The Alabama Lawyer

Vol. 56, No. 3 MAY 1995

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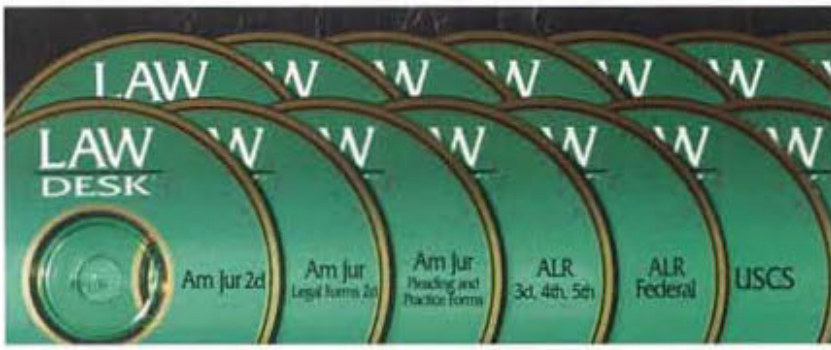

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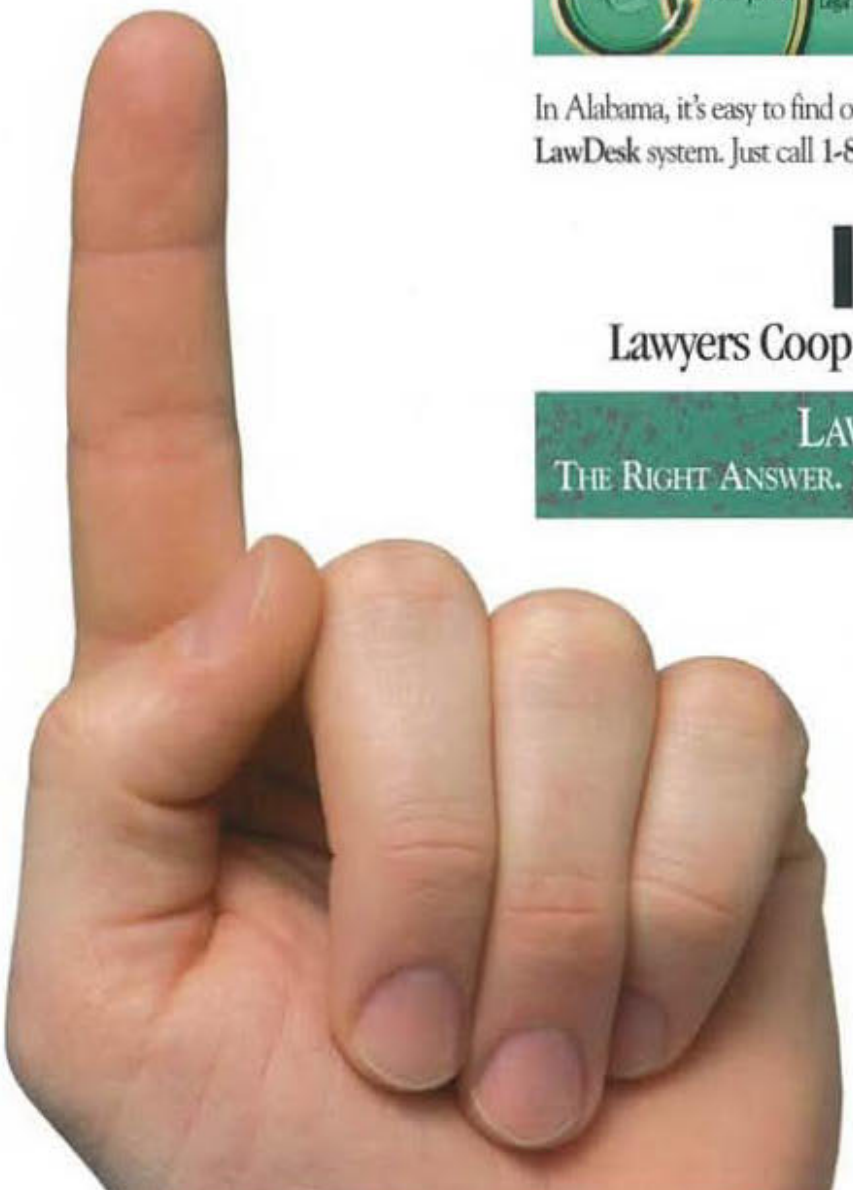

IN BRIEF

May 1995 Volume 56, Number 3

ON THE COVER:

Linn Park and **Jefferson County Courthouse**

Linn Park consists of five acres of trees, water fountains, colorful walkways, and flowers, and was named in honor of Charles Linn, Birmingham's first banker and an industrialist with great vision for the city. The Jefferson County Courthouse was completed in 1932 and has been the site of many historic cases. Birmingham is the site of the Alabama State Bar's 1995 Annual Meeting.

Photo by Paul Crawford, Montgomery, a member of the Alabama State Bar and District of Columbia Bar

INSIDE THIS ISSUE:

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The Alabama Lawyer

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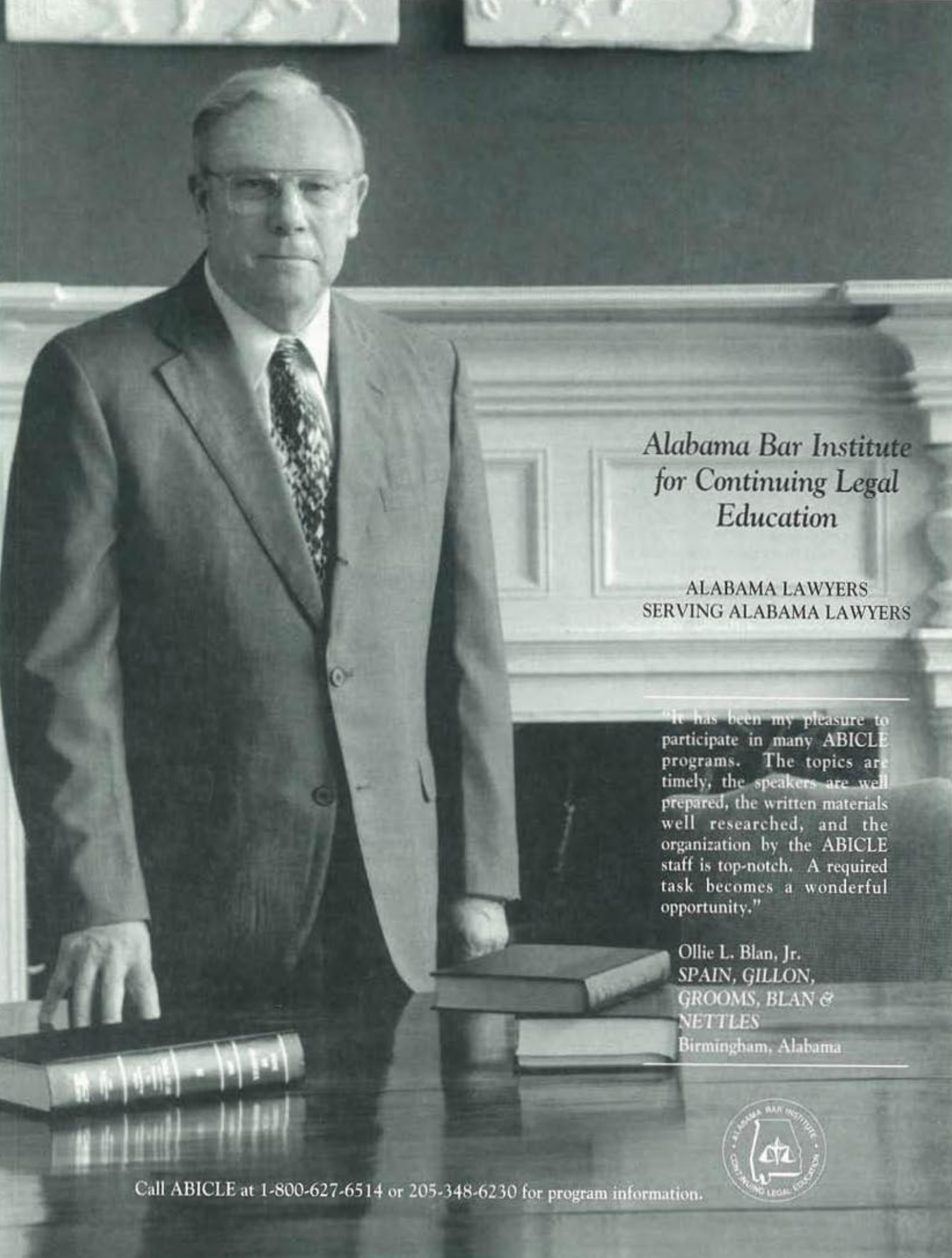

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ALABAMA STATE BAR SPONSORS BENCH & BAR CONFERENCE

March 16, 1995 was a momentous day at the Alabama State Bar headquarters. On that day, the Alabama State Bar and the Task Force on Bench & Bar Relations hosted a special Bench & Bar Conference. The purpose of the conference was to bring together leaders of our in-state bar associations and representatives of the judges' associations to exchange ideas and address issues of judicial elections and campaign conduct and other important issues affecting our profession and the administration of justice in Alabama. The meeting was particularly important in light of the now on-going Third Citizens' Conference on Alabama State Courts. It was also very appropriate to this year's theme stressing unity in our bar.

Broox G. Holmes

I had the pleasure of serving as moderator of the conference along with Judge Joe Phelps who chairs our Task Force on Bench & Bar Relations and is also president of the Circuit Judges' Association.

Those attending the conference were the presidents and other representatives of the Alabama Council of Juvenile & Family Court Judges; Alabama Circuit Judges Association; Alabama District Court Judges Association; the Alabama Criminal Defense Lawyers Association; Alabama Defense Lawyers Association; Alabama Lawyers Association; Alabama Trial Lawyers Association; Alabama District Attorneys Association; and the Task Force on Women in the Profession. Alabama State Bar President-Elect John Owens, Executive Director Keith Norman, Director of Programs Ed Patterson and Director of Communications Susan Andres also attended the conference.

To my knowledge this is the first time in the history of our bar that we have brought together representatives of all of our diverse and specialized groups in one room to talk about our mutual problems and possible solutions to improve the judicial system and our profession. This conference can truly be called a "Summit on the Profession."

When we mailed invitations for the conference, we had some concern about the response we might get on attendance. I was very pleased that every group responded and sent representatives to the meeting. I think the enthusiastic response shows how greatly concerned Alabama lawyers and judges are about our problems and the challenges we must meet. It also shows the great interest Alabama lawyers and judges have in addressing these problems and in improving our judicial system.

In my first "President's Page", I discussed my concern with the increased fragmentation and divisiveness in our bar and the fact that I sensed a hunger for a return to unity. I believe this desire for unity was manifested during the Bench & Bar Conference. I was struck by the frank and open discussions and the consensus of opinions by the participants at the conference on most of the issues we discussed.

The first item on the agenda for discussion was the issue of judicial elections, campaign conduct and campaign financing. Everyone at the meeting was concerned about the damage to the image of the bench and bar contributed to by campaign contribution excesses and negative campaigns in the partisan election of judges.

Some of the representatives favored a form of merit selection with retention elections as an option. Others expressed concern with a pure merit selection system, particularly if the selection committee or commission did not emphasize fairness and diversity in the selection process. Everyone at the meeting felt that some improvement in the election or selection process of judges on both the trial and appellate level is necessary to avoid problems experienced in the 1994 elections.

While time did not permit those assembled to "fine tune" a specific recommended process for selecting judges or conducting campaigns, it was the consensus of the conference that:

(1) nonpartisan elections of both trial and appellate judges is a good first step;

(2) campaign reform should be undertaken with a focus on

Continued on page 134

BENCH & BAR CONFERENCE

Steve Glassroth, Alabama Criminal Defense Lawyers Association, greets Yvonne A.H. Saxon and Gerrilyn V. Grant, both of the Alabama Lawyers Association.

Ann McMahan, Alabama Circuit Judges Association, and James R. Knight, Alabama Trial Lawyers Association, prepare for the conference.

(left) Conference attendees James Knight and Judge Richard Dorrough, Alabama Council of Juvenile and Family Court Judges

Prior to the conference, John W. Haley, Alabama Trial Lawyers Association, talks with Judge William R. Gordon, Alabama Circuit Court Judges Association

Over 25 judges and lawyers attended the conference, representing nine legal associations.

Broox G. Holmes, left, president of the ASB, and Judge Joseph D. Phelps, right, Alabama Circuit Court Judges Association, open the unity conference.

Celia J. Collins, Task Force on Women in the Profession, and Yvonne Saxon...

...and Gerald Topazi, Alabama District Court Judges Association, and Judge Phelps enjoy the luncheon following the conference.

Continued from page 132

limiting campaign contributions and tighter control of campaign conduct; and

(3) circuit and state commissions composed of lay members and lawyers, similar to those already established in Jefferson, Mobile, Madison and Tuscaloosa counties should be considered.

Meaningful discussions were also held on measures to improve the image and perception of the profession, lawyer advertising and solicitation and long-range plans of the Alabama State Bar.

This conference was a great first step in bringing together our legal community to meet the challenges our profession must meet. No other group has a greater ability to influence the improvement of our judicial system in this state than the lawyers and judges of Alabama. No other group has a greater duty to society to improve our system and the profession than we do.

Finally, it was suggested that further such bench and bar meetings be held, including a panel discussion format at the July annual meeting of the Alabama State Bar open to the total membership.

I hope that such bench and bar meetings will become a tradition in Alabama because the benefits to our profession and to the public are enormous.

Third Citizens' Conference Underway

Last December the board of bar commissioners by unanimous resolution called for a Third Citizens' Conference on Alabama Courts.

The Third Citizens' Conference held its first meeting at the Carraway Convention Center in Birmingham on Thursday, March 23, 1995. A committed group of Alabama citizens, judges, lawyers and leading national experts on the judicial selection process met to discuss the selection of judges in Alabama, judicial campaign financing and campaign conduct issues so vital to the life of our profession and the citizens of Alabama.

The day-long conference is the first of several meetings planned to study issues involving the judicial selection process with a view toward making recommendations to the legislature for changes and improvement in the way we select judges in Alabama.

Retired Justice Oscar Adams and former Governor Albert Brewer are to be commended for selecting a group of outstanding citizens and representatives of the legal profession from a diverse background. The response to the invitations to participate was nearly 100 percent which indicates the great concern among our citizens about judicial elections in Alabama. Approximately 140 participants attended and enthusiastically absorbed the information and materials presented, intent on accomplishing their mission. It was evident by the reports of the discussion groups that there is a definite feeling that some changes are due.

The tremendous response in these conferences from lawyers, judges and citizens from a cross-section of our state tells me that we are on our way to solid improvements in our judicial selection process. It's not just a dream; it's happening. ■

EXECUTIVE DIRECTOR'S REPORT

A GLANCE AT YOUR ALABAMA STATE BAR

With the state bar staff to be featured in the July issue of *The Alabama Lawyer*, this is a good time to update you on the operations and programs of the Alabama State Bar.

Membership

How much has the membership grown over the last five years?

The number of members has increased each year for the past five years, for an average of 2.7 percent per year. Currently, there are 10,524 lawyers who are members in good standing. Of this, 9,056 are in-state and 1,468 reside out-of-state.

Counties with the largest number of members are:

Jefferson	3,354
Montgomery	1,172
Mobile	1,022
Madison	514
Tuscaloosa	388
	6,452

(This is 71 percent of all in-state lawyers)

Counties with the fewest lawyers are:

Greene	4
Cleburne	6
Coosa	6
Lowndes	6
Lamar	7
Perry	7

In 1990, 83.3 percent of state bar members were male, while 16.7 percent were female. Presently, 80 percent of the bar's members are male and 20 percent are female. In the same five years, the number of African-American members has grown from 288 to 384, or from 3.1 percent to 3.6 percent of the total membership.

What has been the growth of section membership over the last five years?

Total section membership has fluctuated over the last five years with an average of 2,162 lawyers participating in the bar's various practice sections. Three new sections have been added since 1991. They are the Corporate Counsel Section, Professional Economics and Technology Section and Disabilities Law Section. With the addition of these three sections, there are currently 19 sections.

- Administrative Law
- Bankruptcy and Commercial Law
- Business Torts and Antitrust Law
- Communications Law
- Corporate Counsel
- Corporation, Banking and Business Law
- Criminal Law
- Disabilities Law
- Environmental Law
- Family Law
- Health Law
- Labor and Employment Law
- Litigation
- Oil, Gas and Mineral Law
- Professional Economics and Technology
- Real Property, Probate and Trust Law
- Taxation
- Workers' Compensation Law
- Young Lawyers' Section

Of these sections, the Administrative Law Section, Business Torts and Antitrust Law Section, Bankruptcy and Commercial Law Section, Family Law Section, and Taxation Section publish quarterly newsletters.

