The Alabama Lawyer

Vol. 51, No. 3 May 1990

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The Alabama Lawyer

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In Brief

ON THE COVER — The Chattahoochee River flows southward, forming a boundary hundreds of miles long between Alabama and Georgia. Photograph by Ed Malles, Photo Options Stock Agency, Birmingham

INSIDE THIS ISSUE

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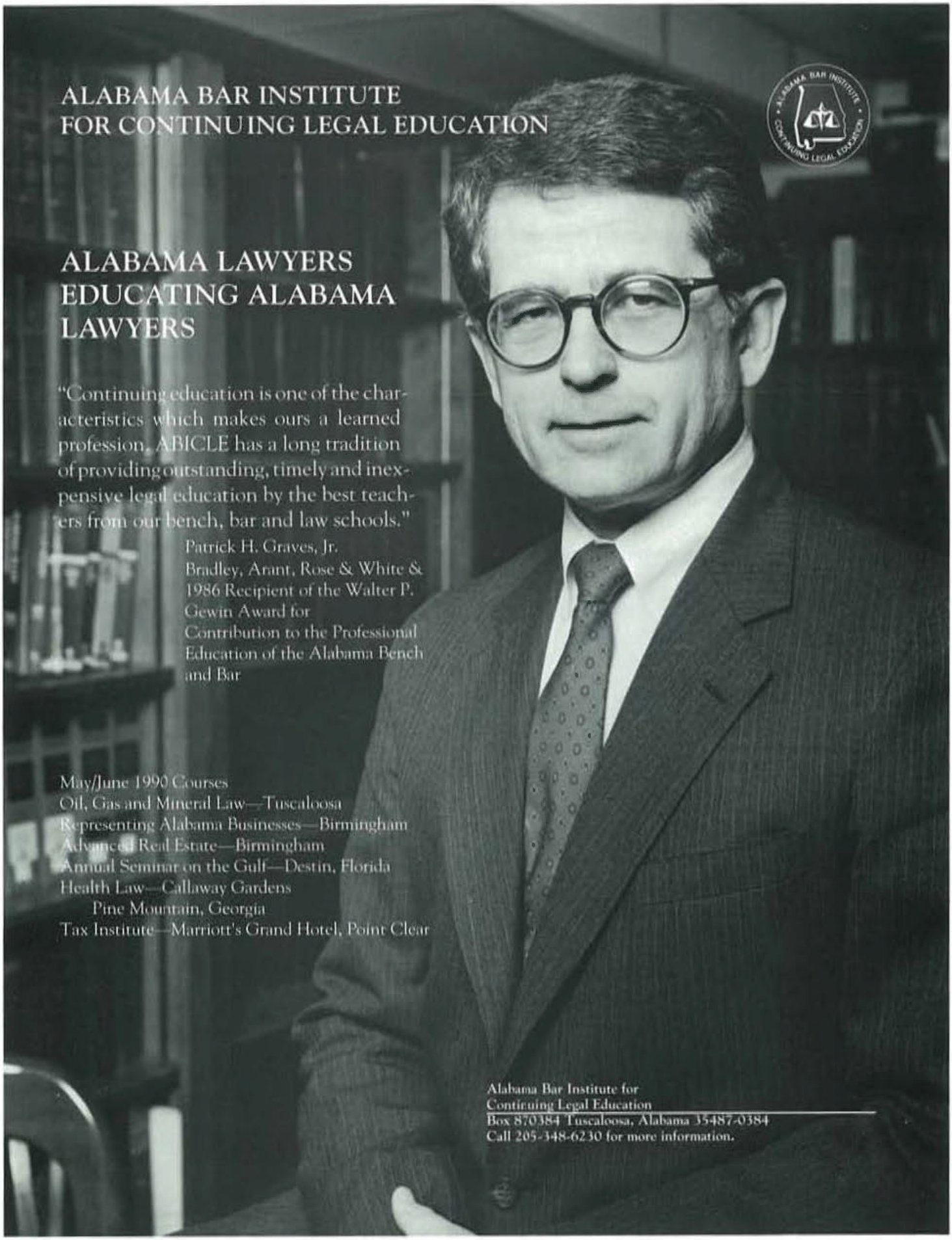
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President's Page

Interview with Alva Caine

The following interview of Alabama State Bar President Caine was conducted by *Alabama Lawyer* editor Robert Huffaker.

Alabama Lawyer: I think of all the covers that we have had on *The Alabama Lawyer* the one that's drawn the most comments has been you on your horse. Tell me how that came about.

Caine: I had originally made the traditional law office picture, wearing a dark suit in a library setting. I sent this to Reggie who immediately called me and said this just wouldn't do, that I was an outdoor person and that I should have a picture made in an outdoor setting. I only had two days to get this done to meet the deadline so I went down to the farm one afternoon, got Brandy out of the pasture, washed and clipped him and took him up to the hay field for the picture. I have always loved horses, and especially Brandy, because I raised him from a colt right there on the farm. I recall my uncle telling me one time that, "There is something about the outside of a horse that is good for the inside of a man." I guess this is why I will always love wide-open spaces and horses.

CAINE

AL: Now that you're three-quarters of the way through your term, in retrospect, what do you view as the major accomplishments of your administration?

Caine: I hope that one accomplishment would be to reunite the bar in making a new commitment to supporting the legal process. One of the great pleasures of this job is to have the opportunity to meet and work with lawyers throughout the state whose practice is different from my own. The Alabama State Bar, like so many bars across the country, became deeply divided over the issue of tort reform. This resulted in lawyers separating into groups which reflected the interest of their own practice with little thought to what may or may not be in the greater good for society as a whole. It always disturbed me as a lawyer to see our profession split into plaintiff and defendant, prosecutor and defense counsel.

Lawyers quite naturally have their own areas of practice in which they have a special interest. However, as professionals, we must never forget that we serve the interest of society as a whole rather than the special interest of our respective clients. On many occasions I have witnessed

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Executive Director's Report

I don't do CLE or licenses

The lead to this column is intended as a play on the TV commercial, "I don't do windows." Every lawyer's secretary would do herself and her boss a big favor if she would issue such a declaration on or about October 1st and December 1st of each year concerning licenses and continuing legal education, respectively.

You would think the vast number of secretaries were subjected to the MCLE requirements to practice law in Alabama. The observation is based upon the number one excuse we receive after we notify those persons who do not submit their annual report or deficiency plans to fulfill their MCLE 12-hour minimum requirement in a timely fashion.

For sometime I have considered writing a column "In Praise of Secretaries"; however, the number of these "lightning rods" who were blamed for delinquent filings this year reached such proportions I wanted to remind our members that your secretary cannot file for you.

Our reporting forms are rather simple. Each lawyer is sent his or her transcript with carryover credits, as well as those credits reported to us. One need only review this transcript, sign it and return same to the MCLE Commission. If additional credits have been earned and not noted on the transcript, these may be added and any error noted thereon may be corrected. Good secretaries always make copies to backstop our postal system.

This reporting requirement is the responsibility of the bar member—not his or her secretary—no matter how efficiently and capably that person performs her responsibilities.

I know many of you rely on office personnel to keep up with your credit hours, course names and locations; however, certification of compliance is your responsibility. Most often the secretary is made the "fall person" when a delinquency status is noted after our second or reminder mailing. While, "I thought my secretary took care of that when it came in," gets over-worked at MCLE time, this is not the only time the secretary is used as the excuse for an important missed deadline.

License buying time (October 1-31) each year is another period in which "my secretary must have overlooked the notice." Sometimes the secretary is defended with the gallant phrase, "I'm sure my secretary didn't get the notice," and therefore no one is at fault. Section 40-12-49, *Code of Alabama*, 1975 addresses this issue.

I know we have all hidden behind our secretaries on more than one occasion, but I know I always feel guilty doing so. I should!

No one has been blessed with a more dedicated and enduring group of fine secretaries and administrative assistants than I. This list goes back to Peggy Bradley who was Justice Merrill's devoted secretary and who typed a very green law clerk's memos for me. Then Patricia Bryant spent the better part of three years keeping a new Air Force Judge Advocate from getting court-marshalled or worse.

HAMNER

Mrs. Bradley and Mrs. Bryant are enjoying well-deserved retirements.

Helen Freeman and the late Grace McIntosh taught me much about lawyers and particularly this bar. While Carolyn Enslen was never my secretary, I know the invaluable assistance she gave Judge John Scott during his service as secretary of the Alabama State Bar and how helpful she was to me when she later served as Chief Justice Heflin's secretary providing the historical connections I often needed.

When Mrs. Freeman retired, I thought my world would surely end; however, Alice Jo Hendrix was proof the sun does indeed come up the next day. Even though Mrs. Hendrix left to serve in the Lt. Governor's office and the clerk's office at the supreme court, she has returned to the bar as its membership secretary. I have often wondered if she would have

done so to serve a second sentence as my personal secretary.

For over ten years, Margaret Boone has been my capable secretary and administrative assistant. She has "suffered" long. Mrs. Boone joined the staff originally as then-President Sonny Hornsby's temporary secretary; however, her talents first caught my attention when she filled a temporary position in a government office where I performed my Air Force Reserve duty. Mrs. Boone is far more than my secretary. She is my sounding board, my grammarian and oftentimes my safety valve—who also takes dictation.

As the bar has grown and our services and responsibilities have expanded, I often have had to rely on another first-class secretary, Diane Weldon. She first joined us as a co-op student while in a high school secretarial science class. She now serves as the executive assistant in the area of programs and activities. I know those of you who work with her from time to time know why we value her.

All of these special people are in large part to blame for my still disliking dictating equipment. (They all took—or still take—real shorthand!) While I will concede the efficiency of such devices, they are devoid of the qualities possessed of these wonderful ladies who cause me to rise in defense of secretaries. I have yet to see a dictating machine that can smile and lift spirits as well as cause me to rethink a bad decision.

I am sure each of you feels the same as I about your secretaries, past and present. Like mine, I am sure you think yours can do everything, but remember, they do not have to do CLE or need a license to practice law.

RTH

P.S. It would be remiss of me if I did not acknowledge those wonderfully capable secretaries who have served our Alabama State Bar presidents. I often feel I have two secretaries because of their invaluable assistance in moving forward the work of the bar with an efficient operation within the president's firm. ■

Notice to Attorneys and Their Staff

Your attention is directed to several provisions of the appellate rules which will help in processing your case. Failure to strictly comply with these rules may result in the dismissal of your case.

Briefs—Number of copies, color of covers, etc.:

Regular appeals—10 copies. Rule 32, ARAP, requires the following color of covers to be used on briefs—appellant/blue, appellee/red, intervenor or amicus curiae/green, reply/gray. (The rules do not indicate a color for the cover of rehearing briefs, but white is suggested.) (Certificate of service should contain name, address, phone number and party represented for all served.)

Petition for writ of certiorari—10 copies of the petition and supporting brief. No color for covers is required, but if any colored cover is used—petitioner/blue, respondent/red.

Petition for writ of mandamus—10 copies of the petition and supporting brief. (Certificate of service should contain name, address, phone number and party represented for all served.)

Petition for permission to appeal—10 copies of the petition and supporting brief. (Certificate of service should contain name, address, and phone number and party represented for all served.)

Binding the briefs—Any clasps, staples, or other fasteners used to bind the briefs must be covered by tape so as to prevent any injury to those handling the briefs.

Docket Fees:

$100 Regular appeal
50 Petition for Writ of Certiorari to court of civil appeals (No docket fee is required on criminal certs.)
50 Petition for Writ of Mandamus
50 Petition for Permission to Appeal (If petition for permission to appeal is granted, an additional $50 is due.)

Extension of time for filing briefs on appeal:

One seven-day extension of time, as provided by Rule 31(d), ARAP, may be granted for the appellant's brief, the appellee's brief and the appellant's reply brief. Requests for extension will be granted over the telephone; however, the extension *must be confirmed* in writing to this office, stating the exact date your brief is due, and a copy of the confirmation letter sent to opposing counsel. For extensions, please call Sharon McLain, Rebecca Norris, Diane Dennis or Louise Livingston.

Filing:

Papers shall be deemed filed on the day of mailing *if certified, registered, or express mail of the United States Postal Service* is used. Rule 25(a), ARAP.

Notice of the trial clerk when appellee brief is filed:

Rule 31(a), ARAP requires that the appellee give notice of the filing of appellee's brief to the clerk of the trial court. Compliance with this rule is necessary in order for the trial clerk to know when to forward the record on appeal to the appellate court.

Second copy of record on appeal or appendix:

Rule 30, ARAP, requires that the parties file either an appendix or a second copy of the record on appeal. This rule *must be* complied with before a case can be submitted to the court for a decision. *If you plan to use the second copy of the record on appeal, you should make arrangements with the clerk of the circuit court to photocopy the record for you before the original record on appeal is sent to this office.* ■

President's Page

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lawyers from different areas of practice come together and, as dedicated professionals, seek solutions to problems with the objective of trying to reach a conclusion which is in the best interest of all citizens. I believe that if the tort reform debate taught the bar of Alabama any lesson, it was that we as professionals must shoulder the responsibility for our own image. I regret that the public could not witness as I did the impartial and dispassionate discussions by lawyers trying to resolve an issue for the greater good of society. It is my hope and dream that this cooperative relationship will increase in years to come and that the Alabama State Bar will truly become unified in spirit, as well as action.

The modern practice of law subjects lawyers to pressures which we have never known before. Statewide practice of a number of lawyers places them in constant conflict with trial settings and appearances in court. The demands placed upon lawyers are forever increasing, mentally, physically and financially. I am convinced that a strong bar with the objective of serving the needs of lawyers and the legal profession is our best hope of coping with the realities of modern day law practice.

One of the best examples of this renewed commitment to working together as lawyers is the work currently being done on time standards on goals for the processing of cases in the various jurisdictions of Alabama's trial courts. A number of lawyers across the state have worked diligently with Judge Joe Phelps of Montgomery and Judge Gerald Topazi of Birmingham to evaluate exactly how cases are being processed through the trial courts and help establish new procedures designed to eliminate delay. Obviously, there is wide disparity from circuit to circuit in the average amount of time required to dispose of particular types of cases. It has only been through the cooperative attitude of lawyers and judges throughout the state that a proposed time standard procedure has been drafted and will be presented to the supreme court for adoption. It is my hope that the relationship between the bench and bar in Alabama will continue to grow so that the legal rights of all citizens will be protected and preserved by the legal process. Public trust in the legal system is imperative if the process is going to work. I am proud to see that Alabama lawyers are rededicating themselves to the task of seeing that the legal process works well for all of the people of Alabama.

AL: Would time standards require legislation which would set some specific dates by which trials would have to be held?

Caine: No. The supreme court, through its inherent rule-making power, has authority to promulgate rules to promote the administration of courts. Time standards are goals for case processing in the trial courts and are designed to provide clear and understandable benchmarks to measure effective case management in the courts.

AL: Attorney discipline remains a somewhat controversial topic. Do you believe that our disciplinary procedures are accomplishing their goals and do they need to be changed?

Caine: I think most lawyers view the disciplinary process as it was intended. That is, to protect the public and the bar against those few lawyers who fail to abide by the Professional Rules of Conduct. This is not an easy task. The overwhelming majority of lawyers are satisfied that the process works. The Center for Professional Responsibility is under the direction of General Robert Norris, who has held this position for almost two years. The bar's staff of four full-time lawyers receives inquiries from lawyers concerning potential conflicts which arise in their daily practice. The disciplinary staff welcomes the opportunity to discuss with lawyers any problems which they perceive might exist in a particular factual situation in an attempt to counsel with lawyers on the Rules of Professional Conduct as they might apply to a question raised by a lawyer. For example, the Office of General Counsel issues in excess of 120 formal ethics opinions a year and delivers in excess of 1,000 informal telephone opinions. Lawyers are encouraged to contact the Center at any time they feel unsure as to exactly how the Rules might apply to a potential conflict.

I have found that the bar's disciplinary staff is eager to receive questions from lawyers and do their utmost to help the lawyer decide exactly how to resolve a conflict within the spirit and letter of the Rules of Professional Conduct.

AL: What is the status of the proposed disciplinary rules that are being considered by the supreme court?

Caine: The proposed rules of professional conduct are currently under submission to the Alabama Supreme Court and a ruling is expected shortly. These new rules were drafted by the Permanent Code Commission in an effort to present a format more familiar to lawyers and more attune to modern day practice by recognizing multiple layers of responsibility in large law firms, complex attorney/client relationships in corporate settings, conflict problems arising from lawyers changing firms, lawyers entering private practice and government service, and spousal employment situations. The Permanent Code Commission received direction from the Alabama Supreme Court through Justice Torbert indicating that the preference of the court would be to adopt rules of professional conduct more in line with the American Bar Association Model Rules insofar as they were consistent with and responsive to Alabama practice.

Early studies by the Permanent Code Commission indicated that the existing *Code of Professional Responsibility* was a seriously flawed document, suffering from poor draftsmanship and internal inconsistencies. The ABA Model Rules consist largely of black letter mandatory rules and commentaries which are made a part of the rules for assistance in interpretation and to give something of a legislative and statutory history to the various rules.

Several new rules were implemented which did not exist in the old *Code of Professional Responsibility*. One of the new rules which drew much study and comment was a rule concerning an attorney's professional competency. This new rule states that, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, fairness and preparation reasonably necessary for the representation." Without a rule on competency, directly applicable to egregious situations, the bar was in the unfortunate position of being unable to censor or remove from office an attorney who had been engaged in gross incompetence within the profession.

Another new rule receiving much comment deals with the fees an attorney may charge for professional services. The new rule makes mandatory nine specific steps that are to be considered in setting a fee. The rule makes it improper for an attorney to charge a clearly excessive fee. The rule requires that a lawyer communicate to the client, preferably in writing, the basis of the fee. The rule requires that all contingent fee matters be covered by a written agreement, including the methods by which the fee is to be determined, the percentage or percentages that shall accrue to a lawyer in the event of settlement, trial or appeal, and how expenses are to be handled. In addition, lawyers are prohibited from charging contingent fees in domestic relation matters and criminal matters. Referral fees are still permitted with certain stated guidelines.

The Permanent Code Commission found that over 50 of the 54 disciplinary jurisdictions in the United States had both rules on competency and rules on fees which have been in effect for more than a decade. It is our hope that by bringing Alabama Rules of Professional Conduct into harmony with the mainstream of disciplinary rules across the country, that resource and research materials from other states and jurisdictions could be utilized not only by practitioners but also by the disciplinary staff in addressing ethical questions which lawyers may encounter.

AL: Another one of the themes of your administration was legal education. Do you feel that our Continuing Legal Education Program is accomplishing its goals?

Caine: I believe the bar's CLE programs get better and better each year. CLE is mandatory in Alabama. Alabama lawyers are making an excellent effort to get their required courses completed each year. Mandatory CLE serves both the interest of the profession and the public very well. We all know that the law is an ever-changing and evolutionary process, and a very effective way to remain informed is to attend meetings and discuss new developments as they evolve on a daily basis. The CLE program requirements are closely monitored and approved by the bar to insure that the courses offered to lawyers will be educational and will assist them in their individual practice.

AL: As you know, there are several judicial races this spring. Do you think that the bar should take a more active role in sponsoring legislation

which would allow for nonpartisan election of judges?

Caine: I definitely believe that nonpartisan election of judges is something that is going to take place in the future. I do not believe that anyone who is closely watching the process of how judges are currently elected can seriously argue that a judge having to spend a million dollars to be elected to the Alabama Supreme Court is something that is good for the courts or for the public. The current election process tends to make the court too political and distracts from its judicial role. Whether this is done by legislation or some other mechanism, I think that nonpartisan election of judges and a merit selection system is something that will be addressed soon in Alabama. I do not know whether the current political atmosphere in Alabama will permit adoption of a new system at the present time. However, I definitely believe that in the not-too-distant future Alabama judges will be elected on a nonpartisan basis.

AL: The IOLTA program has been in place now for several years. Give us an update on the status of that.

Caine: The IOLTA program is one of the shining lights of the Alabama State Bar. IOLTA first became operational in January 1988. To date, 60 percent of all eligible lawyers are participating. The participation rate is among the highest in the nation among opt-out programs. Thus far, $1,570,000 has been received from banks on interest earned on trust accounts maintained by Alabama lawyers under the IOLTA program. This money is administered by the Alabama Law Foundation which has awarded a total of $900,000 in grants. In 1989, $237,000 was awarded and approximately $680,000 has been awarded this year. IOLTA funds can be used for legal aid to the poor, to help promote administration of justice, for law-related education to the public and for local law libraries. Because of the bar's IOLTA program, for the first time in Alabama there now exists a source of funding for worthwhile projects directed toward improving the administration of justice.

Programs developed by the various bar committees now can receive funding. In the past, committee members often were frustrated in their

efforts to implement the work of the committee because of the lack of money needed to get the project started. I believe that this new revenue source will result in getting more lawyers involved in the real work of the bar because now instead of just meeting and coming up with new programs, funds are available to carry new projects into action. I do not think lawyers in Alabama fully realize the great potential and benefit of the IOLTA program as it continues to grow on a yearly basis.

AL: Speaking of funding, is there a need for additional funding for the administrative staff here at the state bar headquarters?

Caine: The Alabama State Bar headquarters is now operating at capacity. Today, we are in the same building where I took the bar exam in 1970. There are approximately the same number of people working in the bar headquarters now as there were then. When I began to practice, there

were less than 5,000 members in the Alabama State Bar. Now the state bar has a membership of over 9,000 lawyers. Sheer numbers mandate that the facilities at the state bar headquarters be expanded. We have definitely outgrown our space. As the number of lawyers admitted to practice increases, the bar also must increase its staff if the bar is to continue to service the needs of the legal community. As the practice of law becomes more complicated, more information is needed to be disseminated to lawyers. The state bar headquarters definitely needs to be expanded both on terms of additional personnel and housing space. For example, the Center for Professional Responsibility is not now located at the bar headquarters. It would definitely be an improvement in the quality of service to lawyers if the state bar could house all of its staff at one location, thus providing direct communication on a daily basis. Until this is accomplished, the state bar will continue to be required to work under less than satisfactory conditions.

AL: Are there sufficient funds to increase the staff at the bar headquarters or would that require some additional funding sources?

