of you who are familiar with our present facility to make suggestions for the inclusion of needed features in the planned addition. One primary goal is to make the bar center an attractive and serviceable work space for our members when they are in Montgomery.

Many of our neighboring bars have moved to new facilities or constructed new bar centers in recent years. While ours was one of the first state bars to have its own building when it was constructed, we now must move ahead to meet the profession's needs of the future.

I hope that you and/or your firms will consider making a pledge to help with the undertaking when you are called upon in the not too distant future. ■

Notice is given herewith pursuant to the *Alabama State Bar Rules Governing Election of President-elect and Commissioners for 1989*.

President-elect

The Alabama State Bar will elect a president-elect in 1989 to assume the presidency of the bar in July 1990. Any candidate must be a member in good standing on March 1, 1989. 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, 1989. 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 19, 1989.

Commissioners

Bar commissioners will be elected by those lawyers with their principal offices on the following circuits: 1st; 3rd; 5th; 6th-Place #1; 7th; 10th-Places #3 and 6; 13th-Place #3; 14th; 15th-Places #1 and 3; 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 posi-

tions will be determined by a census on March 1, 1989, and vacancies certified by the secretary on March 15, 1989.

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 28, 1989).

Ballots will be prepared and mailed to members between May 15 and June 1, 1989. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 13, 1989) to state bar headquarters. ■

Notice of Election

Notice

Conference on Drug Awareness

The Governor's Conference on Drug Awareness will be held April 11-12, 1989, at the Montgomery Civic Center. The conference is sponsored by Governor Guy Hunt and the conference planning committee, which consists of representatives from state agencies and local service organizations. Professional groups and the general public are encouraged to attend; registration is free.

The conference will include separate programs for adults and youth. The adult agenda will focus on recognizing early warning signs of substance abuse among young people. Prevention and early intervention will be emphasized. Offering a number of dynamic workshops, the youth conference will concentrate on substance abuse prevention.

The adult conference--scheduled for 9 a.m. through 4:30 p.m., April 11--will feature an opening address by Governor Hunt. Following the Governor's remarks, 1,000 first-graders, representing the "Smoke-Free Class of 2000," will participate in a mock-graduation ceremony. Health, drug treatment and law enforcement professionals will conduct workshops in the afternoon sessions.

Children in fourth through sixth grades are invited to lunch and an educational session between noon and 2 p.m. on April 11.

The youth conference, designed to meet the needs of seventh- through twelfth-graders, will begin April 12. Highlighting their program will be remarks by Bill Curry, head football coach at the University of Alabama, and Bart Starr, former head coach of the NFL's Green Bay Packers.

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About Members, Among Firms

ABOUT MEMBERS

Correction:

In the January 1989 edition of *The Alabama Lawyer*, **Boyd F. Campbell's** address was incorrectly listed; the correct address is 505 South Perry Street, Montgomery, Alabama 36104.

Joseph M. Powers announces a change of address. Offices now are located at 716 Van Antwerp Building, 103 Dauphin Street, Mobile, Alabama 36602. Phone (205) 432-6966.

Effective February 1, 1989, law offices of **Melton L. Alexander** will be relocated at Suite 325, Park Place Tower, Birmingham, Alabama 35203. Phone (205) 328-7400.

R.O. Hughes announces the relocation of his practice to Suite 1225 Park Place Tower, 2001 Park Place, Birmingham, Alabama 35203. Phone (205) 323-0010.

Larry R. Newman announces the relocation of his office to Lorna Professional Building, 3021 Lorna Road, Suite 310, Birmingham, Alabama 35216. Phone (205) 823-5515.

Tim W. Fleming announces a change of address to 1556 Gulf Shores Parkway, P.O. Box 938, Gulf Shores, Alabama 36542. Phone (205) 968-4444.

AMONG FIRMS

James R. Cleary, Harald E. Bailey, John R. Barran and **R. David McDowell** announce the formation of a professional corporation under the name of **Cleary, Bailey, Barran & McDowell, P.C.** Offices are located at Park Plaza, 303 Williams Avenue, Suite 118, P.O. Box 68, Huntsville, Alabama 35804. Phone (205) 534-2436.

Albrittons, Givhan & Clifton, Andalusia, Alabama, announce that **William Harold Albritton, IV**, has become a member of the firm, effective January 1, 1989. Offices are located at 109 Opp Avenue, Andalusia, Alabama 36920. Phone (205) 222-3177.

Hayden R. Battles, Hugh C. Harris and **Nancy F. McClellan** announce the merger of **Battles & Battles** and **Harris & McClellan** into the firm of **Battles, Harris & McClellan**, with offices at 405 2nd Avenue, S.W., Cullman, Alabama 35055.

The firm of **Gathings & Davis** announces that **Michael A. Worel**, formerly a partner of Emond & Vines, has joined the firm. The firm name has been changed to **Gathings, Davis & Worel**, with offices at 600 Farley Building, 3rd Avenue North & 20th Street, Birmingham, Alabama 35203. Phone (205) 326-3553.

The firm of **Reneau & Reneau** announces that **Blake A. Green** is now associated with the firm, with offices at 114 South Main Street, P.O. Box 160, Wetumpka, Alabama 36092-0160. Phone (205) 567-8488.

Chris S. Christ and **Wendy L. Williams** announce their partnership, in the name of **Christ & Williams**. Offices are located at Suite 710, Frank Nelson Building, Birmingham, Alabama 35203. Phone (205) 252-2222.

The firm of **Schoel, Ogle, Benton, Gentle & Centeno** announces that **Paul A. Liles**, formerly general counsel of BE&K, Inc., has become a partner with the firm. Offices are located at Third Floor, Wats Building, 2008 North Third Avenue, Birmingham, Alabama 35203. Phone (205) 324-4893.

The firm of **Miller, Hamilton, Snider & Odom** announces that **Michael Gillion** and **James V. Elliott** have become members of the firm, **Richard A. Wright** and **Anne Carson Irvine** have become associated with the firm and **William F. Neal, C.A.M.**, has become director of administration with the firm. Mobile offices are located at 254 State Street, Mobile, Alabama 36603. Phone (205) 432-1414.

Nettles, Barker, Janecky & Copeland announces that **Mark A. Newell** has become a member of the firm, and its Birmingham office is now open at 2001 Park Place Tower, Suite 200, Birmingham, Alabama 35203.

The firm of **Johnstone, Adams, Bailey, Gordon & Harris** announces **Robin Brigham Thetford** has become a member of the firm and **David R. Peeler** has become associated with the firm. Offices are located at Royal St. Francis Building, 104 St. Francis Street, Mobile, Alabama 36602.

The firm of **Lyons, Pipes & Cook** announces that **Thomas H. Benton, Jr., Daniel S. Cushing, Gilbert F. Dukes, III**, and **David F. Webber** have become associated with the firm, effective September 1988. Offices are located at 2 North Royal Street, P.O. Box 2727, Mobile, Alabama 36652. Phone (205) 432-4481.

David D. Winger and **D. DeLeal Winger, Jr.**, announce the relocation of **Winger & Winger, P.A.** to 1025 Financial Center, Birmingham, Alabama 35203. Phone (205) 322-3663.

Gary L. Blume and **Nettie Cohen Blume** announce the formation of a partnership for the practice of law under the name of **Blume & Blume**. **Nettie Cohen Blume** is formerly of the

Tuscaloosa County District Attorney's Office. Offices are located at 2300 East University Boulevard, Tuscaloosa, Alabama 35404. Phone (205) 556-6712.



Neva C. Conway and **John S. Andrews** announce the formation of a partnership in the name of **Andrews & Conway**. Offices are located at 415 East Commerce Street, Suite 103, Greenville, Alabama, and 10 Lafayette Street, Hayneville, Alabama. Phone (205) 382-6541, 382-8023 (Greenville) and 548-2132 (Hayneville).



The firm of **Hornsby & Schmitt** announces that upon **E.C. Hornsby's** being elected Chief Justice of the Supreme Court of Alabama, the firm name was changed effective January 17, 1989, to **Steven F. Schmitt, a Professional Corporation**. The firm's offices will remain located at P.O. Box 606, 213 Barnett Boulevard, Tallassee, Alabama 36078. Phone (205) 283-6855.



The firm of **Vowell & Meelheim, P.C.** announces that **C. Stephen Alexander**, formerly law clerk to Judge Jack Carl, became associated with the firm January 1, 1989, and **Martha Jane Patton** became associated with the firm February 1, 1989. Offices are located at Suite 500, 310 North 21st Street, Birmingham, Alabama 35203. Phone (205) 252-2500.



The firm of **Farmer, Price & Smith** announces that **Joel W. Weatherford** has become a partner in the firm. The firm will continue in the name of **Farmer, Price, Smith & Weatherford**. Offices are located at 115 West Adams Street, P.O. Drawer 2228, Dothan, Alabama 36302. Phone (205) 793-2424.



Hand, Arendall, Bedsole, Greaves & Johnston, 30th Floor, First National Bank Building, Mobile, Alabama, announces that **Henry A. Callaway, III**, has become a member of the firm.



The Huntsville firm of **E. Ray McKee, Jr.**, announces that **Jackie D. Ferguson** has joined the firm as an associate. She is a 1987 graduate of the University of Alabama School of Law and recently served as clerk for the Honorable R.L. Hundley, Morgan County Circuit Court. Offices are located at 2319 Market Place, Suite A, Huntsville, Alabama 35801. Phone (205) 551-0300.



Harris, Evans & Downs, P.C., announces that **Lonette Lamb Berg** has become a member of the firm, and **Lonnie D. Wainwright, Jr.**, has become associated with the firm located in The Historic 2007 Building, 2007 Third Avenue North, Birmingham, Alabama 35203. Phone (205) 328-2366.



The firm of **Wilkins, Bankester & Biles** announces that **Marion E. Wynne, Jr.**, has become a member of the firm, and the firm's name is now changed to **Wilkins, Bankester, Biles & Wynne**. **Thomas P. Williams** has joined the firm as an associate. The firm has offices located at Old Trailway Building, P.O. Box 400, Bay Minette, Alabama 36507; Chicago Street, P.O. Box 562, Robertsdale, Alabama 36567; and 221 Fairhope Avenue, P.O. Box 1367, Fairhope, Alabama 36533.



The firm of **Brinkley & Ford** announces that **Richard Chesnut** and **Daniel F. Aldridge** have become partners, and the firm name has been changed to **Brinkley, Ford, Chesnut & Aldridge**. Offices are located at 307 Randolph Avenue, P.O. Box 2026, Huntsville, Alabama 35804-2026. Phone (205) 533-4534.



Lange, Simpson, Robinson & Somerville announces that **Will M. Booker**, a partner in the firm of **White, Dunn & Booker**, and formerly vice-president and general counsel of South Central Bell, has joined the firm as counsel, and that **James F. Walsh, Thomas F. Campbell, Timothy A.**

Palmer, R. Alan Deer, J. Frank Ozzment, M. Beth O'Neill and **Rebecca S. Dunnie** have become associated with the firm.

The firm also announces their merger with **Watts, Salmon, Roberts, Manning & Noojin**, Huntsville, effective January 1, 1989, under the name of **Lange, Simpson, Robinson & Sommerville**.

The Birmingham office is located at 1700 First Alabama Bank Building, Birmingham, Alabama 35203. Phone (205) 250-5000. The Huntsville office is located at 100 Jefferson Street, South, Suite 200, Huntsville, Alabama 35804. Phone (205) 533-3500.



Effective January 1, 1989, the firm name of **Melton & Espy, P.C.** was changed to **Melton, Espy & Williams, P.C.** Offices are located at 339 Washington Avenue, Montgomery, Alabama 36104. Phone (205) 263-6621.



The firm of **Knight & Griffith** announces that **S. Lynn Marie McKenzie** and **Jason P. Knight** have become partners of the firm, effective January 1, 1989. Offices are located at Griffith Building, 409 First Avenue, S.W., P.O. Drawer M, Cullman, Alabama 35056. Phone (205) 734-0456.



Balch & Bingham of Birmingham and Montgomery, Alabama, announces that **John J. Coleman, III**, and **John F. Mandt** have become partners in the firm, with offices at 1710 North Sixth Avenue and 505 North 20th Street, P.O. Box 306, Birmingham, Alabama 35201, and the Winter Building, 2 Dexter Avenue, Court Square, P.O. Box 78, Montgomery, Alabama 36101. Phone (205) 251-8100 (Birmingham) and 834-6500 (Montgomery).



The firm of **Stropp & Nakamura** announces that **Robert H. Stropp, Jr.**, is relocating to Washington, D.C. to become general counsel, **United Mine Workers of America, International Union**. **George C. Longshore and Associates** will associate with the firm,

John L. Quinn will become a member of the firm and **Robert M. Weaver** will be an associate of the firm. The firm will practice under the name of **Longshore, Nakamura & Quinn**, at 21st Floor, City Federal Building, Birmingham, Alabama 35203. Phone (205) 323-8504.

The firm of **Lewis, Martin, Burnett & Dunkle** announce that **Sandra W. Murvin** and **Nancy G. Osborne** have become members of the firm. Offices are located at 1900 SouthTrust Tower, Birmingham, Alabama 35203. Phone (205) 322-8000.

Harris, Shinn, Phillips & Perry, P.A. and **Cadell & Shanks** of Decatur announce the merger of the firms for the practice of law under the name **Harris, Cadell & Shanks, P.C.** and that

Steven C. Sasser has become associated with the firm.

Gary L. Armstrong, David P. Vaughn and **G. Barker Stein, Jr.**, announce the formation of the firm of **Armstrong, Vaughn & Stein**. The mailing address is P.O. Box 2370, Daphne, Alabama 36526, and the office address is The Summit, Suite 3, 3000 Highway 98, Daphne, Alabama 36526. Phone (205) 626-2688.

Nancy Skipper Jones, formerly an assistant district attorney for Tuscaloosa County, announces that she is now the staff attorney for **Bryce Hospital**, a facility of the State of Alabama Department of Mental Health and Mental Retardation. Her new address is Bryce Hospital, Legal Office, 200 University Boulevard, Tuscaloosa, Alabama 35404. Phone (205) 759-0758.

Charles Tyler Clark, P.C. announces the association of **Gregory J. McKay** in the firm of **Clark & James**. Offices are located at 817 Frank Nelson Building, Birmingham, Alabama 35203. Phone (205) 322-3636.

The firm of **Bishop, Colvin & Johnson** announces the relocation of its law offices, formerly at the Frank Nelson Building on 20th Street in Birmingham, to its new offices located at 317 20th Street, North, mailing address P.O. Box 370404, Birmingham, Alabama 35237. Phone (205) 251-2881.

Bishop, Colvin & Johnson also announces that **J. Merrell Nolen, Jr.**, Cumberland School of Law, class of 1988, was associated with the firm effective October 1, 1988.

—NOTICE—

The American Bar Association Standing Committee on World Order Under Law 1989 Bruno Bitker Essay Contest

- | | |
|------------------|---|
| 1989 Topic: | "What Role Should United States Policy Play in the Realization of International Human Rights, Today and Beyond?" |
| First Prize: | \$1,000 |
| Second Prize: | \$500 |
| Eligibility: | Any members of the American Bar Association and students at ABA-accredited law schools |
| Content: | Essays should include discussion of the legal and policy issues related to the role that United States policy, both foreign and domestic, should play in the realization of international human rights. Issues addressed may include the question of U.S. ratification of the international human rights treaties, including the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights; the Conventions on Elimination of All Forms of Racial Discrimination and Elimination of Discrimination Against Women; the American Convention on Human Rights, and the Torture Convention; and the roles of the executive and of Congress in promoting international human rights and of the courts in implementing international human rights law and policy. Essays will be judged on the quality and force of the legal and policy analysis, and elegance and felicity of expression. |
| Length & format: | Entries should not exceed 5,000 words, including footnotes. Format: (textual footnotes should be kept to a minimum) Text and footnotes should be typed double-spaced, on white paper, suitable for photocopying. |
| | For further information write:
Bonita J. Ross
American Bar Association
Standing Committee on World Order Under Law
1800 M Street, N.W., 5-200, Washington, DC 20036,
(202) 331-2277 |
| Deadline: | The essay must be postmarked no later than May 1, 1989, and sent to the above address. This essay contest is in memory of Bruno Bitker, late chairman of the ABA Standing Committee on World Order Under Law, who devoted his life to the quest for peace and justice through law. He practiced in Milwaukee, Wisconsin, for most of his life, and was instrumental in advancing many human rights issues. The breadth of his concern for human rights and world order was global. This contest is made possible by the American Bar Association Standing Committee on World Order Under Law and other friends of Bruno Bitker. |

Young Lawyers' Section

Welcome new admittees

On October 31, 1988, the Young Lawyers' Section welcomed a new group of young lawyers into the ranks of the Alabama State Bar. The fall bar admissions ceremony was a great success, thanks to the hard work of Rebecca Shows Bryan of Montgomery, Alabama. Rebecca replaced Laura Crum, who coordinated the details of the ceremony for many years. The YLS thanks Laura for her untiring service to the section in that capacity. The new admittees, after being sworn in by the Supreme Court of Alabama, were treated to a lunch with their family and friends. The guest speaker for the luncheon was Harold Apolinsky, a managing partner with the Birmingham law firm of Sirote, Permutt, McDermott, Slepian, Friend, Friedman, Held & Apolinsky. Apolinsky is a distinguished tax attorney and member of the state bar, and spoke on the practice of law in the 1990s. The admittees then retired to the supreme court where the traditional pictures are taken, which are contained in the January issue of *The Alabama Lawyer*. We congratulate the new admittees and wish them every success as they enter this distinguished profession.

This high honor is a result of many years of hard work and dedication, coupled with the support and encouragement of their family and friends. However, now that these young lawyers have achieved their goal, the transition is not always easy. The YLS offers an ideal opportunity for the newly-admitted member of the

bar to become an integral part of an excellent professional association, with projects, programs and interaction providing an excellent opportunity for new admittees to develop themselves as lawyers and individuals. The "Bridge-the-Gap" and "Seminar on the Beach" CLE programs are directed toward helping with this transition.

YLS executive committee

The YLS Executive Committee met Saturday, February 11, 1989, at the Grand Hotel in Point Clear. Each committee chairperson was given the opportunity to report the progress of their respective committees.

Those who attended the ABA Mid-Year Meeting the week before gave their reports concerning information gleaned from the workshops offered by the Young Lawyers' Division of the ABA. The focus of this year's mid-year meeting, as always, is the Membership Support Network National Conference. The conference offers a mix of substantive programs designed to assist young lawyers in their professional and personal lives. These programs offer new ways of managing time and stress; peacefully resolving conflict within the work setting; generating business for the law firm; effectively using legal assistance; and the very basics of starting a law practice. The remainder of the mid-year meeting is devoted to the assembly of delegates, wherein numerous resolutions and proposals are debated and voted on by the members of the young lawyers' assembly delegation. Alabama was well-represented at the meeting by a number of our commit-



N. Gunter Guy, Jr.
YLS President

tee members, and we thank them for their attendance and the information they were able to pass on to us.