Bar Organization

What does the ASB do?

The ASB is the licensing and regulatory agency for attorneys in the State of Alabama. The state bar has jurisdiction over the conduct of all attorneys and is charged with stimulating interest and improving the administration of justice. The board of commissioners, whose members are elected by lawyers from each judicial circuit, adopts policies pertaining to the operation of the Alabama State Bar. Pursuant to legislative authority, with approval of the supreme court, the commission prescribes rules governing admission to the bar. In addition, subject to rules promulgated by the supreme court, the commission adopts rules of conduct for state bar members and has the enforcement authority for them as well.

How is the bar organized?

The bar operates in six divisions. These six divisions and their staff totals and major responsibilities are:

1. *Membership*
   Division Staff: 2
   License Fees
   Special Membership Dues
   Pro Hac Vice Admission
   Client Security Fund Fees
   Maintenance of Member Files

2. *Programs and Activities*
   Division Staff: 5.5
   MCLE Program Accreditation
   MCLE Commission
   Specialization
   Board of Legal Specialization
   Committees and Task Forces
   Volunteer Lawyers Program
   Sections
   Annual Meeting CLE Program
   Membership Benefit Programs
   Lawyer Referral Service
   Legislative Monitoring

3. *Center for Professional Responsibility*
   Division Staff: 10
   General Counsel
   Ethics Advice and Opinions
   Client Security Fund Claims
   Disciplinary Commission and Boards
   Discipline
   Unauthorized Practice of Law
   Licensing Compliance

4. *Admissions*
   Division Staff: 2
   Bar Examination
   Board of Bar Examiners
   Law School Student Applications
   Character and Fitness

Keith B. Norman

5. *Communications/Publications*
   Division Staff: 2.5
   Public and Member Relations
   Public Information and Education
   Member Periodicals (*The Alabama Lawyer* and *The Alabama Bar Directory)*

6. *Administration and Finance*
   Division Staff: 5.5
   Board of Bar Commissioners
   Bar Elections
   Annual Business Meeting
   Accounting
   Data Processing
   Personnel
   Facilities
   Alabama State Bar Foundation
   Alabama State Bar Foundation Board of Trustees
   Print Shop

In the next issue we will cover the bar's funding and fiscal operation and feature individual staff members and their responsibilities. ■

Unauthorized Practice of Law Notices

Tammy Pridgen has been running ads in the Huntsville area stating, "Avoid the high costs of divorce. If both parties agree, I can prepare the paperwork at a very reasonable rate. Call 828-0630." The Office of General Counsel is trying to determine if Ms. Pridgen is working for a law firm in Alabama. Please notify Bonnie Mainor with the General Counsel's Office immediately if Tammy Pridgen is employed by you or your firm. [UPL 94-34]

Marc A. Bivens of Birmingham has been permanently enjoined from the practice of law in Alabama. Law offices in the Tuscaloosa/Birmingham/Mobile areas may contact the Office of General Counsel for further information should Mr. Bivens apply with your firm as a paralegal or legal assistant. [UPL 94-22]

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

On April 18, 1995 the Alabama Legislature convened for its Regular Session which can continue until July 31, 1995. The Law Institute has completed and presented to the Legislature a Revised Article 3 and 4 of the Uniform Commercial Code, see March 1995 *Alabama Lawyer,* and an Unincorporated Nonprofit Association law, see November 1994 *Alabama Lawyer*. A third major revision on partnership, which includes Limited Liability Partnerships, has been completed. In addition, a committee of the Institute looking at laws affecting the family has recommended the following four bills:

"Cooling-Off Period"

This bill is designed to mandate a "cooling–off period", thereby enabling couples to have an opportunity to contemplate the ramifications of their actions prior to obtaining a divorce. Under current Alabama law there is no waiting period for couples to obtain a divorce. A couple, both of whom reside in Alabama, may now be granted a divorce on the same day on which the petition is filed.

This bill would change the law so that the court could not issue a final decree until at least 30 days had elapsed from the date of the filing of the summons and the complaint in a divorce action.

Subsection (b) of Section 1 authorizes the court during the waiting period to enter such temporary orders as are necessary concerning custody or support prior to the expiration of the waiting period.

The act will take affect January 1, 1996. The purpose behind the delayed effective date is to give the bench and bar ample time to become aware of the change.

Legal Separation

This bill is designed to allow couples who are facing marital discord to have a viable alternative to immediately obtaining a divorce. It has been drafted to provide flexibility so that it can be utilized by couples who hope for a brief period of legal separation while they attempt to reconcile or it can be used by couples who anticipate a long, perhaps even permanent separation but do not want to obtain a divorce for religious or other reasons.

Under subsection (a) the court shall enter a legal separation if requested by one or both of the parties, provided that the jurisdictional requirements for a dissolution of a marriage have been

met. In so doing, the court must comply with Rule 32 relating to the mandatory child support guidelines, if the couple has children.

Subsection (b) reiterates that a decree of legal separation does not terminate the marital status of the parties. Subsection (c) specifies that the terms of a legal separation can be modified or dissolved only by written consent by both parties and ratification by the court or by court order upon proof of a material change of circumstances. Moreover, the existence of a legal separation does not bar a party from later instituting an action for dissolution of a marriage.

Subsection (d) contemplates that the terms relating to alimony or a property settlement in the legal separation will not generally be incorporated into a final divorce decree absent agreement by the parties. This section recognizes that in many instances the parties hope to reconcile and therefore have not attempted to equitably divide their property during what is hoped will be only a brief period of separation. However, this section does provide the flexibility of allowing the couple to agree that if a reconciliation does not occur that the division of property and the alimony provision will be continued in a final decree.

Subsection (e) provides that "the best interest of the child" standard shall apply if the parties to the legal separation later file for dissolution of their marriage.

Subsection (f) provides that if both parties consent, property acquired by each party subsequent to the legal separation will be deemed the sole party of the person acquiring the property. Likewise, if both parties consent, each spouse may waive all rights of inheritance subsequent to the the legal separation. This section has bee included to provide flexibility to those parties who desire more economic certainty when a legal separation is anticipated to extend for a long period of time or when the parties prefer to have those matters settled by consent prior to the entry of the legal separation.

Subsection (g) provides that the cost for legal separation is the same as if a dissolution of the marriage was requested.

Sections 30-2-30 and -31 relating to divorce from bed and board have been repealed.

The act has a delayed effective date to

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

January 1, 1996 to enable the bench and bar to be informed of the new law.

Property Settlement

Until recently the retirement benefits were excluded from consideration by the court when property was divided upon divorce. Recently, under case law, the courts have begun to divide retirement benefits upon divorce. This bill would amend the code section to provide statutorily for the trial court to have discretion to include the present value of future or current vested retirement benefits in making a property settlement upon divorce. However, certain conditions must be met.

Subsection (b) delineates that three conditions must be met in order for the judge to have the authority to divide the retirement benefit. First, the parties must have been married for a period of ten years during which the retirement was accumulated. The ten year requirement was selected because it is the same time requirement used for a spouse to draw social security benefits based on a former spouse's work record. Second, the court may not include the value of any retirement benefits that were acquired prior to marriage. Finally, the total amount of the retirement benefits that are paid to the noncovered spouse may not exceed 50 percent of the retirement benefits.

Under subsection (c) if the court determines that the covered spouse's benefits should be distributed to a noncovered spouse those benefits are not payable to the noncovered spouse until the covered spouse begins to receive his or her retirement benefits or reaches the age of 65 years old unless both parties agree to a lump sum settlement that is payable in one or more installments.

This act has a delayed effective date to January 1, 1996 to allow the bench and bar to become acquainted.

Joint Custody

This bill provides statutory clarification concerning joint and sole custody of children including enumerating factors for the court to consider as well as dealing with the accessibility of records by both parents. Subsection (1) espouses the policy of encouraging minor children to have frequent and continuing contact with both parents provided that such contact is in the best interest of the children. The bill specifies that joint custody does not necessarily require equal physical custody. Subsection (2) of the act provides definitions for joint legal custody and sole legal and physical custody.

Under subsection (3) the court may award any form of custody that has been determined to be in the best interest of the child. Subsection (3)(a)(i) through (v) delineate the additional factors that the court will consider in determining whether joint interest is in the best interest of the child. Subsection (3)(b) requires the court to make specific finding of facts as to why joint custody is in the best interest of the child if it orders any form of joint custody without the consent of both parents. Subsection (3)(c) establishes a presumption that joint custody will be in the best interest of the child if both parents request joint custody. If the court fails to grant joint custody when requested by both parents, the court must make a specific finding of fact as to why joint custody was not granted.

Subsection (5) provides that unless otherwise prohibited by court order or statute all the records and information pertaining to the child shall be equally available to both parents in all types of custody arrangements. Subsection (6) provides that rule 32 relating to child support guidelines will be followed by the court. Subsection (7) clarifies that the awarding of joint custody does not preclude the court from later finding that one parent has committed a violation of the UCCJA of the Interference of Custody Act as provided in section 13A-6-45.

Subsection (8) provides that this statute does not constitute grounds for modification of an existing order of child custody. This bill has delayed effective date to ensure that the bench and bar has adequate time to prepare.

Revised articles 3 and 4 were discussed in the March 1995 edition of the *Alabama Lawyer*. The other proposed revisions are included.

For further information, contact Bob McCurley, Alabama Law Institute, P. O. Box 1425, Tuscaloosa, Alabama 35486, or call (205) 348-7411, FAX (205) 348-8411. ■

ABOUT MEMBERS, AMONG FIRMS

ABOUT MEMBERS

David A. McDonald announces the opening of his office at 208 S. Warren Street, Mobile, Alabama 36602. The mailing address is P.O. Box 832, Mobile 36601. Phone (334) 434-0045.

Kathryn McC. Harwood announces the relocation of her office to Riverbluff Office Park, 2207 River Road, Suite 1, Tuscaloosa, Alabama 35401. Phone (205) 759-2516.

Michael A. Kirtland announces the opening of his office at 312 Montgomery Street, Suite 210, Montgomery, Alabama. The mailing address is P.O. Box 1701, Montgomery 36102-1701.

Charles D. Decker, formerly with Hardwick, Hause & Segrest, announces the opening of his office at 262 W. Main Street, Suite 2, Dothan, Alabama 36303. The mailing address is P. O. Box 5541, Dothan 36302. Phone (334) 702-2725.

Dorothy R. Drake announces the relocation of her office to Riverbluff Office Park, 2207 River Road, Suite 1, Tuscaloosa, Alabama 35401. Phone (205) 758-8488.

Kimberly O. Fehl, formerly with Fehl & Chancey, announces the opening of her office at Suite 1015, Bell Building, 207 Montgomery Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 101, Montgomery 36101-0101. Phone (334) 269-0890.

Daniel G. Blackburn announces the formation of **Daniel G. Blackburn, P.C.** Offices are located at 110 Courthouse Square, Bay Minette, Alabama 36507. Phone (334) 937-1750.

M. Andrew Mantler announces the relocation of his office to 107 North Side Square, Huntsville, Alabama 35801. Phone (205) 536-5199.

A. Gregg Lowrey, formerly with the district attorney's office, Shelby County, announces his relocation to 230 Bearden Road, Pelham, Alabama 35194. Phone (205) 663-2171.

Robert R. Hembree announces the relocation of his office to 503 Gunter Avenue, Guntersville, Alabama 35976. Phone (205) 582-0169.

Robert E. Kirby, Jr., formerly with Lucas, Alvis, Kirby & Wash, announces the opening of his office at 3100 Lorna Road, Suite 132, Birmingham, Alabama 35216. Phone (205) 979-1924.

Bradley P. Ryder, formerly of Wilmer & Shepard, announces the opening of his office at 100 Jefferson Street, Suite 300, Huntsville, Alabama 35801. The mailing address is P.O. Box 18095, Huntsville 35804. Phone (205) 534-3288.

S. Alec Spoon announces the relocation of his office to 631 S. Perry Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 1212, Montgomery 36102. Phone (334) 262-0730.

Eugene A. Beatty announces the opening of his office at 2201 Arlington Avenue, Birmingham, Alabama 35205. Phone (205) 930-6900.

Richard H. Cater, formerly of Burnham, Klinefelter, Halsey, Jones & Cater, announces the opening of his office at SouthTrust Bank Building, 1000 Quintard Avenue, Anniston, Alabama. The mailing address is P.O. Box 1059, Anniston 36202. Phone (205) 235-1973.

James G. Curenton, Jr., formerly of Smith & Curenton, announces the opening of his office at 101 N. Section Street, Fairhope, Alabama. The mailing address is P.O. Box 1435, Fairhope 36533. Phone (334) 928-3993.

AMONG FIRMS

Perry & Perry announces that **Jack M. Purser, Jr.** has become a member. Offices are located at 111 Washington

Avenue, Montgomery, Alabama 36104. Phone (334) 262-7763.

Gentle, Pickens & Landon announce that **C. Steven Ball** and **Emily Vaughn Frost** have become associates. Offices are located in the Colonial Bank Building, 1928 First Avenue, North, Suite 1500, Birmingham, Alabama 35203. Phone (205) 716-3000.

Emond & Vines announce that **Lloyd W. Gathings** has become a partner and **J. Flint Liddon** and **Vivian D. Vines** are associates. Offices are located at 2200 SouthTrust Tower, 420 N. 20th Street, P.O. Box 10008, Birmingham, Alabama 35202-0008. Phone (205) 324-4000.

Clark, Scott & Sullivan announces that **Jannea S. Rogers**, formerly of Daniels, Kashtan & Fornaris, has become an associate. Offices are located at First Alabama Bank Building, 56 St. Joseph Street, 10th Floor, Mobile. The mailing address is P.O. Box 1034, Mobile, Alabama 36602. Phone (334) 433-1346.

Patricia T. Mandt, formerly of Bradley, Arant, Rose & White, has joined the legal staff of **Harbert Corporation.** The mailing address is P.O. Box 1297, Birmingham, Alabama 35201. Phone (205) 987-5500.

G. William Davenport, formerly senior trial attorney for the Equal Employment Opportunity Commission in Birmingham, has been appointed an **U.S. Administrative Law Judge.** Offices are located at the Office of Hearings and Appeals, U.S. Social Security Administration, 423 N. 12th Street, Middlesboro, Kentucky 40965. Phone (606) 248-5320.

Secretary of State Jim Bennett announces that **Kenneth A. Dowdy** has been appointed legal advisor. His office will be located at 600 Dexter Avenue, Montgomery, Alabama 36130. Phone (334) 242-7205.

Pierce, Carr & Alford announces that **Andrew C. Clausen** and **H. William Wasden** have become shareholders. The firm's name has changed to **Pierce, Carr, Alford, Ledyard & Latta**. Offices are located at 1110 Montlimar Drive, Suite 900, Mobile, Alabama. The mailing address is P.O. Box 16046, Mobile 36616. Phone (334) 344-5151.

Berkowitz, Lefkovits, Isom & Kushner announces that **Richard A. Pizitz, Jr.** has become a member and **Ellen E. Henderson** has become an associate. Offices are located at 1600 SouthTrust Tower, Birmingham, Alabama 35203-3204. Phone (205) 328-0480.

Leon M. Capouano, Jerome D. Smith, Joseph W. Warren and **Thomas B. Klinner,** formerly of Capouano, Wampold, Prestwood & Sansone, announce the continuation of their practice under a new name, **Capouano, Smith, Warren & Klinner.** Offices are located at 350 Adams Avenue, Montgomery, Alabama 36104. The mailing address is P.O. Drawer 4689, Montgomery 36103-4689. Phone (334) 834-3891.

Longshore, Nakamura & Quinn announces that **Graham L. Sisson, Jr.,** formerly deputy attorney general, Americans with Disabilities Act Coordinator, State of Alabama, has become an associate.

London, Yancey, Elliott & Burgess announces that **Bert S. Nettles** has joined the firm and **Lisa Wright Borden, Mark D. Hess, Peggy C. Hooker** and **A. David Fawal** have become associates. The firm's name has been changed to **London & Yancey.** Offices are located at 1000 Park Place Tower, 2001 Park Place, Birmingham, Alabama 35203. Phone (205) 251-2531.

Walston, Stabler, Wells, Anderson & Bains announces that **Anne Byrne Stone** has become a partner and **Julia Boaz-Cooper, Gregory L. Doody** and **Dawn Helms Sharff** have become associates. Offices are located at Financial Center, 505 20th Street, North, Suite 500, Birmingham, Alabama 35203. Phone (205) 251-9600.