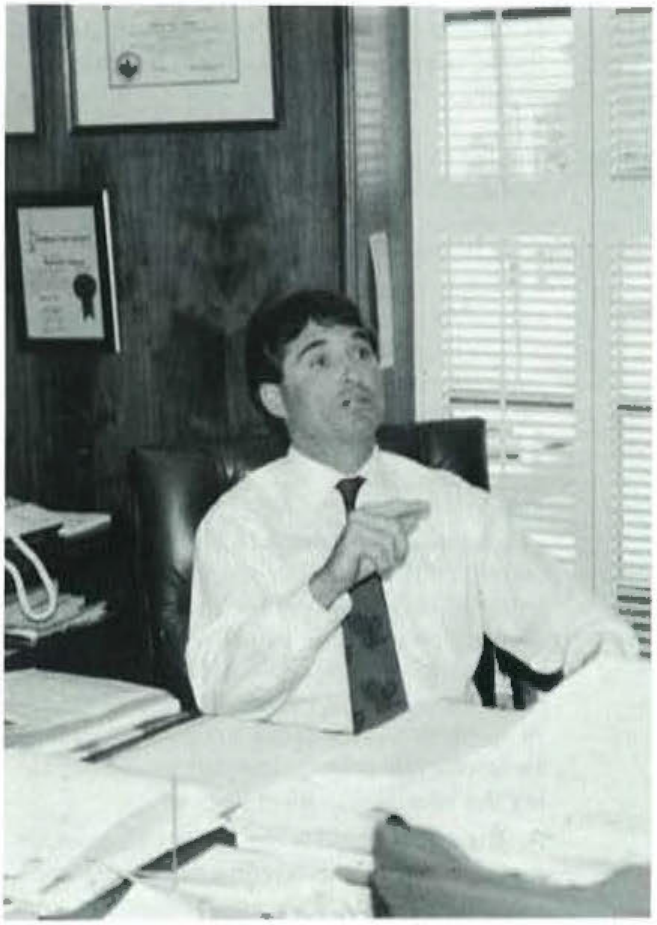
Caine: It will definitely require additional funding. The major revenue source for the state bar is the issuing of law licenses to practicing attorneys. Of course, the state bar has a budget. It must and it does stay within that budget each year. The bar does not receive any funds from the state that are not generated directly by lawyers. Perhaps in the near future, a serious look must be taken at increasing license fees. This, of course, will not be a very popular alternative. However, recognizing the ever-increasing cost of salaries and supplies, it might become necessary to increase the cost of a law license.

AL: When will the work begin on the addition to the state bar headquarters?

Caine: We hope construction will begin mid-July 1990. The funding campaign is now underway. Lawyers across the state are being urged to support the building campaign with their contributions. The new building is going to cost approximately $3 million. It will be constructed at a slightly higher elevation behind and connected to the existing structure. Also, plans are being made to renovate the old building. When completed, the bar headquarters building is anticipated to have sufficient space to house all of the various departments of the state bar. The new building will offer increased office space and a much larger meeting room. Presently the existing facilities make it almost impossible to accommodate the needs of a meeting of the board of bar commissioners if there is a full attendance. The architects have anticipated in the plans additional space for expansion as the number of lawyers in the state increases.

AL: The midwinter meeting was completed several months ago. Were you satisfied with the participation?

Caine: Very well satisfied. The meeting was held in conjunction with the Bicentennial celebration of the American Bill of Rights with Justice Anthony Kennedy of the United States Supreme Court as



our keynote speaker. The program consisted of excellent presentations by Professor Michael Tigar of the University of Texas School of Law and Professors Dan Meador and A.E. Dick Howard of the Universtiy of Virginia Law School. We had a great attendance. On Friday, we had the midwinter meeting of the bar, which consisted of committee meetings and section meetings. I am hoping that the midwinter meeting of the bar will be reinstated on a permanent basis. I feel that because of the ever-increasing size of the bar, there exists a need to meet as an association more than once a year.

AL: One of the themes of your administration was to achieve a return to professionalism. As a trial lawyer, do you perceive what could be called a growing lack of civility between plaintiff and defense lawyers?

Caine: Unfortunately, I do. When I started practicing law in 1970, the bar was much smaller. My senior partner, Francis Hare, often would counsel all of the young lawyers in our firm about how to conduct ourselves and, in essence, act as our mentor. The situation that exists today is not as it was back then. Law firms are much larger with little time to develop close, personal relationships. When I started practice, I knew that the senior partners of most defense firms and the senior partners of my firm were close friends, and that if I did not conduct myself professionally, my senior partners would find out about it.

I think one of the great problems that we face today as a bar is the lack of mentor images and role models that young lawyers can emulate. Law firms have grown to such large numbers and the senior partners in these firms have such great demands placed on their time that they do not have time to sit down and counsel young lawyers when the need arises.

Local bar associations have adopted codes of professional courtesy which I think is a step in the right direction. However, nothing can replace the counsel and guidance of a senior lawyer. The "Rambo" tactics of the late 1970s and 1980s are out there and a number of lawyers have employed these tactics, unfortunately becoming successful at it.

I hope that the senior members of the bar will accept the responsibility of working with younger lawyers both inside and outside their respective firms in an effort to instill in them the long-term value of close personal relationships. So much of the practice of law is conducted by a handshake. A lawyer's word must be his or her bond. I do not think that the practice of law could function successfully and efficiently if everything had to be reduced to writing. In my judgment, it is imperative that the concept of a mentor image in our senior lawyers is utilized to its fullest and most valued extent.

AL: How do we alter that atmosphere?

Caine: Professionalism is indeed more than just abiding by a series of rules. It is and always has been an individual state of mind. I think lawyers simply have to make up their minds that certain conduct will not be tolerated. When a lawyer does not conduct himself properly and professionally, members of the bar should, in a very constructive and professional way, make their feelings known. It may be necessary to remind our fellow lawyers that their conduct is being watched not just by other lawyers but by the public at large. Lawyers must not forget that only lawyers control their own public image and that image is as defined by the public. Everything we do and say and our actions toward one another are picked up by the public. Impressions of the legal profession for the most part are formed by the public in the way we conduct our business one with the other. The deep and abiding personal respect which one lawyer holds for his fellow lawyer has always been the foundation on which the practice of law is conducted on a daily basis. I believe that lawyers throughout the state are conscious of their public image and are dedicating themselves to enhancing that image by their words and deeds.

AL: Give us a preview of what will be happening at the state bar convention this summer.

Caine: We are excited about the plans for our annual meeting to be held in Mobile July 19-21. The Mobile Bar traditionally has been a grand host, sponsoring many social and cultural events. The meeting will begin Thursday morning, July 19, with section meetings, and at noon we will have our Bench and Bar Luncheon. Dean John Reed will be our guest speaker at the luncheon. Dean Reed enjoys a national reputation as an out-

standing speaker and legal scholar. This year we anticipate a large attendance by Alabama judges. The judges will be meeting earlier in the week at their own judicial conference at Perdido Bay and have been invited and encouraged to come to Mobile to participate in the annual meeting of the state bar. Task Force on Bench and Bar Relations Committee has put together an outstanding program, to follow the luncheon, to address bench and bar problems with the hope that through this discussion relations can be improved throughout the state.

It is our hope that by focusing on and discussing bench and bar relations the various judicial districts in the state, including federal courts, can gain an increased awareness of one another's problems and come together to seek solutions for the greater good of every citizen in Alabama. It is simply not good enough to have some circuits current in their caseload while others are straddled with a huge backlog of litigation. Equal access to the courts is imperative if the administration of justice is to succeed as intended.

Thursday evening will feature the traditional cocktail reception held at Tulip Point at the Grand Hotel in Point Clear. The Friday program will consist of section meetings and programs offering continuing legal education. Friday night, the bar will sponsor an old fashioned political rally. Candidates for statewide offices who have received their party's nominations will be invited to attend and participate in what is anticipated to be a fun evening of fellowship and politics. The Saturday program will conclude with the presentation of a major address by a national political figure, as well as the regular business meeting of the bar. We are looking forward to a large registration of lawyers and judges throughout the state for what we hope to be a most informative and entertaining annual meeting.

AL: Are you looking forward to the end of your term?

Caine: Well, I do in the sense that if I don't get back to Birmingham I will probably be out of a job. It has been a great pleasure and experience for me to serve as bar president this year. This experience has afforded me the opportunity to meet many new lawyers across the state and share with them the problems which they face in their particular areas of practice. It has caused me to realize just how narrow the field in which I practice really is.

The experience has given me a new appreciation for the value of a strong state bar. I encourage every lawyer to give some of his or her time to the work of the state bar. I believe that only by participating can we really understand the needs of our profession. There is a place for every lawyer in Alabama to participate in the work of the state bar. I know that you will find your experience rewarding and fulfilling as a professional.

I am grateful to the lawyers of this state for the opportunity to serve this year. We are privileged to have such an outstanding lawyer as Harold Albritton of Andalusia to serve as your president next year. I know that the members of the bar will give him the support and encouragement which you gave to me during my year in office. I believe now more than ever before that the calling to become a lawyer is divine and that the work which we do as lawyers is essential if our democratic form of government is to survive and prosper. ■

Phillip Exton Adams, Jr.

President-elect, Alabama State Bar 1990-91

Pursuant to the Alabama State Bar's rules governing the election of the president-elect, the following biographical sketch is provided of Phillip Exton Adams, Jr., of Opelika, Alabama. Adams is the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 1990-91 term.

Education and early years

Phillip E. Adams, Jr., was born in Alexander City, Alabama, December 25, 1943. He attended the public schools of Alexander City and graduated from Auburn University in 1965. He received his law degree from the University of Alabama School of Law in 1968 and was admitted to the state bar that year.

He served as law clerk to Associate Justice Pelham Merrill of the Alabama Supreme Court from 1968-69 and has been with the Opelika firm of Walker, Hill, Adams, Umbach & Meadows since then.

Bar service and activities

Adams served as president of the Lee County Bar Association in 1971 and is a member of the American Bar Association.

As a state bar commissioner he has been on the board since 1983. He has been a member of the MCLE Commission since 1984 (chairperson 1987-89); a member of Disciplinary Panel V from 1983-87 (chairperson 1984-87); a member of the Disciplinary Commission since 1987 (chairperson 1988-present); a member of the Executive Committee from 1985-89; a member of the Supreme Court Liaison Committee from 1986-89; and on the editorial board of *The Alabama Lawyer* from 1982-87.

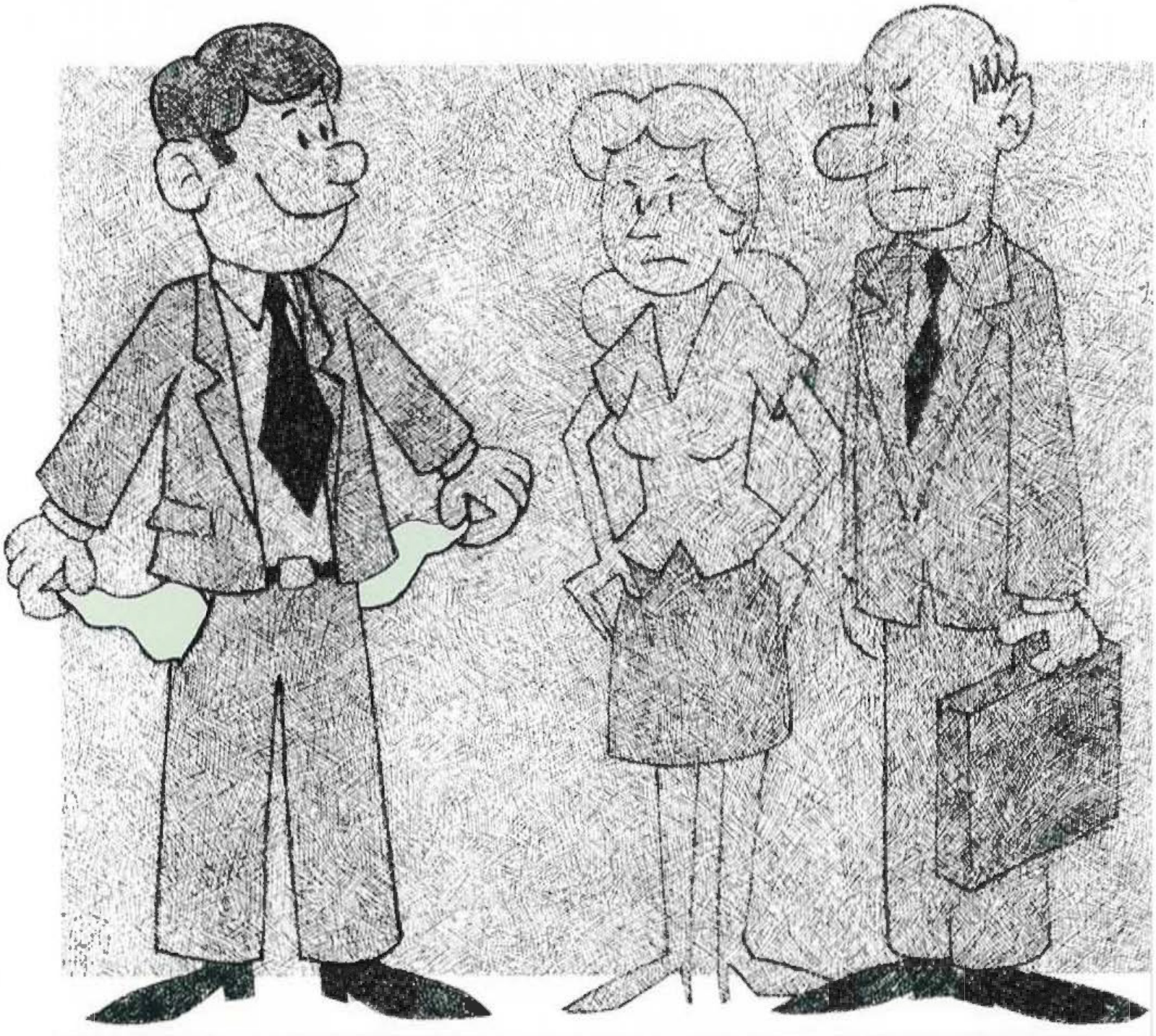
Other professional and civic activities

Adams also has served as a municipal judge for the City of Opelika since 1976.

He is a member of the First Presbyterian Church, the Opelika Kiwanis Club and the City Board of Directors of Colonial Bank in Opelika.

He is married to the former Chris Akin of Tuskegee, Alabama, and they have two sons, Josh, 11, and Kirk, ten. ■

The Relationship Betweer



Divorce and Bankruptcy

by Herndon Inge, III

The relationship between divorce and bankruptcy has been largely ignored by the divorce as well as the bankruptcy practitioner. Since the number of marriages ending in divorce as well as the number of personal bankruptcy petitions have dramatically increased over the past several years, this relationship will be gradually receiving more attention. Also, the Bankruptcy Reform Act of 1978 enlarged the potential conflicts between the debtor and his former spouse by allowing the discharge of obligations between such parties which were previously sacrosanct from discharge. There is hope, however, since there is no statute of limitations for bringing an action to determine non-dischargeability of a divorce-related support obligation.[1]

This outline will report on the major conflicts between divorce and bankruptcy laws.

Statutory authority

Eleven U.S.C. 523(a)(5) states:

(a) a discharge under section 727...of this Title does not discharge an individual debtor from any debt -

(5) to a spouse, former spouse or child of the debtor for alimony to, maintenance for, or support of spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record or property settlement agreement, but not to the extent that -

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

Historical background

Prior to statutory enactment of bankruptcy laws, the non-dischargeability of family support obligations was based on the theory that the obligation to support a spouse or child was not a debt and that only a debt could be discharged.

However strange, the Bankruptcy Act of 1898 did not expressly except from discharge alimony, maintenance or support of a bankrupt's wife or children. The United States Supreme Court quickly cured[2] this deviation from the common law by finding that debts arising out of a husband's natural duty to support his wife and children was not dischargeable under the Act. Section 523 of the present Bankruptcy Code is substantially similar to the 1901 amendments to the original Act.

Bankruptcy determination of non-dischargeability

It should first be stated that the determination of dischargeability of an alimony, maintenance or support obligation is a matter of federal rather than state law.[3] This may explain why most divorce practitioners are usually unfamiliar with the relationship between divorce and bankruptcy.

As is expected, the various bankruptcy courts are split in their view on the dischargeability of support obligations set by a divorce judgment. The majority view is to ascertain the intent of the parties and the divorce trial judge by consulting the settlement agreement or divorce judgment as well as the other surrounding circumstances.[4] The minority view has been to give primary consideration to the form of the obligation by comparing each individual obligation with the characteristics of local law as evidenced by the divorce judgment itself.[5] Even bankruptcy trial judges with-

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in Alabama and within the individual districts are split in their view on this issue. Therefore, the domestic relations practitioner should be aware of both views to plan accordingly.

The Eleventh Circuit Court of Appeals has provided controlling authority in this circuit in *In re Harrell, supra,* at 907, but even this has not clearly adopted the majority view:

> The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support. The language does not suggest a precise inquiry into the financial circumstances to determine precise levels of need or support; nor does the statutory language contemplate an ongoing assessment of need as circumstances change.

This includes the use of state law to provide at least a basic guide for developing a federal standard.[6] Reference to state law is also necessary because there is no federal common law of domestic relations and because attorneys generally draft divorce agreements to express the parties' intent in terms of state divorce law.[7]

Harrell further provided that the bankruptcy trial judge should not duplicate the functions of the state domestic relations court and should influence the state domestic relations issues "in the most limited manner possible."

This "simple inquiry" contemplated in *Harrell,* deciding whether a particular divorce-related support obligation is actually in the nature of alimony, maintenance or support, or actually a property settlement, according to the federal laws, is usually not simple since it can only be performed on a case-by-case basis.[8] In performing this case-by-case review, bankruptcy trial judges have most often considered:

(1) the labels attached to the obligations;
(2) the terms of the agreement or divorce;
(3) the location of the obligations in the agreement or decree;
(4) whether there is a separate division of property;
(5) whether the former spouse of the debtor was shown, at the time of the divorce, to have suffered in the job market or been otherwise disadvantaged because of a dependent position held in the marriage;
(6) the economic disparity between the parties;
(7) whether the obligation terminates on the death or remarriage of the recipient spouse;
(8) whether the obligation terminates when dependent children reach the age of majority;
(9) whether the debtor's former spouse relinquishes rights and property in return for the obligation;
(10) whether the debts were incurred for the living expenses of the former spouse;
(11) whether the debt is enforceable by contempt;
(12) the relative incomes of the parties;
(13) the length of the marriage;
(14) the number and ages of children;
(15) the amount of obligation payable in installments over a substantial period of time;
(16) whether the obligation is payable in installments over a substantial period of time;
(17) the parties' levels of education;
(18) the probable need of future support;
(19) the age and health of the parties; and
(20) the property brought into the marriage by each party.

As the federal common law on this issue develops other considerations are added, but from all this the bankruptcy trial court need only conclude:

(a) whether the intent of the state court or parties was to create a support obligation,

(b) whether the support provision has the actual effect of providing necessary support,

(c) whether the amount of support is so excessive as to be unreasonable under traditional concepts of support, and finally,

(d) if the amount of support is unreasonable, how much of it should be characterized as non-dischargeable for purposes of federal bankruptcy law.[9]

The bankruptcy trial court's appropriate "simple inquiry" on divorce-related support obligations therefore must go beyond the separation agreement or divorce judgment itself, hence the majority view. This bankruptcy inquiry is simply to determine the underlying purpose of the debt, i.e., whether the debt was in lieu of the payment of and therefore in the nature of alimony, maintenance or support or was only a means of dividing the property of the parties.

It should be remembered that where cases are either close or hard, the bankruptcy trial courts tend to find divorce-related support obligations non-dischargeable[10] even though in bankruptcy generally, all debts are assumed dischargeable unless it is proven that the obligation under consideration is specifically within the non-dischargeable class as actually in the nature of alimony, maintenance or support.[11] Therefore, as the support obligations related to the marriage are assumed dischargeable unless proven to be alimony, maintenance or support, with the proper judicial inquiry, close calls will be found non-dischargeable.

Marital debts

The most commonly encountered issue on marital debts is when the husband is ordered in the divorce decree, whether following an uncontested or contested divorce, to pay certain marital debts and then he files a petition for discharge under Chapter 7 in bankruptcy. If no issue is raised at the bankruptcy court as to the non-dischargeability of these marital debts, such debts are assumed dischargeable as to the husband, who is the bankruptcy petitioner, and the third party creditor thereafter pursues collection of the debt from the bankruptcy petitioner's former wife. It is hoped that at first notice of her former husband's bankruptcy, she seeks legal advice. If the bankruptcy trial court is called upon to determine these issues of non-dischargeability of divorce-related support obligations, the third party creditor, usually a bank or other secured creditor, who was not a party to the divorce action, and therefore not collaterally estopped from pursuing the claim against the former wife, must be dealt with.

The bankruptcy practitioner for a bankruptcy debtor should recommend several alternatives to encourage the bankruptcy trial judge to order the divorce-related support obligations dischargeable. He can present evidence and argue to the bankruptcy trial judge that the structuring of the marital debts by assigning responsibility to pay credit card accounts was merely property settlement and not support[12], he can present evidence and argue that the wife of a childless marriage waived alimony, divided debts and agreed to hold the husband harmless on specific debts, so such debt allocation could not have been for her maintenance or support[13], or that the former husband's obligation to pay the debts did not terminate upon the only minor child's reaching majority, so such obligation could not have been for the maintenance and support of the children.[14] The debtor can also argue that if the divorce-related debts are found to be incurred to purchase or support luxuries, and not necessities, and that since the wife waived alimony, the bankruptcy debtor's obligation to pay these debts could not have been for her support.[15]

If the bankruptcy debtor can therefore prove the provisions in a divorce decree merely divide assets or liabilities or are for luxuries, such divorce-related obligation is dischargeable.[16] Likewise, if the divorce decree includes the provision that a spouse hold the other harmless for marital debts, it is more likely dischargeable, except when incurred for pre-divorce necessities.[17] On the contrary, if the responsibility for the payment of those marital liabilities or the provision to hold the other spouse harmless from certain marital debts can be proven to be "in the nature of alimony, maintenance or support," then they will be found non-dischargeable.[18]

Alimony-in-gross or periodic alimony

The allowance of alimony upon granting of a divorce is provided by statute in Alabama.[19] This allowance of alimony may be granted to the spouse in either a periodic or a lump sum fashion and if granted in a lump sum fashion, it may be paid in installments if the total amount owed is fixed.[20] Therefore, installment payments of alimony-in-gross may resemble payments of periodic alimony but in

bankruptcy they are very different.

The purpose of awarding periodic alimony is to provide for the current and continuous support of the spouse while the award of alimony-in-gross is a lump sum which represents the present value of the spouse's marital rights which are being terminated by the divorce.[21] The former is for "maintenance and support" and the latter is not.

The term "alimony-in-gross" is synonymous with a property settlement.[22] And alimony-in-gross, as property settlement, is dischargeable in bankruptcy as it is not a debt to a former spouse for alimony to, maintenance for, or support of such spouse, rather it is division of the marital property. Therefore, the bankruptcy trial judge must determine if the contested provision of the divorce judgment is actually "alimony to, maintenance for, or support of such spouse" or "in the nature of alimony, maintenance or support."

For an award to constitute alimony-in-gross it must be certain with respect to both amount and time of payment and the right to it must be vested and not subject to modification.[23]

This distinction between periodic alimony or alimony-in-gross and property settlement is often found in the state law context where one party seeks modification of the alimony award due to a change in circumstances. This has often been litigated, and fortunately, Alabama has developed a large body of case law interpreting this distinction.[24] These state divorce court cases can assist the bankruptcy court in resolving the dischargeability issues.