Sid Jackson updated the committee on the details of the Sandestin Seminar, and it sounds like it will be another outstanding program this year. The social activities, as well as the CLE program, should not be missed.

The remainder of the Executive Committee meeting concerned the usual business at hand, touching on such matters as the Youth Judicial Program, the Bridge-the-Gap Seminar and the annual bar meeting in Huntsville this summer.

By the time this article reaches you, I anticipate the presentation of another successful Bridge-the-Gap Seminar. This seminar conducted February 17-18, 1989, has been a valuable tool for the young lawyers in bridging the gap between law school and the private practice of law. The YLS thanks committee chairperson Steve Shaw of Birmingham and the distinguished faculty and practicing attorneys who made the seminar a success. The seminar included lectures on probating an estate, small business transactions, simple trial practice, law office practice, criminal

law practice, domestic law transactions, bankruptcy and real estate law. For those who may have missed this very informative CLE seminar, you can contact the University of Alabama, Alabama Bar Institute for Continuing Legal Education, for the possibility of obtaining the hand-out materials.

I bring attention again to the outstanding job being done by Charlie Anderson of Montgomery in coordinating the activities of the Youth Judicial Program this year. This program offers high school students the opportunity to participate as attorneys, judges, witnesses and jurors in a variety of courtroom experiences. At the time of this writing, the program is

not complete, but I anticipate another success, with well over 400 high school students as participants. I will update our section after the program is completed in Montgomery February 27, 1989.

I do not feel it too early to mention the annual meeting of the Alabama State Bar July 20-22, 1989, in Huntsville, Alabama. Our Executive Committee chairpersons, Amy Sladen and Frank Potts, are working hard to make this meeting a success for the YLS's activities. Although Huntsville is a long distance for many members of the bar, I encourage everyone to mark their calendars and make plans to attend. Your participation certainly can make a contribution to its success. ■

CORRECTION NOTICE

IN RE: MARITAL AND FAMILY LAW CERTIFICATION

The notice of a Marital and Family Certification process which appeared on page 23 of the January 1989 *Alabama Lawyer* was printed in error. The Board of Commissioners has not granted certification authority to any section, committee or such bar entity. After an earlier study, the Board of Commissioners specifically rejected this concept of specialization.

—Notice—

The Board of Commissioners of the Alabama State Bar has recommended to the Alabama Supreme Court that the *Code of Professional Responsibility* of the Alabama State Bar be superseded by the adoption of new "Alabama Rules of Professional Conduct." The court has taken those new rules under consideration and ordered that they be published in the Southern Reporter 2d series advance sheet. That publication should be made in an advance sheet appearing during late February or March, and will probably be made in a special Alabama edition of the advance sheet (i.e., an edition mailed only to those subscribers with Alabama mailing addresses). Interested persons have until April 28, 1989, to submit to the Clerk of the Supreme Court, P.O. Box 157, Montgomery, Alabama 36101, any written objections or comments concerning those proposed rules.

Riding the Circuits

Lee County Bar Association

The Lee County Bar Association recently elected its officers for 1989. They are:

President: Robert H. Pettey,
Opelika

Vice-president: Arnold W. Umbach, Jr., Auburn

Secretary-treasurer: Cecil M. Tipton,
Opelika

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—Notice—

Join the Bankruptcy and Commercial Law Section for its Annual Seminar at the Beach
May 13, 1989—Perdido Beach Hilton

Combine education and relaxation! Get 3.5 CLE credits with time to work on your tan, your forehead and your backswing, and enjoy the epicurean delights of the Alabama Riviera!

THE PROGRAM:

8 a.m.	Late registration/Southern-style continental breakfast
8:30 a.m.-noon	Hon. Arthur Briskman, Judge, U.S. Bankruptcy Court, So. District of Alabama Recent 11th Circuit Decisions Affecting Bankruptcy Law and Practice
	C. Edward Dobbs, Esq., Parker, Hudson, Rainier & Dobbs, Atlanta, Georgia Fraudulent Transfers and Leveraged Buy-outs

The Hilton is holding a limited number of rooms at special seminar rates of king/dbl—\$89; suites \$133/\$198. Reservation deadline is **April 12, 1989**. Make arrangements directly with the hotel at 1-800-634-8001, P.O. Box 400, Orange Beach, Alabama 36561.

Sign me up for the beach!

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MAIL TO: Romaine S. Scott, III • P.O. BOX 306 • Birmingham, Alabama 35201 • (205) 251-8100

Alabama's drug epidemic has spread to the workplace. While national estimates vary, there is no dispute that employee drug use, on and off the job, yields serious human and economic harm. Many employers now are grappling with drug abuse on the job, abuse which undermines attendance, productivity and both workplace and public safety.

Some employers recently have implemented drug-testing programs intended to identify employees or applicants who use controlled substances. Once a "user" has been identified, employers' policies vary dramatically. Some programs call for the immediate termination of any employee who tests "positive" for controlled substances or who possesses drugs on the employer's premises. Other employers routinely reject applicants whose drug screens are positive for controlled substances.

While the contours of employer policies vary, the "lynchpin" usually is a mandatory drug screening procedure. Some employers will test employees only where there is a reasonable suspicion of drug abuse while others will test employees on a random basis. Many programs include specific circumstances under which an employee will be tested, such as when he or she has an excessive number of accidents or an unusual number of absences from work.

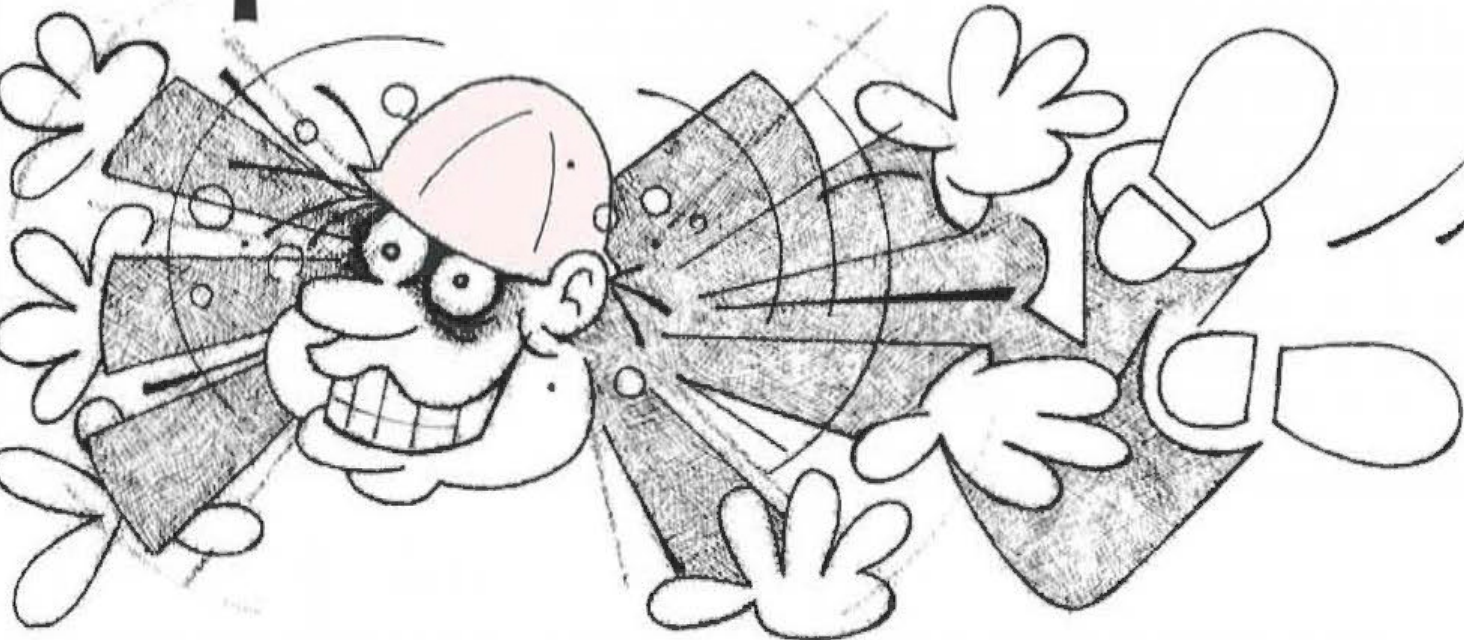
Some employers provide rehabilitation options for employees who test positive. The nature and extent of rehabilitation available vary widely. A number of employers simply implement a "last chance" policy under which the employer will rescind any discipline imposed upon an employee who tests positive for drugs if that employee can show that he or she entered and successfully completed a drug rehabilitation program. Other employers adopt company-sponsored rehabilitation programs which are mandatory for any employee who tests positive. Some company-sponsored programs are open to any employee who desires to enter the program, and the rehabilitation involved may range from outpatient counselling for so-called recreational drug users to an extended inpatient treatment program for drug-

Drug Testing a Legislative

by James P. Alexander and John W. Hargrove



in Employment: Proposal for Alabama



dependent workers. Although the expenses associated with company-sponsored rehabilitation may be significant, employers often find that the benefits received, both in terms of eventual cost savings and improved workforce morale, outweigh the initial out-of-pocket expense. Indeed, the impact upon recovered employees can be overwhelming. As one employee (of an Alabama employer), who had denied Valium and alcohol addiction for 26 years, commented, "I have a new life now. I would probably be dead if I hadn't gotten into [the company's] drug program . . . I go out and just drive around looking at all the things I've missed in the last 26 years. I'm getting to know my four-year-old grandson . . . The new life I found is my incentive to keep clean."

Although there are a variety of screening tests either marketed directly to

employers or available from laboratories, perhaps the most widely-used test is an enzyme immunoassay which is administered upon a urine specimen! This procedure actually detects the presence of metabolites (as opposed to the drug

itself) that are consistent with the use of various controlled substances. Urine specimens usually are collected in the presence of a witness, and the collections take place either on the employer's premises or at a designated collection site.

James P. Alexander is a partner in the Birmingham firm of Bradley, Arant, Rose & White, and he received his undergraduate and law degrees from Duke University. He is a lecturer in employment discrimination law at the University of Alabama School of Law.

John W. Hargrove is in his third year as an associate with Bradley, Arant and he received his undergraduate degree from Auburn University and law degree from Vanderbilt University.

In contrast to tests which measure blood alcohol concentration, drug tests do not provide even a rough index of an individual's impairment from a particular drug. Alabama law provides presumptions of impairment that stem from the level of alcohol in the bloodstream. *Ala. Code* §32-5A-194 (1983 and Supp.1988). However, the presence of the cannabinoid metabolite, for example, yields no reasoned inference about the extent to which, if any, an individual presently may be affected by marijuana. Moreover, there are a variety of controlled substances, and these substances metabolize at differing rates. For example, cocaine metabolites may be excreted completely within 72 hours after ingestion while marijuana metabolites, which apparently bond to fatty tissue, may be present for much longer periods. Additionally, the individual's physiology and other circumstances may affect the rate a drug is metabolized. Accordingly, a "positive test" for drugs does not necessarily reflect an individual's fitness for duty, but it may, in fact, identify only occasional use

which may have no current impact on job performance.

Many employee groups have been vociferous in their objections to drug testing. While certain of their objections may be fairly characterized as irresponsible (that is, offered only to permit, if not foster, the recreational use of some drugs), others have merit. First, collecting a urine specimen for a drug test implicates personal privacy to an extent. Second, immunoassay tests, as well as other commonly utilized drug screens, have a cognizable error rate, and some studies have confirmed false positives. Moreover, there have been instances where either careless laboratories, inadequate chain-of-custody procedures or simple employer ineptitude have yielded inaccurate results. Finally, many employers have misunderstood a drug test result and improperly or unfairly publicized the result, with the effect of stigmatizing an employee.

Not all employee objections, of course, are well-founded. For example, any legitimate objections to the possibility of false

positives arising from an initial screen can be rectified through confirmatory testing. Indeed, some laboratory procedures are designed such that a false positive is more likely to result than a false negative because the false positive triggers a more accurate confirmatory test, ultimately yielding greater overall accuracy. Additionally, certain specific complaints, such as the complaint that immunoassay tests, in particular the Enzyme Multiplied Immunoassay Technique (EMIT), registers false positives for blacks as a result of a cross-reaction with melanin, a dark skin pigment, appears to have no rational support in the scientific community.² Many other employee issues can be dealt with through the adoption of responsible practices and controls by both the employer and the testing laboratory.

Employers, on the other hand, have a number of incentives to adopt drug-testing programs. First, the federal government has suggested that employers take a proactive position with respect to employee drug abuse. Legisla-

—Notice—

Alabama Attorneys for Animals, an association of 35 attorneys licensed in the state of Alabama, was recently incorporated as a non-profit corporation. The group has been operating for approximately four years and formed a non-profit corporation to seek solicitation of funds for a legal defense fund for animals.

The group is the first of its kind organized on a statewide basis in the country and recently received news exposure in several national animal rights publications.

Any attorneys or other persons in Alabama who would like to join Alabama Attorneys for Animals, Inc., or who would like further information should contact:

James R. Foley
101 North Side Square
Huntsville, Alabama 35801.

—Notice—

It has been brought to the attention of the secretary of the Alabama State Bar, by the United States District Court for the Middle District of Alabama, that lawyers may encounter problems regarding service of process and certification of counsel.

A number of lawyers are listed as agents for service of process, accepting the summonses and complaints and forward them by regular mail to their principals. In a recent case, a defendant suffered default because the principal said he did not receive such papers from his lawyer. Lawyers choosing to act as agents must realize that they are subject to liability as agents to their principals and should assure themselves of the ability to demonstrate that they have duly forwarded such papers to their principals.

A second problem concerning service occurs when a lawyer certifies service on all counsel without naming them and without saving copies of cover letters or other papers from which they may reasonably demonstrate service "on all counsel." Certificates should indicate the names and addresses where such service was sent so that at least someone in the office can responsibly testify that the certificate is accurate as to each counsel who was supposed to have been served.

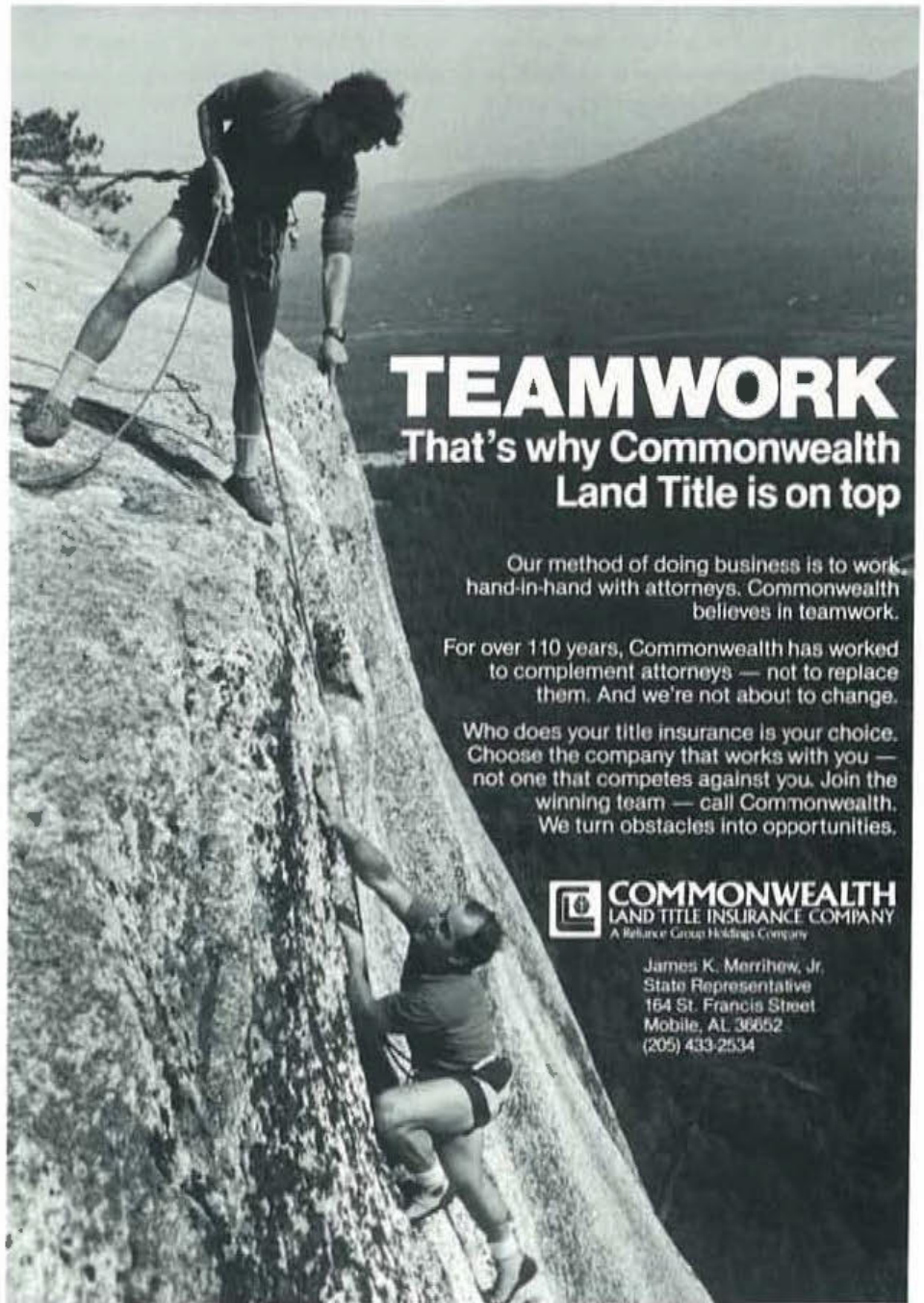
tion recently enacted requires federal contractors to provide a drug-free workplace and to develop educational programs for employees.³ Second, impaired workers may have a grave impact on workplace safety. A substantial north Alabama employer who implemented limited substance abuse testing (as a part of a comprehensive substance abuse program) found that his accident rate decreased by over 50 percent in the first year the program was in effect. Third, employers in industries where there is substantial possibility of public liability (e.g., ready-mix concrete companies, over-the-road trucking companies, construction companies and others) have dramatic incentives to try to eliminate impaired employees from its workforce. Fourth, the conclusion is inescapable that drug abuse is a major contributor to poor productivity as well as increased costs from medical and other insurance coverages. Certainly, the safety and economic considerations suggest that the prudent employer should at least consider adopting substance abuse testing as a component of a comprehensive workforce drug program.