Balch & Bingham announces that **Lee H. Zell** has become a partner, and **Michael D. Freeman, James H. Hancock, Jr., Robin G. Laurie, Daniel M. Wilson,** and **Jesse S. Vogtle, Jr.** have become members. Offices are located in Birmingham, Huntsville and Montgomery, Alabama, and Washington D.C.

Bradford & Associates announces that **Timothy P. Donahue** has joined the firm. The firm's name has been changed to **Bradford & Donahue**. Offices are located at 2100-A SouthBridge Parkway, Suite 585, Birmingham, Alabama 35209. Phone (205) 871-7733.

McGlinchey, Stafford & Lang announces that **Elena A. Lovoy** has become an associate. Offices are located at 643 Magazine Street, New Orleans, Louisiana 70130. Phone (504) 586-1200. Lovoy is a 1987 Alabama State Bar admittee.

Robert P. Bynon, Jr. announces that **Becky A. Blake** has joined the firm as an associate. Offices are located at 2213 Forestdale Boulevard, Birmingham, Alabama 35214. Phone (205) 791-0028.

Leigh Beasley Simmons and **Gilmer T. Simmons** announce the formation of **Simmons & Simmons.** Offices are located at 1163 Center Point Parkway, Suite 100, Birmingham, Alabama 35215. Phone (205) 854-1800.

William D. Davis, III, Kerry S. Curtis, Lora R. Dorin, Pete Neil and **Jane A. Davis** announce the formation of **Davis, Dorin, Curtis & Neil.** Associates are **Earl Reuther** and **Charles Ratcliff**. Offices are located in Birmingham and Huntsville, Alabama.

Owens & Carver announces that **M. Bradley Almond** has become an associate. Offices are located at 2720 6th Street, Suite 3, Tuscaloosa, Alabama 35401. The mailing address is P.O. Box 2487, Tuscaloosa 35403-2487. Phone (205) 750-0750.

Burr & Forman announces the opening of their Atlanta, Georgia location. Offices are located at 1 Georgia Center, 600 W. Peachtree Street, Suite 470, Atlanta 30308. Phone (404) 817-3536. **W. Lee Thuston** and **Allyson L. Edwards,** announce they have joined **Burr & Forman**. Offices are located in Birmingham and Mobile, Alabama.

Johnson & Cory announces the formation of **Cory, Watson, Crowder & Petway**. Offices are located at 300 21st Street, North, Suite 900, Birmingham, Alabama 35203. Phone (205) 328-2200.

Michael A. Anderson announces the formation of **Horton, Maddox & Anderson**. Offices are located at One Central Plaza, 835 Georgia Avenue, Suite 600, Chattanooga, Tennessee 37402. Phone (615) 265-2560. Anderson is a 1985 Alabama State Bar admittee.

Burdine, Collier, Burdine & Long announces that **Roy Edgar Long** has become a partner. Offices are located at First Federal Building, 102 S. Court Street, Suite 412, Florence, Alabama 35630-5656. Phone (205) 767-5930.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Herbert Harold West, Jr.** has become a partner. Offices are located in Birmingham and Mobile, Alabama.

M. Wayne Sabel and **Mark Sabel** announce the formation of **Sabel & Sabel.** Offices are located at Hillwood Office Center, 2800 Zelda Road, Suite 100-5, Montgomery, Alabama 36106. Phone (334) 271-2770.

Lightfoot, Franklin, White & Lucas announces that **Michael L. Bell** has become a partner. Offices are located at 300 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 581-0700.

Tommy H. Siniard announces that **Patrick M. Lamar** has become a member and **Roy Braswell** has become an associate. The firm's name is now **Siniard & Lamar.** The mailing address is P.O. Box 2767, Huntsville, Alabama 35804. Phone (205) 536-0770.

Braxton W. Ashe, J. Michael Tanner, Larry B. Moore and **Grant A. Wright,** formerly of Almon & McAlister, announce the formation of **Ashe, Tanner, Moore & Wright.** Offices are located in Tuscumbia and Florence, Alabama.

Bradley, Arant, Rose & White announces that **F. Keith Covington; Philip J. Carroll, III; James S. Christie, Jr.; Sherri Tucker Freeman; Stephen K. Greene; J. David Pugh; Kenneth T. Wyatt; Denson N. Franklin, III;** and **John E. Goodman** have become partners. Offices are located in Birmingham and Huntsville, Alabama.

Capell, Howard, Knabe & Cobbs announces that **W. Holt Speir, III** has become a member, and **Richard F. Allen** has become chief deputy Attorney General, State of Alabama. The firm is located at 57 Adams Avenue, Montgomery, Alabama 36104-4045. Phone (334) 241-8000.

Milling, Benson, Woodward, Hillyer, Pierson & Miller announces that **Jean M. Sweeney** has become a partner. Offices are located at 909 Poydras Street, Suite 2300, New Orleans, Louisiana 70112. Phone (504) 569-7000. Sweeney is a 1984 Alabama State Bar admittee .

Edward G. Isaacs Bowron, Rudene Crowe Oldenburg and **Jeffrey L. Luther** announce the formation of **Bowron, Oldenburg & Luther.** Offices are located at AmSouth Center, 63 S. Royal Street, Suite 609, Mobile, Alabama 36602. The mailing address is P.O. Box 1003, Mobile 36633. Phone (334) 433-8088.

Julian B. Brackin announces that **Kelly A. McGriff** has become an associate. The name has been changed to **Brackin & McGriff.** Offices are located at 676 S. McKenzie Street, Suite 131, Foley, Alabama 36535. The mailing address is P. O. Box

998, Foley 36536. Phone (334) 943-4040.

Phelps, Jenkins, Gibson & Fowler announces that **K. Scott Stapp** has become a partner. **Stephen E. Snow** and **Ivan B. Cooper** have joined the firm as associates. Offices are located at 1201 Greensboro Avenue, Tuscaloosa, Alabama 35401. Phone (205) 345-5100.

Leitman, Siegal, Payne & Campbell announces that **Bradley G. Siegal** and **Shawn Hill Crook** have become members. Offices are located at 600 N. 20th Street, Suite 400, Birmingham, Alabama 35203. Phone (205) 251-5900.

Raymond P. Fitzpatrick, Jr. and **David P. Whiteside, Jr.**, formerly of Johnston, Barton, Proctor, Swedlaw & Naff, announce the formation of **Whiteside & Fitzpatrick.** Offices are located at Farley Building, 6th Floor, 1929 3rd Avenue, North, Birmingham, Alabama 35203. Phone (205) 320-0555.

Hubbard, Smith, McIlwain & Brakefield announces that **R. Cooper Shattuck** has become a shareholder. The firm's new name is **Hubbard, Smith, McIlwain, Brakefield & Shattuck.** Offices remain at 808 Lurleen Wallace Boulevard, North, Tuscaloosa, Alabama. The mailing address is P.O. Box 2427, Tuscaloosa 35403-2427. Phone (205) 345-6789.

Woodall & Maddox announces that **William A. Austill** and **Jeffrey W. Parmer,** formerly of Clark & Scott, have joined the firm as a shareholders. Offices are located at Suite 101, 3821 Lorna Road, Birmingham, Alabama 35244. Phone (205) 733-9455.

Maynard, Cooper & Gale announces that **Mark L. Drew, Jayna Partain Lamar** and **Randall H. Morrow** have become members, and **Patrick C. Cooper, Peter S. Fruin, Cary D. Tynes, Elizabeth G. Beaube,** and **James T. Carr** have become associates.

Leonard N. Math, formerly of Trimmier Law Firm, announces he has joined the firm of **Chambless & Cooner.** The firm's new name is **Chambless, Cooner & Math.** Offices are located at 5720 Carmichael Road, Montgomery, Alabama 36117. Phone (334) 272-2230.

Sirote & Permutt announces that **David W. Long** and **Fern Singer** have become shareholders and **Michael A. Catalano, Jeffry B. Gordon, Samuel Mark Hill, Roxane D. Peyser, Sarah Wright Ruffner,** and **Laura Morrison Schiele** have become associates. Offices are located at 2222 Arlington Avenue, South, Birmingham, Alabama 35255. The mailing address is P.O. Box 55727, Birmingham 35255-5727. Phone (205) 933-7111.

Johnston, Barton, Proctor, Swedlaw & Naff announces that **R. Marcus Givhan**, formerly deputy attorney general, State of Alabama and Deputy District Attorney, Montgomery, and **Josh Mullins**, formerly circuit judge, 10th Judicial Circuit have joined the firm. Offices are located at 2900 AmSouth/ Harbert Plaza, 1901 6th Avenue, North, Birmingham, Alabama 35203-2618. Phone (205) 458-9400.

Hand, Arendall, Bedsole, Greaves & Johnston announces that **J. Burruss Riis** has become a member and **Brooks P. Milling** and **E. Luckett Robinson, II** have become associates. Offices are located at 3000 First National Bank Building, Mobile, Alabama 36601. The mailing address is P.O. Box 123, Mobile. Phone (334) 432-5511.

Lehr, Middlebrooks & Proctor announces that **Albert L. Vreeland, II** and **Brent L. Crumpton** have become shareholders. Offices are located at 2021 3rd Avenue, North, Suite 300, Birmingham, Alabama 35203. Phone (205) 326-3002.

Onnie Davis Dickerson, III and **G. Wray Morse**, formerly principal legal advisor for the Birmingham office of the FBI, announce the formation of **Dickerson & Morse**. Offices are located at 214 Lorna Square, Birmingham, Alabama 35216. Phone (205) 979-0100.

Stephen D. Apolinsky announces the formation of **Eastman, Stapleton & Apolinsky**. Offices are located at 100 Colony Square, 1175 Peachtree Street, Northeast, Suite 404, Atlanta, Georgia 30361. Phone (404) 876-2208. Apolinsky is a 1994 Alabama State Bar admittee.

Raymond D. Waldrop, Jr. and **S. Lisa Frost** announce the dissolution of **Smith & Waldrop** and the formation of **Waldrop & Associates**. Offices will remain at 108 Southside Square, Suite A, Huntsville, Alabama 35801. Phone (205) 534-8485.

W. Donald Bolton, Jr. announces that **Shawn Junkins**, former deputy attorney general, State of Alabama, is now an associate. Offices are located at 307 S. McKenzie Street, Suites 203-206, Foley, Alabama 36535. The mailing address is P.O. Box 259, Foley 36536. Phone (334) 943-3860.

Albrittons, Givhan, Clifton & Alverson announces that **Julie S. Moody**, formerly of Cobb & Shealy, has become an associate. Offices are located at 109 Opp Avenue, Andalusia, Alabama 36420. Phone (334) 222-3177. ■

NOTICE

Any address or name changes received at the Alabama State Bar after March 30, 1995 ***will not be*** reflected in the 1995 edition of *The Alabama Bar Directory*.

BUILDING ALABAMA'S COURTHOUSES

ELMORE COUNTY COURTHOUSE

By SAMUEL A. RUMORE, JR.

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

Courthouse at Wetumpka

ELMORE COUNTY

Rivers have played an important role in the history of Elmore County. Two rivers, the Coosa and Tallapoosa, join in the county to form the Alabama River. Archaeologists believe that nomadic Indians camped in the area, due to the rivers and abundant game, as early as 5000 B.C. And DeSoto's Spaniards were the first Europeans to see present-day Elmore County when they visited Indian villages on the river banks around the year 1540. The competition between the French and the British for control of the rivers also had a significant impact on the area as they vied for influence and trade with the Indians.

In the 17th century, the French and British were involved in a worldwide rivalry for colonial possessions. This rivalry often led to war. By the early 1700s, France held the colony of Louisiana that included New Orleans and Mobile, and Britain had colonies in the Carolinas, leaving the vast interior of present-day Alabama and Georgia (Georgia would not be established as a colony until 1733) as a target for their competition.

By 1714, the French sought an outpost upriver from Mobile in the territory of the Alabama Indians. These Indians were an Upper Creek tribe known to the French as the "Alibamons." They influenced the balance of power in the area due to their location on the strategic rivers and trade routes. Their friendship could give the French an upper hand in the Franco-British rivalry.

In July 1717, Lieutenant Vitral de La Tour led a detachment of soldiers to the junction of the two rivers in present-day Elmore County. His men built a fort on the large, level peninsula between the rivers on land high enough to be safe from flooding. The fort was located a few miles downriver from the fall line of the Coosa River. These river rapids are found near present-day Wetumpka. The official name of the fort was Fort Toulouse, in honor of Admiral Louis Alexander de Bourbon, the Count of Toulouse. He was a legitimated son of Louis XIV, and the dominant member of the Council of Marine who oversaw French colonies at that time.

The fort was established as the easternmost outpost on the flank of the Louisiana colonies. The French successfully maintained amicable relations with the Indians and hindered British movement in the region. They also profited from a flourishing trade in deer skins that were sent downriver to Mobile and then on to France.

The French actually built two forts on the site of Fort Toulouse over the years and occupied the area until 1763. In that year events on the larger world stage turned against the French. The treaty ending the French and Indian War transferred all French possessions east of the Mississippi River to the victorious British. The French garrison peaceably turned over ownership to them. It is interesting to note that Fort Toulouse was never attacked and never fired its

guns against a hostile force.

Even though the British owned the fort, they never occupied it. The French had treated the Indians well and some soldiers and French traders had even inter-married with them. Indian loyalties remained with the French. It never became necessary for the British to challenge these loyalties and the fort declined into ruins.

In 1776, naturalist William Bartram during his travels observed the site of the old fort. He wrote, "This is perhaps one of the most eligible situations for a city in the world, a level plain between the conflux of two majestic rivers." After the American Revolution this territory and the fort site became part of the United States.

The fort attained new significance following the Creek Indian War. Andrew Jackson came into the area with his Tennesseans in 1813. He defeated the Creek nation at the Battle of Horseshoe Bend on the Tallapoosa River on March 27, 1814. After the battle, he led his men to the site of old Fort Toulouse and set about reconstructing the fort there. Plans were made for a chain of forts to extend from Tennessee into Georgia. Fort Toulouse was renamed Fort Jackson by Major General Thomas Pinckney in honor of the victorious Andrew Jackson.

On August 9, 1814, the Creek Indian War officially ended with the signing of the Treaty of Fort Jackson. By this treaty the Creek nation surrendered almost half of its land. Significantly, its remaining lands were cut off from other Indian tribes and from the Spanish to the south. The Creeks were isolated and would no longer be able to ally themselves with any other power to become a threat to the United States.

After the war, regular army troops occupied Fort Jackson. A settlement sprang up nearby and became known as Jackson Town. When the Mississippi Territorial Legislature established Montgomery County in 1816, Jackson Town became its first county seat. For whatever reason, the town did not flourish. Most newcomers settled in Montgomery to the south or the Wetumpka area to the north. Court was held in Jackson Town until May 1818. After that time, the fort and town were abandoned, and the site became farmland.

Tallassee courthouse and city hall

In 1971 the Alabama Historical Commission gained possession of the Fort Toulouse-Fort Jackson site. Archaeologists have begun the task of excavating the forts, but much excavation and study remain to be done. It is anticipated that they will find a treasure trove of historical information during future excavations.

The first permanent settlers in the area that would become Elmore County were soldiers from Tennessee who served under Jackson in the Creek Indian War. Other settlers came from Georgia, the Carolinas, and Virginia. As previously noted, a portion of land around the Fort Toulouse-Fort Jackson site and north of the Tallapoosa River was a part of Montgomery County at this time. Most of present-day Elmore County west of the Coosa River became part of Autauga County which was created in 1818. The largest portion of present-day Elmore County was east of the Coosa River and remained in Creek Indian hands until the 1832 treaty that transferred all territory of the Creek nation to the State of Alabama. After this treaty, much of present-day Elmore County, including east Wetumpka, became part of the newly established Coosa County.

The town of Wetumpka was settled as early as 1820. Its name is derived from two Creek Indian words—"wi" meaning "water"and "tamka" meaning "sounding" or "rumbling". It received its name from the shoals of the Coosa River nearby. Wetumpka is located at the fall line of the Coosa and is the uppermost point of navigation on the river.

In 1825, the Alabama Legislature considered moving the state capital from Cahaba to Wetumpka. The vote was extremely close but the resolution was defeated on December 12, 1825 by a vote of 31 to 30. The next day the legislature voted to name Tuscaloosa the new state capital.