Judgments for attorney fees

Though this too is strange, the determination of whether a particular divorce-related obligation to pay counsel fees for services rendered to the nondebtor former spouse was in the nature of alimony, maintenance or support is strictly a matter of federal law. Since an award of counsel fees may be essential to the nondebtor spouse's ability to commence or defend a marital action or to collect arrears in support and therefore may be deemed a "necessity" which the bankruptcy debtor was obligated to provide under his duty of support from the divorce, bankruptcy courts generally have treated counsel fees as being non-dischargeable as long as they are found to be in the nature of alimony, maintenance and support.[25] If the bankruptcy debtor can prove the subject attorney fees were incurred by the nondebtor spouse to collect property settlement, and not to collect alimony, maintenance or support, then such attorney fees are dischargeable in bankruptcy.[26]

Following a minority view, some bankruptcy trial judges have found a divorce-related judgment to pay counsel fees dischargeable, even when the attorney fees were to collect alimony, since the judgment was to be paid directly to the attorney rather than to the spouse, following the theory that the judgment was to the "wrong payee." Similarly, if the bankruptcy trial judge finds that the obligation to pay counsel fees was merely an assignment of a claim, following the theory that it is an "assigned claim" then it also will be dischargeable.[27] Section 523(a)(5) does not exclude from discharge those claims payable to other than a spouse, former spouse or child of the debtor nor assigned claims.

Practical suggestions

Considering the above, the domestic relations practitioner should litigate and draft all settlement agreements or judgments with bankruptcy in mind. Whether the bankruptcy debtor spouse was represented by an attorney at the time of settlement or in a fully contested divorce trial, all settlement agreements and divorce judgments are subject to review and there is nothing the divorce practitioner can do in state court at the time the divorce decree is entered to ensure his client that such decree will escape review in the event of bankruptcy.[28]

A. Specific language in settlement agreement or divorce judgment

If the bankruptcy trial judge follows the majority view on non-dischargeability and looks to the substance, not form, of the divorce agreement or judgment, he must make a determination whether the parties or divorce trial judge intended to create a non-dischargeable debt, whether the payment of the subject debt was for the payment of necessities of the nondebtor spouse, and whether the amount of such payment was reasonable.[29] If the bankruptcy trial judge

follows the minority view and looks to the form of the divorce decree only, the four corners of such decree must clearly reflect the parties' or judge's intention and findings.

Therefore, the divorce practitioner should draft all settlement agreements and judgments specifically stating that the obligations to pay periodic alimony is "as maintenance and support," which marital debts are for the payment of necessities and therefore "as maintenance and support" and which are for payment of luxuries or property settlement, and that the obligation to pay the spouse's counsel fees is for her "maintenance and support." This specificity will assist the bankruptcy trial judge in the event of a bankruptcy review. If the settlement agreement or divorce judgment is one that does not provide for payment of alimony or if the parties agree that each waives any claim to alimony, the paragraphs providing for the payment of child support, the debts of the marriage or attorney fees should be included in the divorce judgment preceding the paragraph where the parties waive any "further" claim to alimony. The placement of such provisions in a settlement agreement or divorce judgment may be determinative.

In a settlement agreement where one spouse intends to provide periodic maintenance and support or the payment of marital debts as "alimony" for income tax purposes, the divorce practitioner can include additional facts in the testimony deposition that it is the intent of the parties to create a maintenance and support obligation, that the payment of such alimony, the marital debts or attorney fees is in payment of the "necessity" of the recipient spouse and the amount of such payment is "reasonable." These additional factors can be used to prove the "alimony" nature of such obligations for income tax and bankruptcy dischargeability purposes.

B. State divorce court determination of non-dischargeability

State courts have concurrent jurisdiction with the bankruptcy courts to determine the dischargeability of a divorce-related support obligation;[30] the state court must make this determination by applying the federal standards.[31]

Therefore, it has generally been recommended that the divorce practitioner who obtained the initial award of support return to the state divorce court for a decision on the non-dischargeability of that same obligation of support. The state court which initially entered the divorce judgment directing the support to be paid by the now bankruptcy debtor may be more attuned to the needs of the nondebtor former spouse and more likely to uphold the terms of its own decree. Practically, when the nondebtor former spouse receives notice of her former husband's filing of the bankruptcy petition and of the debtor former spouse's attempt to have her support obligation ordered dischargeable, the nondebtor spouse should immediately file a motion in state divorce court for a determination, by the application of the federal standards, of the dischargeability of the support obligation. Both bankruptcy rules and the doctrine of collateral estoppel require that such a judgment in state court be adopted by the bankruptcy court and accepted as conclusive on the issue of dischargeability of the debt.[32] Though this is seldom done, there is clear legal authority[33] and, properly presented, the divorce court should be a more favorable battleground.

In the event both the state divorce court and the federal bankruptcy court are petitioned to determine the dischargeability of a divorce-related support obligation, it is likely that the first court to be "petitioned" will be the one which decides the case,[34] though Bankruptcy Rule 4007 states that if the state divorce court makes its determination prior to any bankruptcy court ruling, the state divorce court's judgment thereon is sufficient to dispose of the issue.

C. Additional proof

At the trial of a contested divorce, care should be taken that the record include testimony that the marital debts were incurred for the support of the wife, that the debts were incurred for her necessities, that the debts are reasonable, that the wife is unable to repay such debts, and that the husband's obligation to pay those debts is in the nature of support and maintenance of the wife. This

additional proof, in addition to the standard testimony regarding "income of the parties," "need" and "ability to contribute to that need" may be critical in the event a bankruptcy trial judge is later called upon to determine non-dischargeability.

D. Additional findings of fact and conclusions of law

The divorce practitioner may consider asking the divorce trial judge to make additional findings of fact and conclusions of law in the final decree, whether the divorce judgment is entered following an uncontested divorce settlement, in which case these additional findings of fact and conclusions of law are merely voluntary, or following a litigated divorce action, where the additional findings of fact and conclusions of law are entered by the divorce trial judge in accordance with Rule 52, Alabama Rules of Civil Procedure. Support, the obligation to pay marital debts and the obligation to pay the attorney fees should be covered in these findings and conclusions. Care should be taken to prove the support is for necessities, not luxuries, and not property settlement.

These findings of fact should address the same four-part test:[35]

(a) whether it was the intent of the state court (in the event of a contested divorce) or the parties (in the event of an uncontested divorce agreement) to create a support obligation;

(b) whether the support division has the actual effect of providing necessary support;

(c) whether the amount of support is so excessive as to be unreasonable under tracitional concepts of support; and finally, (d) if the amount of support is unreasonable, how much of it should be characterized as non-dischargeable for purposes of federal bankruptcy law.

Likewise, the conclusions of law should address this same four-part test.

The former wife's bankruptcy counsel can allege additional reasons to find the divorce-related obligations non-dischargeable, e.g. false pretenses, false representations, actual fraud, use of false writings, larceny, willful and malicious injury by the debtor to the former spouse or her property, failure to pay a governmental fine or penalty, failure to pay an educational loan made, insured or guaranteed by a governmental unit or nonprofit institution, a debt on a judgment of liability in a motor vehicle collision involving intoxication, etc.[36] Additional proof in the uncontested divorce testimony deposition or at the contested divorce trial and additional findings of fact and conclusions of law also should address these other exclusions to bankruptcy dischargeability.

E. Contempt wars

The filing of a bankruptcy petition often is preceded by or immediately followed by a contempt action in state divorce court for failure to pay an obligation created under a divorce decree.

It can be argued that a post-bankruptcy petition contempt motion filed in state court may violate the general automatic stay of section 362 of the Bankruptcy Code, though it can also be argued that the automatic stay does not apply to an obligation determined to be alimony, maintenance and support under subsection 5, which is specifically exempted under section 362. Nevertheless, it is recommended that a determination of the nature of the divorce-related support obligation be made prior to the filing of an action, or before proceeding further in an action already filed, in state court to enforce the obligations under a divorce decree or settlement agreement.[37] The former spouse who files a post-petition motion in state court or continues to prosecute a pre-petition enforcement motion without a determination of non-dischargeability in bankruptcy or in the state divorce court is at least at risk whether or not the obligation is later determined to be a dischargeable one.[38] The bankruptcy trial court will not hesitate to fine violators of section 362 and award attorney's fees to a debtor for his defense of such action.[39]

The divorce practitioner representing the bankruptcy debtor's former spouse is advised to file a state divorce court petition to determine non-dischargeability, as

noted in subparagraph B., above, or a motion for relief from the automatic stay[40] in bankruptcy court immediately seeking the right to proceed with the collection of the divorce-related support obligation, immediately upon the obligor former spouse filing his petition in bankruptcy listing the support obligation as a dischargeable debt and await a decision on non-dischargeability before proceeding with the state divorce contempt motion. Likewise, the divorce practitioner should advise the divorce-related support payor to consult with his bankruptcy counsel to consider filing an adversary proceeding in bankruptcy seeking the determination that such divorce-related obligation is dischargeable. The divorce practitioner of the former spouse payor should consider notifying the former spouse payee's divorce counsel of the possible sanctions for violating the automatic stay in bankruptcy to prevent the former spouse payee from taking any further action in state court during the pendency of the dischargeability adversary proceeding in bankruptcy court.

F. Motion to increase support

If the former spouse payee neglected to seek legal advice at the time of her former husband's bankruptcy, or if the bankruptcy court found certain divorce-related obligations discharged, or if it is the appropriate time otherwise to seek an increase in alimony or child support, the divorce practitioner should finally consider returning to the state divorce court to increase the amount of maintenance and support to the former spouse or children as a result of changed circumstances resulting from the bankruptcy court entering the order that certain support obligations of the divorce judgment were discharged.[41] This will reopen the support obligations but in some cases is the only available relief.

Conclusion

The divorce practitioner, however, should not conclude that if he can "call a cow a horse" by providing that a property settlement is designated "in the nature of alimony, maintenance or support," that he might have the best of all possible worlds. The bankruptcy court is a court of equity and using such a device will risk the court's holding that it is a mere subterfuge. Careful planning for settlement or trial and careful drafting of divorce documents and pleadings, considering the relationship between divorce and bankruptcy, will make that difference.

NOTE: Two definitive articles, Freeburger & Bowles, "What Divorce Court Giveth, Bankruptcy Court Taketh Away: A Review of the Dischargeability of Marital Support Obligations," 24 *Journal of Family Law* 587 (1985-1986), and Ravin & Rosen, "The Dischargeability in Bankruptcy of Alimony, Maintenance and Support Obligations," 60 *American Bankruptcy Law* Journal 1 (1986), provided primary guidance and were often quoted herein.

Footnotes

1. F.R. Bankr. P. 4007(b), (c)(Supp. II 1984).
2. *Audubon v. Shufeldt*, 181 U.S. 575, 45 L.Ed. 1009 (1901).
3. *In re Harrell*, 754 F.2d 902, at 905 (11th Cir. 1985); *In re Williams*, 703 F.2d 1055, at 1056 (8th Cir. 1983).
4. *In re Williams*, *supra*; *In re Spong*, 661 F.2d 6 (2nd Cir. 1981); *Poolman v. Poolman*, 289 F.2d 332 (8th Cir., 1961).
5. *Rule v. Rule*, 612 F.2d 1098 (8th Cir. 1980); *In re Albin*, 591 F.2d 94 (9th Cir. 1979).
6. *In re Hughes*, 16 B.R. 90, at 92 (Bankr. N.D. Ala. 1981).
7. *In re Harrell*, supra, at 905.
8. *In re Delaine*, 56 B.R. 460 (Bankr. N.D. Ala. 1985).
9. *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983).
10. *Martin v. Henley*, 452 F.2d 295 (9th Cir. 1971); *In re Smith*, 436 F.Supp. 469 (N.D. Ga. 1977).
11. *Tilley v. Jessee*, 789 F.2d 1074 (4th Cir. 1986).
12. *In re Brown*, 37 B.R. 295, at 299 (Bankr. W.D. Ky. 1983).
13. *In re Lynch*, 32 B.R. 52, at 53 (Bankr. W.D. Mo. 1983).
14. *In re Martin*, 19 B.R. 367 (Bankr. M.D. Fla. 1982).
15. *In re Fontaine*, 14 B.R. 10 (Bankr. D.R.I. 1981).
16. *In re Cartee*, 9 B.R. 543 (Bankr. N.D. Ala. 1981) (joint debts were discharged); *In re Haney*, 33 B.R. 6 (Bankr. N.D. Ala. 1983) (Debts on wife's automobile, house and furniture were discharged); *In re Pody*, 42 B.R. 570 (Bankr. N.D. Ala. 1984) (Debts on wife's real estate, 1975 Datsun and loan secured by wife's family savings account were discharged).
17. *In re Delaine*, *supra*, at 470; *In re Beatty*, (BK 82-3092, AP 82-0887 [Bkrptcy. N.D. Ala. W.D. 1982]); *In re Evans*, 4 B.R. 232, at 236 (S.D. Ala. 1980); *Cf. Thompson v. Thompson*, 280 Ala. 248, at 254, 210 So.2d 808 (1968) (husband not in contempt for failure to pay business debts which were not necessities); *In re Portaro*, 108 B.R. 142 (Bankr. N.D. Ohio 1989) (mortgages on rental houses cosigned by non-debtor spouse); *In re Clark*, 105 B.R. 753 (Bankr. S.D. Ga. 1989).
18. *In re Brand*, 108 B.R. 319 (Bankr. N.D. Ala. 1989) (joint credit card debts); *In re Likenberg*, 107 B.R. 139 (Bankr. N.D. Ohio 1989)(joint debts).
19. Section 30-2-51, 1975 *Code of Alabama*.
20. *Blalock v. Blalock*, 51 Ala. App. 686, 288 So.2d 747 (1974). See generally Inge, *Alabama Domestic Relations Law*, 22 Ala.L.Rev. 427, at 444 (1970); Cook, *Family Law: Surveying 15 Years of Change in Alabama*, 36 Ala.L.Rev. 419, at 453 (1985); McCurley & Davis, *Alabama Divorce, Alimony and Child Custody*, Section 11-5 1982).
21. See *Dees v. Dees*, 390 So.2d 1060, at 1064 (Ala. Civ. App. 1980).
22. See Inge, *supra*, at 444 n. 151; Note, *Prohibition Against Subsequent Modification of Alimony in Gross*, 16 Ala.L.Rev. 144, at 145 (1963).
23. *LeMaistre v. Baker*, 268 Ala. 295, at 298, 105 So.2d 867, at 869 (1958).
24. See 7B, Alabama Digest, Divorce Key No. 245(1). See generally Cook, *supra*, at 453; Inge, *supra*, at 444 n. 151.
25. *In re Delaine*, *supra*, at 469; *In re Evans*, *supra*; *In re Portaro*, *supra*; *In re Fornachon*, 99 B.R. 428 (Bankr. E.D. Mo. 1989).
26. *In re Hunter*, 771 F.2d 1126 (8th Cir. 1985).
27. *In re Van Vleet*, 39 B.R. 816 (Bankr. M.D. La. 1984), citing *In re Allen*, 4 B.R. 617, at 620 (Bankr. E.D. Tenn. 1980); *In re Drumheller*, 13 B.R. 707, at 709 (Bankr. W.D. Ky. 1981); *In re Crawford*, 8 B.R. 552 (Bankr. D. Kan. 1981).
28. *In re Harrell*, *supra*, at 905.
29. *In re Calhoun*, *supra*, at 1110.
30. F.R. Bankr. P. 4007(b) Advisory Comments.
31. *In re Helm*, 48 B.R. 215, at 217 (Bankr. W.D. Ky. 1985) n.3.
32. Freeburger & Bowles, What Divorce Court Giveth, Bankruptcy Court Taketh Away: A Review of the Dischargeability of Marital Support Obligations, 24 *Journal of Family Law* 587, at 598 n. 48-55. See also *In re Crowder*, 37 B.R. 53, at 56 (Bankr. S.D. Fla. 1984).
33. *In re Mattern*, 33 B.R. 566 (Bankr. S.D. Ala. 1983).
34. See generally *In re Helm*, *supra*, at 217 n. 3. See also, *Loyko v. Loyko*, 490 A.2d 802, 200 N.J. Super. 152 (N.J. Super. A.D. 1985).
35. *In re Calhoun*, *supra*, at 1104, et seq.
36. 11 U.S.C. Section 523.
37. See generally *In re Pody*, *supra*, at 573; *In re Crowder*, *supra*; *Graham v. Jenkins*, 32 B.R. 978, at 985 (Bankr. S.D. Ohio 1983).
38. *In re Pody*, *supra*, at 573.
39. See, e.g., *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306 (11th Cir. 1982); *In re Lohnes*, 26 B.R. 593 (Bankr. D. Conn. 1983); *In re Bray*, 17 B.R. 152 (Bankr. N.D. Ga. 1982); *Carter v. Buskirk*, 16 B.R. 481, at 483 (Bankr. W.D. Mo. 1981).
40. 11 U.S.C. Section 362(d); See generally Fibich & Floyd, Impact of Bankruptcy on Family Law, 29 *South Texas Law Review* 637, at 643.
41. *Kilby v. Kilby*, 500 So.2d 32, at 35 (Ala. Civ. App. 1986); *Simpkins v. Simpkins*, 435 So.2d 753, at 754 (Ala. Civ. App. 1983); *Eckert v. Eckert*, 424 N.W. 2d 759 at 761 (Wis. App. 1988). ■

Retirement Plans and Divorce: Some Considerations in Planning Settlements

by William B. Sellers

Introduction

The world of deferred compensation is a land of ever-changing complex rules and alphabet soup titles into which most lawyers with any concern for their own sanity would just as soon not venture. Indeed, the statutes molded by federal legislation and regulated by the Internal Revenue Service and the Department of Labor have increased so exponentially that it is hard for even the specialist to keep current.

As the amounts of pension plan assets have burgeoned to over $2 trillion and have come to be less of a luxury and more of a right, Congress has seen fit to legislate. And, since the annual tax benefits given to employers' retirement plans by Congress as incentives for employees are estimated to be in the billions, Congress has enacted laws to make certain these benefits are not abused and to accomplish a variety of what they see to be desirable social aims; just like kudzo, the regulation of deferred compensation has spread into many areas only tangentially related to providing employees retirement.

One such area reached by the growth of regulation is domestic relations. Congress was concerned that benefits provided to an employee should not exclude the spouse in the event of divorce. So, while the trusts that hold the sums of deferred compensation are spendthrift by law and inalienable, there is one exception and that is to a spouse pursuant to divorce.[1]

It is the purpose of this article to focus on the law and regulations of deferred compensation as they relate to divorce

and see how they function when there is a divorce. Planning opportunities in this area will be discussed to elucidate these rules for the practitioner and to provide meaningful guidelines in representing parties in divorce.

Retirement benefits

A. Background

The Employee Retirement Income Security Act (ERISA) of 1974 required benefits under a retirement plan not be assigned or alienated. To qualify for favorable tax treatment as required by ERISA, a retirement plan was required to have spendthrift provisions to prevent any person or entity from attaching the retirement benefits of a participant in a plan. Because of these provisions in ERISA, state law was preempted, and it was the position of most federal district courts that the spouse of a retirement plan participant had no rights to benefits in a retirement plan. Because of the inequities of this position many courts began to chip away at this harsh rule and made exceptions for support and alimony payments. As there were differing and varied opinions as to the extent to which ERISA preempted some state laws relating to family support obligations, the IRS felt compelled to respond and attempt some uniformity.

In Revenue Ruling 80-27, the IRS ruled that the required spendthrift provisions in a retirement plan are not violated when a plan trustee complies with a court order mandating the distributions of benefits to a participant's spouse or children in satisfaction of support obligations.[2] To further clarify this position, Congress enacted the Retirement Equity Act (REA) of 1984. This act accomplished several objectives. The first was a provision restating the requirement that retirement plans have spendthrift provisions, but an exception was allowed so that benefits could be attached for family support obligations; lest there be any question as to what exactly qualified as a family support obligation, Congress defined the procedure for obtaining benefits from a retirement plan. They stated that the only manner for benefits to be attached was by having a Qualified Domestic Relations Order (QDRO). It no longer would be enough for the divorced spouse of a plan participant to obtain a divorce decree and thereby receive benefits; the spouse now must present a "qualified" domestic relations order to the plan administrator and then, and only then, would the administrator be required to pay out a portion of the retirement benefits.[3]

B. Alabama law

In Alabama, retirement plan assets cannot be used to pay alimony in gross or to make a property settlement.[4] However, it is proper for periodic alimony payments to be paid from retirement plan payments.[5]

The cases under Alabama law now cited as precedent were written before REA was passed. Under current federal law, most retirement plans must have the consent of a spouse to obtain loans and determine the types of payments to be made under the plan.[7] In addition, the spouse of a retirement plan participant must receive a death benefit unless the spouse has consented otherwise.[8] Requiring spousal consent implicitly supports the position that the spouse of a participant has incidents of ownership over a portion of the plan.

While such an argument has never been made in an Alabama case of which this writer is aware, the Internal Revenue Code appears to support the position that spouses of participants in retirement plans possess incidents of ownership and, thus, should be entitled to a portion of the participant's retirement plan assets. The argument also could be made that the sweeping language of ERISA §514(a) preempts state law and as a result, ERISA would require a state court to recognize a spouse's right to receive benefits under a retirement plan.[8]

Unless such an argument is made and accepted by an Alabama court, a QDRO may only be used in Alabama when the participant spouse agrees to use his plan assets to pay alimony or as a property settlement. Thus, until such time as the Alabama courts acknowledge a spouse's rights to retirement plans assets, a QDRO will benefit only those retirement plan participants who consent to its use.

C. Requirements for a Qualified Domestic Relations Order

With the number of retirement plans in existence in the United States, it is important for the practitioner representing either side in a divorce to know the requirements for a QDRO. If drafted properly, a spouse may receive retirement benefits under a retirement plan, and, if negotiated properly, the participant spouse may receive favorable tax treatment.

The mechanics of the QDRO are straightforward. First, there must be a domestic relations order. This is defined by the tax code as "any judgment, decree, or order (including approval of a property settlement) which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant and is made pursuant to a State domestic relations law."[9] This domestic relations order must create or recognize the existence of the spouse's right, or assign to the spouse a right to receive all or a portion of the benefits payable to a participant under the retirement plan.[10] Thus, to be recognized as a domestic relations order under the Internal Revenue Code, a spouse may

William B. Sellers is an associate with the Montgomery firm of Kaufman, Rothfeder & Blitz, P.C. Sellers graduated from Hillsdale College, Hillsdale, Michigan, magna cum laude. *He received his law degree from the University of Alabama School of Law and continued his legal education at New York University where he received an LL.M. in taxation.*

have any generic divorce decree, but within the body of the decree there should be specific language that the spouse has a right to benefits under the retirement plan. If a decree does not mention the right to receive retirement benefits, then the divorce decree will not be a domestic relations order and the spouse will not be able to receive benefits.

Once it is established that there is a domestic relations order or when one is drafted, the next step is for the order to be qualified. The first step in qualification is that the order contain certain information. This information includes: 1) the name and last known address of the retirement plan participant and the mailing address of the spouse; 2) the amount or percentage of the participant's benefits to be paid to the spouse; 3) the number of payments or the period to which the order applies, and; 4) each retirement plan covered by the domestic relations order.[11]

In addition, the domestic relations order must *not* have certain provisions. The provisions that will disqualify a domestic relations order are: 1) any type or form of benefits, or any option that is not provided in the plan; 2) any provision requiring the plan to provide increased benefits determined on the basis of actuarial value, and; 3) any provision requiring the payment of a benefit to a spouse that is required to be paid to another spouse under another QDRO.[12] This step is probably the most difficult and requires that all retirement plans under which a participant spouse benefits be carefully examined.