There are a variety of reasons which suggest that employer drug testing is a legitimate area for state regulation. There can be little doubt that employer substance abuse programs which encompass mandatory drug testing are in the public interest. The substances at issue, after all, are unlawful, and no person has any 'right' to ingest them. As former Transportation Secretary James Burnley observed, "No one has the constitutional right to use illegal narcotics in a way that puts people at risk." Moreover, the laudable objectives of both improved safety and productivity are unassailable. Additionally, considering that most Alabama citizens must maintain steady jobs in order to survive, there is no cogent argument that the workplace is not an appropriate front on which to wage the war on substance abuse. Accordingly, the legislature should facilitate responsible employer substance abuse programs, especially those which include mandatory drug testing, since mandatory testing is the key element in making a substance abuse program effective.

While encouraging substance abuse programs, the legislature must protect legitimate employee concerns. Some

employers apparently have behaved irresponsibly with respect to drug testing. For example, some employers have terminated employees on the basis of positive drug screens without confirmation tests. Privacy concerns of employees have not been uniformly respected. The possibility of employer abuse remains genuine. Moreover, many of the legitimate objections to drug testing may be addressed by an appropriate and well-defined standard of care. The legislature peculiarly is well-equipped to balance these competing concerns.

There are, however, limits upon what a state statute can accomplish. While a state statute can enumerate, or limit, causes of action arising under state law, a state statute, of course, will be preempted by conflicting federal law. Relevant to workplace drug testing is the panoply of federal laws governing the employer-employee relationship and protecting individual employee rights. The general counsel of the National Labor Relations Board, for example, determined that the unilateral implementation of a mandatory drug-testing program dur-




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ing the term of a collective bargaining agreement between a company and a union violates the company's duty to bargain under the National Labor Relations Act. Title VII of the Civil Rights Act of 1964 prevents the implementation or application of a program which targets minorities, women and other protected groups. The Occupational Safety and Health Act and similar statutes prevent employers from using drug-testing programs to harass whistleblowers. Additionally, with regard to programs affecting public sector employees, a state statute may not limit the constitutional protections for these employees under the Fourth, Fifth and Fourteenth amendments. Thus, in cases where federal law effectively prohibits a drug test, or action pursuant to a test, the federal law would

make illegal actions otherwise lawful under the state drug-testing statute.

One legislature, that of Utah, has done a competent job of balancing the competing interests at stake in implementing a drug-testing program. See *Utah Code Ann.* §34-38-1-15 (1988). The Utah legislature succeeded in accommodating the interests of employers, employees and the general public. Although one might quibble about particular provisions of the 1987 Utah statute, it represents a reasoned approach to the drug-testing issue. The statute specifically authorizes the use, by employers, of alcohol and drug tests provided that, as a condition of implementing such tests, the employer's management also must be tested "on a periodic basis." *Id.*, §34-38-3. Moreover, the expenses of implementing a drug-

testing program are allocated exclusively to employers. *Id.*, §34-38-5. The statute specifically adopts professional standards and requires that adequate safeguards be implemented. Specifically, section 34-36-6, in part, states:

(1) The collection of samples shall be performed under reasonable and sanitary conditions;

(2) Samples shall be collected and tested with due regard to the privacy of the individual being tested, and in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples;

(3) Sample collections shall be documented, and the documentation procedure shall include:

(a) labeling of samples so as to reasonably preclude the probability of erroneous identification of test results; and

(b) an opportunity for the employee or prospective employee to provide notification of any information which he considers relevant to the test, including the identification of currently or recently used prescription or non-prescription drugs, or other relevant medical information.

(4) Sample collection, storage, and transportation to the place of testing shall be performed so as reasonably to preclude the probability of sample contamination or adulteration; and

(5) Sample testing shall conform to scientifically accepted analytical methods and procedures. Testing shall include verification or confirmation of any positive test result by gas chromatography, gas chromatography-mass spectroscopy, or other comparable reliable analytical method, before the result of the test may be used as a basis for any action by an employer [allowed by the statute].

Id. This provision essentially codifies what many professionals believe to be prudent testing safeguards.

The Utah statute requires that employers utilizing testing for drugs or alcohol develop a written policy. The employer's policy, which is not prescribed under Utah law, must be distributed to employees and be "available for review by prospective employees." *Id.*, §34-38-7(1). An employer in Utah may utilize drug testing within a program in connection with the following specifically enumerated circumstances: (1) accident and workplace theft, (2) investiga-



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tions, (3) suspicion of individual impairment, (4) as a tool for improving safety either as it affects coworkers or the general public, (5) for quality control purposes, and (6) for security reasons. See *id.* Thus, this provision of the Utah statute codifies the legitimate reasons for which an employee may be tested.

The statute expressly provides the lawful testing "need not be limited to circumstances where there are indications of individual job-related impairment of an employee." *Id.*, §34-38-7(3). It does not, of course, make sense to limit an employer's right to test only when there are obvious signs of impairment. Various controlled substances have a variety of different symptoms, and it is difficult (or impossible) for an untrained observer to identify impairment in every instance. Additionally, unannounced drug testing may have some deterrent effect on drug use. The Utah statute implicitly rejects impermissible reasons for administering

drug testing. For example, an employer could not single out an individual for testing simply because it thought that employee was a troublemaker.⁴ Plainly, the Utah statute does not provide a charter to employers to use drug testing for impermissible motives.

Obviously, the integrity of the urine sample used in a drug test and adequate chain-of-custody safeguards are critical. At the sample collection point, most laboratories recommend a "witnessed void." That is, the individual being tested must be observed so that he provides a specimen of his own urine, as opposed to purchased "clean" urine.⁵ Likewise, the specimen must not be adulterated with chemicals or other substances (such as water taken from a restroom tap or toilet) which would interfere with a test. Utah's statute recognizes these problems in sample collection and simply insists that employee privacy be accommodated to the extent possible.

Also, Utah requires that chain-of-custody documentation be maintained. Simply put, the specimen must be labeled upon collection and its custodians identified from collection until the conclusion of the laboratory analysis. Competent laboratories understand chain-of-custody requirement and are well-equipped to provide proper documentation through the process. This provision, as a practical matter, may deter all but large employers (such as those with in-house nurses or physicians) from internally administering a "kit" screen.

Utah also recognizes the problem of cross-reactivity. For example, some non-prescription pain relievers apparently result in a false positive test for cannabinoids on some versions of the EMIT test. Likewise, an employee may be taking legitimately prescribed medication that would include one or more controlled substances. In that event, the employer may not want to impose any

Supreme Court Of Alabama Order

Whereas, the Board of Commissioners of the Alabama State Bar has recommended certain amendments to the Rules of Disciplinary Enforcement; and

Whereas, the Court has considered the Board's proposed amendment;

It is, therefore, ordered that Rule 1(a) of the Rules of Disciplinary Enforcement be amended to read as follows:

"All attorneys admitted to practice law in this state, including district attorneys, assistant district attorneys, United States attorneys, assistant United States attorneys, and the attorney general, assistant attorneys general, and any attorneys specially admitted by any court in this state for a particular proceeding are subject to the exclusive disciplinary jurisdiction of the Disciplinary Board of the Alabama State Bar, with review by the Supreme Court of Alabama."

It is further ordered that this amendment will be effective immediately.

Torbert, C.J., and Maddox, Jones, Almon, Shores, Beatty, Adams, Houston, and Steagall, J.J., concur.

Robert G. Esdale, Clerk,
Supreme Court of Alabama

—Notice—

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disciplinary measures, but it may desire, depending on the particular drug's effects, to isolate the employee from known workplace hazards or other employees.

Section 34-38-6 of the Utah statute provides that any positive result obtained on a urine screening test must be confirmed by a gas chromatography/mass spectrometry (GC/MS) test or a comparable substitute before any adverse action can be taken against an employee. EMIT and other initial screening tests generally are determined to have accuracy rates in excess of 95 percent.⁶ Thus, some "false positives" may occur. However, the utilization of a confirmation test such as GC/MS virtually eliminates false positives.⁷ The reported case law to date accepts this approach. See, e.g., *National Treasury Employees Union Chapter 168 v. Von Rabb*, 816 F.2d 170 (5th Cir. 1987), cert. granted, 108 S.Ct. 1072 (1988). Some employers have resisted the GC/MS test because of its relative expense. The decision, however, of the Utah legislature to require GC/MS before adverse action is taken is a reasoned one. The statute ex-

pressly leaves room for "comparable analytical methods" as testing technology improves while foreclosing shortcuts which might be tempting to employers trying to reduce costs.

The Utah statute permits an employer to elect the course of action to take with an employee who tests positive after the required confirmation test. The statute authorizes rehabilitation, suspension, termination, refusal to hire or "other disciplinary measures in conformance with the employer's usual procedures, including any collective bargaining agreement." *Utah Code Ann.* §34-38-8. The statute neither requires nor prohibits any of these actions but simply indicates that the test result may be used appropriately in any of these contexts. Correctly, the Utah statute does not purport to dictate policy for employers or substitute its provisions for those of a collective bargaining agreement. However, if the employer elects to use drug testing, the actions provided in section 34-38-8 are permissible.

The Utah statute also provides certain protections for an employer who implements a drug-testing program. First,

no cause of action arises against an employer who fails to test a particular individual or who utilizes a test that fails to detect the presence of a controlled substance within an employee. *Id.*, §34-38-9. Moreover, with respect to any employee action where there is a claim of a false test result, the Utah statute establishes a rebuttable presumption that the test result was valid as long as the sample was obtained and processed in accordance with the statute, and the statute immunizes the employer (but not the testing laboratory) from monetary damages if reliance on a false test result "was reasonable and in good faith." *Id.*, §34-38-10(2). Likewise, the statute limits the employer's libel and defamation liability to disclosure of false test results with malice. See *id.*, §34-38-11. Finally, the statute makes all drug and alcohol testing communications confidential, and the results may not be disclosed except in connection with an adverse action challenged by an employee. *Id.*, §34-38-13.

While the Utah statute appears to be well-drafted legislation, there probably

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are several ways the law could be improved. Because the Utah statute is relatively new, passed in April 1987, no case law identifies possible weaknesses in the statute. However, several general criticisms can be made of the Utah law. First, the statute exempts all government employees. *Id.*, §34-38-2. A possible explanation for this may be avoidance of constitutional problems with drug testing which arise in the public sector. Rather than sidestep the constitutional issue with regard to state and local employees, however, especially considering the number of safety and security sensitive jobs involved (e.g., firefighters, vehicle and equipment operators, police), a drug-testing statute should contain provisions covering these employees with due regard to constitutional constraints.

Second, a statute of this nature must be absolutely clear as to the litigation exposure created or arguably created by its passage. The whole purpose of a statute such as this is to encourage, not discourage, employers within the state to take reasonable steps to join in the fight against substance abuse. Consequently, employers must not implement drug-testing programs in good faith under the statute and then be saddled with costly and unfounded lawsuits. One way to approach this problem would be to expressly codify the causes of action that could arise under the statute and unequivocally exclude all others. Although the Utah statute treats this issue, it is not comprehensive.

Third, the confidentiality concerns of employees tested should be addressed in greater detail. The Utah statute seems to protect employees against disclosure of test results only if those results are false. *Id.* §34-38-10-11. A drug-testing statute should offer greater protection of legitimate employee privacy concerns, and this could be done in such a way as to avoid unnecessary litigation risk. As part of such a confidentiality provision, a labor union's entitlement to testing results should be addressed, and the best approach probably would be similar to that taken under the National Labor Relations Act, allowing disclosure only with the consent of the individual employee involved.⁸

A fourth suggestion with regard to improving the statute would be to better define the urine collection procedures

necessary for testing. Employers, on the one hand, need to know what precautions are generally accepted and lawful in meeting chain-of-custody requirements, and employees, on the other hand, should know what to expect in what could be an embarrassing and distasteful urine collection experience.

On balance, the Utah statute has much to recommend it. First and foremost, it requires that employers who utilize drug-testing programs use techniques designed to ensure accuracy and compliance with responsible, professional standards. Second, it limits the circumstances in which tests may be administered to those which are legitimate and in the public interest. Third, it requires that employers who adopt a plan do so in writing and that the plan be communicated to employees and applicants. Fourth, it addresses the confidentiality of drug test results. Fifth, it limits an employer's liability where it has acted in accordance with the statute.

The Utah statute, however, does not dictate that every employer must adopt a drug-testing program. Moreover, it does not substitute the legislature's judgment for that of an employer or the provisions of a collective bargaining agreement. Yet, its provisions will eliminate many of the abuses associated with irresponsible testing programs, yield more reliable results and permit employers to address serious workplace drug problems.

The Utah statute is a model which Alabama might responsibly follow. It certainly provides a useful starting point should the legislature determine that this would be a fruitful area of state regulation. ■

FOOTNOTES

¹ Other widely-used screening tests include thin-layer chromatography ("TLC") and radioimmunoassay ("RIA") tests, both of which also measure drug metabolites.

² See Note, *Title VII Discrimination in Biochemical Testing for Aids and Marijuana*, 1988 Duke L.J. 129, 140 n.68 [hereinafter "Biochemical Testing"].

³ See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §5153, 102 Stat. 4181, 4306 (1988); see also Exec. Order No. 12564, 51 F.R. 32889 (1986) (requiring a drug-free federal workplace and mandating drug testing).

⁴ Additionally, as discussed in the text above, employees still have numerous federal law remedies for an employer's improper use of drug testing.

⁵ Not only have employees found ways to carry specimens hidden in containers on their bodies, but a recent news story reported that several athletes recently hired a doctor to replace urine in their bladders, through catheterization, with clean urine.

⁶ See *D. Copus, Matters of Substance: Alcohol and Drugs in the Workplace* 54-56 (2d Ed. 1987).

⁷ See *Biochemical Testing*, 1988 Duke L.J. at 135.

⁸ See, e.g., *Detroit Edison Co. v. N.L.R.B.*, 440 U.S. 301, 319 (1979) (involving aptitude tests).

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Alabama Deceptive

by
Michael A. Bownes

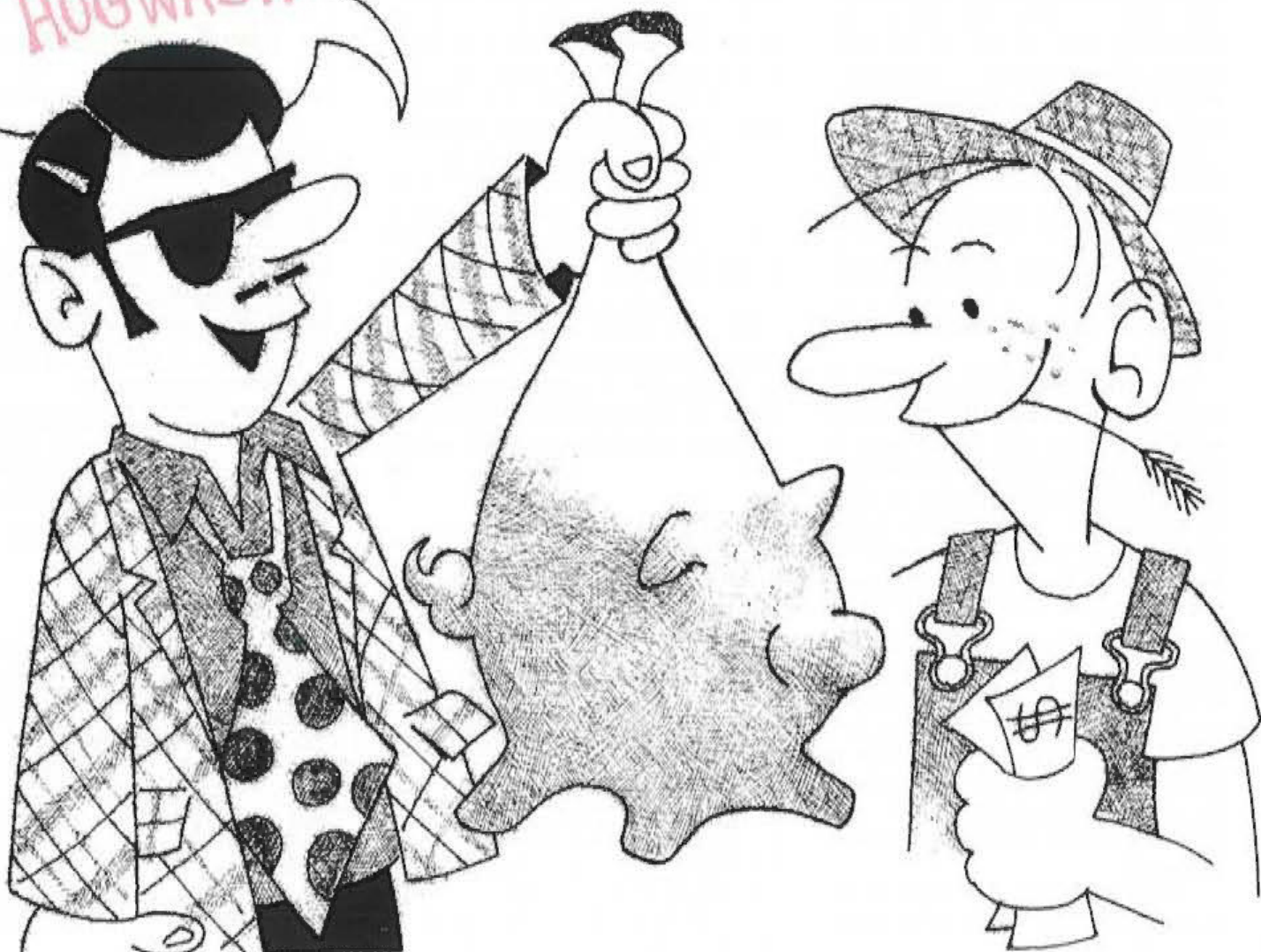
Introduction

Consumer fraud is "big business" in Alabama. In the last three years, the Office of Consumer Protection has returned close to three and a half million dollars in monies taken through deceptive trade practices. Even this amount is not an accurate gauge of the problem, as this office receives only a small percentage of

the complaints that exist. The purpose of this article is two-fold: it will provide a basic overview of some of the concepts and elements of the Alabama Deceptive Trade Practices Act and will encourage the use of the Alabama Deceptive Trade Practices Act as an alternative to traditional common law actions.

State and federal consumer protection statutes are premised on the concept that fairness in the market place promotes the public interest. Some type of consumer protection statute exists in all 50 states. Basically, these statutes attempt to pro-

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Trade Practices Act

hibit businesses from taking advantage of consumers and inducing sales of products and services through fraudulent or deceptive trade practices. These prohibitions against unfair or deceptive trade practices also are contained in the Federal Trade Commission's Act, which can be found at 15 U.S.C. §45 (1982). Many states copied the FTC Act in its entirety, while nearly all states used the FTC Act as a model. The Alabama Deceptive Trade Practices Act was modeled after the Texas Deceptive Trade Practices Act.

The primary intent of these consumer statutes is to promote meaningful disclosure. Consumers should have all relevant and material information on which to base a decision to purchase a product or service. These disclosure requirements allow the consumer to make an intelligent decision concerning purchases. The statutes attempt to put the consumer in a better, if not equal, bargaining position. Ideally, we would hope that a seller would disclose anything that is relevant to a sale; however, as this is not always the case, these deceptive trade practices acts require relevant information before a sale is completed.