Wetumpka continued to grow and prosper. On January 17, 1834, the portion of Wetumpka on the east side of the Coosa River was formally incorporated. This portion of the town was in Coosa County. On February 18, 1834, the portion of Wetumpka on the west side of the Coosa River was incorporated. This portion of the town was in Autauga County. An act of the legislature united the two sections into one incorporated unit on January 30, 1839. This same act established a city court which continued in operation until 1844. Also, in 1839 the legislature placed the state penitentiary at Wetumpka.

Wetumpka could have achieved even greater significance in Alabama history except for two important events that occurred in the 1830s. The first was the

decision of Daniel Pratt not to locate his industrial complex at Wetumpka. Pratt had sought a site for his factories on the Coosa River above Wetumpka. Residents asked exorbitant prices for their land and so Pratt moved on to a new site that later became Prattville. The second event was the financial panic of 1837. This time of unsettled confidence caused the company which had begun the grading of a railroad bed from north Alabama through Wetumpka to the Georgia line to cease operations. The railroad would not come to Wetumpka until 1878.

In 1846, the legislature once again considered the issue of moving the Alabama state capital. Since the Indian removal of the 1830s and the creation of new counties from their territory, the center of wealth and population in Alabama had shifted to the south and east. Great growth took place along the Coosa, Tallapoosa, and Alabama river systems. Eight towns made bids for the state capital, but the real fight was between Tuscaloosa, the state capital at that time, Wetumpka and Montgomery.

Both Wetumpka and Montgomery were attractive sites for the state capital. Both had more than 3,000 inhabitants. Both had many citizens influential in state politics. Wetumpka was already home to the state penitentiary and was located at the head of navigation above Mobile. However, unlike Montgomery, Wetumpka had no railroad. Further, a crucial factor in the decision was that the business community of Montgomery promised to construct a capitol building at no cost to the state. This foresight won the contest. After 16 ballots, Montgomery was chosen the state capital and its prominence in Alabama has been assured ever since.

Wetumpka, though not a county seat at the time, did survive. However, when the fight for the capital was lost, many citizens moved away to Montgomery. A number of buildings were demolished and the building materials were taken to Montgomery and used to construct new structures in the capital city.

In 1850 when Hancock County, later called Winston County, was established, Alabama had 52 counties. No new counties were created for 16 years, until the Reconstruction legislature took office. From February 15, 1866, until December 30, 1868, 13 new counties came into existence. The first of these was Elmore County established on February 15, 1866 out of territory taken from southern Coosa, western Tallapoosa, eastern Autauga, and northern Montgomery counties.

The new county of Elmore was named for General John Archer Elmore who came to the Autauga portion of Elmore County in 1819. He was a native of Virginia, a prominent citizen of South Carolina, having served in the state legislature there, and a Revolutionary War general. After arriving in Alabama he served in the Alabama legislature in 1821. He died in 1834 leaving a number of descendants who became prominent in their own right. Among these was a United States senator from South Carolina, a treasurer of South Carolina, a secretary of state of Alabama, a probate judge of Macon County, and a member of the Constitutional Convention of 1865. It was probably due to the influence of his descendants that the first reconstruction county in Alabama was named for General Elmore. The town of Elmore in Elmore County was named for Albert Stanhope Elmore, one of the general's five sons by his second wife.

The act which created Elmore County made provisions for the election of county officials and the selection of a county seat by popular vote. The election was held on January 14, 1867. As a result of this election, "East Wetumpka" was selected as the county seat location. Thus, at long last, Wetumpka became a capital—the capital city or county seat of Elmore County.

Samuel A. Rumore, Jr.
Samuel A. Rumore, Jr. is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore. Rumore serves as the bar commissioner for the 10th Circuit, place number four.

In the early days of the county, court was held in a brick building called Haggerty Hall on South Main Street, now called Montgomery Street. The building had a tavern, barber shop, and other private businesses on the first floor with a courtroom and county offices on the second floor.

The county soon needed a building dedicated exclusively as a courthouse. On March 27, 1884, ground was broken for such an edifice. Arthur Marshall was contractor. The cost of this brick structure was $15,000. It consisted of two stories and had external iron stairways on either side of the facade that led up to a second-floor iron balcony and portico. This courthouse served the county well until the present facility opened in 1932.

By 1930, when members of the Elmore County Commission decided that the county needed a new courthouse, they visited six states checking on designs and financing. They chose not to issue any bonds. Instead the county allocated the first $100,000 for the project from the county general fund. The balance was paid from increased revenues resulting from re-evaluation of properties on the Tallapoosa River and by financial arrangements made with the Alabama Power Company.

The present Elmore County Courthouse was begun in 1931 and completed in 1932. It cost approximately $250,000, a huge sum for the Depression era. No wood was used in the building except in the courtrooms, the county commission room, and for the mahogany stairway.

Marker inside the courthouse at Wetumpka

Its basic building materials are granite and concrete for the foundation, limestone for the outside walls, and marble for the interiors. The roof is concrete and gravel and could be removed to add another story. Windows and doors have steel frames. The structure itself is virtually fireproof.

This courthouse was designed by architects Warren, Knight & Davis of Birmingham and was constructed in the Greek Revival style. It has a classic design and resembles a Greek temple. The facade has eight fluted Doric columns. The two-story structure with a basement is 100 by 128 feet in dimensions. It was added to the Alabama Register of Landmarks in 1977.

In concluding the story of Elmore County's courthouses, a passing mention must be made of the town of Tallassee, which is located on the eastern boundary of the county just across the Tallapoosa River from Tallapoosa County. Tallassee was named for an ancient Indian town. On this site, Thomas Barnett built a cotton mill around 1838.

As early as 1941, an effort was made to build a branch courthouse for Elmore County at Tallassee. But because of war time shortages, nothing could be done. The movement for a court in Tallassee gained new energy in 1948 with the proposal for a $100,000 brick courthouse. Plans were again placed on hold. Finally, in 1953, a new city hall and courthouse were built in Tallassee. This building cost $90,000 and was designed by Montgomery architect Carl Cooper. Wyatt Construction Company was the low bidder. The building is owned by the City of Tallassee.

The purpose of locating a court in Tallassee was to allow Tallassee residents to conveniently try small matters without the necessity of traveling to the county seat. At that time, the court located there was known as the Court of Common Pleas. Before the passage of the new Judicial Article of the Alabama Constitution in 1973, small claims-type trials took place at Tallassee. However, Tallassee was never a co-county seat, and according to Chief Justice Sonny Hornsby of Tallassee, all trials are now held at the courthouse in Wetumpka.

The author acknowledges Chief Justice Sonny Hornsby, the late Joe A. Macon, Jr. of Wetumpka, Alabama, and the Elmore County Commission for help in obtaining information used in this article.

Elmore County is presently building a new courthouse. The completion is expected during the summer of 1995. Updated information on the new Elmore County Courthouse will be featured in a future issue of ***The Alabama Lawyer.*** ■

Sources: *History of Elmore County Through 1876,* Fannie Lois Martin Graves, 1939; *Wetumpka Alabama—Finger Tip information on a Great Southern Town,* Austin R. Martin, Elmore County Historical Society, 1971; *A History of Wetumpka,* Elizabeth Porter, Wetumpka Chamber of Commerce, 1957; *Fort Toulouse,* Daniel H. Thomas, The University of Alabama Press, 1989.

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BAR BRIEFS

• The **Cabaniss, Johnston** Scholarship is awarded to a resident of Alabama for the second year of law school. The scholarship will cover tuition and books to a maximum of $5,000. A second place scholarship of $1,000 will also be awarded at the scholarship committee's discretion. For an application contact Tracy Daniel at (334) 269-1515. The deadline for applying for the 1995-96 school year is June 16, 1995.

• In what was a collaborative community effort, the Alabama State Bar and the **Alabama Center for Dispute Resolution** hosted 90 Lanier High School faculty and observers for conflict resolution and peer mediation training February 20 and 21 at state bar offices.

Staff from the Peace Education Foundation presented the training as a part of a program arranged by the Alabama Center for Dispute Resolution and funded by the Dexter Avenue United Methodist Church. Additional support came from the Montgomery Public School System and local YMCA.

The program, called "Win/Win", will help the faculty teach students the skills they need to resolve conflict successfully without violence. Those skills include identifying and focusing on the problem, attacking the problem rather than the person, listening with an open mind, treating the person's feelings with respect, and taking responsibility for their own actions. Among the "fouls" students will learn to avoid are name-calling, blaming, getting even, threats, bad language, sarcasm, hitting, pushing, and making excuses.

In March, Lanier initiated "Drop Everything for Peace", and classes were suspended for two days to train all 1,400 students in conflict resolution. A peer mediation program followed, where selected students were trained to act as neutral mediators between other students involved in a dispute. If disputants agree to participate, the mediators (usually two for each mediation) help them work out a mutually agreeable solution to the conflict, averting the possibility of violence.

Governor Fob James, Jr. proclaimed May 3, 1995 as Alabama's first statewide **Legal Assistant/Paralegal Recognition Day.** The Proclamation was co-sponsored by the Legal Assistant Section of the Montgomery County Bar Association and the Alabama Association of Legal Assistants.

At the informal celebration at the state capitol on March 29, 1995 are, left to right, front row, Teresa Sault, Becky Shipes, Stella Sanford, Lynn Reynolds, Cathy Hunter Hollon, and Marilyn Mashatt. Back row, left to right, are Michael Ivey, Ed Patterson, Thomas Methvin, Donna Sims, and Dr. George Schrader.

For more information on school conflict resolution and peer mediation programs, call the Alabama Center for Dispute Resolution at (334) 269-0409.

• Effective March 10, 1995, the following revisions were made to the **Vaccine Injury Table and the Qualifications and Aids to Interpretation of the Table**. 42 U.S.C. §300aa-14(a) & (b).

—Chronic arthritis will be added as an on-Table injury for the vaccines against rubella (MMR, MR, R). This addition to the Table creates the rebuttable presumption that chronic arthritis was caused by the MMR vaccines, where the first symptom or manifestation of the arthritis occurs within 42 days after the administration of the MMR vaccines. 42 U.S.C. §300aa-14.

—Because the addition of chronic arthritis may significantly increase the likelihood that a petitioners alleging a rubella vaccine-related chronic arthritis will obtain compensation, an individual alleging that an on-Table chronic arthritis occurred on or after March 10, 1987 has until March 10, 1997 to file his or her claim with the U.S. Court of Federal Claims. This limitation period is an exception to the general limitations rule that a petitioner must file a claim for a vaccine-related injury within 36 months after the first symptom or manifestation of the injury. See 42 U.S.C. §300aa-16)a).

—The statute of limitations bars the claims of persons whose first symptom or manifestation of chronic arthritis occurred prior to March 10, 1987. 42 U.S.C. §300aa-16(b).

—Hypotonic-hyporesponsive episode (HHE) and Residual seizure disorder (RSD) have been deleted as Table injuries for the diphtheria, tetanus and pertussis vaccines.

—As a result of the deletions of HHE and RSD, the presumption that HHE or RSD was caused by the vaccines will no longer exist, and an individual filing a petition on or after March 10, 1995 and

alleging these injuries, must prove that the DTP vaccine was the cause-in-fact of the RSD or HHE.

—The Qualifications and Aids to Interpretation of the Vaccine Injury Table have been revised. See 42 U.S.C. § 300aa-14(b). Generally, these revisions amplify and clarify the medical terms used in the Vaccine Injury Table. The revisions to the Qualifications and Aids to Interpretations apply to all petitions filed on or after March 10, 1995.

For more information, contact David Benor at (301) 443-2006.

• During school year 1994-95, six members of the **Pickens County Bar Association** volunteered their time to teach a course at Pickens Academy in Carrollton, Alabama, entitled "Street Law". There were 12 students in the class and it was taught each morning during the school year. There were a number of field trips sponsored by the individual teachers, including a visit to the jail, a visit to Juvenile Court, and a visit to Aliceville Municipal Court.

The program was so successful that the bar association intends to repeat it for the 1995-96 school year at Pickens Academy and possibly extend the course offering to public schools. All of the lawyers donated their time and materials for the course.

Those attorneys participating and the courses they taught included:

John A. Russell, III—Introduction to Law and Criminal Law and Juvenile Justice

John Earl Paluzzi—Individual Rights and Liberties

William D. King, IV—Torts

Susan Milner—Family Law

Kathy L. Marine—Real Property (Housing) Law

Allison Anderson—Consumer Law

• **Herman J. Russomanno,** a 1975 Cumberland graduate, has been named 1995 Distinguished Alumnus of the Year by Cumberland School of Law, Samford University. He received the award at an alumni brunch March 18.

Russomanno is a senior partner with the Miami, Florida firm of Floyd, Pearson, Richman, Greer, Weil, Brumbaugh & Russomanno. He is a *magna cum laude* and Phi Beta Kappa graduate of Rutgers University. While at Cumberland, he was president of the school's Student Bar Association. ■

POSITION AVAILABLE

Alabama State Bar Volunteer Lawyers Program Director

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PROFILE

WARREN BRICKEN LIGHTFOOT

Born on August 21, 1938, Warren Lightfoot grew up in Luverne, Alabama, where he graduated from Luverne High School in 1956. He thereafter attended The Citadel in Charleston, South Carolina, from 1956-1958, received his undergraduate degree from the University of Alabama in 1960, and graduated from the University of Alabama School of Law in 1964. A member of Phi Beta Kappa and Jasons, he also served as president of Omicron Delta Kappa and Phi Delta Phi legal fraternity and as leading articles editor of *The Alabama Law Review*. From 1960 to 1962, Lightfoot was on active duty in the United States Army. An infantry officer and paratrooper, he served as a company commander from 1961-1962.

Following graduation from law school in 1964, Lightfoot practiced law with Bradley, Arant, Rose & White for 25 years, until January 15, 1990, when he and seven other partners formed Lightfoot, Franklin, White & Lucas, now a 26-lawyer litigation firm in Birmingham.

Lightfoot was elected president of the Young Lawyers' Section of the Birmingham Bar in 1969, served on the city bar's Executive Committee from 1970 to 1972, and was elected president of the Birmingham Bar Association in 1991. He was Jefferson County's sole bar commissioner from 1979 to 1985, was a founding member of the MCLE Commission in 1982 and served on the Alabama State Bar Executive Committee in 1979. During the first six years of MCLE, from 1982 to 1988, he gave over 45 presentations to and on behalf of various bar groups, and in recognition for those efforts received the Alabama Bar Institute's 1988 Walter P. Gewin Award for Outstanding Service to Bench and Bar in Continuing Legal Education. In 1994, he became the first president of the Birmingham Bar Foundation, and currently is a member of the Board of Trustees of the Alabama Law School Foundation.

Warren Bricken Lightfoot

He is a Fellow of the American College of Trial Lawyers and has been a member of its state committee since 1992. He also is an Advocate of the American Board of Trial Advocates, is a member of the International Association of Defense Counsel, and has been listed in *Best Lawyers In America* since 1983.

Lightfoot chaired the Advisory Committee to the United States District Court for the Northern District of Alabama from 1988-1990 and presently is a member of the 11th Circuit's Lawyers Advisory Committee. He served as co-chair of the program committee for the 11th Circuit Judicial Conferences of 1994-1995.

Lightfoot was a charter member of Leadership Birmingham (1983-1984) and served on its faculty in 1986. A past president of the Birmingham Kiwanis Club, he also served in 1991 as president of the Civic Club Foundation, which owns the Harbert Center in downtown Birmingham. Lightfoot was an elder at Independent Presbyterian Church from 1972-74 and 1978-79, and has frequently been an adult Sunday School teacher there during the last 20 years. He is currently serving as chairman of Independent's Board of Trustees, and he was a trustee of the Presbyterian Home for Children in Talladega from 1987 to 1993.

Lightfoot has been married since 1963 to the former Robbie Cox of Birmingham, and they have two children: Warren, Jr., who practices law with Maynard, Cooper & Gale in Birmingham, and Ashley, who is a branch manager for AmSouth Bank in Birmingham. ■

NOTICE

Any address or name changes received at the Alabama State Bar after March 30, 1995 ***will not be*** reflected in the 1995 edition of *The Alabama Bar Directory*.

Superior Estate Planning Documents:

Going The Extra Mile

By Leonard Wertheimer, III

One of the estate planner's most important jobs is to provide as much flexibility as possible to anticipate the client's personal, economic and tax changes, and to reflect the client's desires when the client can no longer express them. The estate planner must write today to anticipate future circumstances and enable another's present wishes to be fulfilled. Such unforeseeable changes include personal changes such as marital status, parental issues, financial success or failure and accompanying pressure from creditors, health-related problems including alcoholism and drug addiction, social and political changes. Also unforeseen are revisions of existing, and enactment of new, tax measures. Frequently it is impossible to predict the change and its consequences, but the conscientious draftsperson will build in as many capabilities to react as is reasonable. This outline discusses areas where flexibility may be desirable.