The section of the plan that should be especially examined are the provisions concerning distribution. Most retirement plans have many forms of distribution. Since Congress did not think it was fair to force a plan to make a distribution not provided in the plan, a spouse is limited by the types of distributions drafted into the plan. The drafter then should be careful to provide only for a benefit to be distributed as given in the plan. If an order were to provide otherwise, it will be disqualified, and the spouse will receive nothing.

D. The role of the plan administrator

When a domestic relations order is drafted as required, so that it becomes a qualified domestic relations order, the rights of the spouse do not spring into existence. Rather, a determination must be made by the plan administrator as to whether the order is in fact a QDRO. Plans are required to establish procedures to determine the status of the domestic relations order and this is another reason for examining the plans of the participant spouse to ascertain the proper party to whom a client's domestic relations order be submitted.

A domestic relations order should be sent to the plan administrator, and he is required to notify the participant and the spouse promptly that he has received the order and given all parties a copy of the plan's procedures to determine if the order is qualified. This determination is required to be made within a reasonable period of time. During the time it takes for the administrator to make the determination, all monies that would have been paid to the spouse must be placed in a segregated account. If the plan administrator determines that the order is a QDRO, then all monies placed in the segregated account may be paid to the spouse. If there is a determination that the order is not a QDRO then the segregated amounts are paid as they would have been paid under the plan and the spouse can follow appeals procedures.[13]

E. Payment of benefits to spouse

Benefits for a participant's retirement plan are paid to the spouse when the participant would receive benefits. As mentioned above, the payment of the benefit cannot be distributed in a form that is not provided in the plan. However, while there are certain limitations on the time when a participant may receive benefits there are exceptions for spouses under a QDRO that are more lenient.

Some plans require a participant to separate from employment in order to receive benefits. Under the rules above, in order for a QDRO to be qualified, the spouse would not be entitled to receive a benefit until the participant retired. However, a special exception exists for a QDRO so that a spouse may receive a benefit even though the participant is still employed by the business contributing to the plan. The QDRO may provide that the spouse is to receive a benefit when the participant reaches earliest retirement age, even though employment has not been terminated. Earliest retirement age is a term of art and is defined by the Internal Revenue Code as the earliest of: 1) the date on which the participant is entitled to a distribution under the plan, or 2) the later of: (a) the date the participant attains age 50, or (b) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.[14]

Again, it will be important to consult the plan to determine how the distribution feature works. It could be that a participant is entitled to receive amounts contributed to the plan after tax at any time. If this were the case, then the spouse could receive immediate payments from the plan. If the participant is not near early retirement age, then the benefit of receiving a payment would not be immediate and could present a problem. However, there might be a benefit in bargaining to receive a benefit that would not begin for some time as this would decrease the spouse's retirement needs.

There is authority that a plan may be amended to provide for payments to a spouse before earliest retirement age.[15] In order to have a plan amended so that a distribution may be made prior to earliest retirement age, a favorable determination letter should be obtained from the Internal Revenue Service. Amending a plan is not always an easy task and can be costly. Any amendment would have to follow procedures outlined in the plan documents and typically must be approved by the plan sponsor. While amending a plan for a small employer can be accomplished speedily, it is doubtful that a plan sponsored by a large employer would be as accommodating.

Tax planning with QDROs

A. Introduction

Perhaps the most interesting aspect of QDROs and the most important in negotiating the divorce settlement is the ability to plan for tax purposes. There are a variety of financial products that can be utilized to assist a participant spouse in accomplishing his tax planning needs. Instead of being taxed on making withdrawals from his retirement plan, a QDRO could give his spouse certain benefits and thus avoid tax on distributions. The spouse, however, would have to include these benefits in income. There are also various excise taxes that apply to distributions from retirement plans, and since QDROs are given favorable treatment, these can be avoided to the benefit of the participant.

B. Distributions from retirement plans

When a participant has reached retirement age, and begins to receive distributions under the plan he will be taxed on amounts he receives as if he had an annuity. However, if amounts are distributed to his spouse from the plan, under a QDRO, then the distribution will not be taxable to the participant. The amounts that are distributed will be taxable to the spouse as if she were a participant and distributee of the benefit, and she will be taxed as if an annuity was received.[16] This allows for the participant to give the spouse benefits from the retirement plan in the QDRO and not be taxed on the amounts.

C. IRAs

IRAs are not required by the Internal Revenue Code to be spendthrift and may be attached at any time. Therefore, when there is a divorce and one spouse has an IRA, it is not necessary that there be a qualified domestic relations order. IRAs have no plan administrator and there is no need to provide the same guidelines as there would be for a retirement plan with several employees. It is possible, however, to make a transfer from one spouse's IRA to the other spouse, and this will not be treated as a taxable transfer to either spouse.[17] It is necessary that there be a valid divorce decree or a writing incident to divorce.[19] So, in the case of a divorce involving IRAs, amounts saved in the IRA may be transferred with no tax to either the distributing spouse or to the receiving spouse.

D. Early distribution tax

Under the Internal Revenue Code, if a participant takes an early distribution from his retirement plan, a 10 percent excise tax will be imposed on the distribution.[20] Thus, in a situation where a participant had not terminated employment, but had reached early retirement age and received a distribution from his retirement plan, he would have a 10 percent excise tax to pay on the distribution he received. There is, however, a special exception for QDROs. Any distribution to a spouse under a QDRO is not subject to the 10 percent excise tax. So, if a participant gave the spouse a right to receive amounts from his retirement plan that would begin when he reached early retirement age, he could satisfy the obligation from amounts in his retirement plan that he would not be able to touch without paying an excise tax.[21]

E. Excess distribution tax

To prevent highly compensated persons from receiving too much of the retirement plan tax subsidy, Congress enacted a provision that forces retirees receiving over $112,500 a year (adjusted annually for inflation) from retirement plans to pay an excise tax of 15 percent[22] However, in computing the $112,500 amount, any retirement distribution to a spouse under a QDRO is not included. Thus, a wealthy employee receiving retirement benefits could draft the QDRO so that the spouse would get contributions in excess of the $112,500 amount. The spouse's claim is satisfied and at the same time, the participant spouse avoids the excise tax he would have paid if he were forced to withdraw that amount to make a cash payment to the spouse.

F. Planning ideas

If a spouse will receive amounts from a participant's retirement plans, the amount of the distribution must be included in gross income as discussed above. If the spouse wanted, this tax could be avoided by having the spouse roll the amounts received into an IRA or another qualified retirement plan. The rollover must be accomplished within 60 days of receiving the distribution. The spouse will not be taxed until she reaches 70 1/2 and begins to withdraw money out of the IRA, but in the meantime, the money would be allowed to grow tax free. Thus, taking a distribution from a retirement plan in lieu of the same amount in an outright cash settlement could prevent the spouse from payment tax on receipt of the amount and allow the funds to be rolled over into an IRA or other retirement plan to be invested tax free until the spouse reaches retirement age.[23]

Conclusion

Most people in this day and age are participants in retirement plans. They have contributed money and their employer has contributed money so that their account balance in the plan or the benefit that they have accrued is substantial and could easily be the largest asset they have. As there is no longer a question as to the means and manner for access to retirement plans in a divorce, practitioners can assist their clients by considering how the accumulated amounts in the retirement plans will be divided in the settlement.

By drafting the divorce decree so it is a qualified domestic relations order, clients can be assured that they have either a right in their participant spouses' retirement plan or that their spouse has no rights in the plan. Since qualified domestic relations orders are favored, the tax treatment afforded to spouses using a QDRO can be beneficial. When the property settlement is negotiated the assets in retirement plans can be used to satisfy both the current and future needs of the spouses. Care should always be taken in considering the tax aspects and a QDRO just might be the vehicle to remedy any adverse tax problem.

FOOTNOTES

1. IRC §401(a)(13).
2. Rev. Rul. 80-27, 1980-1 C.B. 8.
3. IRC §401(a)(13).
4. *See Kabaci v. Kabaci*, 373 So.2d 1144 (Ala.Civ.App., 1979). *See also, Thompson v. Thompson*, 532 So.2d 1027 (Ala.Civ.App., 1988).
5. *See Taylor v. Taylor*, 37 So.2d 645 (Ala., 1948).
6. IRC §417 (a)(2) & (4).
7. IRC §401(a)(11)(B) and §417(a)(1).
8. *See Mackey v. Lanier Collections Agency & Service*, 108 S.Ct. 2182 (1988).
9. IRC §414(p)(1)(B).
10. IRC §414(p)(1)(A).
11. IRC §414(p)(2).
12. IRC §414(p)(3).
13. IRC §414(p)(6) and (7).
14. IRC §414(p)(4)(B).
15. Private Letter Ruling 8743102 and 8744023.
16. Private Letter Ruling 8907062, *See also*, IRC §402(a)(9).
17. Private Letter Ruling 8916083, *See also*, IRC §408(d)(6).
18. Id. *See also*, Treas. Regs. 1.408-4(g)(1).
19. IRC §72(t).
20. Private Letter Ruling 8751040.
21. Id. *See also*, IRC §402(a)(6)(F).
22. IRC §4981A. ■

Proposed Health Law Section Application

This section is open to members of the plaintiff's and defense bar who are interested or involved in the everbroadening interface between law and healthcare, including but not limited to various state and federal issues such as Medicare fraud and abuse, payment problems, merger and acquisition of healthcare entities, antitrust, risk management, peer review, provider malpractice, individual rights, and supreme court actions.

This section anticipates a CLE program at the annual state bar meeting and other appropriate times. Proposed dues are $10 per year. Please check on the line below if you are interested in forming this section, and add in the space provided any other area of interest you would like to see added to those above.

_____

I am interested in forming a Health Law Section of our bar _____

I would like to see the section description include _____

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Name _____

Bar ID # _____

Address _____

_____

Please return promptly to:

Gregg B. Everett, Chairperson
Task Force for Health Law Section
Alabama State Bar
P.O. Box 671
Montgomery, Alabama 36101

About Members, Among Firms

ABOUT MEMBERS

T. Roe Frazer, II, announces a change of address. The new address and phone number are Langston & Frazer, One Jackson Place, Suite 1356, P.O. Box 23307, Jackson, Mississippi 39225-3307. Phone (601) 969-1356.

■

AMONG FIRMS

Smith, Hynds, Blocker & Lowther, P.C. announces the relocation of their offices to 3500 Independence Drive, Birmingham, Alabama 35209. Phone (205) 879-9595.

■

Inge, Twitty, Duffy, Prince & McKean announces that **Agee S. Broughton, III,** is now a partner in the firm. Offices are located at First Alabama Bank Building, P.O. Box 1109, Mobile, Alabama 36633.

■

Starnes & Atchison announces the relocation of its offices to Seventh Floor, Four Metroplex Drive, Birmingham, Alabama 35209. Phone (205) 868-6000.

■

Balch & Bingham announces that **John David Snodgrass** has joined the firm as a partner in the Huntsville office, October 1, 1989. The firm also announces that **James A. Byram, Jr.,** has joined the firm as a partner in the Montgomery office, October 1, 1989, and **M. Stanford Blanton** has become a partner with the firm in the Birmingham office, January 1, 1990.

■

Roger L. Lucas, formerly a partner with Emond & Vines, and **K. Rick Alvis** and **Robert E. Kirby, Jr.,** formerly associates with Emond & Vines, announce the formation of their professional corporation for the practice of law under the name **Lucas, Alvis & Kirby, P.C.** Offices are located at 250 Park Place Tower, 2001 Park Place North, Birmingham, Alabama 35203. Phone (205) 251-8448.

■

The firm of **King & King** announces that **Randy G. Stephens,** formerly general counsel of the Alabama Education Association, has become associated with the firm, December 1989. Offices are located at The King Professional Building, 713 South 27th Street, P.O. Box 10224, Birmingham, Alabama 35202-0224. Phone (205) 324-2701.

■

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Cecil H. Macoy, Jr.,** has become an associate of the firm, with offices in Birmingham and Mobile.

■

George P. Ford and **J. Gullatte Hunter, III,** formerly members of Simmons, Ford & Brunson, P.A., announce the formation of **Ford & Hunter, P.C.,** February 1, 1990. Offices are located at 645 Walnut Street, Suite 5, P.O. Box 388, Gadsden, Alabama 35902. Phone (205) 546-5432.

■

Miller, Hamilton, Snider & Odom announces that **Daniel B. Graves** and **Hugh H. Smith** have become members of the firm, and **Alison M. MacDonald, M. Frederick Simpler, Jr.,** and **Susan Elizabeth Russ** have become associated with the firm. Offices are located in Mobile, Montgomery and Washington, D.C.

■

Michael A. King, of Helena, Alabama, has joined the firm of **Cahill, Gordon & Reindel** in New York, New York. He was admitted to the Alabama State Bar in Alabama in 1988.

■

Joe R. Wallace and **Richard L. Wyatt,** formerly of the Birmingham firm of Davies, Williams & Wallace, and **W. Kirk Davenport,** formerly of the Anniston firm of Bolt, Isom, Jackson & Bailey, P.C., announce the formation of a partnership for the practice of law to be known as **Wallace, Wyatt & Davenport.** Offices are located at 308 Jefferson Federal Building, Birmingham, Alabama 35203. Phone (205) 324-7635.

■

Eyster, Key, Tubb, Weaver & Roth announces that **James G. Adams, Jr.,** has become a partner in the firm. Offices are located at 402 East Moulton Street, Decatur, Alabama 35601. Phone (205) 353-6761.

■

Dominick, Fletcher, Yeilding, Wood & Lloyd, P.A. announces that **C. Clark Collier,** formerly senior vice-president with AmSouth Bank, has joined the firm. Offices are located at 2121 Highland Avenue, Birmingham, Alabama 35205. Phone (205) 939-0033.

■

Sheffield & Sheffield, P.C. announces that **R. Wendell Sheffield** has become a partner in the firm and that the name of the firm has been changed to **Sheffield, Sheffield & Sheffield, P.C.** Offices are located at 730 Frank Nelson Building, Birmingham, Alabama 35203. Phone (205) 328-1365.

■

The firm of **Agee & Meriwether** announces that **J. Glenn Cobb, Jr.,** has become an associate, and the name of the firm has been changed to **Agee, Meriwether & Cobb, P.C.,** P.O. Box 11366, Chickasaw, Alabama 36611. Phone (205) 457-2378.

■

Douglas I. Friedman, P.C. announces that **J. Craig Bailey** has become associated with the firm at Suite 535, 2000-A Southbridge Parkway, Birmingham, Alabama 35209. Phone (205) 879-3033.

■

The firm of **Schoel, Ogle, Benton, Gentle & Centeno** announces the relocation of its offices to 600 Financial Center, 505 North 20th Street, Birmingham, Alabama 35203. The new telephone number is (205) 521-7000. The firm also announces that **David O. Upshaw** has become associated with the firm. He received his undergraduate degree from Auburn University in 1986 and his law degree from Florida State University School of Law in 1989.

■

Coale, Helmsing, Lyons, Sims & Leach, P.C. announces that **Richard E. Davis** and **Sandy J. Grisham** have become members of the firm. Offices are located at LaClede Building, 150 Government Street, Mobile, Alabama 36652. Phone (205) 432-5521.

■

The firm of **Johnston, Barton, Proctor, Swedlaw & Naff** announces that **Virginia Carruthers Smith** has become associated with the firm. Offices are located at 1100 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 322-0616.

■

James B. Noel, formerly assistant counsel to the National Football League, has joined the firm of **Davis, Wright & Tremaine,** located at 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington 98101-1688.

■

The firm of **Ted Taylor** announces that **Jerry D. Roberson,** formerly of Rives & Peterson, and **Leah O. Taylor** have become partners in the firm and that the firm name has been changed to **Taylor & Roberson,** with offices at 114 East Main Street, P.O. Drawer H, Prattville, Alabama 36067, and 2112 First Avenue North, Birmingham, Alabama 35203.

■

Oliver Frederick Wood, Ralph Wyatt Howell and **C. Harry Green** announce the formation of a partnership, effective March 12, 1990, to be known as **Green, Wood & Howell.** The mailing address is P.O. Box 1597, Hamilton, Alabama 35570. Phone (205) 921-2133.

■

Stokes & McAtee announces the relocation of their offices to 1000 Downtowner Boulevard, Mobile, Alabama 36609. The mailing address is P.O. Box 991801, Mobile, Alabama 36691. The new phone number is (205) 460-2400.

■

William R. Blanchard, Laura A. Calloway and **Boyd F. Campbell** announce the formation of **Blanchard, Calloway & Campbell, P.C.,** effective April 1, 1990. Offices are located at 505 S. Perry Street, Montgomery, Alabama. The mailing address is P.O. Box 746, Montgomery, Alabama 36101-0746. Phone (205) 269-9691, (205) 265-8671.

■

The firm of **Rives & Peterson** announces that **Charles P. Hovis** has become of counsel to the firm. He is a former administrative judge of The Armed Services Board of Contract Appeals and is former deputy assistant general counsel of the Procurement Law Division of the United States General Accounting Office. Judge Hovis received his undergraduate degree from Erskine College and law degree from George Washington University National Law Center. He will be located at the firm's office at Hilton Head, South Carolina.

■

Mary Beth Trice has joined the firm of **Walsh, Donovan, Lindh & Keech,** located at 595 Market Street, Suite 2000, San Francisco, California 94105-2831. Phone (415) 957-8700. She is a member of the Alabama, California and Texas bars.

■

Phillips & Funderburk announces several changes. The new address, firm name and phone number are **Funderburk, Day & Lane,** P.O. Box 1268, Phenix City, Alabama 36868-1268. Phone (205) 297-2900.

■

The firm of **Leo & Associates** announces the association of **James R. Hinson, Jr.,** formerly associated with Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves in Mobile, Alabama, and **Robert N. Payne,** formerly associated with Martinson & Beason in Huntsville, Alabama. The firm's new offices are located at 200 Randolph Avenue, Suite 200, Huntsville, Alabama 35801. Phone (205) 539-6000.

■

Markow, Walker, Reeves & Anderson of Jackson, Mississippi, announces that they have opened a Tuscaloosa office, effective January 1, 1990, and that **Edward H. Hubbard** and **F. Martin Lester, Jr.,** have become associated with the firm. The office address is 700 Energy Center Boulevard, Suite 405, Northport, Alabama 35476. Phone (205) 349-3500.

■

Lightfoot, Franklin, White & Lucas announces the opening of its office at 300 Financial Center, 505 10th Street North, Birmingham, Alabama 35203-2706. Phone (205) 581-0700.

The firm's partners are Warren B. Lightfoot, Samuel H. Franklin, Jere F. White, Jr., William R. Lucas, Jr., Mac M. Moorer, John M. Johnson, M. Christian King and E. Glenn Waldrop, Jr. Associates are Adam K. Peck, Harlan I. Prater, IV, Michael L. Bell, Madeline H. Haikala and William H. King, III. ■

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.
Miglionico & Rumore
1230 Brown Marx Tower
Birmingham, Alabama 35203

Walker County

Walker County was created December 26, 1823. It was named for John Williams Walker of Huntsville, one of Alabama's hardest working and brightest political leaders, who had died only nine months before.

Walker was born in Virginia in 1783. He graduated from Princeton University in 1806, practiced law in Petersburg, Virginia, and then moved to Huntsville, Alabama, in 1810 with the family of his father-in-law, Leroy Pope. He became speaker of the Territorial Legislature in 1818, United States Territorial Judge in 1819 and president of the first Alabama Constitutional Convention. He was also Alabama's first United States Senator. Declining health forced him to retire from the Senate November 21, 1822, and he died March 27, 1823, at the age of 39. Four of his sons became prominent in Alabama politics.

The Legislature designated the home of Peter Baker, located in the area between King's Chapel and Lost Creek, as the temporary seat of justice for the new county. Two communities vied to be the site of a permanent courthouse: Holly Grove on Lost Creek, about one mile from the present town of Townley, and Jasper.

Dr. Edward Gordon Musgrove was an early settler in the area of present day Jasper. He originally came from South Carolina. Musgrove was a physician, a scholar and the first judge of the county court. It has been recounted that Musgrove heard cases while sitting on a big rock. The jury sat on another, larger rock nearby.

Musgrove offered to give land to Walker County from his own property provid-

ed that the courthouse be located there. He also commenced construction of a courthouse building. This act was enough to secure the county seat for Jasper. It has remained there ever since.

Jasper was named in honor of William Jasper of South Carolina. His was a popular name because a substantial number of the residents in the area came from that state. Jasper is believed to have emigrated from Germany, settled in Philadelphia in 1767, enlisted in the Army under Francis Marion, and fought with the Second South Carolina Infantry.

Jasper won recognition at the Battle of Fort Moultrie in Charleston Harbor on June 28, 1776. When the American flag was shot down, Jasper recovered it outside the walls of the fort and nailed it on another staff. For his heroism, Jasper reportedly was offered a battlefield commission by Governor John Rutledge of South Carolina. Jasper told the governor that he was not a schooled man and could not read. He did not want to dishonor the officer corps by being appointed to its ranks. He told the governor that if offered, he would accept the rank of sergeant in the Continental Army. History remembers him today as Sergeant Jasper. Jasper continued to serve and he died at the Battle of Savannah on October 9, 1779.

The first Jasper courthouse was a log cabin. This building was damaged March 28, 1865, when the Union Raiders under General James Wilson burned the courthouse, the jail and a few other buildings. This courthouse was repaired during the Reconstruction Era but burned again July 22, 1877. It was rebuilt and continued to serve the county until a third fire destroyed the courthouse September 21, 1884.

The next structure to serve as a courthouse was a two-story brick building constructed by Shields & Wilson. During construction, the original framework was destroyed by a fire in 1885. Ultimately the construction was finished and the building opened for use December 22, 1886.

By 1907 Jasper and Walker County had grown to such an extent that a new courthouse was needed. The county built on the same site as the previous courthouses a classic granite rock courthouse fronted by a portico, four columns and a triangular pediment. The structure was

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

Walker County Courthouse

crowned with a dome containing the courthouse clock, and it was topped by a flag. Early photographs of this building show an impressive structure and include views of the landscaped square, Confederate memorial and a gazebo on the grounds over an artesian well. This gazebo or bandstand was moved to the campus of Walker College where the structure is preserved for future Walker countians.

Fire struck again January 12, 1932, and for the fifth time in Jasper's history the county lost all or part of a courthouse by fire. Work began on a new courthouse July 4, 1932. The new building was constructed on the foundation of the previous courthouse. This building continues to serve the county.

The present Walker County Courthouse was completed and accepted by the county in May 1933. It is a three-story structure with a flat roof, and is constructed of white limestone on a steel frame. The interior of the building is finished in white marble. Clock faces appear on the south, west and east sides of the building. The courthouse was designed by architect Charles H. McCauley and the builders were Foster & Creighton of Nashville, Tennessee, and Birmingham. Their original bid was $69,000 with an additional $15,000 to complete the third floor.