Alabama's Deceptive Trade Practices Act

Alabama's Deceptive Trade Practices Act, *Code of Alabama*, 1975, §-8-19-1, et seq., (hereinafter, ADTPA) was signed into law in 1981. Alabama was one of the last states to acquire some type of deceptive trade practices act. The bill defines words and phrases, lists specific unlawful trade practices, lists exemptions, authorizes the attorney general's and district attorneys' offices to restrain the violations of this act, authorizes the attorney general and district attorneys to investigate complaints and prohibited acts, establishes a statute of limitations, provides for a private cause of action, and lists the penalties for violations of the statute.

Powers of the attorney general's and district attorneys' offices

The ADTPA gives the attorney general's office and the district attorneys' offices various powers and duties. These offices can receive consumer complaints and conduct investigations concerning the allegations received in the complaint. The ADTPA further gives the attorney general's office the authority to seek injunctions and restraining orders. The statute has provided businesses with a safeguard whereby they are entitled to appear before law enforcement officials before any legal proceedings are initiated. This right, however, is conditioned on the law enforcement official's determination that the subject does not intend to leave the state, to remove property therefrom or to continue conducting unlawful practices. When the attorney general's office receives a consumer complaint, a copy of that complaint is sent to the business along with correspondence asking the business for its position regarding the allegations and issues raised in the complaint. A large percentage of the complaints received actually are not violations of the ADTPA. The attorney general always allows any business a reasonable opportunity to resolve the complaint before initiating any further proceedings or investigations.

The ADTPA also authorizes the courts to suspend or revoke any license or certificate authorizing a person to engage in business in the state of Alabama.

Unlawful trade practices

Section 8-19-5, *Code of Alabama*, 1975, lists and defines acts and practices which are specifically declared to be unlawful. The first seven unlawful acts deal primarily with misrepresentations as to the quality, ingredients, labeling and source of goods or services. Specific examples include: causing confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services; representing that goods or services are of a particular standard, quality or grade; representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, second-hand or altered to the point of decreasing their value.

The statute declares it to be an unlawful trade practice to advertise goods or services with the intent not to sell them as advertised. This sales practice is more commonly known as "bait-and-switch." Further, it is unlawful to advertise goods or services without the intent to supply the reasonably expected public demand, unless the advertisements specifically disclose limitations as to quantity avail-

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able for sale. Though few complaints are received concerning this practice, investigations have shown that "bait-and-switch" practices are quite widespread.

Section 8-19-5(12) deals with affirmative disclosures that must be made in certain circumstances. Individuals must identify goods damaged by flood, water, fire or accident, if they are damaged to the point of decreasing their value or if the goods are rendered unfit for the ordinary purposes for which they were purchased. It is also unlawful for an individual to make a false or misleading statement of fact concerning the price reduction's amount, existence or cause.

Section 8-19-5(13) declares it to be unlawful to make false or misleading state-

ments of fact concerning the need for parts, their replacement or repair service. This violation is seen primarily and most frequently in automobile and home repair fraud.

Section 8-19-5(15) deals with odometer fraud. North Alabama is one of the top five areas in the United States for the commission of odometer fraud. As odometer statements are now required to accompany title applications on an automobile, in most cases the buyer can determine an odometer roll back by obtaining a title history on the vehicle in question.

Section 8-19-5(16) deals with false advertising relating to going-out-of-business sales. There has been a tremendous in-

crease in the use of distress sales to attract consumers. In addition to the ADTPA, which determines this practice to be unlawful conduct, §-8-13-1, et seq., of the *Code of Alabama*, 1975, requires certain conditions to be met before an individual is allowed to advertise a distress sale. However, this statute is exempted by any municipal licensing requirement with similar provisions. The statute requires that any person planning to conduct a going-out-of-business sale first must obtain a license 30 days prior to conducting the sale. This statute covers all distress merchandise sales and includes fire sales, adjustment sales, reorganizing sales, moving sales, bankruptcy sales, loss of lease sales, etc. Applicants for this license also must obtain a bond.

In a municipality without similar licensing provisions, an applicant for this license should apply to the judge of probate in the county in which the sale is to be held. The statute further contains certain restrictions on the sale, store hours, additions to inventory, advertising, etc. Any party who plans on conducting a distress sale should be advised to follow these statutory requirements.

Section 8-19-5(18) discusses chain referral programs. While businesses can use referral plans they cannot use these referral plans as an inducement to purchase.

Sections 8-19-5(19) and (20) discuss pyramid organizations. The ADTPA declares pyramid sales structures to be illegal; however, multilevel sales plans may not be pyramids. The definition of a pyramid varies from state to state. Section 8-19-5(19) defines a pyramid as a sales structure, which "includes any plan or operation for the sale or distribution of goods, services or other property, wherein a person for consideration acquires the opportunity to receive a pecuniary benefit, which is based primarily upon the inducement of additional persons, by himself and others, regardless of number, to participate in the same plan or operation, and is not primarily contingent on the volume or quantity of goods, services or other property sold or distributed." The emphasis of a multilevel sales program must be on the sale of a product or service and not on recruitment of additional participants. However, the fact that a multilevel organization offers a product or service does not exclude the pos-

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sibility that it may be a pyramid sales structure. Even the infamous chain letters have become legally sophisticated as they now offer some sort of bogus product or service. Often a determination of whether a pyramid exists can be made only after examining the actual sales presentation. The ADTPA further makes it illegal to misrepresent potential earnings and potential markets for the sale of goods. Public policy designated this type of sales practice to be illegal because as pyramids grow geometrically, the market quickly becomes saturated and consumers are unable to recruit additional participants and, inevitably, there is a large class of consumers who loses their money.

The last listed violation is a broad declaration that it is unlawful to engage in any unconscionable, false, misleading or deceptive act or practice in the conduct of trade or commerce.

Standards of unfairness and deception

The terms "deception" and "unfairness" are not defined in §3 of the ADTPA. Further, unlike most states, the ADTPA

does not expressly prohibit "unfair" practices. Although Alabama courts have not expressly equated the term "unconscionable" with "unfair", it is significant that §8-19-6, *Code of Alabama*, 1975 declares that, "[I]t is the intent of the legislature that in construing Section 8-19-5, due consideration and great weight shall be given where applicable to interpretations of the federal trade commission and federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act (15 USC 45(a)(1))." Section 45(a)(1) states, "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are declared unlawful." While the terms "deception" and "unfairness" are not defined in the FTC Act, these terms have been interpreted through extensive case law.

Although the difference between deceptive and unfair practices tends to become somewhat confusing, the two standards are distinct. While a deceptive trade practice normally is considered to be an unfair practice, an unfair practice is not always, by legal definition, deceptive. The unfairness doctrine is potentially broader than deception and can be

used to reach conduct that the deception standard does not encompass.

Traditionally, a deceptive act or practice has been described as one having the tendency or capacity to mislead a substantial number of consumers in a material way. *American Home Products Corporation v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982). Recently the commission has restated this standard by describing deception as a "misrepresentation, omission, or other practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." Committee on Energy and Commerce, letter to Hon. John D. Dingell, chairman, October 14, 1983. One important accomplishment of this restatement was to specifically include an admission of information as a deceptive trade practice. *Simeon Management Corporation v. FTC*, 579 F.2d 1137, 1145 (9th Cir. 1978).

The unfairness standard established by the Federal Trade Commission provides the following criteria for determining whether a business practice which is neither anti-competitive nor deceptive is nonetheless unfair to consumers: 1.

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whether the practice offends public policy; 2. whether it is immoral, unethical, oppressive or unscrupulous; and 3. whether it causes consumers substantial injury. This criteria was developed and published in the commission's report entitled "Unfair Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Statement of Basis and Purpose," 29 Fed. Reg. 8355 (1964). The United States Supreme Court cited this criteria with apparent approval in *FTC v. Sperry & Hutchinson Company*, 405 U.S. 233, 244 n. 5, 92 S.Ct. 898, 905 n. 5, 31 L.Ed.2d 170, 179 n. 5. (1972).

In *Sperry & Hutchinson, supra*, the Supreme Court has approved the FTC's use of a consumer unfairness doctrine not tied to the traditional components of

deception. The commission, through its rules and decisions, has continued to refine the unfairness standard. In a 1980 policy statement to Congress, the commission set forth the following principle for identifying unfair trade practices: "...to justify finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided The Commission has attempted through this policy statement to provide greater certainty in the application of the unfairness standard." The application of this policy statement was first used by the FTC in *Horizen Corpora-*

tion, 97 F.T.C. 464 (1981). This test was also applied in *American Financial Services v. FTC*, 767 F.2d 957 D.C. Cir. (1985).

In *American Financial Services, supra*, the Court further distinguished deception and unfairness when it held that, "[a] practice is deceptive when a consumer is forced to bear larger risks than expected, whereas a practice is unfair when a consumer is forced to bear a larger risk than an efficient market would require."

Currently, there is no Alabama case law which attempts to define the terms deceptive or unfair trade practices. The seldom-used ADTA has not developed any relevant case law construing the statute. The elements necessary to constitute a violation of the ADTPA should not be confused with the elements required to prove fraud, as they differ markedly. There is a plethora of case law interpreting and defining common law fraud in Alabama. The statutory definitions of fraud are contained in §6-5-100 through §6-5-104, of the *Code of Alabama*, 1975.

Private right of action

The ADTPA contains a private right of action under §8-19-10, *Code of Alabama*, 1975. As the state generally enforces the consumer protection act on behalf of large classes of consumers, it is important that this right of private action be available to any consumer. This act is available to any consumer who suffers monetary damages due to conduct which has been declared unlawful by this act. Section 8-19-10 states that if a consumer suffers monetary damages due to violations of this statute, they will be entitled to: 1. any actual damage sustained by the consumer or the sum of \$100, whichever is greater; or 2. up to three times any actual damages, in the court's discretion; and 3. the court awarding attorney's fees in its successful action. If the court finds that an action brought under this section is frivolous or was brought in bad faith or for the purpose of harassment, the court shall award the defendants reasonable attorney's fees and costs incurred defending the action. Included in this section are the guidelines for the court's determination of these damages.

Section 8-19-10 provides procedures and requirements which must be followed when using the ADTPA as the



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cause of action. The act requires that at least 15 days prior to filing any action, a written demand must be made for relief upon the defendant. The claimant must be identified and there must be a reasonable description of the complaint, the unfair conduct and the injury suffered. This demand must be communicated to any prospective defendants by placing it in the United States mail. Any person who receives this demand, and within 15 days of delivery makes a written settlement offer, which is rejected, may subsequently file this offer of settlement and the plaintiff's rejection thereof in an affidavit. If the court finds that the offer of settlement was sufficient to compensate the consumer for their damages, the court shall not award any additional damages or attorneys' fees to the petitioner. The demand requirements do not apply to prospective defendants who do not maintain a place of business or keep assets within the state of Alabama. Upon commencement of any action, the clerk of court should be instructed to mail copies of any filings or pleadings to the office of the attorney general and to the local district attorney. Further, copies of any orders, injunctions or decrees which are obtained also must be forwarded to these officials.

Under Alabama's private right of action, a consumer may not bring an action on behalf of a class. The authority to bring an action in a representative capacity is limited to the office of the attorney general and district attorneys' offices.

Attorneys' fees

In an attempt to encourage the use of the ADTPA as a cause of action, the statute authorizes the court to order reasonable attorneys' fees in a successful action. The attorneys' fees awarded should be reasonable and based on an objective evaluation of the services rendered. While consideration can be given to the actual amount in controversy, the attorneys' fees are not dependent on the actual damages suffered by the consumer. Many lawyers do not accept good consumer cases due to small damages, however, it is important to remember that the reasonable fees that could be incurred in bringing an action are not directly related to the actual damages suffered.

Alabama and Texas are among the few states that require a demand for relief to be made to the defendant and a written tendered offer of settlement to the aggrieved party. Also unique is the procedure allowed in the event the offer is rejected. In Alabama, the offer may be filed and reviewed by the court. If the court finds the offer was sufficient to compensate the aggrieved party, the court is not allowed to award any additional damages, including attorneys' fees and costs. The courts in several jurisdictions have held that the aggrieved party's attorney's fees are not part of the injury suffered by the party, and therefore, in determining the reasonableness of a settlement offer in relation to the injury suffered, it was held that it is not proper to include attorneys' fees as part of the aggrieved parties injuries. *Kohl v. Silverlake Motors, Inc.*, 369 Mass. 795, 343 N.E.2d 374 (1976). In *Kohl, supra*, the court stated, "It was unaware of any incidents in which the words 'injury' or, 'injury actually suffered' were intended by the legislature to include attorney's fees." 369 Mass. at 801, 343 N.E.2d at 379.

Exemptions and defenses

Section 8-19-7 deals with persons and activities which are exempted from investigation and prosecution under the ADTPA. Exempted are any acts done by the publisher, owner, agent or employee of a newspaper, periodical, radio or television station or telephone company in the publication or dissemination of an advertisement, in which the owner or agents did not have knowledge of the false, misleading or deceptive character of the advertisement. Insurance and banking activity also is exempted. There are several other exemptions, and the burden of proving the exemption is on the person claiming it.

Section 8-19-13 states that it shall be a defense to any action brought pursuant to the ADTPA, upon a showing by a preponderance of the evidence, that the individuals did not knowingly commit any act or knowingly engage in conduct which violated the statute.

Election

An important consideration when deciding to use the ADTPA as the cause of action is the election that is required

under Section 8-19-15. An election to pursue the civil remedies prescribed in this act shall exclude and be a surrender of all other rights and remedies available at common law, by statute or otherwise, for fraud, misrepresentation, deceit, suppression of material facts or fraudulent concealment arising out of any act, occurrence or transaction actionable under this act. This election is probably one of the reasons the ADTPA is used.

Statute of limitations and criminal ramifications

Section 8-19-14 establishes a statute of limitations of one year. No action can be initiated under the act more than one year after the person bringing the action discovers, or reasonably should have discovered, the deceptive act or practice. In no event may an action be brought under this act four years from the date of the transaction giving rise to the cause of action, unless the contract or warranty does not expire for more than three years.

There also may be criminal ramifications from conduct which is in violation of the statute. Any person who continuously and willingly violates the ADTPA shall be guilty of a Class A misdemeanor.

Conclusion

The Alabama Deceptive Trade Practices Act is one of the many remedies that is available to redress consumer fraud. In addition to state remedies there are numerous federal statutes that deal with specific areas. While federal consumer protection statutes are beyond the scope of these materials it is important to be both aware of the statutes and the remedies that they offer. Frequently-used statutes include the Fair Credit Billing Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, Equal Credit Opportunity Act, Truth-in-Lending Act, Magnuson-Moss Warranty Act, Mail Fraud Statute, Unordered Merchandise Act and the Home Solicitation Act.

When evaluating a potential consumer case, legal analysis often is less reliable than what offends a person's sense of right and wrong. The ADTPA is designed and seeks to promote fair and quick settlements and is a viable alternative to the more traditional common law remedies. ■

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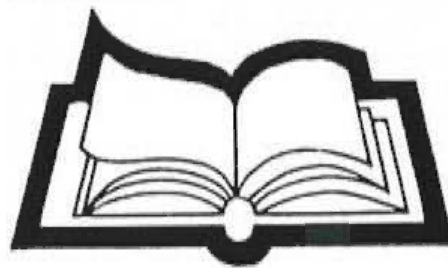
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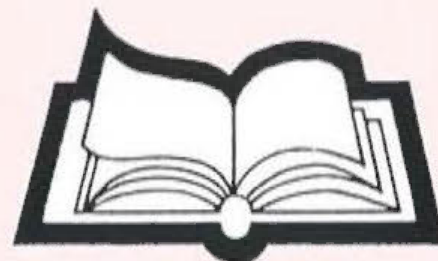
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by
Andrew P. Campbell

I. Introduction

For almost a century one of the most fascinating and yet difficult areas of tort law in Alabama has been that of interference with business and contractual relations. In 1986, the Alabama Supreme Court, in *Gross v. Lowder Realty*, 490 So.2d 590 (Ala. 1986), rendered the most important decision in almost a century of confusing jurisprudence since the court first recognized a cause of action for interference. The court in *Gross* consolidated the previously separate and distinct causes of action of interference with contract and interference with business to create a unified tort of interference with business or contractual relations. In doing so, the court attempted to discard "an outdated and inconsistent body of law," 494 So.2d at 596, and create certainty by setting forth specific elements necessary to establish liability of a third party for intentional interference with the business dealings or relations between two other parties. Yet, these requirements included many of the same elements of the old torts. Accordingly, the case law prior to *Gross* retains viability and may be authoritative.

While the objective in *Gross* may have been to end confusion and provide guidance, a careful analysis of the new tort's elements and their application to specific contexts show that great uncertainty still exists over the parameters of the tort. Simply put, the court in *Gross* created a theory of liability which penalizes some aggressive business conduct in a free economy while legitimizing other competitive behavior without any explanation of the difference. This article will outline the historical antecedents of the unified tort, review the general prerequisites for liability established by the *Gross* court and trace their development in the last two years since *Gross*. From this analysis, the article will attempt to provide some guidance to the practitioner in prosecuting or defending claims for tortious interference.

Interference with Business the Unified Tort since *Gross v.*



II. Historical underpinnings

Prior to *Gross*, two separate torts existed, a very limited tort of intentional interference with an existing contract and much broader and amorphous tort of intentional interference with business. The

tort of interference with contract generally did not exist except where a third party (1) intentionally or knowingly interfered with an existing employer-employee relationship or (2) induced a breach of a lease by coercion or fraud. The underly-

Relations: Lowder Realty



breach of contract to recover his damages.

An important case illustrating the tort of interference with contract was *James S. Kemper and Co. Southeast, Inc. v. Cox and Associates, Inc.*, 434 So.2d 1380 (Ala. 1983). In that case, the defendant brokerage company induced the employee of the plaintiff brokerage company to breach his noncompete agreement with his employer and accept employment with the defendant. The defendant also induced the employee to solicit customers of his former employer, another breach of his employment agreement. The court found that the defendant broker was liable for tortious interference with contract.

In direct contrast to this constricted tort, the tort of interference with business enjoyed an almost unlimited development, applying to a myriad of contexts. The common law genesis of the tort was derived from the 19th century principle of substantive due process that a person's trade, profession or business was a property right protected by law from interference. The Alabama Supreme Court set forth this policy in the case of *Sparks v. McCrary*, 47 So. 332, 334 (1908):

"[T]he individual citizen, as a necessity, must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right, he cannot be a free man. This right to choose one's calling is an essential part of that liberty which is the object of government to protect; and a calling, when chosen, is a man's property and right. In necessary consequence, an unlawful invasion of or interference with the pursuit of progress of one's trade, profession or business is a wrong for which an action lies. He

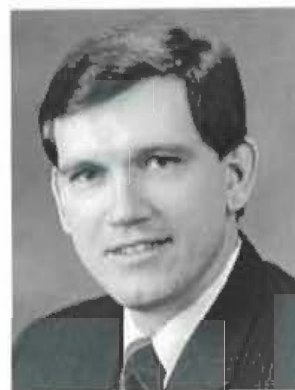
that hinders another in his trade or a livelihood is liable to an action for so hindering him . . ."