This issue is even more apparent when irrevocable *inter vivos* trusts comprise a significant part of the estate plan. The irrevocable nature of many trusts places a tremendous burden on the estate planner to build into the trust flexibility and to address issues which transcend the basic objectives of the trust. Since irrevocable trusts cannot be changed by the grantor in future years, the cost of not including flexibility in such documents becomes very apparent.

Who Is The Trustee?

A. The grantor

The client should never be the trustee of an irrevocable trust which is the recipient of gifts from the client, since the property transferred to the trust would be included in his estate for federal estate tax purposes. The Grantor would have retained overly-broad powers under Internal Revenue Code Sections 2036 and 2038.

B. A corporate trustee

If life insurance is the primary corpus of a trust and the client's objective is that a corporate trustee manage the trust assets once they mature into cash at the client's death, he should consider refraining from appointing the corporate trustee until his death. Corporate trustees commonly charge minimum fees for serving as trustee, and its primary responsibilities prior to the death of the client/insured would be the rather simple tasks of safeguarding the insurance policy, paying premiums and monitoring the status and creditworthiness of the insurance company. The minimum fee could be avoided by designating a family member as initial trustee, with the corporate trustee becoming trustee upon the event of the death of the client/insured.

C. Trustee appoints own successor

In addition to providing for the appointment of successor trustees in the event the primary trustee cannot serve for any reason, under appropriate circumstances the trust instrument could give the trustee then serving the power to override the appointment contained in the instrument and appoint his own successor. Consider the situation where the children are minors when the trust instrument is signed and cannot be named as trustees. Perhaps the client's spouse, and then his siblings are appointed. If the spouse in later years, once the children have become adults and matured, determines that the children should serve as successors, the spouse, as acting trustee, could have the power to redesignate successors, eliminate the

siblings (who may have died or become incapacitated), and designate one or more of the children as successor trustees.

D. Power to remove trustee

1. The objective

For a variety of reasons, the trustee appointed by the client may not be an appropriate trustee in future years. The trustee or beneficiaries may have moved to another state. The relationship of the trustee to the beneficiaries may have changed because of divorce, marriage or other personal circumstances. The beneficiaries may simply prefer to deal with a successor trustee or, within parameters set forth in the power of removal provision, to appoint another trustee. As a common example, a spouse of a descendant may have been appointed trustee but may become divorced from the descendant. Flexibility frequently prescribes giving the beneficiaries the ability to react to this type of situation.

2. The tax problem

Rev. Rul. 79–353, 1979–1 C.B. 325, held that a trust grantor's retention of a power to remove a corporate trustee and appoint another corporate trustee was equivalent to a reservation of the trustee's power. Under the terms of the trust instrument in question, the grantor was treated as having reserved beneficial interests in the property under Internal Revenue Code Sections 2036(a)(2) and 2038(a)(1). Since the issuance of Rev. Rul. 79– 353, practitioners have criticized the ruling. Practitioners have been concerned that the reasoning of that ruling would be extended so that a trust beneficiary who possesses a power to remove a trustee and name a new trustee will be treated as having the powers of the trustee, even if the beneficiary cannot name himself or herself. If the trustee's power to distribute trust income and principal is not limited by an ascertainable standard, then the beneficiary will be treated as having a general power of appointment under Internal Revenue Code Section 2041.

3. The revitalization of the problem

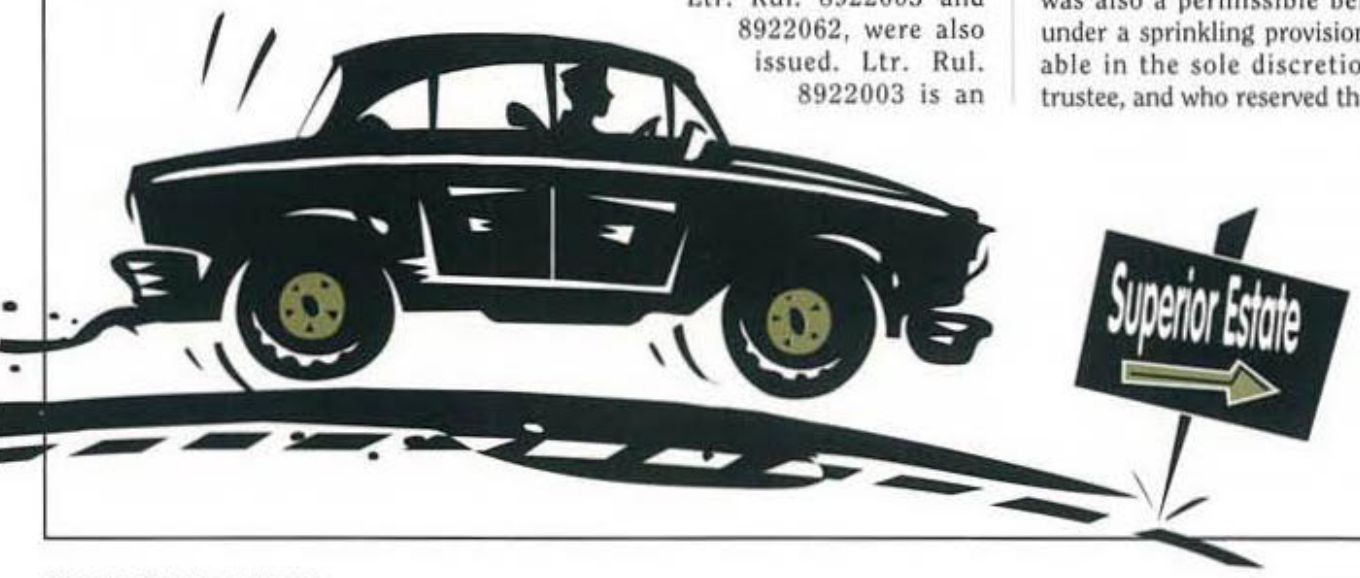
Ltr. Rul. 8916032, which cites Rev. Rul. 79–353, takes the position that a right given to a trust beneficiary other than the grantor to remove the trustee and appoint a successor trustee results in the trust beneficiary possessing the power of the trustee. If the trustee's powers are not limited by a fixed and ascertainable standard, the trust beneficiary has a general power of appointment under Internal Revenue Code Section 2041 and all trust assets are included in the estate of the trust beneficiary. According to some commentators, the ruling makes clear that the attribution of the trustee's discretionary powers to the beneficiary or beneficiaries with a removal power is not troublesome when these powers are limited by a fixed and ascertainable standard.

Within six weeks of the issuance of Ltr. Rul. 8916032, two other rulings, Ltr. Rul. 8922003 and 8922062, were also issued. Ltr. Rul. 8922003 is an attempt by the IRS to apply the rationale of Rev. Rul. 79–353 to trustees and grantors of irrevocable life insurance trusts. Under the terms of the trust instrument, the corporate trustee possessed all incidents of ownership in the life insurance policy held by the trust. The IRS concluded that because the grantor retained the right to remove the trustee, the grantor retained the incidents of ownership for purposes of Internal Revenue Code Section 2042(2).

Ltr. Rul. 8922062 involved the creation of several irrevocable trusts by the grantor for the benefit of grantor's daughter and grandchildren. The ruling cites Rev. Rul. 79–353, but holds that the grantor's reservation of the power to remove the named corporate trustee did not cause the trust to be taxed to the grantor's estate because the discretionary powers of the trustee were sufficiently limited to an ascertainable standard.

4. Recent developments

In *Estate of Wall v. Comm'r,* 101 T.C. No. 21 (October 12, 1993), the tax court allowed the grantor of an irrevocable trust to retain the power to remove and appoint independent corporate trustees without adverse tax consequences, even though the trustee had the power to distribute trust property pursuant to a nonascertainable standard. In a different factual setting, the court in *Estate of Vak v. Comm'r,* 973 F.2d 1409 (8th Cir. September 1, 1992), held that a grantor of an irrevocable trust who was also a permissible beneficiary under a sprinkling provision exercisable in the sole discretion of the trustee, and who reserved the right to



remove any trustee and appoint a successor independent trustee, had not made an incomplete gift upon transferring beneficial interests to the trust. In Ltr. Rul. 9303018 (October 23, 1992), the power to remove an independent trustee for cause was held not to create a general power of appointment in the grantor of the trust.

5. Planning techniques

Although the above rulings and Rev. Rul. 79–353 have been subject to extensive criticism and may be incorrect in their conclusions, and although some recent decisions have been favorable to the taxpayer, cautious practitioners should avoid giving a beneficiary the unrestricted power to both remove and replace the trustee. If the client wants a provision that provides for removal of the trustee, a number of options are available.

a. The trustee's power to make discretionary distributions can be limited by an ascertainable standard *and* not exercised in a manner that would discharge a legal obligation. In such event, the trustee's powers would not constitute a general power of appointment even if attributed to the beneficiary possessing the removal and replacement power.

b. The most conservative solution would be to vest the removal and replacement powers in different individuals, not empowering a close relative of the beneficiary (such as his or her spouse) to select a replacement trustee because of the appearance of influence.

c. The power of removal could limit the person or persons possessing the power of removal to exercising their power only upon "reasonable cause", which, according to Ltr. Rul. 9303018, *supra*, may include, for example, the following: (i) inability of the corporate Trustee and the beneficiaries to agree upon reasonable compensation for the corporate Trustee; (ii) unreasonably poor investment performance; (iii) the removal of all current income beneficiaries from the state wherein the corporate Trustee is licensed to conduct business as a corporate Trustee; (iv) unreasonable inattention to the reasonable needs of the beneficiaries; (v) unreasonable lack of communications between the Trustee and the beneficiaries; (vi) unreasonably inaccurate or unclear transaction statements or statements of account; (vii) unreasonable conflicts between the corporate Trustee and the beneficiaries; (viii) merger, acquisition or a deteriorating financial condition of the corporate Trustee; or (ix) unreasonably high turnover of account officers assigned to any trust created under the trust instrument.

E. Delegation among co–trustees

When co–trustees are serving, each may have its own talents and expertise. Perhaps the corporate trustee should handle investments. Perhaps the corporate trustee should be absolved from responsibility for managing the family business. If three children are jointly serving as trustees, perhaps two of the children should delegate to the third full authority to sign checks and perform certain ministerial duties. Estate planning documents can contain directives addressing this type of issue.

F. Delegation to corporate agent or custodian

Frequently a spouse or other individual is designated as trustee. This individual may lack the sophistication or inclination to maintain accurate records, make investment decisions, collect and deposit income, prepare estate and income tax returns, or perform many of the responsibilities of a trustee. Although in practice individuals frequently appoint corporate fiduciaries to serve as agent or custodian, general principals of trust law contain a prohibition against trustees delegating their powers and responsibilities. A trust provision specifically authorizing such delegation would encourage an individual trustee to avail himself or herself of available professional services.

G. Conflicts of interest

Sensitivity to situations in which a family member serving as executor or trustee may have a conflict of interest can be critical to the implementation of the client's estate plan. This possibility can be clearly shown in the estate of a person who owns a closely–held business. When the executor or trustee will be a family member who is already involved in the business and/or who will receive a controlling interest in the business under the client's estate plan, many conflicts can arise with other beneficiaries, possibly other children, who are not involved in the business. The executor and trustee will control the board of directors, so he can elect himself as president, and can establish his own salary and fringe benefits. He can control decisions regarding the declaration of dividends, which may be the only available vehicle to provide income to other family members who own minority interests in the business. In conjunction with effectuating a testamentary clause equalizing distributions among all family members, the executor can select a friendly appraiser who will value the business conservatively.

To avoid the conflicts of interest which are inherent in vesting control of the estate plan in the family member inheriting the business, the client may consider the following alternatives:

1. Using one or more disinterested fiduciaries;
2. Appointing a special trustee to participate in decisions involving potential conflict;
3. Choosing a committee of trusted persons who must consent before certain actions may be taken by the actual fiduciary; or
4. Include a will provision requiring the fiduciary to notify all beneficia-

ries in advance of any conflicts of interest and perhaps requiring the consent of all other beneficiaries before action can be taken.

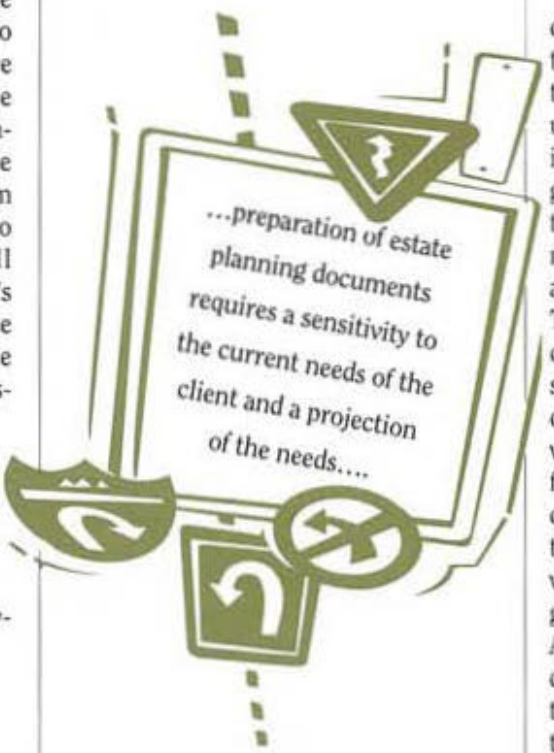
Who are the Beneficiaries?

A. Power of appointment to include spouse as beneficiary

Frequently trusts for lineal descendants do not grant beneficial interests to spouses of lineal descendants. In some situations it may be appropriate to grant to a descendant the power to decide whether a spouse can receive any beneficial interests upon the death of the descendant. The descendant may recognize the fact that the spouse depends upon income from the trust for support and may want to direct that the spouse receive all income for the balance of the spouse's life, or perhaps until remarriage. The descendant may also be granted the power to direct that principal be distributed to the spouse. Because the surviving spouse did not create the trust and is not the "transferor" for estate tax purposes, this power does not result in inclusion of the trust assets in the surviving spouse's estate under Internal Revenue Code Sections 2036 and 2038.

B. Power to change distribution to descendants

If one spouse dies and leaves a trust which provides that the remainder be divided among descendants and paid out at certain specified ages, after the death of the surviving spouse, the descendants may not receive any distributions from the trust for many years. What happens if the family circumstances change? What happens if the surviving spouse concludes that one child cannot prudently manage money and needs an independent trustee for life? What if one child develops a serious illness and needs more than a pro rata share of the trust for future support? What if one child becomes disabled and would qualify for governmental aid in the absence of receiving a portion of the trust? The surviving spouse can be granted a limited power to rearrange the manner in which the trust assets pass to descendants, varying the ages of distribution and perhaps the percentages to be distributed to each child. Because the surviving spouse did not create the trust and is not the "transferor" for estate tax purposes, this power does not result in inclusion of the trust assets in the surviving spouse's estate under Internal Revenue Code sections 2036 and 2038.



C. Large age differences among children

How fair is an equal division of trust assets among children if the eldest child is 28 years old and the youngest is 14 years old? The youngest child will spend part of his or her inheritance to provide upkeep and maintenance during minority and will pay for his or her own college education. The parents had already paid these expenses for the eldest child. One solution to this problem is to increase the share of the youngest child by a formula amount intended to provide true equalization. Another solution is the creation of a "pot" trust containing the following terms:

- Spray income and principal among descendants for health, education, support and maintenance until the youngest child attains age 25 (the age at which higher education should be completed).
- Any principal paid to a child, or that child's descendants, after that child attains age 25 is charged to that child's share upon ultimate distribution of the trust assets.

D. Expenses of guardian

In selecting a guardian for minor children, a testator should be sensitive to the additional financial burden the guardian frequently assumes by undertaking the responsibility of raising the testator's children. The guardian may need to make an addition to his or her current home or move to a new home. There may be additional housekeeping expenses. The cost of including the testator's children in family vacations could be substantial. There may be additional costs incurred in the children's visits with grandparents. Is it appropriate, for example, for the trustee to pay the cost of improving or adding a room to the guardian's home? Such cost would inure to the benefit of the guardian as well as the children. Although an appropriate subject for discussion between the guardian and the trustee, specific directions in a testamentary document expressing a sensitivity to the financial burden and directing the trustee to pay certain expenses eliminates any question about the propriety of the expenses.