On April 3, 1974, at 7:57 p.m. a tornado hit Jasper and severely damaged the courthouse. However, the building was repaired and a new annex was added during 1976-77. The architects for the new project were Cobb, Adams & Benton Architects, Inc. and the general contractor was Sparks Construction, Inc.■

cle opportunities

may

14-15

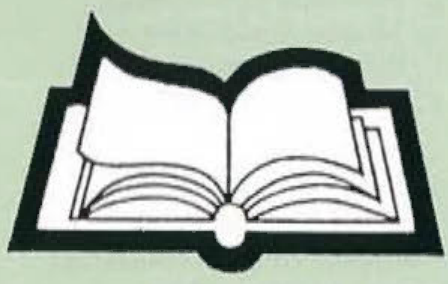
RESOLVING GOVERNMENT CONTRACT COST DISPUTES
Hyatt Orlando, Orlando
Federal Publications, Inc.
Credits: 11.0 Cost: $775
(202) 337-7000

14-16

PENSION LAW TODAY
Georgetown Inn, Washington, DC
Federal Publications, Inc.
Credits: 21.0 Cost: $900
(202) 337-7000

17 thursday

ALABAMA SALES AND USE TAX: AN OVERVIEW & UPDATE
Montgomery
Lorman Business Center, Inc.
Credits: 6.0 Cost: $105
(715) 833-3940



17-19

FAMILY LAW INSTITUTE
Savannah
Institute of Continuing Legal Education in Georgia
Credits: 12.0 Cost: $145
(404) 542-2522

18 friday

DEFENDING THE DUI CHARGE IN ALABAMA
Birmingham
Professional Education Systems, Inc.
Credits: 6.0 Cost: $115
(715) 836-9700

18-19

ANNUAL SEMINAR-ON-THE-GULF
Sandestin Resort, Destin
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

21-22

ENVIRONMENTAL LAW
Reno
Rocky Mountain Mineral Law Foundation
Credits: 10.0 Cost: $460
(303) 321-8100

21-25

LABOR LAW AND LABOR ARBITRATION
Westin Hotel, Dallas
Southwestern Legal Foundation
(214) 690-2377

23-25

HEALTH LAW UPDATE
J.W. Marriott Hotel, Washington, D.C.
National Health Lawyers Association
Credits: 17.1 Cost: $550
(202) 833-1100

25 friday

USE OF EXPERT WITNESSES
Harbert Center, Birmingham
Birmingham Bar Association
Credits: 3.0
(205) 251-8006

ACCIDENT RECONSTRUCTION
Atlanta
Institute of Continuing Legal Education in Georgia
Credits: 6.0 Cost: $95
(404) 542-2522

june

1-2

DIVORCE ON THE BEACH
Gulf State Park Resort, Gulf Shores
Alabama State Bar Family Law Section
Credits: 6.0
(205) 930-9000

HEALTH LAW
Calloway Gardens, Pine Mountain, Georgia
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

2-8

BASIC COURSE IN TRIAL ADVOCACY
The Radisson, Seattle
Association of Trial Lawyers of America
Cost: $600
(800) 424-2725

7-8

WORKERS' COMPENSATION
Omni Parker House Hotel, Boston
Defense Research Institute
(312) 944-0575

7-9

TAX INSTITUTE
Grand Hotel, Point Clear
Alabama Bar Institute for CLE
Credits: 9.0
(205) 348-6230

13-14

INSURANCE CLAIMS MANAGEMENT
Marriott, Des Moines
Defense Research Institute
Credits: 12.1 Cost: $320
(312) 944-0575

20-22

AMERICAN INSTITUTE ON FEDERAL TAXATION
Wynfrey Hotel, Birmingham
American Institute on Federal Taxation, Inc.
Credits: 16.4 Cost: $350
(205) 254-1626

22 friday

MEDICAL ASPECTS OF A CASE
Harbert Center, Birmingham
Birmingham Bar Association
Credits: 3.0
(205) 251-8006

22-23

PROOF & ARGUMENT OF PSYCHOLOGICAL INJURIES
The Hilton at Disney Village, Orlando
Association of Trial Lawyers of America
Cost: $300
(800) 424-2725

july

11 wednesday

ALABAMA SALES AND USE TAX
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

12 thursday

ALABAMA SALES AND USE TAX
Huntsville
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

AVOIDING ENVIRONMENTAL LIABILITY IN COMMERCIAL REAL ESTATE TRANSACTIONS IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

13 friday

AVOIDING ENVIRONMENTAL LIABILITY IN COMMERCIAL REAL ESTATE TRANSACTIONS IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

16-19

SUMMER CONFERENCE
Perdido Hilton, Orange Beach
Alabama District Attorneys Association
(205) 261-4191

19-21

ANNUAL MEETING
Riverview Plaza Hotel, Mobile
Alabama State Bar
(205) 269-1515

22-28

ANNUAL CONVENTION
San Diego
Association of Trial Lawyers of America
(800) 424-2725

26-29

ATLANTIC BANKRUPTCY LAW INSTITUTE
The Breakers, Palm Beach
Norton Institutes on Bankruptcy Law
Credits: 16.0 Cost: $550
(404) 535-7722

Assessing the Legal Needs of the Poor: Building an Agenda for the 1990s

by Patricia Yeager Fuhrmeister

Patricia Yeager Fuhrmeister is a managing attorney with Birmingham Area Legal Services Corporation. She received her undergraduate degree from Auburn University and her law degree from the University of Alabama School of Law. Fuhrmeister is a member of the Alabama State Bar Committee on Access to Legal Services and is immediate past president of the Shelby County Bar Association.

This is the second in a series of articles by members of the Alabama State Bar Committee on Access to Legal Services. The articles are based on the results of a survey performed by Davis, Penfield & Associates, a Birmingham research firm, on legal needs in Alabama. The survey was commissioned by the Legal Services Corporation of Alabama and the Committee on Access to Legal Services with funds from an IOLTA grant.

The first article dealt with responses from low income residents of Alabama; however, in any study of statewide legal needs, it is equally important to examine the attitudes of the individuals available to meet those needs. To that end, Davis, Penfield surveyed over 250 Alabama attorneys and 61 attorneys, paralegals and administrative employees of Legal Services' offices across the state.

Not surprisingly, marked differences were observed in the basic composition of the two groups. The attorney sample was overwhelmingly white and male, while over half the Legal Services' employees were female and over 40 percent were non-white.

Nearly all non-Legal Services Corporation attorneys surveyed were in private practice, and 40 percent were engaged in a general practice. The mean firm's size was over 15 members, and the sample was composed of predominantly urban practitioners with nearly 90 percent found in Birmingham, Mobile and Montgomery.

Legal needs of the poor

Both private attorneys and Legal Services' employees were questioned as to the existence of unmet legal needs in Alabama and how best to meet those needs.

Slightly more than one-half of the private bar felt that the legal needs of the poor were not being adequately met, pointing to the areas of domestic relations, housing and consumer problems as the most serious of the unmet needs. Even more of the Legal Services employees (75 percent) felt that there were unmet legal needs in Alabama, also citing domestic relations and housing, but pointing to stringent eligibility requirements and inadequate staffing as further barriers.

Of the private attorneys who felt that the legal needs of the poor were, in fact, being met, most pointed to Legal Services/Legal Aid as the primary source of assistance. Most attorneys responded that the poor generally do not know how to seek legal assistance on their own; however, most also felt that their community had an effective referral system for directing the poor to an appropriate source of assistance. Local bar associations, individual private attorneys and social service agencies were primarily credited with assisting low income persons in getting legal aid.

Awareness of Legal Services

Almost all attorneys surveyed were aware of a Legal Aid or Legal Services office in their community and had had actual contact with Legal Services. This contact was generally stronger in rural than in urban areas.

Attorneys perceived Legal Services' casehandlers as handling primarily the same types of cases which they felt represented the greatest unmet need—domestic relations, housing and consumer problems; however, despite this perception and the fact that attorneys generally evaluated Legal Services positively, few regularly referred clients to Legal Services and almost one-third had never made a referral. Referral patterns, just as awareness and contact, were strongest in rural areas.

Concerns of Legal Services' professionals

Respondents from the Legal Services community expressed genuine concern

as to their ability to meet the unmet legal needs of the poor. Understaffing was viewed as a problem by an overwhelming majority, but accessibility of legal services offices and lack of knowledge on the part of potential clients were also seen as problems. Significant percentages felt that poor people were limited in seeking legal assistance by transportation problems and by the fact that they simply were not aware that they had a "legal" problem.

Legal Services' professionals surveyed had been with a Legal Services program an average of eight years and over one-third indicated they would probably stay with Legal Services for most of their careers. A large majority were satisfied both with Legal Services as a career and with their present position at Legal Services; however, many expressed a desire for increased salaries and staffing and less regulation and bureaucracy.

Legal Services respondents listed cases involving finances and credit, social services, housing and domestic relations as the majority of their caseload, but perceived community economic development, community education, children's rights and housing as needs to be reckoned with in the future.

Pro bono issue

One solution to the problem of unmet legal needs in Alabama is the fostering of increased pro bono efforts among members of the private bar. Before formulating a strategy or making recommendations, however, it is vital to gauge attorneys' attitudes and perceptions about pro bono work. Both private attorneys and Legal Services' employees were questioned about pro bono work in their community. While similar in some respects, responses varied in significant areas.

Private attorneys generally seemed to feel that pro bono work was present in their community, and claimed to handle an average of about ten pro bono cases per year; they also responded that they should be doing more pro bono work and that large firms, especially, should increase their efforts. About half felt that the state and local bar associations should play an even more active role in promoting pro bono work. About the same number, though, opposed the establishment of a mandatory pro bono requirement.

Legal Services' employees responded overwhelmingly that private attorneys must be willing to increase their pro bono efforts and that large firms and the state and local bar associations should more actively promote pro bono work. Legal Services respondents favored hiring a state pro bono coordinator and the establishment of a CLE voucher system as possible incentives for increased pro bono work. By a slight margin, the payment of nominal fees for pro bono work was also favored. In stark contrast to the private bar, three-fourths of Legal Services' employees favored a mandatory pro bono requirement.

It seems apparent that present resources are not adequate to address Alabama's unmet legal needs. The solution is less obvious, but clearly must have the support of all segments of the bar to be successful. The final article in this series will make recommendations and, it is hoped, will be the first step in a cooperative effort to provide legal assistance to those who need it most.■

Notice

United States Bankruptcy Court
Northern District of Alabama

Effective April 2, 1990, each bankruptcy divisional office in the Northern District of Alabama will be accepting all bankruptcy cases for filing which are within their respective territories as set out in Local Rule 9(a).

Please check the counties below to determine which divisional office your petition, pleadings, claims and adversary proceedings must be filed.

Honorable L. Chandler Watson, Bankruptcy Judge
Anniston (Eastern Division) comprised of the following counties: Calhoun, Cherokee, Clay, Cleburne, DeKalb, Etowah, Marshall, St. Clair, and Talladega.

Honorable William E. Johnson, Jr., (Chapter 13) Bankruptcy Judge
Honorable R. Clifford Fulford, (Chapters 7, 9, 11 and 12) Bankruptcy Judge
Birmingham (Southern Division) comprised of the following counties: Blount, Jefferson and Shelby.

Honorable Edwin D. Breland, Bankruptcy Judge
Decatur (Northern Division) comprised of the following counties: Colbert, Cullman, Franklin, Jackson, Lauderdale, Lawrence, Limestone, Madison, Morgan, and northern Winston.

Honorable George S. Wright, Chief Judge
Tuscaloosa (Western and Jasper Divisions) comprised of the following counties:
Bibb, Fayette, Greene, Lamar, Marion, Pickens, southern Winston, Sumter, Tuscaloosa, and Walker.

Office	Mailing Address	Location
Anniston	103 U.S. Courthouse Anniston, AL 36201	103 U.S. Courthouse Anniston, AL 36201
Birmingham	500 South 22nd Street Birmingham, AL 35233	500 South 22nd Street Birmingham, AL 35233
Decatur	P.O. Box 1289 Decatur, AL 35601	312 Federal Courthouse Decatur, AL 35601
Tuscaloosa	P.O. Box 3226 Tuscaloosa, AL 35403	350 U.S. Courthouse Tuscaloosa, AL 35401

All adversary proceedings, motions and other papers must be filed in the office where the bankruptcy case is pending. Any requests for information must be directed to the office where the bankruptcy case is pending.

William C. Redden, Clerk
U.S. Bankruptcy Court
500 South 22nd Street
Birmingham, AL 35233

Index to Summaries of General Laws Enacted and Constitutional Amendments Proposed by the Legislature of Alabama at the Special Session, 1989

Act No.	Bill No.
89-965	S. 3
89-980	S. 4
89-990	H. 3
89-991	H. 32
89-992	H. 39
89-993	H. 33
89-994	H. 36
89-1004	S. 1
89-1005	S. 7
89-1007	S. 19
89-1008	S. 20

Senate Bills
Special Session
1989

Senate Bill No.	Act No.
1	89-1004
3	89-965
4	89-980
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20	89-1008

House Bills
Special Session
1989

House Bill No.	Act No.
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Summaries of General Laws Enacted and Constitutional Amendments Proposed by the Legislature of Alabama at the Special Session, 1989

Act No. 89-965, S. 3, proposes an amendment to the Constitution relating to Tuscaloosa County to validate certain laws regulating costs and charges of court and to validate certain acts and actions taken pursuant to such laws.

Act No. 89-980, S. 4, amends section 8-8-15, *Code of Alabama* 1975, relating to bad check charges levied by lenders of money and extenders of other credit, so as to include merchants and the assignee of a lender of money, extender of other credit, or merchant.

Act No. 89-990, H. 3, adopts and incorporates into the *Code of Alabama* 1975 those general and permanent laws of the state enacted during the 1988 First and Second Special Sessions and the 1989 Regular Session of the Legislature.

Act No. 89-991, H. 32, reduces the appropriation made in Act No. 89-350, 1989 Regular Session, from the general fund to Court Related Costs Not Otherwise Provided For—Legal Advice and Legal Services Program allocated to the Bibb County Commission for the fiscal year ending September 30, 1990.

(continued on next page)

Act No. 89-992, H. 39, makes an appropriation from the Special Educational Trust Fund to the Huntsville City Board of Education for the fiscal year ending September 30, 1990.

Act No. 89-993, H. 33, makes an appropriation from the general fund to the Bibb County Commission for the fiscal year ending September 30, 1990.

Act No. 89-994, H. 36, amends section 11-88-6, *Code of Alabama* 1975, relating to water, sewer and fire protection authorities, so as to provide further for the board of directors of such authorities.

Act No. 89-1004, S. 1, amends sections 41-9-321 and 41-9-323, *Code of Alabama* 1975, relating to the Tannehill Furnace and Foundry Commission, so as to provide further for the number and appointment of members of the commission and the meetings of the commission.

Act No. 89-1005, S. 7, amends section 10-10-10, *Code of Alabama* 1975, relating to professional associations furnishing statements of members or shareholders to the Secretary of State, so as to provide that such statements shall be furnished upon request of the Secretary of State and to remove the $1 filing fee.

Act No. 89-1007, S. 19, makes an appropriation from the general fund to the National Conference of State Legislatures for membership dues.

Act No. 89-1008, S. 20, makes a supplemental appropriation from the agricultural fund to the Department of Agriculture and Industries for the fiscal year ending September 30, 1990.

Divorce—on the Beach

This family law seminar is designed to provide valuable information for the family law practitioner. The faculty will be discussing basic strategies and concerns that will assist attorneys handling similar situations with confidence and relative ease. Because of the experience and reputations of the faculty, those who have previously dealt with domestic relations will find valuable insight and gain procedural skill.

Registration fee: FLS Members—$59; Non-members—$75. Registration fee at the door will be $20 more in each category. Pre-registration is strongly encouraged. Non-members will receive FLS membership by attending.

Tax deductible: An income tax deduction may be allowed for expenses of education (including travel, meals and lodging) undertaken to maintain and improve skills. See Treas. Reg. §1.162.5, *Coughlin v. Commissioner,* 203 F.2d 307 (2nd Cir. 1953).

MCLE credit: The seminar will provide 6.0 hours of Mandatory Continuing Legal Education credit. It is the responsibility of each attorney to maintain records of his or her attendance.

Please note: Make your reservations at the Gulf State Park Resort Hotel as early as possible in that the Family Law Section cannot assure accommodations will be available for reservations made after May 10, 1990.

Activities: There will be a golf tournament scheduled for those desiring to participate. Announcements as to time and place will be made at the seminar. Please have your registration in early so we can make arrangements for your participation.

List of Topics

—Hot Tips and Recent Developments

—The ABCs of Divorce Taxation (Spoken in Clear English)

—Psychological Issues in Divorce: How the Lawyer Can Assess and Affect Reactions in Long-term Adjustments in Divorce

—Determining the Validity of Allegations of Sexual Abuse in the Custody and Visitation Context

—A Panel Discussion on the Use of Off-the-Shelf Computer Software as an Aid in Law Office Management for the Small Firm

—What Circuit Judges Really Want to Hear from Divorce Lawyers in the Trial of Litigated Divorce Cases ■

March 12, 1990

MEMORANDUM

TO: **Attorneys, court reporters and others receiving indigent defense payments**

FROM: **Robert L. Childree, State Comptroller**

SUBJECT: Social Security Number or Federal Employer Identification Number

As an enhancement to the State of Alabama's financial accounting system, a common vendor file is being developed to streamline and improve the payment process. A vendor number will be assigned to every individual or company doing business with the state. This number will consist of either the vendor's social security number or the federal employer identification number, followed by two digits assigned by my office.

In order to implement the new vendor file, we are requesting your assistance by completing the form at the bottom of this memo and returning it to my office as soon as possible. It is imperative that we receive this information, and failure to respond will result in delayed payments to those vendors who do not furnish the requested data.

DETACH HERE

Social Security Number _____

or

Federal Employer ID Number _____

Vendor Name _____

Vendor Address _____

_____

_____

Return to: **State Comptroller's Office**
Indigent Defense
110 Alabama State House
Montgomery, AL 36130

Bar Briefs

U.S. District Judge Gesell chosen eighth annual Devitt Award winner

Veteran trial court Judge Gerhard A. Gesell is the recipient of the Eighth Annual Edward J. Devitt Distinguished Service to Justice Award. Judge Gesell is honored for his contributions to justice as exemplified by his service as a member of the board of the Federal Judiciary Center, and a member of the Judicial Conference Committee on the Operation of the Jury System and the Advisory Committee on Criminal Rules.

A United States District Court Judge for the District of Columbia since 1967, Judge Gesell has served as presiding judge for a number of the nation's most closely watched trials, including several Watergate trials, the "Pentagon Papers" trial, and most recently, the complex Iran Contra and Colonel Oliver North trials.

The award carries an honorarium of $15,000 and is symbolized by an inscribed crystal obelisk. Presentation will be made to Judge Gesell at a time and place to be named later.

Judge Gesell joins the following winners: United States Circuit Judge Albert B. Maris of Pennsylvania (1982); United States District Judge Walter E. Hoffman of Virginia (1983); Chief Justice Warren E. Burger (special award, 1983); United States Circuit Judge Frank M. Johnson, Jr., of Alabama (1984); United States District Judge William J. Campbell of Illinois (1985); United States Circuit Judge Edward A. Tamm, Washington, D.C. (special award, 1985); United States District Judge Edward T. Gignoux of Maine (1986); United States District Judge Elmo B. Hunter of Missouri (1987); and joint recipients United States Circuit Judge Elbert Parr Tuttle of Georgia, and United States Circuit Judge John Minor Wisdom of Louisiana (1988).

Cooper nominated to chair ABA House of Delegates

N. Lee Cooper, a partner in the Birmingham firm of Maynard, Cooper, Frierson & Gale, P.C., recently was nominated to chair the House of Delegates of the American Bar Association.

Cooper's nomination will be voted on at the ABA Annual Meeting in Chicago in August. If he is elected, he will take office at the close of that meeting, and preside over sessions of the House of Delegates between February 1991 and August 1992. The House of Delegates, with 460 members, meets twice yearly to establish association policies. Its members represent various ABA components, as well as state, local, specialty and ethnic bar associations.

Cooper has been a member of the House of Delegates since 1979, initially representing the Birmingham Bar Association and since 1980 representing the Alabama State Bar. As a delegate, he chaired the House Drafting Committee on the Model Rules of Professional Conduct and he currently chairs the Select Committee of the House. He also is a former member of the ABA Commission on Professionalism and former chairperson of the ABA Section of Litigation.

Cooper received a bachelor of science degree in 1963 and a law degree in 1964 from the University of Alabama at Birmingham, where he was an editor of the *Alabama Law Review*. He is a trustee of the Alabama Law School Foundation and of the Farrah Law Society of the law school.

Garth elected fellow of college

Thomas F. Garth, of the Mobile firm of Lyons, Pipes & Cook, has been elected a Fellow of the American College of Probate Counsel.

The American College of Probate Counsel is an international association of lawyers who have been recognized as outstanding practitioners in the laws of wills, trusts, estate planning and estate administration. The College actively pursues improvements in the administration in the tax and judicial systems in these areas of law, in addition to providing programs of continuing legal education for its Fellows.

Garth

Membership in the College, which is a post of honor conferred by the peers of the newly-elected Fellow, is by invitation of the Board of Regents.

Starnes admitted to American College of Trial Lawyers

W. Stancil Starnes has become a Fellow of the American College of Trial Lawyers. Membership is by invitation of the board of regents. The College is a national association of 4,500 Fellows in the United States and Canada. Its purpose is to improve the standards of trial practice, the administration of justice and the ethics of the profession. The induction ceremony took place during the recent annual banquet of the American College of Trial Lawyers. More than 1,200 persons were in attendance at this meeting of the Fellows in New Orlears, Louisiana. Starnes is a partner in the firm of Starnes & Atchison in Birmingham, Alabama. He is an alumnus of Cumberland School of Law. ■

Starnes

Consultant's Corner

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

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

Networking in small firms—should you?

Last September I wrote an article in which I stated that one of the genuine technological breakthroughs of the '90s was the fact that vendors had finally solved the reliability problems of networks for small firms. They also had made progress in making them more cost effective. That said, should you consider a network for your firm?

Rationale for networking

The two fundamental reasons for considering a network in a small firm (or any size firm, for that matter) are the perceived desirability of combining text and data bases, word processing and data processing, if you prefer. Let us examine each reason and then look at the economics.

Word processing

It has almost become an article of faith that it is "good" to be able to share text among working (secretarial) stations. Is it? Perhaps, if the text is common to most of the practice. How often is this the case? Take a hypothetical five-person practice with two real estate practitioners, a bankruptcy practitioner and two P.I. practitioners. How common is the text base? Not very. True, the real estate practitioners could share some common forms and the P.I. practitioners could as well, but does this justify, much less call for, a networked environment?

The rule of thumb ought to be: If the majority of the lawyers in a firm use a common data base, then networking is certainly an option to be considered (further). If there is no majority, then networking, for the sake of linking text processing, makes little economic sense. There are other ways to share occasionally useful forms and documents, as in making a disk copy and loading it on each secretary's system, or simply walking down the corridor and handing a disk to a co-worker.

Bornstein

Data processing

The term is meant to include billing as well as other practice support applications, such as docket control, conflict checking, etc. First, billing. Again, it is almost an article of faith (one to which I subscribe) that it is both efficient and logical to have a secretary enter her lawyer's time into whatever billing system exists (including a manual one). That said, does this mean you have to network in order to accomplish this vital task?

Until recently, perhaps so. Now, many of the billing vendors have developed and released satellite versions of their time slip entry screen formats. This means that stand-alone work stations can be loaded with this satellite program, enabling the keying of time from each secretary's work station without the necessity of networking.

What about other practice support applications? There may be a basis here. For example, a P.I. practice might want to network to avail themselves of P.I. data base programs as well as docket control. Likewise, an insurance defense practice might find the conflict checking application well worth the effort and cost of a network. To generalize, any specialized firm might have sound reasons for networking in order to take advantage of common practice support applications.