This common law right is incorporated into article one, Section 13 of the Alabama Constitution, which provides that "every person for any injury done him in his lands, goods, person or reputation should have remedy by due process of law." See *Evans v. Swaim*, 245 Ala. 641, 18 So.2d 400 (1944). A statutory basis is also *Ala. Code* §6-5-260 (1975) which provides a remedy for "unlawful deprivation of or interference with" one's personality. In at least one case, *Mims v. Citizens Bank of Prattville*, 372 So.2d 311 (Ala. 1979), the Alabama Supreme Court applied this statute as a basis for interference with business, holding that a bank's unlawful repossession of plaintiff's truck tortiously interfered with his logging business.

Prior to *Gross*, only two elements were required for a plaintiff to establish a *prima facie* case of interference with business and shift the burden to the defendant. First, the plaintiff was required to show an intentional act of affirmative interference and some consequential harm to the plaintiff's business. E.g., *Purcell Company, Inc. v. Sprigg Enterprises, Inc.*, 431 So.2d 515 (Ala. 1983); *Evans v. Swaim*, 245 Ala. 641, 18 So.2d 400 (1944). The unlimited scope of the tort was found in its protection of all facets of the plaintiff's trade, profession and business and not simply its relations with third parties. Thus, any direct interference with the business created a basis for a *prima facie* claim.

Once a *prima facie* case was established, the burden of proof shifted to the defendant to prove justification or pro-

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ing policy for this strict limitation on the tort was found in *Erswell v. Ford*, 208 Ala. 101, 95 So. 67 (1922) wherein the Alabama Supreme Court held that the plaintiff, whose contract was interfered with, already had an available remedy in

priety for its interference. Early Alabama cases indicated that the burden of proof was on the plaintiff to show the interference was wrongful, improper or unjustified; e.g. *Sparks v. McCrary*, *supra*. The principle gradually developed, however, that justification is an affirmative defense to be plead and proved by the defendant. *Polytec, Inc. v. Utah Foam Products, Inc.*, 439 So.2d 683, 689 (Ala. 1983). As Judge Wisdom held in *Thompson v. Allstate Insurance Co.*, 476 F.2d 746, 748 (5th Cir. 1973), a seminal 5th Circuit case interpreting the tort:

"Justification for interference in another's business is an affirmative defense and is no part of the plaintiff's case. It is enough to allege and prove the conduct in effect leaving the defendant to justify, if he can."

What constituted justification prior to *Gross* was never fully defined. The subjective nature of this standard of propriety when applied to competitive acts created immense problems for defendants, particularly since the supreme court had held that justification was a question of fact to be determined by the jury. Generally, in its cases, the court distinguished incidental harm to the plaintiff's business resulting from the natural workings of competition, which were permissible, from affirmative intentional acts taken out of a motive to injure the plaintiff's business, which were tortious.

As to the second and third elements of knowing and intentional interference, the *Gross* court apparently retained these prerequisites from the old cause of action of interference with business. This

was apparent in the recent decision of *Bear Creek Enterprises, Inc. v. Warrior & Gulf Nav.*, 529 So.2d 959 (Ala. 1988). In that case, the court reaffirmed prior law (e.g., *Ala. Power Co. v. Thompson*, 278 Ala. 367, 178 So.2d 525 [1965]) that a third party's refusal to deal that disrupts the plaintiff's business relation, as opposed to an active interference, is not actionable. In reaching this result, the court relied on *Restatement (Second) of Torts* §766 and comments which validate refusals to deal to reach its result. Given the court's adoption of the Restatement in *Gross* and *Bear Creek*, practitioners should become familiar with Restatement, §§766-767, on interference, and particularly §§768-774, which identify specific examples of justification. To the extent a party can fit its acts within one of these examples, it may gain acceptance by the supreme court.

With respect to the element of justification, the supreme court created more uncertainty than clarity in *Gross*. While the court listed absence of justification as one of the elements of proof, the court stated in a footnote that it was retaining the principle that justification was an affirmative defense to be plead and proved by the defendant. 494 So.2d at 597, n. 3. In the same footnote, the court reaffirmed prior law that justification normally would be a question for the jury. The court then adopted the Restatement (Second) of Torts § 767 (1979) balancing test for a jury to determine justification based on a consideration of factors, including (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the

other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (6) the proximity or remoteness of the actor's conduct to the interference; and (7) the relations between the parties. A critical review of these factors reflects that this balancing test of considerations (1) muddles the law rather than giving any certainty to the bar and businesses as to what constitutes legitimate business conduct and; (2) may turn the issue of justification into a subjective value-oriented decision based on a jury's rough notions of fairness as opposed to a determination based at least in part on some objective criteria. Arguably under this test, the most important feature, as with the old law, will be the intent or motive of the actor in carrying out the alleged interference and not whether the act itself constitutes valid business competition as opposed to wrongful behavior.

In subsequent decisions after *Gross*, the Alabama courts have tended to place the burden on the plaintiff to prove absence of justification. In *Finley v. Beverly Enterprises, Inc.*, 499 So.2d 1366 (Ala. 1986), the defendant nursing home adopted the policy of not allowing nurses whom it had previously discharged to work as private nurses to patients at its facility. While the supreme court recognized that this constituted a potential interference with the relationship, the court held that the plaintiff had not "produced a scintilla of evidence to show that

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there was no justification for Beverly's policy that discharged Beverly's employees may not re-enter the premises to work as private duty nurses." 499 So.2d at 1368. In *Birmingham Television Corp. v. Deramus*, 502 So.2d 761 (Ala.Civ.App. 1986), the court of civil appeals emphasized that plaintiff had failed to prove an absence of justification for interfering with a former employee assuming a position with a competitor. *Id.* at 765-66.

While the court in *Gross* left unclear the scope of the justification defense and the evidentiary standards for establishing it, subsequent cases have shown that with the demise of the scintilla rule and the question on the burden of proof, justification may be more of an appropriate issue for summary judgment. See *Finley, supra*; *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, (11th Cir. 1988). Indeed, what could develop is an evidentiary standard akin to federal discrimination claims where (1) the plaintiff has the burden to offer proof of the four other elements of actionable interference; (2) the defendant then must articulate or show some evidence of justification; and (3) the plaintiff, in turn, must prove that the articulated rationale is pretextual for an intent or motive to harm the plaintiff's business. This evidentiary standard would be more consistent with the emphasis placed by *Gross* and its pedigree on the actor's motive in effecting the alleged interference, while affording real protection to a defendant's aggressive but lawful acts.

IV. Conspiracy to interfere

The limitations imposed by *Gross* apparently did not affect the availability of the separate tort claim of conspiracy to interfere with business or relations. Prior to *Gross*, the supreme court held that if two or more persons planned or participated in an actual interference, they were liable for the separate tort of conspiracy to interfere. E.g., *Purcell, supra* at 527. Unlike traditional conspiracy law the essence of tort was not the conspiratorial agreement but the interference carried out as a result of it. Without the elements of the underlying tort, i.e., actual interference and damage, the claim failed. *Id.* The supreme court in *Fossett v. Davis*, 531 So.2d 849 (Ala. 1988), held this claim for conspiracy is still available if a party establishes the *Gross* elements and shows by circumstantial evidence that other parties participated in an agreement to effect the interference. *Id.* at 851.

V. Conclusion

Critics with some justification have argued that a tort of interference with business relations not only is too vague, but fundamentally inconsistent with an economy founded on free and vigorous competition. This difficulty of reconciling a tort of interference with the competitive order in the United States becomes more acute when the defendant competitor is required to prove that his conduct was justified under some undefined subjective standard to be submitted to a jury. What is fundamentally clear from *Gross* and its prodigy is that the broad elements of the new tort sketched out in *Gross* need substantial "fleshing out" and clarification, particularly on the justification defense if businesses are to be afforded the certainty promised, but undelivered, by *Gross v. Lowder*. ■

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Building Alabama's Courthouses

by Samuel A. Rumore, Jr.

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. *The Alabama Lawyer* plans to run one county's story in each issue of the magazine. If you have any photographs of early or present courthouses, please forward them to:

Samuel A. Rumore, Jr.
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Lawrence County

Lawrence County was created by the Alabama Territorial Legislature on February 4, 1818. It was named for Captain James Lawrence of the United States Navy. Captain Lawrence had fought in the War with Tripoli and in the War of 1812. He is most remembered as the commander of the "Chesapeake." On June 1, 1813, he was mortally wounded in a battle with the British. As his men carried him into the hold of his ship he said the famous words, "Fight her 'til she sinks! Damn it all! Don't give up the ship!"

The earliest county seat of Lawrence County was located at Melton's Bluff. This area was at the head of the Elk River shoals on the south bank of the Tennes-



see River. It was named for John Melton, an Irishman who had married a Cherokee woman and amassed a fortune, reportedly by robbing settlers passing the bluff on flatboats. He could be called an Alabama "river pirate." With his booty he bought numerous slaves and established a tavern.

After his death in 1815, Melton's tavern, plantation and slaves were purchased by Andrew Jackson. Jackson and his associates thought that they could establish a town at a point above the shoals. They laid out a main street on a line parallel with the river bluff. A large city, which was to be called Marathon, was planned.

The first recorded court convened in Lawrence County at Melton's Bluff on August 24, 1818. The Honorable Obadiah Jones presided. Court sessions also commenced there on November 8, 1819, and February 14, 1820.

As in most counties of Alabama, the site of a permanent county seat was a question of great political importance. On December 4, 1819, the Territorial Legislature passed an act calling for an election of five commissioners who would choose the permanent county seat

site in Lawrence County. Two communities, Courtland and Moulton, immediately incorporated in order to have an edge in the selection. The commissioners chose Moulton, the area closest to the geographical center of the county.

Because of its name, many people believe that Courtland was a former county seat of Lawrence County. This is not true. Courtland received its name from the United States Land Office and Federal Court which had been established there. However, in later years the legislature mandated that one session of the probate court be held each month in Courtland.

The fourth session of the circuit court officially convened at Melton's Bluff on August 14, 1820. It immediately adjourned in order to meet the next day at the new county seat of Moulton. In spite of Andrew Jackson's expectations, Melton's Bluff never succeeded as a town, and Marathon never materialized. Today there are no remains of the place as the area is underneath the waters of the Tennessee River.

Many places in Alabama are named for war heroes. The town of Moulton was named for Lieutenant Michael C. Moulton of the United States Army who was killed at the Battle of Horseshoe Bend on March 27, 1814. It is interesting to note in passing that the two other officers who died at this battle also have county seats named for them. The city of Montgomery was named for Major Lemuel P. Montgomery, and Somerville in Morgan County was named for Lieutenant Robert M. Summerville (Somerville).

The first courthouse in Moulton dated back to 1820. It was a log building that had a fence around it; in 1859 this pioneer structure burned.

On April 4, 1859, plans were made for a new courthouse to be completed by March 1, 1860. When constructed, this new courthouse was 54 feet square, two stories high and built of brick. It was topped by a central tower. The building had two large offices, two small offices, two jury rooms and a courtroom. Pend-

Samuel A. Rumore, Jr., is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairman of the Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore.





Lawrence County Courthouse

ing its construction, chancery court was held at the office of Hansell & Clark, and the circuit court convened at the Baptist Female Institute. During the Civil War the building was used as a hospital.

The third and present Moulton Courthouse replaced its predecessor on the town square in 1936. The architectural firm was Turner & Northington, and the contractor was W.C. Chambers Construction Company. The building cost \$450,000 and was financed by a special tax used to pay off a bond issue. It was constructed in a classic revival style of limestone from the quarries near Russellville. This structure serves the county to this day.

In closing, it is fitting to quote the inscriptions on the entrances to the Lawrence County Courthouse. They are an inspiration to the people of Lawrence County and to all people. Over the front entrance are the words, "The eternal laws of justice are our rule and our birthright"—*Burke*. And over the rear entrance are the words, "Let us remember that justice must be observed even to the lowest"—*Cicero*. ■



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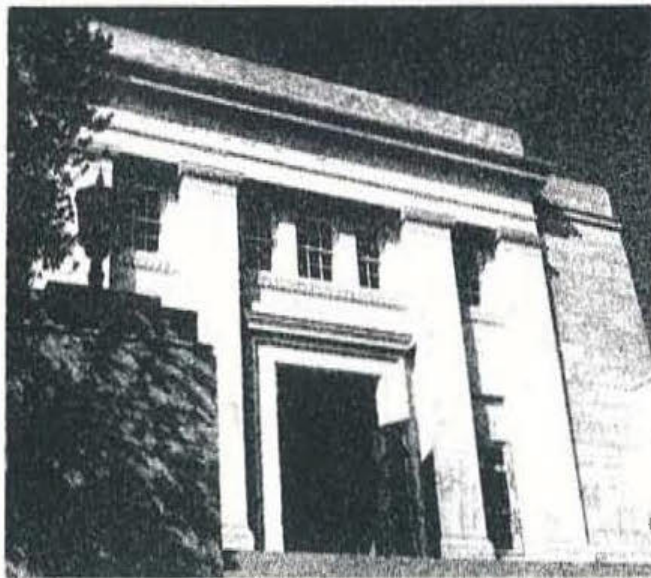
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Recent Decisions

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

Recent Decisions of the Alabama Court of Criminal Appeals

State cannot force driver to submit to chemical test

Thrower v. State, 8 Div. 982 (November 10, 1988)—This case presents an issue of first impression in the State of Alabama, i.e., whether or not reversible error occurs when a defendant is forced to submit to a chemical test designated by a law enforcement agency over his objection and refusal.

The evidence at trial demonstrated that Thrower was properly placed under lawful arrest and transported to police headquarters and then to the

Guntersville Emergency Room. At the emergency room, a blood sample was taken at the direction of the police officer and after the defendant had twice refused to submit to the test. A unanimous court of criminal appeals reversed and remanded the case and held that the trial court committed reversible error in admitting the blood sample into evidence over the objection of the defendant.

The state sought to uphold the seizure based upon the Alabama Implied Consent Act, §32-5-192, *Code of Alabama* (1975), and the United States Supreme Court's decision in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

Judge Tyson focused the issue as follows:

"The sanction under Alabama law (§32-5-192) is if a person refuses upon proper request of a law enforcement officer to submit to a chemical test, then such refusal may be placed in evidence at trial and appropriate action taken by law enforcement agencies with reference to the party's privilege of driving a motor vehicle upon the public highway. However, the Alabama statute is clear that a law enforcement agency does not have the right, after refusal by the arrested party, to go forward over their refusal and take a blood sample."

The appellate court, relying upon the rationale of the Supreme Court of Alabama in *Love v. State*, 513 So.2d 24 (Ala. 1987), ruled that "the appropriate sanction is to place such refusal in evidence, and the Director of Public Safety, upon proper certification of such refusal, shall suspend the party's license to drive."



John M. Milling, Jr., is a member of the firm of Hill, Hill, Carter, Franco, Cole & Black in Montgomery. He is a graduate of Spring Hill College and the University of Alabama School of Law. Milling covers the civil portion of the decisions.



David B. Byrne, Jr., is a graduate of the University of Alabama, where he received both his undergraduate and law degrees. He is a member of the Montgomery firm of Robison & Belser and covers the criminal portion of the decisions.

Recent Decisions of the Supreme Court of Alabama—Civil

Constitutional law . . .
contractual provisions which deny common-law marriages same status as ceremonial ones are void as against public policy

Scott v. Board of Trustees of the Mobile Steamship Association, etc., 22 ABR 3941 (September 23, 1988). Plaintiffs were purported to be common-law spouses. Jack Scott worked as a longshoreman and was a member of a plan that provided group health insurance to its employees and qualified dependents. The plan only covered spouses of employees who had entered into a ceremonially solemnized marriage. Louise Scott filed a claim for medical benefits, and the claim was denied because she was a common-law spouse. Plaintiff contended *inter alia* that the plan's exclusion of common-law spouses violated the public policy of Alabama. The federal district court upheld the plan administrator's denial of the claim, and plaintiff appealed to the Eleventh Circuit. The Eleventh Circuit certified the question to the supreme court.

The supreme court held that contractual provisions denying common-law marriages the same status as ceremonially solemnized marriages are void as violative of the public policy of Alabama. The supreme court noted that the term "public policy" of a state includes its Constitution and statutes, and when they have not directly spoken, then it includes the decisions of the courts. The supreme court also noted that it is well-settled in Alabama that the courts recognize common-law marriages as well as ceremonially solemnized marriages.

Courts . . .

Ex parte Smith distinguished in its application of §12-11-9

Ex parte Loftin, Jr. (Re: *Andrews v. Loftin, Jr.*) 22 ABR 3888 (September 23, 1988). Andrews was injured in an accident and filed a negligence suit against Loftin in district court claiming \$5,000. Six years later he moved to amend the complaint to raise the *ad damnum* to \$10,000. The district court denied the motion, and the circuit court refused to transfer the case to the circuit court pursuant to §12-11-9, *Ala. Code* (1975). On appeal, the court of civil appeals reversed, and the supreme court granted certiorari to clarify the law.

Andrews relied upon *Ex parte Smith*, 438 So.2d 766 (Ala. 1983). In that case, the circuit court transferred the case from district court to the circuit court because plaintiff's damages exceeded the \$5,000

jurisdictional amount. The supreme court distinguished *Smith* on the grounds that *Smith* was a detinue action and the *undisputed* testimony showed that plaintiff's damages exceeded \$5,000, whereas in this case Andrews' action is one sounding in negligence where the remedy is merely monetary damage. The supreme court noted that it is well-settled that plaintiff may forego his claim for monetary damages in excess of the jurisdictional limit of the district court in order to bring his action in the district court. Since the statute of limitations expired on his negligence claim, Andrews cannot dismiss and refile in circuit court, and his only remedy is to limit his damage claim to \$5,000 and remain in district court.

Insurance . . .

insurance adjusters' settlement negotiations do not amount to "constructive appearance" to prevent default

Lee v. Martin, 22 ABR 3904 (September 23, 1988). Following an accident, plaintiff entered into settlement negotiations with defendant's insurance adjuster. Plaintiff filed suit, and service of process was perfected. No response was filed, and plaintiff took a default. Defendant filed a Rule 60(b), *Ala.R.Civ.P.*, motion for relief from judgment with a supporting affidavit which stated that the insurance adjuster accidentally placed the summons and complaint in a box of closed files, and they were not discovered until after the default. The trial court denied the defendant's motion, and defendant appealed. The supreme court reversed.