E. Contingent marital deduction

If a husband prepares a trust for the benefit of his wife and funds the trust with an existing policy of insurance on his life, the face amount of the life insurance will be included in his estate under Internal Revenue Code Section 2035 if the husband dies within three years of the date of the insurance transfer. The trust should contain a contingent marital deduction provision, which would create a transfer to or for the benefit of the wife which qualifies for the marital deduction, eliminating estate taxes, in

the event any of the trust assets are included in the grantor's estate because of an untimely death.

F. Divorce

Under Alabama law, a person who is divorced from a decedent or whose marriage to the decedent has been annulled is not a surviving spouse of the decedent for probate purposes. *Code of Alabama* (1975) § 43–8–252. If, after executing a will, the testator is divorced or his marriage is annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, and revokes any nomination of the former spouse's executor, trustee, or guardian, *unless* the will expressly provides otherwise. *Code of Alabama* (1975) § 43–8–137.

The above Alabama statutes do not apply to non–testamentary disposition, such as dispositions under the terms of *inter vivos* trusts. It is, therefore, important to include in any *inter vivos* trust agreement a provision accomplishing this same objective.

Miscellaneous

A. Authorization to make gifts

Although a revocable management trust may appear not to require the same sensitivity to flexibility as an irrevocable insurance trust, this trust becomes irrevocable upon the death or permanent disability of the grantor. One issue which should be addressed in preparing a revocable management trust is the continuing authority of a trustee to make gifts for the grantor.

In an exception to the effective repeal of Internal Revenue Code Section 2035, transfers of property interests otherwise includible in a decedent's estate under Internal Revenue Code Section 2038 are includible in the decedent's estate if made within three years of the date of death. Recent developments have included in the gross estates of decedents gifts made from revocable trusts that qualify for the gift tax annual exclusion on the theory that the property would have been included in the decedent's estate under Internal Revenue Code Section 2038 if the decedent had not made the gifts and had retained the property in the revocable trust. *Estate of Kisling v. Comm'r*, T.C. Memo. 1993–262, 65 T.C.M. (CCH) 2956 (June 15, 1993); *Estate of Kisling v. Comm'r*, 65 TCM No. 262 (1993); *Estate of Jalkut*, 96 TC 675 (1991); Letter Rulings 9117003, 9010004, 9010005, 9015001 and 9016002. If the trust instrument permits distributions to beneficiaries other than the grantor, the result is inclusion in the estate. TAM 9049002. If the trustee was only allowed to make distributions to the grantor, the result appears to be exclusion from the estate. TAM 9018004.

Only with an appropriate authorization can a trustee continue a preexisting gift–giving program or otherwise make gifts to save estate taxes.

B. Who pays estate taxes?

The estate of a decedent for estate tax purposes often contains property which is regarded as an asset of the estate for estate tax purposes but which did not belong to the decedent as a matter of property law and which does not pass under the terms of the decedent's will. In the absence of a contrary expression of intent by the person writing the will, Alabama law requires that estate taxes, including estate taxes on property which does not belong to the decedent under state property laws, be paid from his or her residuary estate. *Code of Alabama* (1975), Section 40–15–18. This "default option" under Alabama law can significantly distort an estate plan. The residuary estate can be substantially depleted by its obligation to pay estate taxes attributable to nonresiduary, and perhaps nonprobate, assets. For example, the decedent's estate may consist of $1,000,000 of stock in the decedent's corporation, which is specifically devised to Child A, and $1,000,000 of marketable securities owned by the decedent and payable to Child B under the residuary clause of the decedent's will. Although the decedent's intent is that both children share equally in the estate, Child B's share will be responsible for estate taxes on both Child A's and Child B's inheritances. The estate taxes will substantially eliminate Child B's inheritance. This result can be avoided if the draftsperson departs from the ordinary, stereotyped and common clause allocating all taxes to the residue and instead drafts a clause apportioning estate taxes among the beneficiaries of the estate in proportion to the value of their respective devises.

C. Reciprocal trust doctrine

If reciprocal trusts are created whereby two settlors, such as spouses or siblings, create trusts, each of which names the other settlor as a beneficiary and is identical in its terms, each settlor may be constructively treated as the settlor of the trust of which he is a beneficiary. The result of such a construction would be that I.R.C. Sections 2036 and 2038 would include in the beneficiary's estate the entire corpus of a trust which would not otherwise be includible. Application of the rule does not require that the trusts are created in consideration of each other with tax avoidance motives. *Estate of Moreno v. Commissioner*, 260 F.2d 389 (8th Cir. 1958); *U.S. v. Estate of Joseph P. Grace*, 395 U.S. 316, 69–1 USTC 12,609 (1969); Rev. Rul. 85–24, 1985–1 C.B. 329; and PLR 8717003. When drafting trusts in this situation, the drafter should be sensitive to this rule and vary the terms of the two trusts to the extent necessary to avoid an argument by the Internal Revenue Service that the trusts are reciprocal.

D. Uniform transfers to minors act

When making lifetime gifts to minors, draftpersons should consider incorporating the trust provisions contained in the Alabama Uniform

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Transfers to Minors Act ("AUTMA"), *Code of Alabama* (1975), Section 35-5A-1 *et. seq.*, rather than drafting trust agreements. The provisions of AUTMA essentially create a trust which terminates in favor of the child at age 21 and allows the trustee (referred to in AUTMA as "custodian") to pay or accumulate income or principal for the support and education of the child. This informal trust is frequently appropriate for the client's circumstances and is more economical than the preparation of trust documents.

E. Who are "crummey" beneficiaries?

An irrevocable insurance trust frequently grants to certain designated beneficiaries the power to withdraw their pro rata share of any contributions to the trust (typically funds to enable the trustee to pay insurance premiums), to qualify such contributions for the $10,000 per donee gift tax annual exclusion. This power of withdrawal is frequently referred to as a "Crummey" power. What happens if one of the children has the audacity to actually exercise his or her withdrawal right, thereby thwarting family plans? What happens if the grantor of the trust wants to utilize his or her $10,000 exclusion in other ways? Without discussing the details, if the withdrawal right exceeds the greater of $5,000 or 5 percent of trust corpus and a "hanging" power is utilized to avoid lapsing problems on the release of the power under Internal Revenue Code Sections 2041(b)(2) and 2514(e), it may be desirable to vary the identity of Crummey beneficiaries from time to time. Flexibility to deal with these issues is desirable and can be accomplished by a provision giving the person contributing property to the trust the right to eliminate the rights of any Crummey beneficiaries named in the document to withdraw the property then being contributed.

F. Monetary devises

Rather than leaving specific dollar amounts to specified beneficiaries, an estate plan will have more flexibility if the monetary devises are expressed in terms of a percentage of the testator's estate. If the size of the estate increases or decreases in value, the amount of the devise will be adjusted as well. The potential inequities caused by monetary devises which constitute a disproportionately large or small portion of an estate can be eliminated.

G. Beneficiary's withdrawal rights

Many clients prefer to stagger mandatory corpus distributions to their children on the theory that it is wiser to let the child make an early mistake with less than all of the property. Many of these clients are receptive to a suggestion that distribution at specified ages not be mandatory. Instead, the child is given withdrawal rights to increasing portions of the trust as he or she grows older and, presumably, better able to care for his or her money. If the beneficiary is satisfied with the trust's administration, if he or she is ill, disabled, unavailable because of travel or other commitments, or just not comfortable undertaking large financial responsibilities, he or she may prefer to forego withdrawal rights, at least for a time.

H. Incentive planning

Estate planners are increasingly being asked to draft plans that include incentives for productive behavior on the part of minors or young adult beneficiaries. Incentive plans typically reward productive behavior and penalize non-productive behavior. For example, a trustee may be authorized to distribute to the grantor's children such part or all of the net income or principal of their respective trusts as the trustee shall determine in its discretion, *provided* that the child falls within one of the following descriptions:

1. The child is a full-time student at an accredited college, university, vocational school or similar institution and maintains the equivalent of a grade point average of 2.5 or better on a scale in which 4.0 is an "A" grade, and the child's course of study is progressing toward the completion of an undergraduate or other degree at the rate of a full-time student;
2. The child is employed full time in an occupation to which the child devotes at least 35–40 hours of work per week or the child is pursuing a career which is socially productive on a full-time basis, such as a career as an artist or a musician, to be determined solely by the trustee in the trustee's discretion;
3. The child is disabled and such disability prevents him or her from being a productive and self-supporting member of society as determined by the trustee in the trustee's sole discretion;
4. The child is pursuing an educational, scientific or charitable goal which the trustee has determined, in its sole discretion, is in the best interest of the child and the general public and which makes the child a productive member of society as determined by the trustee in the trustee's sole discretion; or
5. The child is occupied full-time caring for other family members, and the trustee determines in its sole discretion that such obligation reasonably precludes the child from earning a living (an example of such occupation would be motherhood).

Conclusion

Contrary to the preconception of many clients and more than a few attorneys, the preparation of estate planning documents is not simply a matter of pushing a few buttons on a computer to invoke one of several standardized documents. The preparation of superior estate planning documents requires a sensitivity to the current needs of the client and a projection of the needs which may arise as circumstances change in the future. Only by being sensitive to these issues and skillfully creating or adapting forms to meet current and anticipated needs can the attorney fully address the needs of his clients. ■

OPINIONS OF THE GENERAL COUNSEL

By ROBERT W. NORRIS, general counsel

QUESTION:

"Approximately ten years ago, I represented "J" in the presentation of a workmen's compensation claim while she was an employee of "K's, Inc.", E., Alabama. The claim and representation were settled with a lump sum consent settlement and medical benefits remained opened.

In 1988, her son and daughter were involved in an auto accident wherein her daughter, "B", was killed and her son, "C", the driver of the auto, was injured. As a result of this auto collision, "C.D." and "J.D.", as parents and next friends of each minor child, instituted a suit for personal injury damages for their son and for the wrongful death of their daughter, and a derivative claim for injuries as the parents.

I have been asked to represent the driver of the vehicle and owner of the vehicle and employer of the driver, "R", which collided with the vehicle occupied by the minor children of the "Ds."

***

I request an opinion to rely upon to make certain my representation of R, *et al.*, is not an ethical violation. I am asked to join this litigation as co-counsel with another attorney who has his office in Montgomery. For this reason, I need a response as quickly as possible to permit the other attorney to obtain additional legal assistance, if I am wrong in my belief I can assist him."

ANSWER:

You may ethically represent the driver and owner of the vehicle against your former client.

DISCUSSION:

Rule 1.9(a) prohibits subsequent representation of a person whose interests are materially adverse to the interests of a former client in the same or in a substantially related matter. There appears to be no legal relationship to your prior representation of Mrs. "D" ten years ago on a worker's compensation claim and the present case. In reality, Mrs. "D" is only a titular party in the auto accident case. Her medical condition, past or present, is not going to be in issue. In the Disciplinary Commission's view, the matters are not "substantially related."

Rule 1.9(b) prohibits your adverse use of any information violating to the original representation of Mrs. "D". If your defense in the present case would require the adverse use of any client confidences then you should not involve yourself. If this is not a problem, then you may enter the accident case without concern for ethical conflict with your former client. ■

[RO-91-42]

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C·L·E OPPORTUNITIES

The following in-state programs have been approved for credit by the Alabama Mandatory CLE Commission. However, information is available free of charge on over 4,500 approved programs nationwide identified by location, date, or specialty area. Contact the MCLE Commission office at (334) 269-1515, or 1-800-354-6154, and a complete CLE calendar will be mailed to you.

MAY

3 Wednesday

ALABAMA ELDER LAW
Birmingham, Holiday Inn Redmont
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

5 Friday

LEGAL WRITING
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

JURY SELECTION AND JURY PERSUASION
Birmingham, Sheraton Civic Center
Southeastern Educational Institute, Inc.
Credits: 6.0 Cost: $165
(404) 457-9082

JURY SELECTION AFTER *BATSON*
Birmingham
Lorman Business Center, Inc.
Credits: 6.0 Cost: $159
(715) 833-3940

11 Thursday

CORPORATE INCOME TAXATION IN ALABAMA
Birmingham, Holiday Inn Redmont
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

12 Friday

CORPORATE INCOME TAXATION IN ALABAMA
Huntsville, Radisson Suite Hotel
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

12-13

CITY AND COUNTY GOVERNMENTS
Orange Beach
Alabama Bar Institute for CLE
Credits: 6.5
(800) 627-6514

HEALTH LAW UPDATE
Pine Mountain, Georgia, Callaway Gardens
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

16 Tuesday

BAD FAITH LITIGATION IN ALABAMA
Mobile, Admiral Semmes Hotel
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

17 Wednesday

BAD FAITH LITIGATION IN ALABAMA
Montgomery, Madison Hotel
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

18 Thursday

TRYING THE AUTOMOBILE INJURY CASE IN ALABAMA
Birmingham, Holiday Inn Redmont
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

19 Friday

TRYING THE AUTOMOBILE INJURY CASE IN ALABAMA
Huntsville, Holiday Inn Research Park
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

19-20

ENVIRONMENTAL LAW
Orange Beach
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

19-21

YOUNG LAWYERS' SANDESTIN SEMINAR
Sandestin Resort
Young Lawyers' Section, Alabama State Bar
Credits: 6.0 Cost: $140
(334) 433-3131

23 Tuesday

JURY SELECTION
Bay Minette
Baldwin County Bar Association
Credits: 1.0
(334) 928-4400

BASIC PROBATE PROCEDURES AND PRACTICE IN ALABAMA
Mobile, Ramada Resort and Conference Center
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

24 Wednesday

BASIC PROBATE PROCEDURES AND PRACTICE IN ALABAMA
Montgomery, Madison Hotel
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

JUNE

1-3
TAX INSTITUTE
Orange Beach
Alabama Bar Institute for CLE
Credits: 9.0
(800) 627-6514

2-3
DIVORCE ON THE BEACH
Gulf Shores
Family Law Section,
Alabama State Bar
Credits: 2.5
(800) 354-6154

8-9
ESTATE PLANNING FOR FOREST LANDOWNERS
Tuscaloosa, Bryant Conference Center
Auburn University
Credits: 14.0 Cost: $225
(334) 844-5101

9 Friday
EVIDENCE
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

20 Tuesday
TEN COMMON MISTAKES MADE IN WILL DRAFTING
Bay Minette
Baldwin County Bar Association
Credits: 1.0
(334) 928-4400

22 Thursday
ADA/WORKERS' COMPENSATION
Birmingham
Lorman Business Center, Inc.
Credits: 6.0 Cost: $135
(715) 833-3940

25-26
PREVENTING EMPLOYEE LAWSUITS
Tuscaloosa, Bryant Conference Center
University of Alabama
Credits: 13.0 Cost: $795
(205) 348-6224

United States District Court Northern District of Alabama

Telephone System Change Effective 2/21/95

Main Clerk's Office Number–**731-1700**

THE MAIN NUMBER WILL BE 731-1700 FOR ALL SECTIONS AND EMPLOYEES.

The following is a list of extensions for each section of the clerk's office. You must dial 731-1700, then enter the 3-digit extension . You may reach a particular individual by dialing 731-1700 and pressing "1", then enter the first three letters of the last name of the person you need to reach.

SECTION	*EXTENSION*
Attorney Admission & Naturalization	106
Automation Systems	170
Building Services	192
Criminal Docketing	147
Financial	111
Intake & General Information	120
Jury	115
Magistrate Judge & CJA Matters	158
Personnel	107
Procurement	113

Civil Docketing:

Judge	*Extension*	*Judge*	*Extension*
Acker	136	Nelson	133
Blackburn	137	Pointer	131
Clemon	141	Propst	134
Guin	140	MDL	143/144
Hancock	132	Others	130
Lynne	130/139		

Courtroom Deputies:

Judge	*Extension*	*Judge*	*Extension*
Acker	155	Lynne	156
Blackburn	160	Nelson	153
Clemon	154	Pointer	150
Guin	157	Propst	152
Hancock	151		

Office hours are 8:30 A.M. to 4:30 P.M. Monday through Friday. You may date stamp pleadings and place them in the drop box in the lobby from 7:00 A.M. to 8:30 A.M. and from 4:30 P.M. to 5:30 P.M. You may reach a deputy clerk for **EMERGENCY** filings outside of these hours by dialing 731-1700, ext. 130, or 956-8828, or digital beeper 888-2410.

Alabama Law Foundation Awards $808,000 in IOLTA Grants

By Tracy A. Daniel, executive director, Alabama Law Foundation

IOLTA income remained constant in 1994, allowing the Alabama Law Foundation to award $808,890 in grants to 35 organizations throughout Alabama in March 1995. Interest rates on IOLTA accounts ceased their decline and showed a slight increase toward the end of the year. The foundation had been forced to reduce the amount of grants awarded each of the past two years, but was able to award $8,000 more in grants this year than last year.