Getting there from here

So, a network seems practical, based on a combination of text and data processing needs. How do you go about choosing? First of all, and perhaps last of all as well, do not ask a vendor if you should network. You might just as well ask a bartender if he will sell you a drink. To be fair, there are some vendors who will "turn you down" if they honestly think you do not need a network. Do not count on getting one of them on the phone. Get some help from another firm who has gone the network route. See if they are pleased with their decision or somehow regret it. Ask about vendors they considered and chose. You cannot

be too careful in this regard.

Do not buy the easy solution. You can network ten work stations to an AT clone, but the network will fall to its knees whenever more than three or four secretaries are using the word processing program. It takes a pretty fair sized file server to accommodate both text and data processing with, say, ten stations. Typically, you will need 32 bit architecture, with three or four megs of main memory and 200 to 300 megs of mass memory. Word processing, in particular, is a terrible "core hog" that puts a heavy burden on a file server.

Summing up: In small environments (five or fewer stations) do not do it even if there is commonality of both text and data. In larger environments, maybe, provided there is commonality of text and data. As in any summation, one has to lump together a lot of situations. Sure, there are undoubtedly exceptions to the rule. If you think your situation is somehow unique then please seek the advice of a colleague similarly situated before going the route. ■

Mark your calendars for

—Mobile—

What: Alabama State Bar 1990 Annual Meeting

When: July 19, 20, 21

Where: Mobile's Riverview Plaza

Robert S. Vance Memorial Fund

A fund entitled the Robert S. Vance Memorial Fund has been established at the University of Alabama Law School, the judge's alma mater. In order to endow an academic chair in the judge's name, the fund must raise $600,000. Contributions to the fund are tax deductible.

Checks should be made payable to the University of Alabama Law School Foundation, indicating on the check and the cover letter that the check is intended for the Vance Fund. Contributions should be mailed to:

Alyce M. Spruell
Director of Law School Development
University of Alabama Law School
P.O. Box 870382
Tuscaloosa, Alabama 35487-0382

Questions about the fund may be directed to Spruell, at (205) 348-5752, or to Mary Nell Terry, at:

Chambers of the Honorable Robert S. Vance
900 United States Courthouse
Birmingham, Alabama 35203
(205) 731-1086

Request For Consulting Services Office Automation Consulting Program

SCHEDULE OF FEES, TERMS AND CONDITIONS

Firm Size*	Duration**	Fee	Avg. cost/ lawyer
1	1 day	$ 500.00	$500.00
2-3	2 days	$1,000.00	$400.00
4-5	3 days	$1,500.00	$333.00
6-7	4 days	$2,000.00	$307.00
8-10	5 days	$2,500.00	$277.00
Over 10			$250.00

*Number of lawyers only (excluding *of counsel*)
**Duration refers to the planned on-premise time and does not include time spent by the consultant in his own office while preparing documentation and recommendations.

REQUEST FOR CONSULTING SERVICES

OFFICE AUTOMATION CONSULTING PROGRAM

Sponsored by Alabama State Bar

THE FIRM

Firm name _____

Address _____

City _____ Zip _____ telephone # _____

Contact person _____ title _____

Number of lawyers _____ paralegals _____ secretaries _____ others _____

Offices in other cities? _____

ITS PRACTICE

Practice Areas (%)

Litigation	_____	Maritime	_____	Corporate	_____
Real Estate	_____	Collections	_____	Estate Planning	_____
Labor	_____	Tax	_____	Banking	_____
_____	_____	_____	_____	_____	_____

Number of clients handled annually _____

Number of matters handled annually _____

Number of matters presently open _____

How often do you bill? _____

EQUIPMENT

Word processing equipment (if any) _____

Data processing equipment (if any) _____

Dictation equipment (if any) _____

Copy equipment (if any) _____

Telephone equipment _____

PROGRAM

% of emphasis desired

Admin. Audit	_____	WP Needs Analysis	_____	DP Needs Analysis	_____

Preferred time (1) W/E _____ (2) W/E _____

Mail this request for service to the Alabama State Bar for scheduling. Send to the attention of Margaret Boone, executive assistant, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.

Opinions of the General Counsel

by Alex W. Jackson, assistant general counsel

QUESTION #1:

"Another attorney and I represent the estate of an incompetent woman. The time has passed for the first partial settlement and in undertaking to reconstruct the account it appears that the guardian has converted in excess of $80,000 of the ward's money.

"Assuming the guardian cannot come up with the money, the question is what do we do next. Obviously we cannot make any misrepresentation to the court but if she files a statement under oath in effect admitting the conversion then she immediately exposes herself to civil and perhaps criminal liability.

ANSWER:

Disciplinary Rule 7-102(A)(5) provides as follows:

"(A) In his representation of a client, a lawyer shall not:

(5) Knowingly make a false statement of law or fact."

Disciplinary Rule 7-102(A)(7) provides as follows:

"(A) In his representation of a client, a lawyer shall not:

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

Disciplinary Rule 7-102(B)(1) provides as follows:

"(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall withdraw from employment."

Disciplinary Rule 2-111(B)(3) provides as follows:

"(B) A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(3) He has received information contemplated by DR 7-102(B)(1)."

Disciplinary Rules 4-101(A) and (B)(1) provide as follows:

"(A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except as permitted by DR 4-101(C) a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client."

We are of the opinion that the information you have concerning the misappropriation or conversion of $80,000 of the ward's money is a confidence or secret of your client, the guardian, and that the same cannot be revealed other than as provided by Disciplinary Rule 4-101(C). We are of the further opinion that you may not prepare or present to the court on behalf of the guardian a partial settlement that falls to reflect the true disposition of the ward's funds. In addition, since you now have evidence that clearly establishes that your client has perpetrated a fraud upon a person (the ward) you must call upon the guardian to rectify that fraud. If the client is unable to correct the fraud or refuses to do so, you must withdraw from employment as provided by Disciplinary Rules 7-102(B)(1) and 2-111(B)(3). An attorney may not counsel or assist a client in the perpetration of a fraud.

The Disciplinary Commission, when addressing similar questions in the past, has opined that a lawyer may not reveal that his client has made preferential payments to creditors of the client's wholly owned corporation from monies due to a corporate assignee. The lawyer should call upon the client to rectify the situation, and should the client refuse to do so, he then should withdraw. (RO-88-54)

In RO-87-56, where the client had committed the crime of subornation of perjury, the Disciplinary Commission held that the lawyer could not reveal that information since it was a confidence or secret obtained during the representation. The commission further held that the lawyer should assert the attorney/client privilege if questioned by police or prosecutorial authorities and could testify only after being ordered by a court to do so.

The commission has held that the *Code* does not make disclosure of past crimes or frauds by the client mandatory on the part of the lawyer when, having made a demand pursuant to DR 7-102(B)(1) on the client to correct the fraud, the client has refused to do so. [RO-87-56] [RO-89-77]

QUESTION #2:

"I undertook representation of a wife in a divorce action against her husband. Another local lawyer entered an appearance and represented the husband. This case was placed on a trial docket with parties and their counsel appearing at the appropriate time. Negotiations ensued and an agreement was supposedly reached on all issues except that of child sup-

port. The issue of child support was tried and submitted to the District and Domestic Relations Court Judge of our county. At the time of rendering a decision on the disputed issues, the Judge requested that the husband's lawyer prepare a final decree of divorce. After receiving a signed copy of this decree I noted several areas which did not conform to my understanding of our agreement. When these discrepancies could not be completely worked out between counsel, I filed a motion to set aside this decree. At the hearing on this motion I provided the wife with other counsel. The husband's lawyer provided the husband with other counsel. I have testified as to my understanding of our agreement and the husband's lawyer is scheduled to testify in the near future.

"My question is, should the decree be set aside and this case be again placed on the docket for trial, will it be ethical for me to represent the wife after having previously testified as noted above?"

ANSWER:

Disciplinary Rule 5-101(B) states as follows:

> "(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
> (1) If the testimony will relate solely to an uncontested matter;
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client;
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

Disciplinary Rule 5-102(A) states as follows:

> "(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4)."

We are of the opinion that it would be permissible for you to represent the wife if, in fact, the decree is set aside and a new trial scheduled and further provided that you either offer no additional testimony on behalf of your client or that, if you testify, your testimony falls within the categories delineated in Disciplinary Rule 5-101(B).

As we understand the facts as presented by you your testimony was to an issue that would be completely decided upon a determination by the court of the motion filed to have the decree set aside. For purposes of this opinion we have acted upon the assumption that any disagreements over this decree, and any resulting testimony regarding the same, will have been resolved by the court and will not be an issue in the upcoming trial. If, however, this dispute remains in contest and your testimony once again becomes a necessity, then we are of the opinion that you must carefully review the provisions of the Disciplinary Rules cited hereinabove to determine whether it would be ethically permissible for you to proceed as trial counsel. In that regard, and in the event it becomes necessary for you to withdraw, we would further advise you of the provisions of Definition 7 of the Code which state as follows:

> "(7) Unless the context otherwise requires, wherever in these rules the conduct of a lawyer is prohibited, all lawyers associated with him are also prohibited."

[RO-89-49] ■

Riding the Circuits

Escambia County Bar Association receives certificate

(This letter of January 18, 1990, was received by Circuit Court Judge Bradley E. Byrne of the 21st Judicial Circuit.)

It is my pleasure to inform you that the Escambia County Bar Association has been selected to receive a Certificate of Recognition in the American Bar Association's 1989 Law Day U.S.A. Public Service Award Competition.

The award, a certificate mounted on a walnut plaque, will be sent to you as soon as production of the award is completed.

My heartiest congratulations upon winning this award. We appreciate the fine work your organization is doing to promote better public understanding of the American legal system.

Mary M. Waller,
Projects Coordinator,
Public Service Awards,
American Bar Association

Jackson County Bar Association

At a recent meeting, the Jackson County Bar Association elected John F. Porter, III, president. His mailing address is P.O. Box 1108, Scottsboro, Alabama 35768.

Morgan County Bar Association

Norman Roby was recently elected president of the Morgan County Bar Association. The association also passed a resolution mourning the death of the Honorable Robert S. Vance. ■

Recent Decisions

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

Recent Decisions of the Supreme Court of Alabama—Civil

Constitutional law . . . Act no. 87-182 valid even though enacted prior to Amendment No. 473

Ex parte Southern Railway Co. (In re: Mintz v. Southern Railway Co., 24 ABR 335 (November 21, 1989). Petitioners are foreign corporations qualified to do business in Alabama and were doing business in Jefferson County when suits were filed. Respondents are non-residents of Alabama seeking money damages under the FELA for injuries suffered outside Alabama. Petitioners moved to dismiss the complaints based on amendment no. 473 to the Alabama Constitution and act no. 87-182, Alabama Acts 1987 *(forum non conveniens)*. The trial court denied the motions to dismiss, and defendants filed petitions for writs of mandamus. The supreme court granted the writs.

Act no. 87-182, amended §6-5-430, *Ala. Code* (1975) to require the courts to apply the doctrine of *forum non conveniens* in determining whether to accept or decline to take jurisdiction of an action based on a claim arising outside Alabama. However, act no. 87-182 was passed before amendment no. 473 was adopted and ratified. Amendment no. 473 amended section 232 of the Alabama Constitution so that foreign corporations are treated like domestic corporations for purposes of venue. The supreme court was asked to determine whether the subsequent adoption of amendment no. 473 now permits act no. 87-182 a field of operation in a case in which foreign corporations are sued in Alabama on a cause of action accruing outside Alabama. The supreme court recognized that generally an act of the legislature not authorized by the Constitution at the time of its passage is absolutely void, and, if not re-enacted, is not validated by a subsequent amendment to the Constitution. The supreme court noted that there are two exceptions to this general rule. After discussing the two general exceptions, the court announced a third exception: Where a statute is enacted in anticipation of a constitutional amendment offered simultaneously with it, and the statute and the proposed amendment are debated and considered together in the same session of the legislature, the subsequent adoption of the amendment by a vote of the people will serve to validate the statute.

Municipal corporations . . . county has duty to monitor incarcerated juvenile offenders to prevent them from injuring themselves

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.

Keeton v. Fayette County, 24 ABR 552 (December 15, 1989). Keeton, a juvenile, was incarcerated in the Fayette County Jail. He was subsequently found dead and had apparently hanged himself with his belt. His father sued the county for his wrongful death. The trial court granted the county's motion for summary judgment, and plaintiff appealed. The supreme court reversed.

The supreme court noted that §11-14-10, *Ala. Code* (1975), was amended in 1982 and provides that "each county within the State shall be required to maintain a jail within their county." The supreme court also noted that it had not interpreted the phrase "maintain a jail." The supreme court held that by using the phrase, the legislature simply intended to require the county commission to keep a jail and all equipment therein in a state of repair. Under §14-6-1, *Ala. Code* (1975), the sheriff has legal custody of the jail and all of its prisoners. Plaintiff alleged that the county was under a duty to properly supervise, care for and provide adequate detention for the juvenile, and that it failed to do so. The supreme court noted that there was evidence that the jail's audio monitoring equipment was not working. The supreme court also noted that one reason for requiring the monitoring of a juvenile offender confined to a jail cell is to make certain that the juvenile does not injure himself. Therefore, the fact that juveniles may attempt to harm themselves when incarcerated was reasonably foreseeable as a matter of law and summary judgment was improperly granted.

Preliminary injunction . . .
petitioner must demonstrate that offending act or operation is nuisance per se

McCord v. Green, 24 ABR 452 (December 6, 1989). McCord purchased a parcel of land adjoined by property owned by Green. McCord informed Green that he intended to build a lumber treatment plant that would utilize a coal tar-creosote solution to treat the lumber. After McCord essentially completed the plant, Green filed suit and sought a preliminary injunction on the grounds that the plant could be a nuisance. At the hearing on preliminary injunction, two experts testified that the plant would produce odors detectable from 400-900 feet away. The court granted the injunction and found that the anticipated nuisance could be enjoined under §6-5-125, *Ala. Code* (1975), and implied that this section could be utilized without showing that the act was a nuisance per se. McCord appealed, and the supreme court reversed.

The supreme court noted that the granting of injunctive relief in general, and the injunction of anticipated nuisances in particular, are extraordinary powers that must be cautiously and sparingly exercised. Although §6-5-125 authorized the injunction of anticipated nuisances, such injunctions should be denied unless the plaintiff shows to a reasonable degree of certainty that the anticipated act or structure will, in fact, constitute a nuisance. A nuisance per se is an act, occupation or structure that is a nuisance at all times and under any circumstances, regardless of location or surroundings. Where the feared injury is at best speculative, an injunction under §6-5-125 would be unduly harsh.

Torts . . .
AEMLD discussed as it applies to modified general purpose machine

Johnson v. Niagara Machine and Tool Works, 24 AR 247 (November 17, 1989). Johnson was injured while operating an industrial die press manufactured by Niagara. The manufacturing process required Johnson to remove waste steel at the end of the cycle with a hand tool or with the naked hand. Johnson reached the end of the cycle and hit the stop button and reached in to retrieve the waste. The press continued to operate and amputated his hand. He sued Niagara under the AEMLD. The trial court granted Niagara's motion for summary judgment, and Johnson appealed. The supreme court affirmed.

Niagara argued that the press had been substantially modified after it left Niagara's control. Niagara also argued that the press was sold in a "naked" configuration and was modified and integrated into the buyer's particular system. Niagara stated that it was the buyer and not the manufacturer who designed the system into which the press was integrated. The supreme court noted that it has been the custom in the industry for the purchaser of a general purpose machine, such as this press, to assume responsibility for safety devices, such as a guard. Moreover, ANSI standards and OSHA standards place this burden on the purchaser-user of such equipment. The supreme court concluded that Niagara should not be charged with a duty to make safe all possible applications of its general purpose product. Possible applications of general purpose machines in a given manufacturing process, not designed by the manufacturer, are unforeseeable as matters of law.

Recent Decisions of the Supreme Court of the United States

Grand jury secrecy

Butterworth v. Smith, 58 U.S. LW 4363 (March 21, 1990)—May a state require people, who appear before grand juries as witnesses, to keep their testimony a secret forever? The Supreme Court unanimously said no. The Court, in an opinion by Chief Justice Rehnquist, said that Florida's Grand Jury Secrecy Act violated free speech rights.

The respondent, Smith, a reporter, testified before a state grand jury about alleged improprieties committed by certain public officials. At the conclusion of his testimony, he was warned that if he revealed his testimony in any manner, he would be subject to criminal prosecution under a Florida statute which prohibited a witness from ever disclosing testimony given before a grand jury.

After the grand jury terminated its investigation, Smith wanted to write about the investigation's subject matter, including his own grand jury testimony. Accordingly, he filed suit in federal district court seeking a declaration that the Florida statute was an unconstitutional abridgement of speech and an injunction preventing the state from prosecuting him. The district court granted summary judgment in favor of the state. The Eleventh Circuit reversed, holding that the statute was unconstitutional to the extent that it applied to witnesses who speak about their own testimony after the grand jury investigation was terminated.

The Supreme Court's holding gives us a bright-line test regarding Grand Jury Secrecy statutes. Specifically, the Court held that the Florida Grand Jury Secrecy Act, §905.27, violated the First Amendment insofar as it prohibits a grand jury witness from disclosing *his own testimony after the grand jury term has ended*. The opinion authored by Chief Justice Rehnquist interestingly concludes that the interest advanced by the portion of the Florida statutes struck down are not sufficient to overcome a First Amendment right to make a truthful statement of information lawfully obtained, and stated, "The bank extends not merely to the life of the Grand Jury but into the indefinite future."

The Court further noted that the federal government in most states imposes no disclosure restrictions on grand jury witnesses, apparently not even while an investigation is in progress. The decision does not affect state laws that bar people from disclosing their grand jury testimony while the secret panel's investigation is active.

In a concurring opinion, Justice Scalia said he understood the ruling to leave unanswered whether a state could prohibit grand jury witnesses from disclosing the fact that they were called before the panel or to disclose what the grand jury is investigating.

This opinion strongly suggests that Alabama's grand jury secrecy statute also would be unconstitutional and in violation of the First Amendment to the extent that it prohibits a grand jury witness from disclosing their own testimony after the grand jury's term has ended.

Fourth amendment not applicable to foreign searches

United States v. Verdugo-Urquidez, 58 U.S. LW 4263 (February 28, 1990)—Do United States law enforcement agents need search warrants before conducting searches of property owned by non-citizens and located in foreign countries? A divided Supreme Court said no.

Mexican nationals living abroad do not have the same Fourth Amendment rights as United States citizens or aliens living in this country, the Supreme Court said in an opinion authored by Chief Justice Rehnquist. In holding that the Fourth Amendment does not apply to search and seizure by DEA agents of property owned by non-resident aliens and located in Mexico, the Court seemed to be focused on the term "the people" contained within the Fourth Amendment. This reasoning suggests that "the people" refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with the United States to be considered a part of that community. The Chief Justice observed as follows:

> "Situations threatening to important American interests may arise halfway around the globe . . . [that] require an American response with armed force. If there are restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches."

Dilution of *Chimel v. California*

Maryland v. Buie, 58 U.S. LW 4281 (February 27, 1990)—Do police need probable cause to fear for their safety to conduct a sweeping, warrantless search after making an in-home arrest? The Supreme Court, in a seven-to-two decision, said no.

In an opinion authored by Justice White, the Court said that police may search throughout a house when they have a reasonable suspicion there is a hidden danger to the arresting officers. Specifically, the Court held that the Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. (Citing *Michigan v. Long*, 463 U.S. 1032; *Terry v. Ohio*, 392 U.S. 1)

White's opinion, however, cautiously notes as follows:

> ". . . we should emphasize that such a protective sweep aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found."

In *Chimel v. California*, 395 U.S. 752, the Supreme Court held that in the absence of a search warrant, the justifiable search incident to an in-home arrest could not extend beyond the arrestee's person and the area within which he might have obtained a weapon. The rule in *Chimel* is distinguished by the Supreme Court in *Buie*. First, the Court reasoned that *Chimel* was concerned with a full-blown, top-to-bottom search of an entire house for evidence of the crime for which the arrest was made, not the more limited intrusion contemplated by a protective sweep. Second, the justification for the search incident to the arrest in *Chimel* was the threat posed by the arrestee, not the safety threat posed by the house, or more properly by unseen third parties in the house.

Writing for himself and Justice Marshall, Justice Brennan said the decision gives police officers too much discretion. "Police officers searching for potential ambushers might . . . open up closets, lockers, chests, wardrobes, and cars, and peer under beds and behind furniture."

Mandatory death penalty

Blystone v. Pennsylvania, 58 U.S. LW 4274 (February 28, 1990)—May states make the death penalty the only possible punishment for some murderers without violating past Supreme Court rulings banning mandatory death sentences? The Supreme Court, in a sharply divided five-to-four decision, said yes.

In an opinion authored by the Chief Justice, the court upheld a Pennsylvania law that says sentencing juries "must" impose a death sentence if they find at least one aggravating circumstance and no mitigating circumstances. In discussing the Pennsylvania statute, Chief Justice Rehnquist said the mandatory aspect of its language does not make the law an automatic or mandatory one. "Death . . . is imposed only after a determination that the aggravating circumstances outweigh the mitigating factors and thereby pass Eighth Amendment scrutiny."

The Court, in *Blystone*, focused on that portion of the statute which permits the capital sentencing jury to consider and give effect to all relevant mitigating evidence since it does not unduly limit the types of mitigating evidence that may be considered. Death is not automatically imposed upon convictions for certain types of murder; it is imposed only after

a determination that the aggravating circumstances outweigh the mitigating ones present in the particular crime committed by the particular defendant or that there are no such mitigating circumstances. Given the range of the jury's discretion to consider any other mitigating factor, the Court found that the Pennsylvania statute was sufficient, under *Lockett v. Ohio*, 438 U.S. 586.

Twist on *Batson*

Holland v. Illinois, 58 U.S. LW 4162 (January 22, 1990)—Is a defendant's Sixth Amendment right violated when prosecutors exclude prospective jurors because of their race? The Court, in a five-to-four vote, said no.

In an opinion authored by Justice Scalia, the Court said that such exclusions do not violate a defendant's right to a jury drawn from a representative cross-section of the community. However, Justice Anthony Kennedy, who joined that result in a concurring opinion, also indicated that he agrees with the Court's four dissenters that such exclusions may very well violate a defendant's Fourteenth Amendment right to equal protection.

The Supreme Court, in 1986, ruled that exclusion of potential jurors because they are the same race as the defendant violates the equal protection clause. However, the justices have never said that race-based exclusions are unlawful if the excluded prospective jurors are of a different race from the defendant.

Custodial interrogation—assault on *Michigan v. Jackson*

Michigan v. Harvey, 58 U.S. LW 4288 (March 6, 1990)—In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court established a prophylactic rule that once a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right—even if voluntary, knowing and intelligent under traditional standards—is presumed invalid if secured pursuant to police-initiated conversation. In that case, the Supreme Court held that statements obtained in violation of that rule may not be admitted as substantive evidence during the prosecution's case-in-chief. The issue presented to the Supreme Court, in *Michigan v. Harvey*, is whether the prosecution may use a statement taken in violation of the *Jackson* rule to impeach a defendant's false or inconsistent testimony. In an opinion authored by the Chief Justice, the Court said yes.