Defendant contended that his insurance adjuster's settlement negotiations with the plaintiff amounted to a 'constructive appearance' and this required plaintiff to give him a three-day written notice under Rule 55(b), *Ala.R.Civ.P.*, before a hearing on the application for judgment. The supreme court disagreed and stated that there is no appearance until some writing has been filed in court to indicate an intention to defend the action. Settlement negotiations conducted prior to, or after, the date suit is filed cannot constitute an appearance to invoke Rule 55(b)(2). The supreme court also held that the trial court abused its discretion by refusing to set aside the default judgment.

Insurance . . .

there is cause of action for "bad faith" in uninsured motorist context

Sanford v. Liberty Mut. Ins. Co., Supreme Court No. 87-301 (November 23, 1988). Liberty Mutual was sued for bad faith refusal to investigate an uninsured motorist claim. Liberty Mutual filed a motion to dismiss based on *Quick v. State Farm Mut. Auto. Ins. Co.*, 429 So.2d 1033 (Ala. 1983) and subsequent cases. Liberty Mutual contended that *Quick* and its successors held that Alabama does not recognize bad faith in an uninsured motorist context. The trial court agreed and granted the motion, and the dismissal was made final pursuant to Rule 54(b), *Ala.R.Civ.P.* The supreme court reversed.

The supreme court noted that the trial court's ruling reflects a misreading of *Quick* and the other two cases dealing with this issue. The court stated, "We perceive no public policy reason to distinguish between a 'bad faith' claim in an uninsured motorist context and a 'bad faith' claim in other two-party insurance contexts." To the contrary, the supreme court reasoned that the legislative mandate for uninsured motorist protection enhances a public policy favoring such claims.

Tort reform . . .

section 232 of Alabama Constitution limits application of §6-5-430 (forum non conveniens)

Ex parte Illinois Central Gulf Railroad Co. (In re: *Keene v. Illinois Central Gulf Railroad Co.*), 22 ABR 3966 (September 23, 1988). Petitioner, Illinois Central Gulf Railroad (IGC), petitioned the supreme court for a writ of mandamus ordering the Mobile circuit court to grant its motion to dismiss the action pending against it. IGC was a Delaware corporation doing business in Alabama. However, the accident happened in Mississippi, and the plaintiff/respondent lived outside Alabama and all witnesses lived outside of Alabama. The motion to dismiss was based on §6-5-430, *Ala. Code* (1975), recently passed in the tort reform package. Section 6-5-430, as amended, June 11, 1987, provides that the court may dismiss without prejudice any action against a corporation if the tort has arisen outside Alabama, and it is demonstrated that

a more appropriate forum exists outside Alabama. The suit was premised on the Federal Employers' Liability Act which allows suit in any county in which the defendant does business. The supreme court denied the writ based on Section 232 of the Alabama Constitution.

The supreme court noted that Section 232 provides that a foreign corporation may be sued in any county where it does business. The Alabama Legislature is without power, because of the mandate of Section 232, to deny a plaintiff access to our courts and suit against foreign corporations. Although §6-5-430 applies on its face to foreign corporations, it cannot be given effect in light of Section 232, and a foreign corporation may be sued in any county where it does business.

Worker's compensation . . . §25-5-11.1 discussed

Twilley v. Daubert Coated Products, Inc., 22 ABR 4041 (September 30, 1988). Twilley was injured in November 1984, while working for Daubert. He filed a worker's compensation action. In July 1985, he also filed a suit claiming he was "constructively discharged" in retaliation for having filed the worker's compensation suit and sought compensatory and punitive damages. Daubert claimed that he could not return to work because he did not have a doctor's release, and that this was against company policy. Section 25-5-11.1, *Ala. Code* (1975), effective February 9, 1985, provides that no employee shall be terminated solely because he has instituted a worker's compensation claim. The retaliatory discharge claim was tried to a jury, and the jury found in his favor, finding that he was "constructively terminated," but also finding that his termination was not "solely" because of the worker's compensation suit. The trial court granted Daubert's JNOV and held there was not a scintilla of evidence to support Twilley's claim that the worker's compensation suit was the sole reason for his termination. Twilley appealed, and the supreme court reversed.

The supreme court noted that §25-5-11.1 is remedial and, therefore, construed liberally to effect its purpose. According to the court the word "termination" in the statute is broad enough to include a "constructive termination."

The supreme court also stated that an employee may prove a *prima facie* case of retaliatory discharge by proving that he was terminated because he filed suit for worker's compensation benefits. The burden then shifts to the employer to produce evidence that the employee was terminated for a legitimate reason, whereupon the employee must prove that the reason was not true, but a pretext. The supreme court also noted that Twilley's cause of action for wrongful termination did not accrue until July 1985, even though he was injured in November 1984. Therefore, Twilley can maintain this claim under §25-5-11.1.

Recent Decisions of the Supreme Court of Alabama— Criminal

Prosecutor's improper closing argument

Ex parte Tomlin, 22 ABR 3929 (September 23, 1988)—Tomlin was convicted for murder and sentenced to death. During closing argument, the prosecutor made comments on the defendant's failure to call his wife and father and stated:

"The police have done a great job. We have brought the case in here to you. The reason you're still here is because the judge said we had enough evidence for you to vote on. Now you have to do the duty that you are charged with."

The defendant failed to object to the remarks. Nevertheless the supreme court, in a *per curiam* opinion, reversed based upon the court of criminal appeals' decision in *Adkins v. State*, 38 Ala.App. 659, 93 So.2d 519 (1956). In *Adkins*, the prosecutor stated, *inter alia*, "If the State had not made out a case, the Court would have taken it from the jury . . ." The *Adkins* court held that the statement by the prosecutor was prejudicial.

Second, the court held that the comment by the prosecutor regarding the defendant's failure to call his wife, father and other witnesses was also error.

At common law, one spouse was incompetent to testify either for or against the other. *Holyfield v. State*, 365 So.2d 108 (Ala.Crim.App.), cert. denied, 365 So.2d 112 (Ala. 1978). Section 12-21-227, *Code of Alabama* (1975), has modified

the common law by providing that a spouse may elect to so testify. The spouse becomes competent *only after he or she has elected to testify*. Therefore, it is error for the prosecutor to draw an adverse inference from a defendant's failure to call his or her spouse.

Recent Decisions of the Supreme Court of the United States

Brady and its progeny do not require state to preserve evidence absent bad faith

Arizona v. Youngblood, 57 US LW 4013 (November 29, 1988)—Do police have a constitutional duty to preserve evidence that might exonerate criminal defendants, and must they use state-of-the-art technology in analyzing evidence? The Supreme Court, in a six-to-three decision, said no.

Youngblood was convicted by an Arizona jury of child molestation, sexual assault and kidnapping. The Arizona Court of Appeals reversed his conviction on the ground that the state had failed to preserve semen samples from the victim's body and clothing. The Supreme Court granted certiorari to consider the extent to which the due process clause of the federal Constitution requires the state to preserve evidentiary material that might be useful to a criminal defendant.

The victim, a ten-year-old boy, was molested and sodomized by a middle-aged man. After the assault, the boy was taken to a hospital where a physician used a swab from a "sexual assault kit" to collect semen samples from the boy's rectum. The police also collected the boy's clothing, which they failed to refrigerate. A police criminologist later performed some tests on the rectal swab and the boy's clothing, but he was unable to obtain information about the identity of the boy's assailant. At trial, expert witnesses testified that the defendant might have been completely exonerated by timely performance of tests on properly preserved semen samples.

Writing for the majority, Chief Justice Rehnquist said that the due process clause did not require the state to preserve the semen samples, even though the samples might have been useful to the defendant. The Chief Justice noted

that only if the defendant could show bad faith on the part of the police would failure to preserve potentially useful evidence constitute a denial of due process. The Court observed that the failure of the police to refrigerate the victim's clothing and to perform tests on the semen samples could be described, at worst, as negligence, but not bad faith on the part of the police.

Failure to follow mandate of *Anders* is *per se* sixth amendment violation; *Strickland* standard does not apply

Penson v. Ohio, 57 US LW 4020 (November 29, 1988)—Is an indigent defendant denied his right to counsel when his lawyer refuses to file an appeal on grounds that it is frivolous and a court accepts the attorney's withdrawal without requiring a detailed explanation or appointing another lawyer?

Approximately a quarter of a century ago, in *Douglas v. California*, 372 U.S. 353 (1963), the Supreme Court recognized that the Fourteenth Amendment guarantees a criminal defendant the right to counsel on a first appeal, as of right. Four years later, in *Anders v. California*, 386 U.S. 738 (1967), the Supreme Court held that a criminal appellant may not be denied representation on appeal based on appointed counsel's assertion that he or she is of the opinion that there is no merit to the appeal.

The *Anders* opinion, however, did recognize that in some circumstances counsel may withdraw without denying the indigent appellant fair representation, provided that certain safeguards are observed: first, appointed counsel is required to conduct a "conscientious examination" of the case. If he or she then is of the opinion that the case is wholly frivolous, counsel may request leave to withdraw. Second, the request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. Once the appellate court receives this brief, it then must conduct a "full examination" of all of the proceedings to decide whether the case is wholly frivolous. Only after this separate inquiry, and only after the appellate court finds no non-frivolous issue for appeal, may the court proceed to consider the appeal on the merits without the assistance of counsel.

Justice Stevens, writing for the Court, stated:

"It is apparent that the Ohio Court of Appeals did not follow the *Anders* procedures when it granted appellate counsel's motion to withdraw and that it committed an even more serious error when it failed to appoint new counsel after finding that the record supported several arguably meritorious grounds for reversal of petitioner's conviction and modification of his sentence."

Specifically, Justice Stevens noted that, first, counsel's motion to withdraw was not supported with an *Anders* brief so that the court was left without an adequate basis for determining that counsel had performed his duty of carefully searching the record for arguable error and was deprived of assistance in the court's own review of the record. Second, the court should not have acted on the motion before it made its own examination of the record to determine whether counsel's evaluation of the case was sound. More significantly, the court erred by failing to appoint new counsel to represent the petitioner after determining that "the record supported several arguable claims."

Ordinary traffic stop not custodial for purposes of *Miranda*

Pennsylvania v. Bruder, 109 S.Ct. 205 (October 31, 1988)—Must police inform suspects of their *Miranda* rights before conducting roadside sobriety tests? The Supreme Court, in a seven-to-two decision, said no.

In an unsigned opinion and without oral argument, the Justices held that a police officer in Pennsylvania did not violate the rights of a motorist who was stopped for questioning and was not initially given the *Miranda* warnings.

The Justices relied on *Berkemer v. McCarty*, 468 U.S. 420 (1984) in ruling that the driver's statement to the officer prior to receiving his *Miranda* warnings was admissible. In *Berkemer*, the Supreme Court concluded that the "non-coercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*."

The Court reasoned that although the stop was unquestionably a seizure within the meaning of the Fourth Amendment, such traffic stops typically are brief, unlike the prolonged station house interrogation. Second, the Court emphasized that traffic stops commonly occur in the "public view" in an atmosphere far less police-dominated than that surrounding the kinds of interrogation which were at issue in *Miranda*.

Rape shield ruling denies effective cross-examination

Olden v. Kentucky, _____ LW _____ (December 12, 1988)—Must a Kentucky man's sodomy conviction be overturned because his trial lawyer was prevented from questioning the alleged victim of the sexual assault about her living with another man? The Supreme Court, in an eight-to-one decision, answered yes.

In an unsigned opinion, the Justices said that the question could have been crucial to the defendant, who contended that he and the woman had consensual sex. The defendant sought, on cross-examination, to prove that the woman lied about being raped and sodomized to maintain her relationship with the man with whom she was living. The state court held that the cross-examination was properly barred because of its potential for prejudice. The victim was white and the man she was living with at the time of trial was black.

The Justices concluded, "We find it impossible to conclude beyond a reasonable doubt that the restriction on petitioner's right to confrontation was harmless." ■

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Opinions of the General Counsel

by Robert W. Norris, general counsel

QUESTION:

"I am writing for an advisory opinion, pursuant to Rule 14 of the Rules of Disciplinary Enforcement, concerning the ramifications of engaging in civil disobedience. I have three questions:

1. As a general matter, if a lawyer intentionally commits a trespass on property where abortions are performed in order to demonstrate his or her opposition to laws permitting abortions, and if the lawyer is convicted of a misdemeanor therefor, either for trespass, resisting an officer, unlawful assembly, or another offense, is the lawyer subject to disciplinary action under the Rules of Disciplinary Enforcement?
2. Under the same general facts outlined in question one, what would be the result if the lawyer was convicted of a felony?
3. I propose to participate in a peaceful demonstration against abortion in which I may be arrested and convicted of a misdemeanor. I do not intend to harm anyone, but merely intend to demonstrate my opposition to laws permitting destruction of unborn children. If I am convicted, will I be subject to disciplinary action under the Rules of Disciplinary Enforcement?"

ANSWER, QUESTIONS ONE AND THREE:

As a general rule a lawyer who commits a criminal act is always "subject to" disciplinary action under the Disciplinary Rules of the *Code of Professional Responsibility* of the Alabama State Bar. Whether such disciplinary action is taken depends on a wide variety of factors including, but not limited to, the nature and egregiousness of the conduct, its reflection on fitness to practice law, its impact on the administration of justice and its harm to persons and property of others. We, therefore, cannot speculate on what action would be taken under the circumstances you propose in these questions.

ANSWER, QUESTION TWO:

Rule 14(b) of the Rules of Disciplinary Enforcement provides that an attorney convicted of a felony (other than manslaughter), or of a misdemeanor involving moral turpitude, shall be subjected to disciplinary action and shall be suspended or disbarred by the action of the Disciplinary Commission. Rule 14 is mandatory, however, the length of a suspension is dependent on the circumstances.

DISCUSSION:

The type of action that you propose, and which may result in your arrest and conviction, might well be characterized as civil disobedience. The *Code of Professional Responsibility* does not directly address the issue of civil disobedience but several Disciplinary Rules do speak of an attorney's obligation to obey the law. Specifically, Disciplinary Rule 2-102 states that a lawyer shall not engage in illegal conduct involving moral turpitude or any other conduct that is prejudicial to the administration of justice or adversely reflects on his fitness to practice law.

Ethical Consideration 1-5, in illumination of these Disciplinary Rules, states in pertinent part that a lawyer should be temperate and dignified and should refrain from all illegal and morally reprehensible conduct. EC 1-5 goes on to state that, "Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude."

We distinguish between conduct designed to establish test case litigation and civil disobedience. The conventional wisdom of the courts and the legal profession has been that a lawyer may not advise his client to violate a law or court order, except in the instance of a test case where there is a good faith belief that the statute or order may be invalid. *Attorney Grievance Committee v. Kerpelman*, 420 A.2d 940, 958 (1980), cert. denied 450 U.S. 970 (1981). Similarly, a lawyer may not violate a statute, court order or rule of bar discipline unless he has a good faith belief that the law, order or rule challenged can be argued to be invalid on constitutional or other legal grounds. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), *Maness v. Meyers*, 419 U.S. 449 (1975). He must, however, be prepared to accept the consequences of his actions in the event his challenge does not stand.

Absent such good faith belief a lawyer has no legal right to violate a statute, court order or rule simply because he finds it morally repugnant. Conversely, the citizen-lawyer, as a respected member of society, working daily with and in the law, has the high obligation to support and improve the administration of justice and the legal system. See generally Cowen, *The Lawyer's Rule in Civil Disobedience*, 47 N.C.L. Rev. 587 (1969).

The abortion issue has been considered by the United States Supreme Court and appropriate rulings have been issued by that Court. It is assumed that the "abortion clinic"

that will be the object of your protest is operating within the parameters established by the Supreme Court. Given this assumption it is the view of the General Counsel and the Disciplinary Commission that you have no legal or ethical right to engage in potentially illegal acts of civil disobedience of the type described by you based simply upon your conviction that abortion is immoral or personally offensive to you.

The American Bar Association, in Informal Opinion 934, May 7, 1966, considered the request of an attorney who wished to participate in "peaceful picketing" against the Ku Klux Klan where no violations of statutes or ordinances were involved. Conceding that it would not be unethical for the attorney to march in a legal picket line, the opinion nonetheless stated that ". . . this Committee does not feel that the attorney serves the best interest of the profession in so doing." The Committee then opined that:

"While . . . an attorney does not surrender his rights as a citizen by becoming a member of the legal profession and has a right to engage in peaceful picketing so long as no violation of law is involved, we feel that such action on his part invites criticism of his professional judgment and conduct. As we pointed out in our Formal Opinion 275, lawyers are officers of the court and an essential and important part of the judicial processes—being vested with special privileges and subject to grave responsibilities and duties in connection with the administration of justice. They must zealously guard these responsibilities and evermore be mindful of their conduct." (emphasis added)

We adopt this view.
[RO-88-93]

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Legislative Wrap-up

by Robert L. McCurley, Jr.

The following Law Institute bills have been introduced in the Legislature and are pending in both houses:

1. Condominium revision—This bill is a major revision of the 1973 statute on condominiums. It is a balanced re-adjustment of the authority of the developer, the condominium association and the condominium unit owners. The following is a summary of the major changes:

Developer—The developer ("declarant" in the act) is given certain "development" rights which provide greater flexibility in development, especially in the "staged" development of low-rise condominiums. It also protects the developer from some types of interference by the association during the construction and marketing phases.

Association—The bill regulates the transfer of control over the association from the developer to the public unit buyers. Associations are required to be incorporated. The bill strengthens the authority of the associations regarding the enforcement of fines and assessments owed by unit owners, which can be foreclosed in the manner of a mortgage and giving such obligations a limited protection from being cut off by a foreclosure of a first mortgage on the unit.

Unit buyers—The initial public unit buyers are protected by requiring the developer to disclose many matters which might affect the success of the development and the buyer's obligations. The developer must deliver to the initial buyers an offering statement containing the condominium documentation, current rules, covenants and financial information. There is a seven-day "cooling off" period after the delivery of the statement before a contract of purchase is enforceable. A penalty is provided for a conveyance without a delivery of the offering statement. Subsequent buyers also are protected by requiring, if a later buyer requests it, a disclosure of some of the same material by the seller and the association.

Buyers are protected by permitting the association to cancel unfavorable long-term management contracts and recreation leases imposed by the developer on the association while the developer controls it. Unit buyers are protected from each other by requiring the condominium declaration to state limitations on use, occupancy, sales and leasing and set voting limitations on amendments of the declaration.

The bill clarifies numerous technical matters relative to realty recordation, legal descriptions, insurance, termination, apartment conversions and escrow of deposits, among others.

This draft is the result of a study begun by the Institute in May 1982. Chairing the committee have been Albert Tully and E.B. Peebles, both of Mobile, with Professor Gerald Gibbons as the reporter. The bill as pending is sponsored by Senator Ryan deGraffenried, S.B. 66 and Representative Jim Campbell, H.B. 93.

2. Adoption—The Alabama Law Institute began their review of the adoption laws at the request of various legislators. The committee used the American Bar Association's Model State Adoption Act as the basis from which the committee worked to draft the Alabama Adoption Act. This code expands and strengthens the current law in Alabama relating to adoption. There are several significant improvements in the law. The first is to increase the criminal sanctions against individuals who attempt to profit from buying and selling children.