The Grants Committee, chaired by Allan Chason of Bay Minette, had to pare down $1,336,000 in requests to the $810,000 available for grants. Consequently, the foundation could only fund 35 of the 46 requests received. Other members of the committee are Delores Boyd, Montgomery; Richard Hartley, Greenville; Tutt Barrett, Opelika; Sam Stockman, Mobile; Davis Malone, Dothan; Andy Wear, Fort Payne; Jim Pruett, Birmingham; and Donna Pate, Huntsville. Each year the committee members devote a significant amount of time to reviewing grant applications. The foundation is grateful for the willingness of these volunteers to undertake the task of making grant recom-mendations.

The foundation awarded grants in the categories of legal aid to the poor, projects to improve the administration of justice, and for local law libraries. Legal Services offices received funding to continue providing legal assistance to the poor in cases involving domestic violence. Domestic abuse shelters in Anniston, Gadsden, Huntsville, Birmingham, Mobile, Tuscaloosa, and Shelby County received funding to help provide victims' advocates to their clients. The advocates help guide victims of domestic abuse through the court system by providing assistance in such activities as obtaining warrants.

Recognizing that rendering legal services to the needy is an integral part of lawyers' public service, the foundation provided funding to three pro bono programs. The Alabama State Bar Volunteer Lawyers Program and the Mobile Bar Association Pro Bono Program are previous recipients of IOLTA funds. The Birmingham Bar Association Volunteer Lawyers Program has grown to number over 300 volunteers, necessitating a part-time coordinator to efficiently handle case referrals. In all, over 1,500 Alabama lawyers participate in pro bono programs through accepting cases referred directly to them or by voluntarily reporting the number of hours they devote to pro bono efforts.

The foundation funded the first meeting of the Third Citizen's Conference on the Alabama State Courts, held in Birmingham on March 23, 1995. The Citizen's Conference was jointly called by the Board of Bar Commissioners of the Alabama State Bar and the Alabama Judicial College with the charge "to study the selection of judges in Alabama, judicial campaign funding and other issues affecting the administration of justice in Alabama." The Citizen's Conference is co-chaired by former Governor Albert P. Brewer and retired Supreme Court Justice Oscar W. Adams, Jr.

For the second year the foundation is providing operating funds for the Alabama Center for Dispute Resolution, which was started through the efforts of the Alabama State Bar Committee on Dispute Resolution, to serve as a clearinghouse on Alternative Dispute Resolution and coordinate ADR programs in Alabama. The foundation also provided funding to the Alabama Capital Representation Resource Center to continue its work serving as a resource for lawyers appointed to capital cases in the post-conviction stage. Law libraries in 13 counties received funds to purchase equipment and books.

A complete list of grants awarded follows. Without the support of lawyers and banks these projects could not be funded. The foundation thanks you for your participation in IOLTA. If you do not currently participate or have changed banks or firms and wish to establish a new IOLTA account, please contact Tracy Daniel at (334)269-1515 or 800-354-6154.

Alabama Law Foundation 1995 Grants

Legal Aid to the Poor

Legal Services Corporation of Alabama	$240,000
Legal Services of Metro Birmingham	$75,000
Legal Services of North Central Alabama	$75,000
Mobile Bar Association	$45,000
Alabama State Bar Volunteer Lawyers Program	$70,000
Birmingham Bar Association	$25,000
Total	**$530,000**

Law Libraries

Autauga County	$2,000
Baldwin County	$1,500
Choctaw County	$3,500
Colbert County	$3,500
Conecuh County	$3,000
Dale County	$3,000
Elmore County	$2,600
Fayette County	$3,000
Jefferson County	$2,000
Lauderdale County	$2,995
Monroe County	$3,000
Talladega County	$3,000
Wilcox County	$2,000
Total	**$35,095**

Administration of Justice

Capital Representation Resource Center	$70,000
Alabama Prison Project Mitigation Program	$45,000
Alabama Center for Dispute Resolution	$45,000
Montgomery Literacy Council	$2,088
Alabama CASA Network	$3,000
Child Advocacy Center of Gadsden-Etowah County.	$2,500
National Children's Advocacy Center	$5,000
Tuscaloosa Children's Center	$3,500
SafeHouse of Shelby County	$11,000
Turning Point	$11,000
HOPE Place	$5,000
The Shelter	$11,000
2nd Chance	$5,000
Penelope House	$7,500
YWCA Family Violence Center	$11,000
Administrative Office of Courts	$6,207
Total	**$243,795**

Grand Total **$808,890**

SERVICE TO THE PROFESSION - A HALLMARK OF PROFESSIONALISM

Mid-Year Reports of 1994-95 Committees & Task Forces

by Edward M. Patterson, director of programs

Alabama State Bar committees, task forces and sections take the lead role in many initiatives, education, and information, and in fostering business and social contacts within the legal profession. Committee and task force work depends on the efforts of hundreds of lawyers who collectively volunteer thousands of non-billable hours. Few practicing attorneys would deny the legal profession is demanding both in terms of time and work production, and that working nights and weekends is par for the course. That 80 percent of the bar's current 42 committees and task forces are active is significant. This high level of volunteer service is another hallmark of the professionalism of the typical Alabama attorney, as the following summaries from the midyear reports indicate:

Committee on Access to Legal Services
F. Luke Coley, Jr., chair

The committee continues to monitor and evaluate delivery of pro bono services in civil cases to indigent Alabamians through the Alabama State Bar Volunteer Lawyers Program. Meeting quarterly, the committee reviews the operations of the program and gives direction and support to its director, Melinda Waters. The Birmingham Bar Association Volunteer Lawyers Program is now fully operational and has become a tremendous success. Several additional local bar associations established pro bono projects for their membership last fall including Lee County, Morgan County and Montgomery County. These local bars join many bar associations around the state in sponsoring projects for their membership which are administered by Waters and monitored by the committee. The committee, in a joint project with the University of Alabama School of Law, has completed a "how-to" desk manual for use by attorneys volunteering services through the Volunteer Lawyers Program. Nine legal manuals were produced, each focusing on an area of law most often needed by Volunteer Lawyers Program clients and lawyers. ■

Task Force on Adult Literacy
Lynne B. Kitchens, chair

To encourage lawyers to help combat adult literacy, local endeavors are publicized through the task force newsletter, *Read On*, which also offers suggestions about a variety of literacy-promoting activities. At the statewide level, three members of the task force served on a steering committee appointed by the Department of Education to produce a handbook entitled *Adult Education and the Criminal Justice System*, which will link providers of education/literacy services with key persons in the criminal justice system. Our task force was instrumental in organizing a panel discussion entitled "Life After Guilt: Education as a Sentencing Alternative", presented at the mid-winter Circuit and District Judges Conference. Two court/literacy referral programs, one in the Shoals area and the other in Montgomery, developed as a result of task force interest and involvement, provide model approaches for other communities to adapt to their specific situations. Task force members are actively working to get these programs started in their communities. ■

Editorial Board, *The Alabama Lawyer*
Robert A. Huffaker, editor

This year has seen increasing involvement in the publication process by members of the editorial board. Through subcommittees, members are assigned tasks for procuring lead articles. Special human interest features will be published in upcoming issues. In January, a special meeting of the editorial board was held to consider institution of a bimonthly newsletter in order to provide a means for a more timely distribution of topical information to members of the bar. The financial viability of launching this new publication in the near future will be discussed at the editorial board's July meeting, and a decision will be made at that time concerning means of securing appropriate funding to begin publication of the newsletter. ■

***The Alabama Lawyer Bar Directory* Committee**
Teresa R. Jacobs, editor

The committee is charged with publishing the next edition of *The Alabama Lawyer Bar Directory* that includes a geographical telephone directory and an alphabetical directory of all members of the Alabama State Bar. The committee has suggested certain format changes for the anticipated publica-

tion date of June 1, and has utilized the services of an advertising consultant to generate additional revenues to support publication of the directory. ■

Alternative Methods of Dispute Resolution Committee
William D. Coleman, chair

In August 1994, the committee opened the Alabama Center for Dispute Resolution – an ADR management, coordination, research and development office under the supervision of the newly-created Alabama Supreme Court Commission on Dispute Resolution. The committee has drafted a proposed code of ethics for mediators to be submitted to the Supreme Court Commission on Dispute Resolution for approval. The committee's next focus will be on qualifications and training for court appointed/referred mediators. A subcommittee has drafted preliminary recommendations for implementing a mediation program in domestic relations, and another subcommittee is, by means of ads, public service announcements and bar newsletters, getting ADR information out to all areas of the state. The National Conference of Bar Presidents selected the Alabama Center for Dispute Resolution as one of its "Best Bar Projects of 1994". ■

Task Force on Bench and Bar Relations
Honorable Joseph D. Phelps, chair

The task force planned and conducted the Third Annual Bench-Bar Conference during the Circuit and District Judges Mid-Winter Conference in Montgomery in January. The conference was co-sponsored by the Alabama Judicial College and the Montgomery County Bar Association. As a part of the program, an interesting panel was built around what the Bench and the Bar expect from each other.

The task force also co-sponsored a workshop on professionalism to address polarization of Alabama State Bar. This was a first attempt by the leadership of the Alabama State Bar to encourage unity to accomplish the goals of the bar especially in the area of serving the public. A diverse group of judges and lawyers, including representatives from both the plaintiffs' and defense bars, met to determine together answers to the following questions: (1) Are we where we want to be as a profession? (2) Are we serving the public? and (3) Do we have the image we want? Plans are being formulated with all segments of the bar to encourage continued communication and dialogue. Topics of discussion at the March meeting centered on judicial selection and public perception of the legal profession. ■

Committee on Citizenship Education
H. Jerome Thompson, chair

We have worked closely with the Alabama Center for Law & Civic Education to promote involvement of Alabama attorneys in law-related education programs across the state, including the improvement and expansion of the Bar/School Partnership Program. We believe the bar should take a proactive role in planning and promoting law-related education in the classroom. We have completed editing the "Play By the Rules" publication originally drafted by the Young Lawyers' Section ultimately to be made available to all eighth-graders, using liaisons identified by local bar association presidents. ■

Client Security Fund Committee
John A. Owens, chair

Since August 1994, the committee has met once (October 1994) and considered 44 claims. Thirty of those claims were paid in the total amount of $57,995.26 and 14 claims were denied. Currently, there are 56 claims pending with the Client Security Fund. ■

Committee on Correctional Institutions and Procedures
Mark D. Wilkerson, chair

In several regional and statewide meetings, the work of the committee has been multi-faceted: (1) assembling the information necessary to prepare CLE and other programs to educate members of the bar as to community correction alternatives in their area; (2) working with AOC in efforts to resolve concerns over potential liability for community corrections programs; and (3) obtaining bar commissioners' endorsement of a resolution to urge the legislature to renew funding for Community Corrections Programs in 1995, which resolution was adopted by the commissioners on March 17, 1995. Restricting applications of the Habitual Offender Act and cooperative efforts among agencies to provide seed money for developing community corrections programs statewide are being discussed. Ron Jones, prison commissioner, and representatives from the Department of Corrections met with the committee in February to discuss development of community corrections. ■

Disabilities Law Task Force
Victoria A. Farr, chair

The task force was charged with surveying members of the Alabama State Bar to determine if there is sufficient interest to create a Disabilities Law Section. On December 9, 1994, the Board of Bar Commissioners approved the report of the task force, and authorized the creation of a Disabilities Law Section. The organizational meeting was held on March 8, 1995, attended by attorneys representing individuals, business interests, and governmental agencies, at which time interim officers of the section were elected, dues established, and by-laws adopted subject to approval by the board of bar commissioners. On March 17, 1995 the board of bar commissioners approved the by-laws of the section. The section plans to meet during the annual convention when it will present its first CLE program. The section will publish a newsletter informing members of recent decisions and advances in the field of disabilities law. Presently, the section is conducting a vigorous membership drive. ■

Indigent Defense Committee
William R. Blanchard, chair

While our committee has been relatively inactive thus far

this year, this committee's efforts over the last decade show a pattern of diligent effort aimed at reform of the indigent defense system. Meaningful change will either have to come from the legislature or be forced by state or federal courts. The committee is watching reform efforts underway in Tennessee, Louisiana and Indiana with the expectation that as a committee we can, by studying others' efforts and adding to that base, aid in developing a system which consistently provides effective defense services to the poor and underprivileged at a reasonable cost. ■

Task Force to Study the Creation of International Law Section
Robert J. Cox, chair

The core task force was formed in 1993 with 17 members. Since then we have established committees for continuing legal education, newsletter publication, membership and a steering committee. We have surveyed other similar interest groups of bar associations around the country, and have a clear idea of what we need to offer our prospective members. We believe there will be sufficient interest to form a section shortly with the required 75 members. Today we have the names of about 53 individuals who have expressed an interest in the formation of this section. Our mission statement is "to enhance understanding of public and private international law principles that undergird the world economy — including international trade and transactions, international law and treaties, and immigration and nationality law — to educate the membership by conducting programs and to build a state and global network of international legal professionals, thereby improving the delivery of legal services to our clients". ■

Task Force on Judicial Selection
Robert P. Denniston, chair

Last September the task force recommended the Board of commissioners call for a statewide citizens' conference to address the problem of judicial selection and campaign contributions. After long discussions, several meetings and

much work, the task force has transmitted recommended amendments to the Alabama Constitution to establish a merit selection/nominating commission method for selection of appellate, circuit and district judges. The task force has also furnished the commissioners with a brief early history of Alabama's judicial system, and submitted to the commissioners a statement of its willingness to assist as requested in the preparation for and the conduct of the Third Citizens' Conference. The task force expects to submit to the commissioners a comprehensive report providing background, facts and analysis with respect to the issues and its recommendations. ■

Law Day Committee
Tameria S. Driskill, chair

The committee is sponsoring a statewide essay contest using the 1995 Law Day Theme, "E Pluribus Unum — Out of Many, One" to award prizes in two classifications. School superintendents have been contacted, and response is excellent. The Governor of Alabama will again proclaim May 1 *Law Day* in Alabama. Plans are already underway to coordinate 1996 Law Day activities for widespread participation among local bar associations. ■

Committee on Lawyer Advertising and Solicitation
Gregory S. Cusimano, chair

This committee has been extremely busy this year. There was a significant response to the anonymous survey on advertising and solicitation. The results will be distributed by method to soon be determined. The final proposed Rules of Professional Conduct on direct mail solicitation were adopted by this committee on October 27. We are awaiting approval of them by the board of bar commissioners.