The Court held that a statement to police taken in violation of *Jackson* may be used to impeach a defendant's testimony. The *Jackson* rule is based upon the identical "prophylactic rule" announced in *Edwards v. Arizona*, 451 U.S. 477, in the context of the Fifth Amendment privilege against self-incrimination during custodial interrogation. Specifically, the Supreme Court noted that *Harris v. New York*, 401 U.S. 222, and subsequent cases hold that voluntary statements taken in violation of Fifth Amendment prophylactic rules, while inadmissible in the prosecution's case-in-chief, nevertheless may be used to impeach the defendant's conflicting testimony. The majority concluded that there was no reason for a different rule or result in *Jackson*. The bottom line in these cases seems to focus on the "search for truth in a criminal case" rationale which outweighs the speculative possibility that exclusion of evidence might deter future violations of the rules. ■

Notice of Federal Tax Lien

The Alabama Uniform Federal Tax Lien Act became effective January 1, 1990.

There are two concerns that the Internal Revenue Service considers to be of interest to the members of the Alabama State Bar.

First, the act changes the place of filing Notices of Federal Tax Liens as it relates to personal property on the following entities, from the judge of probate offices to the office of the secretary of state:

1. Corporations or partnerships (as defined by Federal Internal Revenue Service laws) whose principal executive office is in this state; and

2. Estates and trusts.

The place of filing Notices of Federal Tax Liens for real property on the above entities continues to be with the judge of probate in the county where the real property is located.

Second, the act changed the place of indexing all Notices of Federal Tax Liens filed with the judge of probate office after January 1, 1990, to the *Uniform Commercial Code* index in the county where the lien is filed.

It is clearly understood that the UCC index has been for personal property in the past, and the filing of tax liens into this index could cause potential problems for those researching title to property and encumbrances.

Tax liens are temporarily being cross-indexed into real property records in some counties in order to provide the general public with further notice of the existence of IRS tax liens. On real property, the IRS considers it to be legally sufficient when a notice is indexed in the UCC records. ■

If you have any questions on this, please contact Cliff Whitely at (205) 731-1248.

Legislative Wrap-up

by Robert L. McCurley, Jr.

The Alabama Legislature has before it over 1,500 bills. The productivity of the Legislature is often measured by how many bills are passed, however, it may also be judged by how many they kill. We are like all the other states this year. Our legislative calendars reflect the war on drugs, abortion, the environment, local legislation and current hot topics as flag burning, bombing of officials, etc.

The Governor's program primarily is a package of bills which concerns criminal sanctions for drug and alcohol abuse. In all there are over 40 "drug" bills.

The abortion issue has been the topic most discussed and avoided. There are approximately 150 bills concerning abortion issues. Thousands of people have descended upon the state house to show their support or opposition to the legislation. Because abortion is so controversial it is doubtful that many bills of any kind will be passed this election year.

In each of the last few sessions environmental issues have increasingly been a topic of concern. The regulation of hazardous waste, recycling and littering are all topics of bills.

Statutes of limitations have become a popular item of legislation. Architects, engineers and builders are seeking a seven-year statute of repose, and the materialman and mechanics lien statutes are being revised.

Service of process for evictions most likely will be modified to provide that if personal service is not perfected, then a copy should be left at the door of the premises and a copy mailed to the last known address of the defendant.

Seeking immunity from liability are such volunteer organizations as volunteer fire departments and municipal non-profit organizations, while liability would be limited for other state and local government agencies.

The Alabama Law Institute has three bills before the Legislature. The Adoption bill, which is endorsed by both the probate judges and the Alabama Department of Human Resources, has drawn opposition by licensed child placing agencies. Among other things the adoption bill requires the licensed agencies to receive court approval for their charges. Lawyers may charge an attorney's fee for services but may not charge for the placement of a child in a private adoption.

The Securities revision modernizes the law of securities and for the first time requires the registration of "financial advisors." The Institute's third bill is a complete revision of the Condominium law.

The last day the Legislature could meet was April 23, 1990. The first primary election date is June 5, 1990, with the run-off set for June 26, 1990.

For further information write Alabama Law Institute, P.O. Box 1425, Tuscaloosa, Alabama 35486. ■

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.

WARN Act Requires 60 Days' Notice

The Worker Adjustment and Retraining Notification Act (WARN) requires businesses that close, dislocating 50 or more workers, and businesses that permanently lay off 500 employees or one-third of their work force (and at least 50 people) to give a 60-day written notice to the following three entities (or groups):

1) Employees or their representatives,
2) Local government to which they pay the most tax, and
3) The State Dislocated Worker Unit.

There is no federal, state or local agency charged with responsibility for enforcement of this law. The law specifically states that enforcement will be through the United States district courts. When notice is required but not given, a suit must be filed by either an employee or the local government, in order to recover pay in lieu of notice or to assess penalties.

Many companies, especially smaller ones, still may not be aware of these requirements, which have been in effect since February 1989. If aware, they still may not know whom to notify or the exact content required in the written notices.

Specific requirements of the WARN Act may be found in the act itself, Public Law 100-379 (29 U.S.C. 2101, et seq.). The Department of Labor published final regulations on April 20, 1989, in the Federal Register (Vol. 54, No. 75). The regulations appear at 20 CFR Part 639.

The State Dislocated Worker Unit will furnish information on the act but cannot provide specific advice or guidance with respect to individual situations. Should clients request assistance you may want to call this unit in Montgomery (205) 284-8800 for a copy of the act. Direct the state notice to:

Alabama Department of Economic and Community Affairs
State Dislocated Worker Unit
P.O. Box 250347
3465 Norman Bridge Road
Montgomery, Alabama 36125-0347

Memorials

Charles Sterling Babcock—Sheffield
Admitted: 1962
Died: February 11, 1990

William Morris Beck, Sr.—Fort Payne
Admitted: 1932
Died: February 26, 1990

Evans Dunn—Birmingham
Admitted: 1916
Died: December 20, 1989

Leland Grant Enzor—Andalusia
Admitted: 1949
Died: March 9, 1990

Walter Joe James, Jr.—Haleyville
Admitted: 1950
Died: January 19, 1990

COLONEL CHARLES STERLING BABCOCK

Colonel Charles Sterling Babcock, 52, died February 11, 1990, in Sheffield, Alabama. He was a native of Sheffield and a resident of the city at the time of his death.

Babcock was a graduate of Sheffield High School. He received his bachelor's degree from Florence State College (now the University of North Alabama) in 1960. In 1962 he received his law degree from the University of Alabama School of Law and was a member of Phi Delta Phi legal fraternity.

Upon graduation from law school, Babcock entered the United States Army Staff Advocate General Corps. He was certified as trial and defense counsel in 1963. In 1968 he was certified as a military judge. He was admitted to practice before the courts of the State of Alabama, United States Court of Military Appeals, United States Army Court of Military Review and the United States Supreme Court.

During Babcock's military career he served as staff judge advocate in Qui Nhon and Cam Ranh Bay, Republic of Vietnam, 1971-72. He served the Eighth U.S. Army in Korea as a military judge in 1979-80. He was awarded the National Defense Service Medal, Vietnam Service Medal (three campaigns), Vietnam Campaign Medal, Vietnam Cross of Gallantry with Palm, Bronze Star, Army Commendation Medal and Meritorious Service Medal.

On December 31, 1983, Babcock retired as military judge at Fort Gordon, Georgia. He immediately entered the private practice of law in Sheffield, Alabama, and remained active in the practice of law until his illness forced him to retire in 1988.

To his friends and associates Babcock preferred to be known simply as Charles. He was always eager to help another person. Judge George E. Carpenter, district court of Colbert County, Alabama, recalled that, "Charles was always interested in how other people were doing rather than thinking of himself."

Charles enriched all whose lives touched his. He is survived by his wife, Jan, and their three children.

—Patta A. Steele
President
17th Circuit Bar Association

LEIGH M. CLARK

Judge Leigh M. Clark died at his home in Birmingham August 11, 1989. Judge Clark was a lifetime resident of Alabama. He was born in Auburn in 1901 and later attended Highland Home College, a junior college located in Highland Home. Judge Clark's father was president of the college at that time. He then attended Alabama Polytechnic Institute (now Auburn) from which he received his undergraduate degree. He received his law degree from the University of Alabama.

A modern history of Alabama would not be complete without considerable reference to Judge Clark's family background. His mother, Willie Gertrude Little, was the first coed to be admitted to Alabama Polytechnic Institute. Willie Gertrude Little and two other young ladies enrolled at Polytechnic Institute on the day females were first permitted to enroll. Each of them graduated two years later. Little was the oldest of the three and she, for that reason, was permitted to be the first one to be admitted. She is now remembered at Auburn because one of the campus dormitories bears her name.

Judge Clark's father likewise was a graduate of Alabama Polytechnic Insti-

tute, and his marriage to Ms. Little constituted the first marriage between two graduates of that University. Judge Clark's father taught in the college at Highland Home for many years. He also taught in the public schools of the State of Alabama, including Auburn University. He finished his work life working for the Alabama Highway Department as an engineer, where he played a big part in the development of the state's highway system. Judge Clark's paternal grandfather was a circuit judge in Georgia during the reconstruction years following the Civil War.

Judge Clark married Evelyn Staggers, and they had one daughter, Jean Clark Marshall. Both ladies survive him.

Very few lawyers have ever contributed to the legal profession the way that Judge Clark did. After having been admitted to practice in 1923, he entered the general practice of law with Rubin Wright in Tuscaloosa. Wright later was elected to the circuit bench, and Judge Clark came to Birmingham and entered a general practice with D.G. Ewing and Dan Traywick. In 1934, Judge Clark was elected to the circuit bench in Jefferson County and except for three years of military service for the Judge Advocate General Department during World War II, served on the bench until 1951, at which time he voluntarily retired to resume the private practice of law. As a judge, he was highly respected by the lawyers for his knowledge of the law and his good sound judgment. He was made a member of the firm of Cabaniss, Johnston, Gardner & Clark, where he became known as an outstanding trial attorney, specializing to a large degree in the defense of railroads. After he retired from active practice in 1973, he was appointed a supernumerary judge and was assigned to the Alabama Court of Criminal Appeals. He remained in this capacity until 1988, when he finally retired from all legal activities.

Judge Clark's memorium was written during his life's activities and by those who know him well.

For 53 years, Judge Clark taught torts at the Birmingham School of Law. He probably could have taught at any law school in the country but he chose to remain at the Birmingham Law School. After finishing a hard day in court, he would drive to the courthouse to teach his torts class. He did this as long as he was able to drive, and even then, Mrs. Clark, who was always faithful and loyal to him, would drive him to the courthouse and one of his students would drive him home. During these 53 years, he taught several thousand students. It is felt that every one of his students was blessed by the knowledge, character and gentleness of this great lawyer. The 1981 senior class of the Birmingham School of Law, in a resolution passed in honor of Judge Clark, correctly described his character in the following words: "Judge Leigh M. Clark is hereby given an honorary degree of juris doctor from the Birmingham School of Law with all the rights and privileges hereto and shall have a permanent place in our hearts for the scholarly gentleness he has shown us. We are thankful to him for giving us a model to emulate in the field of law, one who has courage but not toughness, who has kindness but never weakness, who shows his strength through his love for God, his family, his fellow man and the law."

Judge Clark's fellow circuit judges honored him by electing him president of the Alabama Association of Circuit Judges.

His fellow trial lawyers honored him by electing him as a fellow in the prestigious American College of Trial Lawyers.

Judge Clark, while working as a special judge on the Alabama Court of Criminal Appeals, authored 709 opinions. Each of those opinions was scholarly written and many of them are considered landmark opinions in the field of criminal law. The first opinion he wrote can be found in 279 So.2d 145 and the last (#709) in 545 So.2d 100.

The judges of the Alabama Court of Criminal Appeals, in recognition of his service to that court, went to his home in May 1988 and presented to him a beautiful plaque which read, "Since 1973, a scholar, a gentleman, our friend, presented in appreciation by the Judges of the Court of Criminal Appeals."

Judge Clark loved the law, and he was devoted to it, but even so, he reserved time for other worthwhile endeavors. For 53 years he was an active member of the Central Civitan Club. He was a devout Christian and a member of the West End Church of Christ in Birmingham. He was a Sunday school teacher and lay preacher, and he filled the pulpit of his church and other churches on many occasions. He was a dynamic speaker, whether he was talking about law or about religion, and he did speak about both on many occasions.

Being the scholar that he was, Judge Clark became interested in the history of his church. He devoted much time to a study of that history. This prompted him to write a church hymn, which is contained in the Church of Christ song book. This hymn expresses much more eloquently than I can the deep and abiding faith that Judge Clark had in the goodness of his God. The first two verses of that song read as follows:

"1. Let's tell the old, old story On every hill and plain,
The story of salvation, throughout God's vast domain;
For welcome is the story In every honest heart;
It leads the lost to glory When they, this earth depart

2. Let's take the old, old story Wherever we can go
and bring lost souls to Jesus whoever loves them so!
Let's take the old, old story In word, in deed and thought
and bring mankind's attention To wonders God has wrought
Chorus
They'll love to hear the story! And bless the living story
The never dying story of Jesus and his love."

On August 11, 1989, the God whom Judge Clark had loved and worshipped for so long must have said, "Leigh, your health has failed you. You have truly told the old, old story through every aspect of a full life. You have been a devoted family man; faithful to your Church and community; you have been an outstanding lawyer and judge and an inspiration to all who have known you. I'm going to take you home now but I will leave in the hearts of those who have known you the memory of a faithful servant. I trust they will attempt to emulate you in all

aspects of their lives." We will be better people if we will do that.

—James O. Haley, who studied torts under him in 1934 and knew him from that time up to the date of his death,
Birmingham, Alabama.

DAVID MCGIFFERT HALL

WHEREAS, on the 20th day of January 1990, David McGiffert Hall of Eutaw, Alabama, departed this life; and

WHEREAS, it is the desire of the 17th Circuit Bar Association to recognize and memorialize his lifelong dedication to the legal profession and his record as an attorney;

NOW, THEREFORE, BE IT KNOWN that David M. Hall, a Greene County native, was a graduate of Greene County High School, and received a bachelor of arts degree from Birmingham Southern College in 1931. He received an LL.D. degree from the University of Alabama in 1936 and returned to begin law practice in Marengo County that year.

He was elected to the State House of Representatives in 1935, and served there four years. In 1938-39, he served as Marengo County District Attorney.

Entering World War II, Hall served as judge advocate officer for the United States in France and Germany. He remained in the Army Reserve until he retired in 1970. Following the war, he began a law practice in Greene County in 1946 and retired after more than 50 years active practice in 1988.

In 1957, he was elected to the Alabama Senate, and served a two-year term there. He made his home in Eutaw with his wife, the former Lida Meriwether, and their daughter, Rogers Hall Olverson, who now resides in Maui, Hawaii. Hall was an active member of the Eutaw United Methodist Church, and had served as church school superintendent since 1938. He was an enthusiastic outdoorsman, especially fond of hunting and fishing.

NOW, THEREFORE, BE IT RESOLVED, by the 17th Circuit Bar Association, that the life of David McGiffert Hall be recognized as one of a distinguished attorney, dedicated to the service of his country and devoted to his family and community. He represented honesty and integrity in the practice of law, and will be sorely missed by us all.

—Lee B. Osborn
Staff Attorney
Legal Services Corporation of Alabama

EARL C. MORGAN

My father passed away February 19, 1990, in Ocala, Florida, while returning home from a short fishing trip to the Florida Keys with my mother. He graduated from the University of Alabama Law School and was admitted to the Alabama State Bar in 1950. He most recently served as district attorney of Jefferson County.

Earl Morgan was a public servant. He had a private law practice for several years early in his career, but spent the remainder dedicated to public service. After finishing law school in 1950, my father served a short time as an assistant city attorney in Birmingham and practiced with his uncle, Luther Patrick. He married my mother in 1951 and went back into the Air Force as a JAG officer during the Korean War. In 1953, he returned to Birmingham and eventually moved his practice to Tarrant, where he served as city attorney and judge. When George Wallace was elected governor in 1962, my father was appointed as his executive secretary. The two and a half years he served in that capacity were exciting, yet trying, as well as critical, in our state's history. Then, in 1964, Governor Wallace appointed my father to fill the unexpired term of the late Emmett Perry as district attorney of Jefferson County.

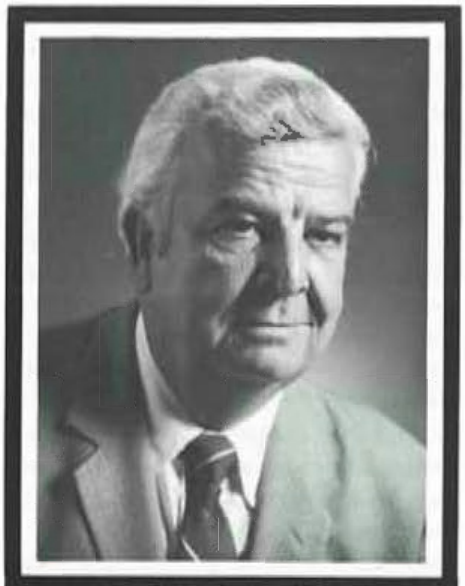
Dad served as the district attorney of Jefferson County from December 1964 until March 1983. He served as president of the Alabama District Attorneys Association, chairperson of the Alabama Law Enforcement Planning Agency and on the Board of Directors of the National District Attorneys Association. He had been a supernumerary district attorney since 1983.

My father believed that public service was a profession and he valued his friendships throughout the bar, government and law enforcement. I guess he was most proud of the people he worked with in the Jefferson County District Attorney's Office—the secretaries, investigators and assistant district attorneys.

Dad flew 50 bombing missions over Europe as a flight engineer in World War II. He coached my little league team and umpired my sister's softball games at Eastside Park in Birmingham. His two favorite hobbies were fishing with his favorite fishing partner—my mother—and playing golf with his friends at Roebuck, Vestavia or Grayson Valley. He loved his family, his friends and his Lord.

His favorite story was telling how he became a page in Washington at a very early age. He and his sister lost their parents when they were young and they were raised by loving aunts, uncles and grandparents. Luther Patrick was dad's uncle and he was serving in Congress representing Jefferson County. My dad said that one day he was shoveling out in the barn in his overalls when a letter came from Uncle Luther for him to come to Washington to serve as a page in the U.S. House of Representatives. His relatives washed his bare feet, dressed him in a suit with a tag that said, "My name is Earl Morgan" and put him on a train to Washington. Several days later, he was being introduced to President Roosevelt. He always said that could only happen in our great country.

—Bryan Earl Morgan
Montgomery, Alabama



WILLIAM BORDEN STRICKLAND

WHEREAS, W. Borden Strickland died in Mobile, Alabama, January 3, 1990; and

WHEREAS, the Mobile Bar Association desires to commemorate the life of Borden Strickland;

BE IT KNOWN that Borden Strickland was born in Bartow, Florida, May 25, 1927, the son of Anna Pearl Browning Strickland and Eddie Strickland. The family moved to Birmingham, Alabama, when he was a young boy, and he attended Woodlawn Grammar School and Woodlawn High School there. While he was still in high school he joined the United States Merchant Marines and served in the Merchant Marines during World War II. Near the end of the war he joined the Army and served in the Eleventh Airborne. While he was in the Eleventh Airborne he earned not only his Paratrooper Wings but also his Glider Wings.

After the Japanese surrender he was stationed in the northern part of Japan and was part of the parade led by General Douglas MacArthur as they marched down the streets of Tokyo when Japan was occupied by United States Forces.

Upon receiving his honorable discharge he returned to Birmingham and entered Howard College (now Samford University). He later transferred to the University of Alabama where he received his undergraduate and law degrees. He was licensed to practice law in all courts of Alabama on January 29, 1955. He moved to Mobile where he opened his law office as a sole practitioner in the Van Antwerp Building.

During the days when Raymond Burr played Perry Mason in the television series, many people, particularly the youngsters, frequently mistook Borden for Mason and more than once people greeted him on the street and referred to him as Perry Mason, to whom he bore a striking resemblance.

He maintained a general practice of law and was a law partner in the early 1960s of the Honorable Michael Zoghby, practicing under the firm name of Strickland & Zoghby. Strickland was associated with Tom Deas from 1967 to 1970. He later was associated with Frank Cunningham and shared offices with George Tonsmeire, III, and Chase Laurendine.

Strickland was an able lawyer and a worthy opponent. Judge Zoghby said, "Everybody loved Borden. He was a very jovial person. Borden worked hard to uphold his clients' rights and he loved representing them." His good friend Deas said, "At times Borden was cantankerous, mean and stubborn, but he was also kind, considerate and a very caring person. I think he had a unique ability to determine a sense of timing in handling a legal matter."

Strickland was very active in community and church affairs. While he was a member of the Mobile Jaycees he served as co-chairperson of America's Junior Miss Pageant, now known as America's Young Woman of the Year. For more than 15 years he was an active member of Spring Hill Baptist Church where he taught Sunday school classes.

He married Jerre West, a certified public accountant, in 1966. They purchased the building at 201 N. Conception Street which they restored and used for their professional offices. They had two children, Dale Strickland and Kelle Strickland, both of whom are college students.

Strickland also had three other children born of a prior marriage: Beth Strickland and Beau Strickland, who reside in Mobile, and Becky Strickland Orfila, who resides in Phoenix, Arizona. He is also survived by two sisters, Elaine Strickland Massimino of Greenville, South Carolina, and Susan Strickland Waldrop of Birmingham.

Strickland contracted a serious illness three years before he died and was incapacitated in July 1988, so that he had to close his law office.

—Richard W. Vollmer, Jr.
President
Mobile Bar Association

Please Help Us . . .

We have no way of knowing when one of our membership is deceased unless we are notified. Do not wait for someone else to do it; if you know of the death of one of our members, please let us know.

Memorial information **must be in writing** with name, return address and telephone number.

Nineteenth Annual Conference on the Environment

May 18-19, 1990

Federal v. State Environmental Protection Standards: Can a National Policy be Implemented Locally?

The ABA Standing Committee on Environmental Law announces its 1990 conference on the environment. This year's program will explore the emergence of state and federal regulation on the environment as a significant regulatory issue of the 1990s.

The program will examine the evolution of environmental protection at the state level and its relationship to federal law and regulation. The last ten years have seen a marked shift from federal initiatives to those by the states. These state-level initiatives have led private industry to call for uniformity by federal preemption. This trend contrasts with the widely-held perception that the states are more readily influenced to lower standards for environmental protection and that federal supervision is necessary to ensure fair and efficient regulation.

Experts will discuss their experiences as state and federal regulators, and environmental organizations and private industry will debate their views of the respective regulatory efforts. By examining the "tug and pull" between state and federal agencies in the context of radioactive and hazardous wastes, as well as air and water quality, the conference will provide a forum for the debates now occurring in some of the most important areas of environmental law.

In addition to providing scholarly papers, presentations and panel discussions, the program will offer opportunities for audience participation with the distinguished panelists and speakers. The informal setting of Airlie House also gives participants the chance to meet and talk with speakers and colleagues during meals and breaks. As in the past, the conference proceedings will be published.

Persons interested in attending the program should complete and return the attached form as soon as possible. In addition, registrants desiring overnight accommodations at Airlie House should register early in order to avoid disappointment.