The second improvement is to expand the consent or relinquishment for adoption provisions. It is felt that the current statutes do not fulfill constitutional requirements and consequently may result in potential problems with children who are adopted without proper parental consent or relinquishment.



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.

Third, confidentiality has been modified to increase the amount of non-identifying information available to the adult adoptee while safeguarding the identity of the natural parents who do not wish to be identified.

The final significant change is to clarify the inheritance law regarding adopted children. This bill will repeal the current statutes relating to the adoption of children and will repeal the provision allowing for adult adoptions for inheritance purposes. Bill Clark of Birmingham chaired the committee, and Professor Camille Cook was the reporter. This bill is sponsored by Senator Charles Langford as S.B. 34 and Representative Beth Marietta as H.B. 103.

3. Memorandum of lease—Alabama's present law requires the recordation of a lease if it is to be enforced for over 20 years. This bill allows for the recording of a memorandum of lease which will have the same effect as filing the lease itself as required in Ala. Code §35-4-6. This bill is sponsored in the House by Representative Bill Fuller and is H.B. 126 and in the Senate by Senator Jim Smith as S.B. 79.

4. Registration of federal tax liens—This bill provides for the registration of federal tax liens and designates a place of filing for notices of tax liens of the United States and applies only to the federal tax liens. The bill provides that federal liens upon real property and certificates and notices affecting the liens to be filed in the office of judge of probate in the county in which the real property is located. Federal liens upon personal property if the lien applies to a corporation or partnership or a trust will be filed in the secretary of state's office. If the interest is against the estate of the decedent or in other cases, then the filing will be in the judge of probate's office in the county where the estate is filed or the person resides. This bill is sponsored by Senator Earl Hilliard as S.B. 202 and Representative Jim Campbell as H.B. 91.

5. Statutes of non-claims—The United States Supreme Court has questioned various laws regarding notice to creditors. In a recent case in the U.S. District Court for the Middle Division of Alabama, Alabama's statute of non-claims was de-

clared unconstitutional. A bill addressing this issue has been introduced by Senator Rick Manley as S.B. 87 and Representative Bill Slaughter as H.B. 298. The chairman of this committee was E.T. Brown, and Professor Tom Jones was the reporter.

6. Fraudulent transfers act—In the mid-1800s, the Alabama Legislature enacted Ala. Code §8-9-6 which tracked the Statute of Elizabeth, passed by Parliament in 1570. Since then, courts have broadened the scope of the statute. There are two kinds of fraud: actual and constructive.

"Actual fraud" is the mental intention to defeat the rights of another. "Constructive fraud" is legal fraud, regardless of intent of the debtor. This act follows the 1985 version of the Uniform Fraudulent Transfers Act adopted by 17 states. It also will make Alabama compatible with the bankruptcy code.

This bill defines "actual" fraud generally the same as the current Alabama law

by requiring actual intent to defraud, however, it also identifies a list of factors the court may consider in determining intent. The bill further addresses "constructive" fraud, which must include inadequate consideration and enumerates factors for consideration.

The chairperson for this committee is Richard Ogle, and the reporter is Dean Nat Hansford. The bill is sponsored by Senator Frank Ellis as S.B. 61 and by Representative Mike Box as H.B. 115. ■

AUTHORS!

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Bar Briefs

Taylor selected presiding judge

Judge Sam Taylor is the new presiding judge of the Alabama Court of Criminal Appeals. Selected by vote of the judges of the court, he will serve for two years. Other judges of the court are John C. Tyson, III, John Patterson and H. Ward McMillan.

Born in Mobile, Taylor served in Montgomery as a county judge, district judge and circuit judge before moving to the court of criminal appeals in 1983.



Taylor

He earned degrees in business and law at the University of Alabama, and a master of laws degree from New York University. He practiced in Birmingham two years and served as an Army legal officer for three years. He then returned to Alabama, practicing law 11 years in Montgomery until appointment to the

judiciary in 1975. He was a state representative from Montgomery County from 1970 to 1974.

Taylor is married to the former Emily Allen Thrasher of Montgomery, and they have a son in medical school, a son at the University of Alabama at Birmingham and a daughter at the University of Alabama.

Alabama statutes and insurance statutes databases on WESTLAW for first time

WESTLAW, the computer-assisted legal research service from West Publishing Company, now contains both annotated and unannotated versions of Alabama statutes. A separate database, containing insurance statutes from Title 27 of the *Code of Alabama*, also has been added to WESTLAW.

Statutes

Alabama annotated statutes, as set forth in the *Code of Alabama*, contain the text of a section, as well as statutory credits, historical notes, annotations and various types of references. These statutes are available in the AL-ST-ANN database on WESTLAW. The unannotated statutes are contained in the AL-ST database. Statutory credits have been added to the full *Code* and appear in each document along with text of the section. Both annotated and unannotated statutes are current through laws passed at the 1987 Regular Session of the Legislature.

Insurance statutes

The new ALIN-ST database contains documents that relate to insurance issues, including controversies involving life, property and casualty insurance, an-

nuities and the regulation of the insurance industry. Documents in the database were selected for relevance to insurance topics and are annotated sections of Alabama's statutes. Statutes are current through laws passed at the 1987 Regular Session of the Alabama Legislature. Coverage includes Title 27 of the *Code of Alabama*.

For additional information call 1-800-WESTLAW (1-800-937-8529).

ABA opens LawTech Center

The American Bar Association opened the ABA LawTech Center in its Chicago offices December 1. The LawTech Center is an assisted learning facility, where lawyers and their staffs can gain hands-on experience with law office technology systems and products, such as time accounting and billing, word processing, litigation support, docket and real property systems, scanners and CD-ROM, as well as the ABA's own LAWlink and ABA/net systems.

The LawTech Center is physically similar to a language laboratory. Users work at individual carrels equipped with a computer or terminal and the system they wish to try. Complete instructional materials are available for each system, and technical support is available as needed from experts on duty at the LawTech Center and from participating vendors via telephone.

Appointments are requested to ensure that every visitor receives personal attention while at the center. Appointments can be made by calling the LawTech Center at (312)988-LINK. Use of the LawTech Center is free to ABA members; non-members will be charged a modest fee.

Remarks of Chief Justice Sonny Hornsby

Supreme Court of Alabama
Investiture Ceremony
Montgomery Civic Center
January 16, 1989

Governor Hunt, Lt. Governor Folsom, Speaker Clark, Mr. Chief Justice Torbert, members of the judiciary and bar, distinguished ladies and gentlemen: I thank you for being here today.

Tradition

Alabama has a long and proud tradition of judges, associate justices and chief justices who were and are outstanding jurists, fair and impartial in their decisions and totally dedicated to the rule of law and the betterment of our state. It is an honor for me to join the ranks of such outstanding men and women.

Fortunate

As I look around the room today, I am reminded of how very fortunate I am. The Lord has blessed me abundantly. I am fortunate to have a family and friends without whose dedicated and steadfast support I would not be here today.

I am fortunate in that the people of Alabama have afforded me the opportunity to serve as your chief justice—and in doing so, have allowed me to realize one of my life-long ambitions—that of completing my professional career in public service.

The supreme court

The eight associate justices on the Supreme Court of Alabama are recognized as being strong individuals. They are thoroughly honest, fair and impartial. I look forward to collegiality on the court. I respect and hold in the highest esteem and regard the associate justices of Alabama's highest court: Hugh Maddox, Red Jones, Reneau Almon, Janie Shores, Oscar Adams, Gorman Houston, Henry Steagall and Mark Kennedy. I am also very excited about working with my friends on the court of criminal appeals and the court of civil appeals. I congratulate Mark Kennedy and Bill Robertson on this special day.

Former chief justices

Former Chief Justice Howell Heflin is the father of the modern court system in Alabama. He persuaded the Legislature to propose and the people of Alabama to adopt a new Constitution for the judicial branch. Chief Justice Torbert has implemented provisions of that Constitutional change over the past 12 years. I salute former Chief Justices Heflin and Torbert for the outstanding work that they have done.

Improved juvenile justice system

I believe that we must improve the juvenile justice system. I further believe that the recommendations developed by the Prison Review Task Force on early intervention/prevention programs provide the best current thinking on this subject. Based upon the successful work of the Prison Review Task Force, the Alabama Judicial Study Commission has directed that a similar comprehensive study be made of the juvenile justice system. Within 30 days, I will appoint a Commission on Juvenile Justice to conduct this research and study. I will be asking the commission to submit its report to the Alabama Judicial Study Commission when it meets in November 1989. I anticipate our first juvenile justice improvement legislation will be ready for submission at the 1990 session of the Alabama Legislature. I am firmly convinced that a first-class juvenile justice system can save wrecked lives, turn would-be young criminals into worthwhile working citizens, reduce congestion in our juvenile and adult criminal courts and relieve over-crowding in our prison system. I believe we can save the taxpayers millions of dollars by the use of effective early intervention/prevention programs and alternative sentencing programs.

Case flow management

Court delay can be prevented; where it exists, it can be reduced. I am proud to report to you that, for the most part, Alabama does not suffer from excessive litigation delay. However, it is something that must be monitored continuously to assure that all cases are processed promptly for the benefit of the citizens

who are the true consumers of court services. There is a growing awareness by the bench, bar and public that litigation frequently takes too long and costs too much. Justice delayed truly is justice denied. People have a right to a timely resolution of their disputes by judges committed to the proposition that prompt disposition is a fundamental attribute of justice. However, we must temper our desire for speed with a recognition that justice is our polestar; in the words of Justice Felix Frankfurter, "Mere speed is not a test of justice. Deliberate speed is. Deliberate speed takes time. But it is time well spent." Therefore, while I am proud of the job we are doing now, I will actively seek ways to do it even better. We cannot stand still.

Cooperation

I believe the three independent branches of government must communicate, accommodate and cooperate to fulfill their Constitutional duties to each other and to the people. Our Constitution is rooted in the will of the people. Employing the doctrine of judicial review, the courts historically have been the interpreters of the Constitution and the protectors of the sovereign will of the people. Courts, in each individual case, must strive to interpret wisely and fairly.

New judicial building

A new judicial building was the goal of the late Chief Justice J. Ed Livingston, former Chief Justice Howell Heflin and Chief Justice C.C. Torbert. Because of Chief Justice Torbert's tireless efforts, it now appears that a new judicial building is going to be a reality during my term of office. It will take about a year to get the design and plans for the building completed and approximately two to three more years to construct the building. Because we are utilizing the best consultants in the country, this judicial building should be one of the most advanced state-of-the-art appellate court buildings in the country, and should serve the state well for the next 50 to 100 years. It will house, under one roof, all three appellate courts, all operations of the Administrative Office of Courts and

the state law library. The court system is presently renting commercial space all over Montgomery. With its increased effectiveness and efficiency, the new judicial building should be very cost-effective.

The law

I believe in the rule of law. The law is the servant of the people. But for the rule of law, there would be no individual rights, freedoms or protections—justice would be defined by economic station, political influence, military might and birthright. It is the rule of law that protects us all. The law makes us all equal . . . rich and poor, young and old, black and white . . . we are all equal in the eyes of the law. The law must reflect a balanced respect for the competing interests in our society. The law has an equal respect for all parties to a dispute. The rule of law is a servant of all the people and its object is the equal and exact justice for all parties.

I promise to continue to school myself in the scholarship of the law, and I promise to exercise the discipline that is required to be the best and fairest chief justice I can possibly be.

Conclusion

Over the last two decades, we have made great strides in improving judicial services in Alabama. Much, however, remains to be done. With your support, with your prayers and with the help of God, we can meet the challenges of the future and insure that the people of our great state continue to receive quality judicial services in a timely manner.

Hornsby becomes Alabama's 26th chief justice; Kennedy assumes supreme court seat; Robertson joins court of civil appeals

Tallasse lawyer E.C. Hornsby became Alabama's 26th chief justice, Circuit Judge Mark Kennedy joins the state supreme court as an associate justice and District Judge Bill Robertson moved to the court of civil appeals in January investiture ceremonies in Montgomery.

Hornsby, a native of Tallassee, has practiced law for 28 years. He has served as president of the state bar, the Elmore County Bar and the Alabama Trial Law-



Torbert congratulates Chief Justice Hornsby at recent investiture.



Kennedy



Robertson

yers Association. He has served as a state senator, assistant commissioner of insurance and as city judge and city attorney for Tallassee.

Hornsby succeeds C.C. Torbert, Jr., as chief justice. Torbert served as chief justice for 12 years and did not seek reelection in 1988.

Kennedy has served as a district judge and a circuit judge in Montgomery. He

succeeds Associate Justice Sam Beatty, who retired.

Robertson, a district judge in Talladega County for six years, replaced retiring Judge Robert Bradley on the court of civil appeals.

Taylor, Holmes are new presiding judges of two appeals courts

The state's two appeals courts have new presiding judges.

Judge Sam Taylor has become the presiding judge of the court of criminal appeals. He served as a district and circuit judge in Montgomery before joining the appellate court in 1983.

Judge Richard Holmes is the new presiding judge of the court of civil appeals. He is the senior member of that court, serving since 1972.

Justices Maddox, Adams, Steagall, Judge Bowen begin new appellate terms

Associate Justices of the Supreme Court Hugh Maddox, Oscar Adams, Jr., and Henry Steagall, along with Judge William Bowen, Jr., of the court of criminal appeals, have begun new six-year terms in office.

Forty-nine new trial judges, circuit clerks assumed office in recent months

Circuit Judges

- 10th Judicial Circuit (Jefferson)
 - Place 7 Mike McCormick
 - Place 11 Bill Wynn
 - Place 18 Sandra Ross
- 11th Judicial Circuit (Lauderdale)
 - Place 2 Don Patterson
- 15th Judicial Circuit (Montgomery)
 - Place 6 Mark Montiel
- 18th Judicial Circuit (Clay, Coosa, Shelby)
 - Place 3 Al Crowson
- 19th Judicial Circuit (Autauga, Elmore, Chilton)
 - Place 2 Steve Drinkard
- 20th Judicial Circuit (Henry, Houston)
 - Place 3 Denny L. Holloway
- 22nd Judicial Circuit (Covington)
 - Place 1 Jerry E. Stokes
- 23rd Judicial Circuit (Madison)
 - Place 1 Joe Battle
- 27th Judicial Circuit (Marshall)
 - Place 1 William C. Gullahorn, Jr.

28th Judicial Circuit (Baldwin)
Place 2 James H. Reid
30th Judicial Circuit (Blount, St. Clair)
Place 1 Robert E. Austin
35th Judicial Circuit (Conecuh, Monroe)
Samuel H. Welch
36th Judicial Circuit (Lawrence)
Philip Reich

District Judges

Baldwin
Place 1 Lyn Stewart
Place 2 Pamela Baschab
Bessemer
Earl Carter
Barbour
Tommy Gaither
Blount
John Dobson
Butler
Cleve Poole
Calhoun
Place 2 Gus Colvin
DeKalb
Lee C. Traylor
Fayette
Terry L. Clary

Franklin
Ben Richey
Houston
(to be appointed)
Jefferson
Place 3 Elise Barclay
Place 6 Robert G. Cahill
Lamar
Ed Gosa
Monroe
John Causey
Randolph
Pat Whaley
Talladega
Place 1 George N. Sims
Place 2 (to be appointed)
Walker
(to be appointed)

Circuit Clerks

Baldwin
Jackie Calhoun
Blount
Mike Criswell
Cherokee
Carolyn Smith
Chilton
Mike Smith

Clarke
Wayne Brunson
Covington
Roger Powell
Greene
Johnnie Knott
Hale
Betty Gayle Pate
Limestone
Charles Page
Marion
James Odis Garrard
Mobile
Susan Wilson
Perry
Mary Moore
Pike
Brenda Peacock
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by Keith B. Norman
Director of Programs,
Alabama State Bar

The Mandatory MCLE Commission held its October 7, 1988, meeting at the state bar headquarters in Montgomery. At this meeting the Commission:

1. Granted a partial waiver of the 1988 CLE requirements for an attorney leaving the practice of law to enter the seminary;
2. Waived, on a one-time basis, the evaluation requirement for an approved sponsor who failed to distribute evaluation questionnaires to program participants;
3. Approved a mixed-audience seminar on hospital law for 10.3 CLE credits offered by an approved sponsor;
4. Approved three topics of a mixed-audience seminar on nursing home law offered by an approved sponsor for a total of 2.5 CLE credits;
5. Approved for 15.8 CLE credits a comparative law seminar on admiralty conducted in London;

6. Declined to approve for credit a seminar sponsored by the 15th judicial circuit offered to law clerks and employees of the circuit clerk's office because the program was designed primarily for nonlawyers and did not meet the requirements of Regulation 4.1.2;

7. Declined to approve for credit a program sponsored by the U.S. Department of Justice concerning attorney management because it did not meet the requirements of Regulation 4.1.2;

8. Approved for 6.5 CLE credits a seminar on estate planning and taxation with a specific admonition to the sponsor not to advertise a program as having been approved for CLE credit in Alabama without first obtaining the Commission's approval of the program;

9. Declined to approve for credit a program dealing with modern economics for the legal profession because it failed to meet the requirements of Regulation 4.1.3;

10. Declined to approve for credit a seminar until the sponsor submitted a complete set of materials for the Commission's review;

11. Approved for partial credit three segments of a corporation's in-house seminar which the commission determined to be in compliance with Regulation 4.1.6;

12. Approved for six CLE credits an accounting course designed exclusively for lawyers;

13. Declined to approve sponsor status to the Etowah County Law Library because it offers only two CLE programs a year.

On December 2, 1988, the MCLE Commission held its meeting at the Wynfrey Hotel in Birmingham. At this meeting the Commission:

1. Approved two attorneys' request for a partial waiver of 1988 CLE requirements due to health reasons;

2. Declined to approve the state commissioner of revenue's request for an exemption from CLE requirements during the remaining portion of his official term, but waived the 1988 CLE requirements conditioned upon his purchase of a special membership;

3. On appeal by the sponsor, reversed the director's original decision denying accreditation for a program where the sponsor failed to distribute materials at the time of the activity, conditioned on the sponsor's providing the director with a copy of the published compilation of program speeches furnished to participants subsequent to the program;

4. On appeal by the sponsor, reconsidered its previous decision granting only partial credit and approved for full credit a corporation's in-house seminar, conditioned on the sponsor's future seminar materials fully complying with Regulation 4.1.6.

5. On appeal by the sponsors, reconsidered its previous decision declining to grant three different sponsors approved sponsor status for 1989 and instructed the director to inform each sponsor that the Commission must be notified of all programs in advance, as well as the name and address of each organization's contact person.

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CORRECTION:

The cover of the January 1989 issue of *The Alabama Lawyer* should have read "Jury Argument—Are There Any Boundaries on Fair Comment?"