Program Schedule:

May 18: 6 p.m.—Reception, 7:15 p.m.—Banquet and Speaker

May 19: 9 a.m. to 5 p.m.—Program

Persons wishing to attend should contact Courtney A. Leyendecker, American Bar Association, 1800 M Street, N.W., Washington, D.C. 20036. ■

Midyear Reports of Committees and Task Forces

The Alabama State Bar's committees and task forces for the 1989-1990 bar year have been busy and productive as excerpts from the following midyear reports indicate:

Prepaid Legal Services Committee—Edgar C. Gentle, III, chairperson

The committee divided into task forces addressing the following areas: (A) plan monitoring; (B) legal and ethical implications of plans; and (C) exchange of information with American Pre-paid Legal Services Institute. Under the first area, the committee made a census and financial viability review of the pre-paid legal service plans operating in Alabama. Under this area, the committee reviewed plan/attorney and plan/customer contracts to determine plan characteristics, including whether the plans were access or referral plans and whether the plans provided comprehensive or limited coverage, whether such plans covered personal legal matters, business matters or both, and whether they were closed, open or mixed. The committee will review whether plan documents reflect an unfair trade practice or are otherwise unfairly misleading.

As to the second area, the committee identified two tasks, including possible implementation of state bar disciplinary rules for lawyers participating in plans by working with the Permanent Code Commission and the state bar's office of general counsel. The second task includes establishing a dialogue with the insurance department and the state bar's office of general counsel to determine how the insurance department and the bar should coordinate efforts to monitor and regulate pre-paid legal service plans and Alabama lawyers participating in them. After this review is completed and the task force considers antitrust, solicitation and other legal and ethical issues that have an impact on plan lawyer disciplinary rules, the committee will make recommendations concerning ethical rules to apply to Alabama lawyers participating in plans.

Finally, with respect to the third area, it was discovered that the American Prepaid Legal Services Institute does not take a census of Alabama plans nor does it know of any Alabama lawyers who get its newsletters, other than several members who presently serve on the committee. Furthermore, the Institute did not express any interest in obtaining data or information from the committee.

State Judicial Building Task Force—Maury Smith, chairperson

Building architects and engineers have completed the schematic plans and design for the new judicial building with only minor changes to be added. The land on Dexter Avenue has been acquired with the exception of four parcels that are currently in litigation. The next phase of the project will be the site preparation and construction, scheduled to commence in April. This date could be delayed if the "right to condemn" issue in the Montgomery County Circuit Court mandamus proceeding is appealed by the property owners to the Alabama Supreme Court.

Permanent Code Commission—Lewis Page, chairperson; William B. Hairston, III, secretary, reporting

Following the preparation of a rule-by-rule review of the proposed Alabama Rules of Professional Conduct and review of comments raised by other sections of the Alabama State Bar, the committee, on September 12, 1989, submitted a final proposal of the Alabama Rules of Professional Conduct to the board of bar commissioners who approved the submission of the proposed rules to the Alabama Supreme Court. The submission contained a comparison of the rules of the Alabama *Code of Professional Responsibility*, a comparison of the rules of the ABA Model Rules, a summary of comments submitted to the Alabama Supreme Court and published criticisms and response of the Permanent Code Commission on behalf of the Alabama State Bar to such comments and criticisms.

On October 16, 1989, Chairperson Page, on behalf of the Alabama State Bar, attended and conducted oral arguments before the Alabama Supreme Court concerning the adoption of the proposed Alabama Rules of Professional Conduct. These rules are currently under submission to the Alabama Supreme Court for consideration and adoption.

Task Force on Judicial Selection—L. Drew Redden, chairperson

This task force has been dormant since the fall, primarily observing what is going on in litigation concerning the selection of judges since those results should more clearly indicate the parameters within which the task force could act.

Unauthorized Practice of Law Committee—M. Dale Marsh, chairperson; Alex W. Jackson, assistant general counsel, committee liaison, reporting

During the period of July 1989 through February 1990, the committee opened nine investigatory files and closed 11. The committee received six cease-and-desist affidavits and successfully concluded and obtained a final judgment in a *quo warranto* action in northeast Alabama. Also, the committee has under active investigation two other situations that, in all probability, will involve litigation. Further meetings to finalize plans regarding possible litigation are contemplated. Other than the two investigations currently under active investigation, the unauthorized practice of law docket is current.

Ethics Education Committee—John D. Clements, chairperson

The initial task of the committee was to respond to comments submitted to the Supreme Court of Alabama regarding the proposed Alabama Rules of Professional Conduct and support the submission of the Permanent Code Commission. A drafting subcommittee, co-chaired by Dr.

Richard Thigpen and Frank House, was appointed and met on several occasions. A draft submission was prepared in support of the proposed Rules of Professional Conduct and approved for filing with the supreme court.

The committee chairperson appeared, along with the chairperson of the Permanent Code Commission, in support of the proposed Rules of Professional Conduct and argued their approval before the Alabama Supreme Court on October 16, 1989.

Following the supreme court hearing, a subcommittee was appointed, chaired by Jenelle M. Marsh and co-chaired by Jackie Shaia, to make recommendations to the committee for the dissemination of the new rules and a general education program on ethics.

Law Day Committee—Fred McCallum, Jr., chairperson

The committee has had three meetings, two in Montgomery and one in Birmingham. The committee continued the project started last year to canvass the local bar associations around the state to find out who celebrates Law Day. The committee gathered information on their activities and included this information in a manual assembled by the committee and mailed to all local bar associations, along with a 1990 Law Day Planning Guide from the ABA. Throughout this process, the committee urged local bar associations to hold appropriate celebrations of Law Day in their respective counties.

The committee also prepared a resolution to be signed by Governor Hunt recognizing Law Day 1990.

Committee on Local Bar Activities and Services—Loring S. Jones, III, chairperson

The committee renewed its liaison with the Young Lawyers' Section to promote the "lawyers helping lawyers" mentor program. The committee also discussed ways to seek assistance of local bar associations to spearhead a public relations effort countering the generally negative press attorneys receive. The committee will examine this matter in more depth in the future.

Board of Editors, *Alabama Lawyer*—Robert A. Huffaker, editor

The editorial board met during the annual state bar convention and also convened in Birmingham at the mid-winter meeting in February. Several years ago, the editorial board instituted a procedure whereby subcommittees of the board were assigned responsibility for procuring lead articles for designated issues of the publication. This procedure has continued to work well and has resulted in active participation by all members of the editorial board.

The financial welfare of *The Alabama Lawyer* is sound, with advertising revenue, coupled with stipends from the state bar, sufficient to defray publication costs.

Task Force on Legal Education—Orrin K. Ames, III, chairperson

The task force concentrated on five general areas which include problems, if any, with out-of-state applicants from unaccredited law schools; pass/fail rate statistics for out-of-state applicants from unaccredited law schools; information regarding grievances, if any, filed against out-of-state applicants from unaccredited law schools; law school visitation; and a survey prepared several years ago by the Legal Education Committee.

The task force contacted the law school deans in Alabama for their opinions on a survey containing information regarding curricula at the schools. Only Birmingham School of Law and the University of Alabama School of Law responded.

Regarding students from Alabama unaccredited law schools sitting for the bar exam, the committee has concluded that it will not study the issue any further. Concerning students from out-of-state unaccredited law schools taking the Alabama bar exam, the committee will probably make a recommendation to the bar commissioners that the committee not study this issue any further and that students from out-of-state unaccredited law schools be permitted to take the bar exam.

The task force intends to meet with the deans of the three unaccredited law schools to discuss the deans' perceptions of the role of this task force and open a dialogue between the task force and respective schools.

Finally, the task force is studying a law school visitation program adopted by the Tennessee Bar Association for possible implementation in Alabama.

Professional Economics Committee—William H. Hardie, chairperson

The committee sponsored a joint seminar with the Alabama Legal Administrators during the administrators' annual conference. More than 50 lawyers and legal administrators registered for the seminar.

Committee on Correctional Institutions and Procedures—Ralph I. Knowles, Jr., chairperson

The committee held five formal meetings in addition to the organizational meeting in Huntsville. The committee's initial focus has been on problems within the juvenile justice system, specifically the condition of juvenile detention facilities throughout the state.

Members of the committee have visited every juvenile detention facility in the state. In some cases, the facilities have been visited more than once. The committee was shocked by the conditions discovered at one particular juvenile detention facility which was visited early during the committee's inspection tours. That facility was recently revisited and the committee learned that the conditions are worse than before.

The committee is currently evaluating inspection reports and other documentary material relating to those facilities. The committee intends to present to the board of bar commissioners a proposal for a resolution, as well as legislation, to address the serious problems that have been discovered.

Insurance Programs Committee—Cooper C. Thurber, chairperson

The committee held its first meeting in March for orientation of new members and to meet with Insurance Specialists, Inc., the bar's administrator for health, disability and life insurance programs. Also at that meeting, the committee met with the James Group from Chicago, Illinois, to discuss the possibility of the James Group's becoming the state bar's administrator for health, disability and life insurance programs. The committee received a progress report on Attorneys Insurance Mutual during this meeting.

The representative for ISI promised that it would begin providing the state bar with more information regarding the various programs that they administer and also that they would keep the Insurance Programs Committee better informed about the bar's insurance programs. (There was some criticism expressed regarding the failure of Insurance Specialists to notify the committee of

problems and anticipated changes in the programs.)

A representative of the James Group offered to make a formal proposal to the Alabama State Bar regarding the administration of various insurance programs. The committee agreed to provide whatever information the company needed for its proposal. Once the proposal is submitted, the committee will decide whether to recommend to the board of bar commissioners that the bar continue its association with ISI or change to the James Group.

Indigent Defense Committee—Dennis N. Balske, chairperson

The committee reported that the Administrative Office of Courts was unable to complete legislation proposed by the chief justice's Special Task Force on Indigent Defense due to the priority received by the chief justice's juvenile justice legislation. The committee hopes that this legislation concerning indigent defense can be introduced during next year's legislative session. The committee reported that because of the high hopes for the Special Task Force's report, the committee plans to regroup and work for the implementation of the task force's proposals.

Task Force on Proposed Communications Law Section—Bruce P. Ely, chairperson

Members of the task force met with interested attorneys at the offices of South Central Bell in Birmingham in February. Members of private firms, South Central Bell, BellSouth, magazine publishers and one of the administrative law judges for the Public Service Commission attended the meeting.

The task force has undertaken a survey of the interest of Alabama bar members in the formation of a communications law section by placing in the March edition of *The Alabama Lawyer* a form for interested lawyers to complete and return.

The task force will analyze the results and make a report to the board of bar commissioners.

Military Law Committee—W.C. Tucker, Jr., chairperson

The Military Law Committee has had two meetings and is working closely with active duty military lawyers in the state to plan a symposium for active duty military attorneys. This symposium is tentatively scheduled for August 1990 at the University of Alabama Law School. The committee has formulated a tentative agenda and roster of speakers.

Special Liaison Tax Committee—David M. Wooldridge, chairperson

This is a regional committee composed of representatives from each state bar in the Internal Revenue Service's southeast region and the head of each division in the IRS regional office. The committee meets in October to share information, air differences and develop ideas for a more satisfactory relationship between the IRS and the tax bar.

Although this committee is fairly narrowly focused, it performs a vital function and service to the members of the bar interested in tax matters and relationships with the IRS.

Task Force on Possible Creation of Health Care Law Section—Gregg B. Everett, chairperson

Ten members attended the task force meeting February 2, 1990, in Birmingham. Several task force members agreed to assess the interest of members in their area of Alabama. The task force completed a draft of a survey form and an article to solicit interest for membership for creation of a section to be published in *The Alabama Lawyer.*

Future of the Profession Committee—Mac M. Moorer, chairperson

On February 2, 1990, the committee met in Birmingham. This was the second meeting of the committee, with the first being held in July at the annual meeting in Huntsville. At the February meeting, the committee discussed possible projects/areas of focus. There was some concern that the issues being examined might already be the subject of ongoing projects by other committees or task forces, and a list of those items, with the corresponding state bar committee/task force, was submitted to the state bar staff for a response.

In addition, the proposed Client Bill of Rights was discussed, as the committee's charge includes taking action deemed appropriate on that document. Because the committee had previously submitted a proposed client bill of rights for consideration to the state bar and the board of bar commissioners, no further action was deemed appropriate absent some further instructions from either of those groups.

The committee agreed to work on the possible development of a presentation to state law students aimed at creating realistic expectations regarding the practice of law in Alabama. A subcommittee was selected to develop details of this concept, with an IOLTA grant being considered as a possible funding source. A subcommittee was established to collect current statistical information regarding the placement of state law students, and, for committee review, examples of creeds being adopted by local bar associations. A report of these subcommittees was distributed in mid-April, and the committee met again in late April-early May to review the information and take appropriate action. ■

Polo Match Helps Those With Diabetes

Birmingham's first polo match hosted by the Birmingham Polo Club will be held May 12 at 11 a.m. at the Polo club field in Calera, just 20 miles from Hoover on I-65 South. The cost is $5 a car and the day's activities include music, an exhibition match at 11:30 a.m. and the Birmingham Polo Classic starts with the throw-in at 12:30 p.m. Plan a tailgating picnic and bring a carload of friends for a fun-filled afternoon watching the world's sport of kings. In addition to an exciting polo match, there will be exhibits on the field and great prizes for the best tailgating party. On May 11, the night before the match, a dinner gala, "Black Tie and Blue Jeans," will be held at the Shoal Creek Equestrian Center. Tickets are $100 a person. The proceeds from this weekend of events will provide funds for diabetes research and education programs. Call the American Diabetes Association for tickets at 870-5179 in Birmingham and 1-800-824-7891 outside Birmingham.

Mark your calendars for

—Mobile—

What: Alabama State Bar 1990 Annual Meeting

When: July 19, 20, 21

Where: Mobile's Riverview Plaza

Judicial Salaries as of 1/1/90

(As published in the *ABA State Legislative Report—S.L.R. TALLY*, December 1989/January 1990.)

State	Salary (in $)	Rank
Alabama	82,880	25
Alaska	85,728	19
Arizona	84,000	24
Arkansas	70,630	39
California	115,161	1
Colorado	72,000	37
Connecticut	86,835	17
Delaware	95,200	5
Florida	97,518	4
Georgia	90,514	12
Hawaii	78,500	29
Idaho	65,874	45
Illinois	93,266	7
Indiana	69,300	41
Iowa	78,900	28
Kansas	75,052	32
Kentucky	70,293	40
Louisiana	76,166	30
Maine	80,392	27
Maryland	90,400	14
Massachusetts	90,450	13
Michigan	106,610	3
Minnesota	84,011	22
Mississippi	75,800	31
Missouri	85,602	20
Montana	53,452	50
Nebraska	66,689	43
Nevada	73,500	35
New Hampshire	84,000	24
New Jersey	93,000	8
New Mexico	62,186	48
New York	115,000	2
North Carolina	84,456	21
North Dakota	63,871	47
Ohio	91,750	9
Oklahoma	71,806	38
Oregon	74,400	34
Pennsylvania	91,500	10
Rhode Island	90,618	11
South Carolina	87,238	16
South Dakota	61,618	49
Tennessee	65,650	46
Texas	89,250	15
Utah	75,000	33
Vermont	68,055	42
Virginia	94,907	6
Washington	86,700	18
West Virginia	72,000	37
Wisconsin	82,623	26
Wyoming	66,500	44

Source: National Center for State Courts

Disciplinary Report

Surrender of License

● In an order dated December 21, 1989, **Edwin Charles Glover** of Cullman was stricken from the roll of attorneys licensed to practice law in this state, effective December 19, 1989. Glover failed to pay his 1989 Client Security Fund payment and opted to surrender his license and resign from the Alabama State Bar rather than submit payment. [CSF No. 89-05]

Suspensions

● On February 13, 1990, the supreme court entered an order suspending **John Lee Hutcheson** of Birmingham from the practice of law for non-compliance with the Client Security Fund Ruling. The suspension became effective February 5, 1990. [CLE No. 89-07]

● Mobile lawyer **Roosevelt Simmons** has been suspended by the Supreme Court of Alabama from the practice of law for a period of one year, effective February 6, 1990, for conduct involving dishonesty and willful neglect in representing a client in a state court civil suit (ASB No. 87-603). Simmons was also ordered suspended for a period of four months for willful neglect and failure to refund the unearned portion of a fee in representing a client in a federal civil suit, this suspension to run concurrent with the one-year suspension (ASB No. 86-534). Further, Simmons was ordered suspended for a term of three months, also to run concurrent with the one-year suspension, for willful neglect in representing a client in an adoption matter. [ASB No. 88-262]

● In an order dated March 26, 1990, the Supreme Court of Alabama suspended **Virgil M. Smith** from the practice of law in the State of Alabama for a period of 30 days, said suspension to become effective April 1, 1990. This suspension was based upon the Disciplinary Board of the Alabama State Bar's finding Smith guilty of certain violations of the *Code of Professional Responsibility*. [ASB No. 83-278]

Public Censures

● On March 16, 1990, Talladega lawyer **Harvey Burk Campbell, Jr.,** was publicly censured for violating Disciplinary Rules 6-101(A), 7-101(A)(1) and 7-101(A)(3) of the *Code of Professional Responsibility* of the Alabama State Bar. Campbell had filed suit in district court on behalf of a client in May 1985 and obtained a default judgment in favor of his client. The matter then was appealed to the circuit court. However, due to the inactions of Campbell, trial in the matter did not take place until August 1989. Campbell thus was found to have willfully neglected a legal matter entrusted to him, to have failed to seek the lawful objectives of his client, and to have prejudiced or damaged his client during the course of the professional relationship. [ASB No. 88-680]

● On March 16, 1990, Montgomery lawyer **J. Eldridge Holt** was publicly censured for unprofessional conduct in violation of DR 7-101(A)(1), (2) & (3) of the *Code of Professional Responsibility* of the Alabama State Bar. On March 14, 1989, Holt was suspended from practicing before the United States Bankruptcy Court for the Middle District of Alabama for a period of six months, for being "consistently derelict" in his representation of bankruptcy clients before the court. [ASB No. 89-164]

● On March 16, 1990, Scottsboro lawyer **Benjamin Lawrence Wesson** was publicly censured for unprofessional conduct in violation of the *Code of Professional Responsibility* of the Alabama State Bar. Wesson was attorney of record in appealing a criminal conviction in Jackson County Circuit Court to the Alabama Court of Criminal Appeals. Wesson did not file a timely brief for his client, did not respond to a letter from the clerk of the court of criminal appeals, and ignored repeated requests from the state bar to provide a written explanation of his conduct. [ASB No. 89-583]

● On March 16, 1990, Birmingham lawyer **William E. Bright, Jr.,** was publicly censured for having violated the *Code of Professional Responsibility* of the Alabama State Bar by representing a party to a cause after having previously represented an adverse party or interest in connection therewith. Bright agreed and undertook to represent a young woman in placing her unborn child with adoptive parents. Later, at the time of the birth of the child, the young woman changed her mind and decided not to go through with the adoption. Bright then filed a court action against the young woman, on behalf of her mother and stepfather, asking the court to terminate his original client's rights in her newborn child, in favor of her parents. [ASB No. 86-403]

Private Reprimands

● On March 16, 1990, an Alabama lawyer received a private reprimand for violation of Disciplinary Rules 6-101(A) and 7-101(A)(2) of the *Code of Professional Responsibility*. The lawyer entered an appearance for a client and was notified by the court that the case was to be dismissed on a certain date unless action was taken by the attorney. The attorney never notified his client of that and as a result of the neglect of the lawyer and the failure of the lawyer to carry through on his contract of employment, the client's case was dismissed for want of prosecution. The Disciplinary Commission determined that the lawyer should receive a private reprimand for this violation of the *Code*. [ASB No. 88-757]

● On March 16, 1990, Montgomery attorney and Deputy District Attorney for Montgomery County **Eleanor I. Brooks** was reprimanded for making an extra-judicial statement to a television station concerning the results of tests on a criminal defendant and voicing an opinion on the guilt of the defendant as a result of those tests in violation of DR 7-107(A)(4) and (6). Brooks was also reprimanded for her failure to cooperate with the bar in this matter. The Disciplinary Commission approved a private reprimand, however, Brooks requested that the reprimand be made public. [ASB No. 88-705]

● On March 16, 1990, a lawyer was reprimanded in two separate matters. In one case, the lawyer was reprimanded for engaging in conduct that adversely reflected on her fitness to practice law. After receiving a fee from the client, the lawyer undertook representation of the client in a divorce matter. When the client's husband failed to timely appear at the lawyer's office to execute the necessary paperwork, the lawyer informed the client that the client would have to pay an additional fee for the lawyer to pursue the matter any further. The lawyer did not obtain the divorce for the client as promised.

In the second matter, the lawyer was reprimanded for withdrawing from employment without taking reasonable steps to avoid foreseeable prejudice to the rights of the client. The lawyer undertook to represent a client in a social security benefits matter. The day before the hearing scheduled in the matter, the lawyer informed the client that she had filed a motion to withdraw as counsel the previous day. The hearing proceeded on the scheduled date, with the lawyer failing to appear on behalf of the client, and the client eventually being denied the applied-for social security benefits. [ASB Nos. 88-254 and 88-661]

● On March 16, 1990, a lawyer was privately reprimanded for having willfully neglected a legal matter entrusted to him, in violation of DR 6-101(A) of the *Code of Professional Responsibility*. The lawyer was retained in the spring of 1983 to handle the estates of two persons who had recently died. The lawyer had an administrator appointed, and distributed the bulk of the assets of the estates, but then failed to complete the work, and failed to communicate with his client. The estates remained unsettled until October 1989, despite the fact that the lawyer had stated in writing, in May 1988, that he would have the final papers concerning the estates to the client within 60 days. [ASB No. 88-173]

● On March 16, 1990, 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 client or failed to carry out a contract of employment with a client. The lawyer undertook to represent an insurance salesman in a dispute over commissions owed him for insurance sold. The lawyer determined that a cause of action existed for breach of contract, but failed to file suit for many months, and did not respond to personal and telephone messages from the client inquiring about the case. [ASB No. 89-333]

● On March 16, 1990, a lawyer was privately reprimanded for willful neglect of a legal matter, in violation of DR 6-101(A), and for intentional failure to carry out a contract of employment, in violation of DR 7-101(A)(2). The lawyer was retained and paid a retainer to represent a woman in initiating a divorce action. The lawyer filed the divorce action but subsequently failed to appear in court when the case was set to be heard, resulting in its being dismissed. The lawyer then failed to explain or apologize to the client for his failure to appear, and failed to cooperate with the investigation of the matter by his local bar's grievance committee. [ASB No. 89-117]

Transfer to Disability Inactive Status

● In an order dated March 20, 1990, the Supreme Court of Alabama transferred lawyer **Thomas R. Christian** to disability inactive status effective February 26, 1990. [ASB No. 87-598]■

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Please check your listing in the current 1989-90 Alabama Bar Directory and complete the form below ONLY if there are any changes to your listing.

Due to changes in the statute governing election of bar commissioners, we now are required to use members' office addresses, unless none is available or a member is prohibited from receiving state bar mail at the office. Additionally, the Alabama Bar Directory is compiled from our mailing list and it is important to use business addresses for that reason.

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Full Name

Business phone number

Race

Sex

Firm or Organization

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