1989 Approved Continuing Legal Education Sponsors

Accredited law schools (ABA, AALS)
Administrative Office of Courts—
Alabama Judicial College
Alabama Bar Institute for Continuing
Legal Education
Alabama Consortium of Legal Services
Programs
Alabama Criminal Defense Lawyers
Association
Alabama Defense Lawyers Association
Alabama District Attorneys
Association
Alabama Lawyers Association
Alabama State Bar and bar sections
Alabama Trial Lawyers Association
American Bar Association and bar
sections
American College of Trial Lawyers
American Law Institute-American Bar
Association, Committee on Conti-
nuing Professional Education
Association of Trial Lawyers of
America
Atlanta Bar Association
Bar associations of the sister states,
the District of Columbia, Puerto
Rico and the trust territories
Birmingham Bar Association
Commercial Law League Fund for
Public Education
Continuing Legal Education Satellite
Network
Cumberland Institute for Continuing
Legal Education
Defense Research Institute
Federal Bar Association, Montgomery
Chapter
Federal Bar Association, North
Alabama Chapter
Federal Energy Bar Association

Huntsville-Madison County Bar
Association
Institutes on Bankruptcy Law
International Association of Defense
Counsel
Legal sections, agency programs—U.S.
and state governments
Library of Congress—Congressional
Research Service
Mobile Bar Association
Montgomery County Bar Association
Montgomery County Trial Lawyers
Association
Morgan County Bar Young Lawyers
Section
Nashville Bar Association
National Association of Attorneys
General
National Association of Bond Lawyers
National Association of Railroad Trial
Counsel
National Bar Association
National College of District Attorneys
National College of Juvenile Justice
National Health Lawyers Association
National Institute of Municipal Law
Officers
National Institute for Trial Advocacy
National Judicial College
National Legal Aid and Defenders
Association
National Organization of Social
Security Claimants' Representatives
National Rural Electric Cooperative
Association, Legal Division
Patent Resources Group, Inc.
Practising Law Institute
Southwestern Legal Foundation
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Tuscaloosa Trial Lawyers Association

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Memorials



Loma Briley Beaty—Fort Payne
Admitted: 1953
Died: September 25, 1988

Jay B. Blackburn—Bay Minette
Admitted: 1928
Died: February 5, 1989

Nace R. Cohen—Montgomery
Admitted: 1973
Died: December 23, 1988

Albert Sidney Gaston—Mobile
Admitted: 1936
Died: December 10, 1988

Edwin Lee Goodhue—Gadsden
Admitted: 1914
Died: August 21, 1988

Robert McClellan Hill—Florence
Admitted: 1929
Died: January 6, 1989

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



ALBERT S. GASTON

Mobile attorney Albert S. Gaston died December 10, 1988, at the age of 74.

Gaston was born October 29, 1914, in Mobile, where he attended public schools. After graduating from Murphy High School in 1931, he read law with the firm of Dozier & Gray for three years. He then attended Cumberland Law School in Lebanon, Tennessee, where he earned his law degree in one year and then was admitted to the Alabama State Bar in 1936.

He practiced law with the federal government in Washington, D.C., for seven years as principal construction attorney for the Federal Public Housing Authority. While in Washington, Gaston also earned an L.L.M. degree from Catholic University of America. He returned to Mobile in 1946 to enter private practice.

A general practitioner who believed that a call to the bar was a call to service, he handled all types of cases, civil and criminal, jury and non-jury, in all state and federal courts. For the past 25 years, he specialized in the field of bankruptcy and debtor relief where he was recognized by his peers as an expert who was always helpful to younger lawyers, as well as to his many clients.

He is survived by Sarah Frances Shafer Gaston of Mobile, to whom he was married in 1940. He is also survived by his sister, Mary Gaston Craighead; two sons, Albert S. Gaston, Jr., a veterinarian, and Ian F. Gaston, a lawyer with whom he practiced for 21 years; and four grandchildren, all of Mobile.

Gaston was a member of Toastmasters International in which he held numerous offices and was winner of many competitions, being most renowned for his abilities as an extemporaneous speaker. In addition, he was a long-time active member of Christ Episcopal Church where he served as a lay reader. He will be missed, but fondly remembered, by his family, friends and brother lawyers.

—Ian F. Gaston,
Mobile, Alabama



WYMAN O. GILMORE

Whereas, Wyman O. Gilmore was born in Silas, Alabama, September 4, 1926, and died in Grove Hill, Alabama, October 3, 1988; and,

Whereas, members of the Camden Bar, officers of the Circuit Court of Wilcox County, and his friends and colleagues desire to remember his name and recog-

nize his contributions to the legal profession and to the courts in which he practiced law, and to those people he represented and helped during his 38 years of law practice;

Now, therefore, be it known, that Wyman O. Gilmore graduated from Southern Choctaw High School in 1944; that he served in the United States Army in Europe during World War II; and that after his service in the army, he graduated from the University of Alabama School of Law February 3, 1951, and was admitted to practice law February 16, 1951.

The day after law school graduation, he went to work in the Joe Thompson law firm in Butler, Choctaw County, Alabama; he left this firm in 1953 to run for circuit solicitor (now district attorney) of the First Judicial Circuit of Alabama, which was composed of Choctaw, Clarke and Washington counties. He served in this position for ten years; during this service, he attended short courses at the University of Chicago and New York University to help him develop his potential in prosecuting cases. In January 1965, he resigned the position of circuit solicitor to join the firm of Watrous Garrett in Grove Hill, Clarke County, Alabama; in November 1967 he left this firm to establish his own law office in Grove Hill, Alabama.

Wyman grew up during the depression of the early '30s; a few years ago, he was quoted in the *Mobile Press Register* as saying, "We had plenty to eat and little to wear, and we worked most of the time." He grew up on the farm, and when he was 13 years old he went from the farm into outside work, and worked in the shipyards when he was 15 and 16 years old. This work attitude carried over into his law practice, where it was known that he would work from about 6 a.m. until nightfall or after preparing for his cases.

Born to Wyman and his wife, Vivian, were three children, Wylynn, Wyman, Jr., and Frederick Parsons. Wylynn Gilmore-Phillippi joined his firm in the fall of 1979, and his son, Wyman O. Gilmore, Jr., (Gil), joined his firm in the fall of 1983. His two children's joining his firm was one of the highlights of his life, and

other highlights were his being elected to the American Board of Trial Advocates in 1985, and in 1986 the recognition given by his peers as one of the best lawyers in the nation in criminal defense.

Wyman said many times, "I have never known anything but work," and it showed in his handling of his cases. Although Wyman was a hard worker, his recreation was developing prime hunting and fishing areas, and he devoted some of his weekends to hunting and fishing, and his family, friends and his cattle farm.

Wyman said, "Each case is a challenge," and "each person deserves the best you've got." Wyman gave each case all he had. He took cases for the weak, for the strong, for the small and large. They each got "the best he had." He will be remembered for many, many years. When people got into trouble, many of them would head for Wyman Gilmore. His reputation will never quit.

—L.Y. Sadler, Jr.
Camden, Alabama



EDWIN LEE GOODHUE

The Board of Directors of The University of Alabama Law School Foundation recently adopted by resolution the following tribute to the memory of Edwin Lee Goodhue, former Gadsden attorney, admitted to the Alabama State Bar in 1914 as a graduate of The University

of Alabama School of Law, and at the time of his death August 21, 1988, the law school's oldest living alumnus:

Edwin Lee Goodhue was born in Gadsden, Alabama, December 17, 1892, the son of Amos E. and Carrie Lee (Ross) Goodhue, and a descendant of Sir William Harris, who was knighted at Whitehall, July 23, 1603. He was educated in the public schools of Gadsden and attended The University of Alabama, receiving a bachelor of arts degree in 1912 and an LL.B. degree in 1914. While at the University, he was business manager of the 1912 Corolla, assistant business manager of the 1911 Crimson White, secretary of the Y.M.C.A. cabinet, on the honor roll his senior year, participated in class and varsity basketball, and was a member of Key-Ice, Alpha Sigma Delta and the Phi Delta Theta social fraternity.

He was admitted to the Alabama State Bar in 1914 and began practicing in Gadsden with his father, his uncle, Augustus R. Brindley (class of 1902), and Hugh W. White, later a member of the State Public Service Commission, in the firm of Goodhue, Brindley & White. This firm was founded by his father in 1886 when he commenced practice in Gadsden, and had included J.E. Blackwood, who became circuit judge in 1914. The name of the firm subsequently became Goodhue & Goodhue until the death of A.E. Goodhue in 1923, when Edwin L. Goodhue was joined by John A. Lusk, Jr. (class of 1913), as partners in the firm of Goodhue & Lusk. They practiced together until 1943 when Goodhue, who had served during World War II as a lieutenant in the Chemical Warfare Service, entered World War II as a \$1-per-year civilian at Tyndall Air Force Base, Panama City, Florida.

He was married in 1943 to the former Julia Tarpley of Gadsden, who had served as a legal secretary to A.E. Goodhue. After the war, he remained in Panama City, engaging in varied business interests including ice and ice cream plants in Mississippi and Alabama. In 1951, they moved to Daytona Beach, Florida, where he lived in semi-retirement, limiting his business activities to his personal in-

vestments. He died there August 21, 1988, at the age of 95. The Goodhues maintained their ties and interests in Gadsden and have been noted for their generosity, particularly to the First Baptist Church, which has its Family Life Center named in honor of Mr. Goodhue.

In his more than 28 years of active practice of law in Gadsden, Goodhue expanded the practice begun by his father with clients which included The First National Bank of Gadsden; A.G.S. Railroad; Nashville, Chattanooga & St. Louis Railroad; and Hartford, Aetna and other insurance companies.

Julius S. Swann, Sr. (class of 1931), a colleague at the Gadsden Bar and later a member of his firm, remembers him as an intelligent, delightful and honorable gentleman as well as a forceful and able attorney whose astute business judgment always served the best interest of his clients in a highly professional manner. Swann said that his wide contacts contributed in a substantial manner to the business and industrial development of Gadsden during the years of its most rapid growth.

The law firm which Goodhue served so ably later became Lusk, Swann & Burns, then Lusk, Swann, Burns & Stivender, and in 1977, merged with the firm of Inzer, Suttle & Inzer to form the present firm of Inzer, Suttle, Swann & Stivender. This combined firm, tracing its lineage to Amos Goodhue's first practice in 1886, celebrated its 100th anniversary in 1986.

ROBERT MCCLELLAN HILL

More than 30 years of what many of his friends and associates call an "era that can never be repeated" ended Friday, January 6, 1989, when retired Lauderdale County Circuit Judge Robert McClellan Hill, 84, died.

He began his legal career in Florence in 1929. He was judge of the Lauderdale County Law and Equity Court for five years prior to his appointment to the State Pardon and Parole Board, at the time of the creation of a new system in Alabama, including the inauguration of adult probation.

He served two and one-half years in the Army in the Allied Military Government in Italy during World War II and was awarded the Bronze Star for outstanding military service. In 1982 the University of Alabama Press published his military memoirs, under the title "In the Wake of War."

Judge Hill was elected circuit judge in 1946, at a time when the judicial circuit covered Lauderdale, Colbert and Franklin counties. During his career as a circuit judge, he served on the National Advisory Council of Judges and was an elected member of the American Academy of Judicial Education. He became semi-retired in January 1977, continuing his service to the judicial system by assignment of cases and writing decisions for the court of criminal appeals.

He served as president of the Alabama Association of Circuit Judges and was awarded the Certificate of Distinguished Public Service by the University of Alabama School of Law.

He was a faithful member of the First United Methodist Church of Florence, singing in the choir for many years and serving on the board of stewards.

Judge Hill exemplified the attributes of a judge, to hear courteously, to consider soberly, to answer wisely and to decide impartially. His life leaves a rich heritage and legacy for the legal profession.

He is survived by his wife, Elizabeth Craig Hill; his sons, Robert McClellan Hill, Jr., and William Fitzgerald Hill; and three grandchildren and one great-grandchild.

—Robert McClellan Hill, Jr.
Florence, Alabama



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Disciplinary Report



Disbarment

● Huntsville lawyer **Warren E. Mason, Jr.**, has been ordered disbarred by the supreme court, effective January 20, 1989. The disbarment order was based upon findings by the Disciplinary Board that Mason had violated various provisions of the *Code of Professional Responsibility*, by neglecting a legal matter entrusted to him, by misappropriating client funds and by failing to deliver to a client all of the papers in his possession to which the client was entitled. [ASB Nos. 87-210 and 87-756]

Suspensions

● Birmingham lawyer **Samuel H. Sanders, III, a/k/a Shmuel Sanders**, was suspended from the practice of law for a period of three years, effective February 20, 1989, by order of the Supreme Court of Alabama. By failing to file any answer to formal disciplinary charges that were pending against him, Sanders admitted that he willfully neglected legal matters entrusted to him, that he failed to seek the lawful objectives of his clients, that he failed to carry out contracts of employment entered into with clients for professional services, that he prejudiced or damaged his clients during the course of the professional relationship, and that he engaged in illegal conduct involving moral turpitude, dishonesty, fraud, deceit, misrepresentation or willful misconduct. [ASB Nos. 87-161 and 87-352]

● On January 5, 1989, Birmingham attorney **Mark Andrew Duncan** was suspended from the practice of law by an order of the Supreme Court of the State of Alabama, effective December 15, 1988, for failure to comply with the Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 88-14]

Public Censure

● On December 2, 1988, Auburn lawyer **Jack F. Saint** was censured for conduct that adversely reflects on his fitness to practice law, in violation of the *Code of Professional Responsibility*. Saint completely ignored repeated requests from the bar that he respond to a former client's complaint that he failed to deliver to the client certain legal documents in his possession that belonged to the client and that the client had requested. [ASB No. 88-398]

Private Reprimands

● On October 7, 1988, a lawyer was privately reprimanded for conduct adversely reflecting on his fitness to practice law. The lawyer prepared a second mortgage and promissory note which was then executed by a client in favor of a friend of the client's who was lending the client a sum of money with which to stop foreclosure proceedings against the client's home. The lawyer agreed to hold the second mortgage and

promissory note in escrow, pending repayment of the loan by the client to the lender, but subsequently delivered the documents to the client, prior to the client's having paid the loan which they secured. [ASB No. 87-774]

● On October 7, 1988, a lawyer was privately reprimanded for having engaged in conduct involving misrepresentation and conduct adversely reflecting on his fitness to practice law. The lawyer filed, on behalf of a client, a petition for wage withholding, alleging that the client's former spouse was two months delinquent in making child support payments, though the circuit court files for the case showed the former spouse to be current in child support payments. [ASB No. 88-39]

● On December 2, 1988, a lawyer was privately reprimanded for having willfully neglected a legal matter entrusted to him, in violation of DR 6-101(A). The lawyer agreed to assist a client in recovering her driver's license, which had been lost as a result of a motor vehicle accident. He did nothing to assist her for a period of over five years, and each time she inquired about the matter, he indicated that he was working on it and would advise her within two or three days as to the status of the matter. He never did so, and he was uncooperative with the bar's investigation of the matter. [ASB No. 87-355]

● On December 2, 1988, a lawyer was privately reprimanded for conduct adversely reflecting on his fitness to practice law, for willfully neglecting a legal matter entrusted to him and for intentional failure to seek the lawful objectives of a client through reasonably available means. The lawyer entered into a contingency fee contract with a client to pursue a claim against a certain business firm, but did not negotiate any settlement of the matter, file any suit on behalf of the client or inform the client that he was withdrawing. The lawyer implied to the client that he had filed suit by stating that the matter would come up on the docket eventually and that he would inform the client when it did. The lawyer allowed the statutory period of limitation to expire on the client's claim. [ASB No. 87-512]

● On January 27, 1989, a lawyer was privately reprimanded for having violated DR 1-102(A)(4), DR 9-102(A)(2), DR 9-102(B)(3), DR 9-102(B)(4) and DR 1-102(A)(6). In the course of representing a client in a personal injury action, the lawyer received funds in settlement of the client's claim and commingled said funds of the client with funds of the lawyer. The lawyer subsequently misappropriated funds belonging to the client to the lawyer's own use, and, further, failed to maintain complete records of the funds of the client coming into the lawyer's possession. The lawyer also dismissed a party defendant to the lawsuit without the client's consent. Being subsequently sued by the client for malpractice, the lawyer negotiated a settlement of that claim with the client which required that the client agree to write a letter to the bar association requesting that the grievance which the client had filed against

the lawyer be dismissed. The lawyer was thereby guilty of dishonesty, fraud, deceit, misrepresentation or willful misconduct, all of which adversely reflected on the lawyer's fitness to practice law. [ASB No. 87-592]

● On January 27, 1989, a lawyer was privately reprimanded for having engaged in conduct adversely reflecting on his fitness to practice law, having willfully neglected a legal matter entrusted to him and having intentionally failed to seek the lawful objectives of his clients through reasonably available means. In undertaking the representation of the clients, the lawyer received from his clients documents regarding a fraudulent transfer of real property which had belonged to the clients. The lawyer assured the clients he would resolve the problem. Some six years later, the matter still having been unresolved, the clients had to retain the services of another attorney, who repeatedly contacted the lawyer requesting that the documents and file of the clients be returned to them. The lawyer promised to return the documents and file of the clients, but never did. Following the filing of a grievance by the clients against the lawyer, four consecutive requests for a response from the lawyer were necessary before a written response was received from him. [ASB No. 88-142]

● On January 27, 1989, an Alabama attorney received a private reprimand for violation of Disciplinary Rules 6-101(A) and 1-102(A)(4). It was determined by the Commission that the attorney had neglected a legal matter entrusted to him and had misrepresented the status of the matter to his client in an

effort to conceal his neglect. The Disciplinary Commission determined that the attorney should receive a private reprimand. [ASB No. 88-371]

● On January 27, 1989, an Alabama attorney received a private reprimand for violation of Disciplinary Rules 5-105(C) and 5-106. The Disciplinary Commission found that the attorney, while representing the plaintiffs in a cause of action in an Alabama circuit court, also undertook to represent a subrogated insurance carrier, without informing the principal clients, and entered into a settlement of the cause of action without the consent of all parties. The attorney also deducted, without the consent of all parties, a contingency fee from the subrogated settlement. The Commission determined that the attorney undertook multiple representation without proper disclosure and settled the matter without the knowing consent of all parties regarding the participation of each person or entity to the settlement. [ASB No. 88-180]


● On January 27, 1989, an Alabama lawyer received a private reprimand for violation of Disciplinary Rules 1-102(A)(4), 1-102(A)(6), 7-102(A)(5) and 7-102(A)(7). The Commission found that the attorney in question maintained personal correspondence with an inmate in the Alabama prison system after having been requested, for good cause by the prison authorities, to discontinue that correspondence. The Commission found that the attorney used false names and addresses to facilitate his correspondence and engaged in conduct that adversely reflected on his fitness to practice law. [ASB No. 87-228]

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3451-1A/1-89

142023

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