We will publish in summary form, with explanation, current rules. The anonymous survey and our personal interviews with lawyers across the state to discuss the conditions of client solicitation show these trends: (1) a significant number of members of the plaintiff's bar are willing to take a more aggressive stance against unethical client solicitation; (2) unethical solicitation is not only occurring, it is on the rise; and (3) there is a misunderstanding about what is or is not unethical solicitation under the present Code, and what is, in fact, constitutionally protected. ■

Lawyers Helping Lawyers Committee
J. Sanford Mullins, III, chair

The major thrust has been to examine ways to strengthen and expand the ALA-PALS work, (Positive Action for Lawyers), the bar's current program for recovery and assistance to attorneys impaired due to substance abuse. The committee held a mid-winter conference March 11-12 in Montgomery to formulate a plan of action to add regional coordinators to ALA-PALS, present programs for law students, provide uniform training programs for ALA-PALS volunteers, and increase education and publicity efforts of the work of this committee. Finally, the committee, within the framework of the current confidentiality rules surrounding its work, is compiling statistics on the number of law students, bar applicants and practicing attorneys served by the ALA-PALS program during the last three years in order to enable the committee to monitor its current efforts and evaluate its utilization and effectiveness in light of the demonstrated need for such a program within the Alabama State Bar. ■

Committee on Lawyer Public Relations, Information and Media Relations
Mary Lynn Bates, chair

We are nearing completion of a number of projects that have been in progress for more than a year. The creation of the position of director of communications to act as a public and media information liaison has immeasurably assisted this committee. We are obtaining favorable media coverage of selected state and local bar charitable and civic activities, IOLTA grants and pro bono services. In addition, the committee has provided a radio spot on mediation based on scripts furnished by ADR Committee and hopes to air it widely upon approval. We are updating four state bar brochures: *Lawyers and Legal Fees, Consumer Finance or "Buying on Time", Legal Aspects of Divorce,* and *Last Will and Testament,* for dissemination on these and other topics of public interest. We are conducting a study on the feasibility of a statewide "Tel-Law" program to provide information to the public on legal topics by tape-recorded messages. We are working on a number of projects to make members of bar aware of the necessity for improving client relation skills, including a CLE program and publications. Our focus has been, and is, both outreach to the public, and inreach to our members. ■

Alabama Lawyer Referral Service
Gregory A. Reeves, chair

The committee is actively pursuing review of the service and needed areas of improvement. Before recommending changes in the current service, the committee is awaiting the written evaluation of the American Bar Association PAR Review Team report. At the request of the committee, a team of lawyers trained in running an effective referral service met with the committee's representatives and bar staff on March 13, 1995 to evaluate the current service, and make recommendations to improve it. While a large number of suggestions has been discussed among the committee, we felt it premature to recommend changes prior to receiving the ABA evaluation report. ■

Task Force on Legal Education
Steve Rowe, chair

At mid-year the task force is in the process of deciding what positions it will take on the following issues: (1) Re-establishing a limitation on the number of times an applicant may take the bar exam; (2) requiring bar examination applicants to be graduates of law schools approved by the ABA or Association of Law Schools; (3) whether or not to suggest to the bar commissioners adoption of the Standards and Procedures for Approval of Law Schools not Accredited by the ABA; and (4) whether to support the proposed amendment of Rule

4(c) of the Rules Governing Admission to the Alabama State Bar with regard to applications by graduates of foreign or out-of-state non-accredited law schools. ■

Task Force on Legislative Activities
Gregg B. Everett, chair

The task force was charged to recommend the most practical means of disseminating information regarding pending legislation and study the suitable role, if any, of a permanent standing committee on legislation. The task force made the following recommendations to the bar commissioners on February 3, 1995: (1) the position of legislative counsel should be retained to follow bills of general interest while the Legislature is in session, and publish a weekly status report available for subscription to members from bar headquarters; (2) the role of the state bar in legislative activities should be limited solely to those bills directly relating to the bar's regulatory functions; (3) legislative counsel's services to track legislation is preferable at the present time over establishing a computer-assisted program; and (4) the task force should not be made a standing committee at the present time. Any need to follow particular legislation can be assigned to a committee or section most affected by same, or in the absence of such a committee or section, an *ad hoc* task force can be appointed. ■

Military Law Committee
Frank M. Caprio, chair

The Military Law Committee is actively engaged in preparing for a Military Law Symposium to be held at the University of Alabama School of Law, August 18-19, 1995, affording active duty and reserve military lawyers and civilian lawyers with an interest in military legal issues, continuing legal education credits. The 1996 Military Law Symposium is tentatively scheduled for August 23-24, 1996. ■

Permanent Code Commission
William B. Hairston, III, chair

The committee was asked to review, comment on and clarify proposed amendments to Rule 7.2, Rules of Professional Conduct, as suggested by the Committee on Lawyer Advertising and Solicitation. Our committee determined that these requested amendments, directed at further restrictions on direct mail solicitation, would be best served as amendments to Rule 7.3 of the Rules of Professional Conduct. We are currently studying to what extent prohibition should be made against direct mailing solicitations, and through the Office of General Counsel, we are soliciting input as to how other states have addressed this problem, with a view to submit a proposed draft amending Rule 7.3, Rules of Professional Conduct. ■

Prepaid Legal Services Committee
Charles L. Anderson, chair

As part of our charge to monitor the development of prepaid legal services plans in Alabama, we are considering, among other proposals, drafting legislation regarding the regulation of such plans in this state. We hope to soon establish a system to accumulate statistical data relating to prepaid plans currently operating in Alabama, with a view to provide background information to Alabama lawyers as well as to providers. ■

Solo and Small Firm Task Force
Paul A. Brantley, chair

The task force is currently trying to identify significant problems and issues that confront solo practitioners and members of small firms in particular. For our purposes, "small firm" includes seven or fewer members. We are developing a survey to be disseminated to a random target group, and hope to have the results tabulated by the beginning of the new bar year. ■

Substance Abuse in Society Committee
John Ott, chair

We are currently working toward implementation of a pilot drug prevention program to be presented in seventh- and eighth-grade classrooms throughout the state. We selected two Jefferson County schools for pilot presentations on substance abuse this spring with the assistance of Bradford-Parkside. We are surveying with what types of substance abuse activities local activities local bars are already involved to avoid duplication of efforts and a coordinated approach for future growth. ■

Unauthorized Practice of Law Committee
L. Bruce Ables, chair

We meet regularly with good attendance, and active participation, and handle an estimated 15 to 20 cases at any given time. If there is any merit to the complaint, a cease and desist order is issued from the General Counsel's office. Serious complaints are assigned to individual members for investigation and recommendation to the committee. Sometimes members take on the task of seeing that criminal charges are brought against an individual through the district attorney's office in their locale, and *quo warranto* proceedings are prepared and filed on occasion by committee members. The committee needs the support of the bar, and believes some legislation should be passed to aid enforcement procedures. ■

Task Force on Women in the Profession
Cecilia J. Collins, chair

A joint luncheon sponsored by the Alabama State Bar for women judges and task force members was held on January 18, 1995 to initiate discussions between the bench and bar. The task force co-sponsored the second annual Women in the Legal Profession Seminar held for CLE credit on April 21, 1995. The comprehensive survey on Women in the Legal Profession has been prepared, and we anticipate the survey, to be completed prior to July bar convention, will be instrumental in assisting us in preparing recommendations to the bar as we continue to ascertain the status of women in the legal profession in this state. ■

Risk/Utility OR Consumer Expectation

What Should be Alabama's Analysis for Product Liability Design Cases?

By R. Ben Hogan, III

Should Alabama utilize a different test for judging product design defects than for judging manufacturing or warning defects? The answer is yes. The risk/utility analysis—whereby the risks inherent in a product design are weighed against the utility of the design—represents the national consensus for design defect cases. Such a test is consistent with Alabama's preference for negligence–based doctrines, and is already utilized in this state's crashworthiness cases.

There are three categories of product defects: manufacturing defects, design defects and marketing/packaging defects, which include warning defects. In a manufacturing defect case, it is assumed that the design of the product is safe, and had the product been manufactured in accordance with the design, it would have been safe for consumer use. In a design defect case the entire product line is called into question, and the standard for defectiveness is set by the trier of fact (jury) and the court. It is only in design cases that the term "defect" is an expression of the legal conclusion to be reached, rather than a test for reaching that conclusion.

Within the past two years, our neighboring states of Georgia and Mississippi have adopted the risk/utility analysis for judging product design defect cases.[1] The risk/utility analysis is the proposed approach of the Restatement (3rd) of Torts[2] and is the clear trend in recent holdings.[3] In most situations for product liability design cases, it is more appropriate than the consumer expectation test.

The AEMLD and the Consumer Expectation Test

In adopting the Alabama Extended Manufacturers Liability Doctrine in 1976, the Alabama Supreme Court made it clear that it was blending warranty law with the Restatement of Torts (Second) to derive an "unreasonably dangerous" definition for "defect" and a consumer expectation test for judging defect.

Altec and Mobile ask what products are covered, what is a 'defect' and by inference, what is 'unreasonably dangerous.' It has been held that the terms are synonymous, that is, defective means unreasonably dangerous and has no independent significance. [Citations omitted]. Our answer is, a 'defect' is that which renders a product 'unreasonably dangerous' i.e., not fit for its intended purpose, and that all 'defective' products are covered. Whether a product is 'unreasonably dangerous' is for the trier of fact, just as negligence vel non is in a traditional negligence case.

The product either is or is not 'unreasonably dangerous' to a person who should be expected to use or to be exposed to it. If it is, it makes no difference whether it is dangerous by design or defect. The important factor is whether it is safe or dangerous when the product is used as it was intended to be used.[4]

In *Casrell*, the Alabama Supreme Court referred to comment i of § 402 A, Restatement of Torts 2nd.[5] A footnoted case in the *Casrell* opinion contains the following jury charge:

> A condition is unreasonably dangerous so as to constitute a defective condition when it is so dangerous that a reasonable man would not sell the product if he knew of the risks involved.... To put it another way, a product is unreasonably dangerous if it is dangerous to an extent beyond which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics.[6]

In all AEMLD cases except crashworthiness cases, Alabama juries are instructed that "the term defective means unreasonably dangerous."[7] As the Alabama Supreme Court explained in 1991:

> The term 'defective' means that the product fails to meet the reasonable safety expectations of an 'ordinary consumer,' that is, an objective 'ordinary consumer,' possessed of the ordinary knowledge common to the community.[8]

On another occasion, however, the Court noted that the origin of the defect definition also borrowed from the Uniform Commercial Code:

> This Court, defining a defect, has borrowed from two separate legal authorities. The Uniform Commercial Code § 2–314, speaks in terms of unmerchantability as evidence of product inadequacy, i.e., that the goods are not fit for the ordinary purposes for which such goods are expected to be used. The Restatement (2nd) of Torts, § 402(a), speaks in terms of 'unreasonably dangerous.' Combining these two principles, and using each in aid of the other, *Casrell [v. Altec Industries, Inc.*, 335 So.2d 128 (Ala. 1976)] at p133, states: 'A defect is that which renders a product unreasonably dangerous, i.e., not fit for its intended purpose, and... all defective products are covered.'**** Defective is interpreted to mean that the product does not meet the reasonable expectations of an ordinary consumer as to its safety. Comment g of the Restatement says defective condition applies when, at the time the product leaves the seller's hands, it is in a condition not contemplated by the ultimate consumer.'[9]

In *Sears Roebuck*, the Court reversed a plaintiff's verdict for injury suffered when a tire blew out after 30,000 miles, because no expert testimony had been offered in support of plaintiff's product defect claims. Does Alabama's consumer expectation test require expert testimony to prove defect? Usually, according to the Court:

> The evidence and testimony likely to prove the defect — that which rendered the product not fit for its anticipated use — and the defect's link to the Defendant, depend upon the nature of the facts; but, ordinarily, expert testimony is required because of the complex and technical nature of the commodity. [Citations omitted]. This does not mean, however, that experts are always required, but simply that they are usually essential to produce evidence to which jurors may reasonably infer that the defective condition of the product is the cause of the product's failure and the plaintiff's resulting injury.[10]

History of the the Risk/Utility Test

In a 1973 note published in the *Mississippi Law Journal* Professor John Wade suggested a different test for measuring whether products were defectively designed.[11] Balancing the dangers or risks of the hazard with the utility or benefit of the product, Professor Wade proposed that the jury should judge whether the product was defective based on seven factors:

(1) The usefulness and desirability of the product — its utility to the user and to the public as a whole;

(2) The safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury;

(3) The availability of a substitute product which would meet the same need and not be as unsafe;

(4) The manufacturer's ability to eliminate the unsafe character of a product without impairing its usefulness or making it too expensive to maintain its utility;

(5) The user's ability to avoid danger by the exercise of care in the use of the product;

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instruction; and

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.[12]

The New Jersey Supreme Court, in adopting Professor Wade's "risk/utility analysis" for automobile crashworthiness cases in 1978, found that it was superior to the "unreasonably dangerous" test of the Restatement (2nd) of Torts.[13] Also relying on Professor Wade's article, the Third Circuit adopted the risk utility analysis in *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957 (3rd Cir. 1980), *cert* denied 450 U.S. 959 (1981) [affirming plaintiff's verdict for automobile crashworthiness case].

In 1985, Justice Maddox, writing for a unanimous Alabama Supreme Court, quoted the *Dawson* decision, and adopted Professor Wade's seven factors as the balancing process to determine defect in an automobile crashworthiness case in Alabama in *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1188, (Ala. 1985). In *Edwards*, however, the court was not abandoning the "unreasonably dangerous" definition of "defective." Instead, it was defining what would "meet the reasonable expectations of an ordinary consumer as to... safety...."[14]

Professor Stuart Madden, who has written extensively on the risk/utility test, explains that:

> The imposition upon plaintiff of the requirement of showing an alternative practical design can be

> seen as an element of the risk/utility analysis, in which it is now accepted that one of the factors to be weighed is 'the manufacturer's ability to eliminate the unsafe characteristic of the product without impairing its usefulness or making it too expensive to maintain its utility.'[15]

The seven factors of Professor Wade which in *Edwards* expounded the consumer expectation of crashworthiness safety, represent, according to Professor Madden, a separate analysis altogether. This being so, Alabama law took its first step toward the weighing process of risk/utility in crashworthiness cases.

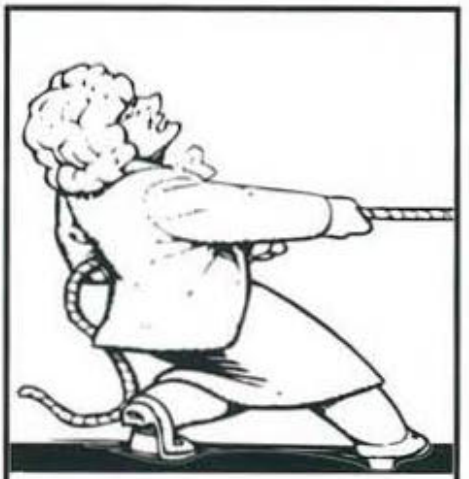
The weighing process of the *Edwards* crashworthiness doctrine was applied to marine crashworthiness in two propeller guard cases, the first decided by the Eleventh Circuit based on Alabama law, and the second decided on certified questions by the Alabama Supreme Court.[16] In the motorcycle helmet crashworthiness case *Dennis v. American Honda Motor Co., Inc.*, 585 So.2d 1336 (Ala. 1991), the court again alluded to the *Edwards* "crashworthiness doctrine."[17] These cases were the exception to an otherwise traditional Restatement consumer expectation test for judging defect under Alabama product liability law, until *Richards*.

The *Richards* Decision and Risk/Utility

In *Richards v. Michelin Tire Corp.*,[18] the plaintiff had received serious injuries when he attempted to mount a 16-inch tire on a 16-inch rim, overinflated the tire and the tire exploded. The complaint alleged counts sounding in both negligence and wantonness related to design, manufacturing, assembling, selling, and failure to warn. No AEMLD claim was sent to the jury. In reversing, however, the Court cited the AEMLD decisions of *Beech* and *Elliott* for the proposition that "[t]o prove defectiveness under Alabama law, a plaintiff must prove that a safer, practical, alternative design was available to the manufacturer at the time it manufactured its product."[19]

If the imposition upon plaintiff of the proof requirement of showing a feasible alternative design is expanded past Alabama crashworthiness cases into other product liability design cases, then Alabama product liability law will transform its consumer expectation test of defect into a risk/utility weighing process.

In *Richards*, the Eleventh Circuit interpreted that Alabama has already extended risk/utility analysis beyond crashworthiness cases to all design defect cases involving claims of negligence or wantonness. What are other states doing about the definition of defect?



In a risk/utility analysis, an open and obvious hazard does not defeat liability, but is merely a factor to be taken into consideration.

Other states

It is clear that there is a trend away from the consumer expectation test and toward Professor Wade's risk/utility analysis in product liability design cases.[20] In adopting the risk/utility analysis for future product design cases in December 1994, the Georgia Supreme Court reported that it had "conducted an exhaustive review of foreign jurisdictions and treatises... [which] revealed a general concensus regarding the utilization in design defect cases of a balancing test whereby the risks in a product design are weighed against the utility or benefit derived from the the product."[21] The court went on to observe:

> This risk/utility analysis incorporates the concept of 'reasonableness,' i.e., whether the manufacturer acted reasonably in chosing a particular product design, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take the necessary steps to eliminate the risk. When a jury decides that the risk of harm outweighs the utility of a particular design (that the product is not as safe as it should be), it is saying that in choosing the particular design and the cost trade–offs, the manufacturer exposed the consumer to greater risk of injury than he should have. Conceptually and analytically, this approach bespeaks negligence [Citations omitted]. The balancing test that forms the risk/utility analysis is thus consistent with Georgia law, which has long applied negligence principles in making the determination whether a product was defectively designed.[22]

In 1993, the Mississippi Supreme Court spurned the consumer expectation test for risk/utility analysis in product design cases.[23] Under the risk/utility analysis in Mississippi, a product is "unreasonably dangerous" if "a reasonable person would conclude that the danger–in–fact, whether foreseeable or not, outweighs the utility" of the design.[24]

California has supplemented the consumer expectation test with the risk/utility test, reasoning that although the product might meet consumer expectations because it was identical to others of the same product line, the consumer would not be in a position to know how safe the manufacturer could make the product.[25] In *Soule v. General Motors Corp.*, a crashworthiness case, General Motors briefed to the California Supreme Court that the consumer expectation test is an "unworkable, amorphic, fleeting standard" which should not be an optional basis for finding design defect. General Motors argued that the consumer expectation test

defies definition, focuses not on the objective condition of the product but on subjective and often unreasonable opinions of consumers and ignores reality.[26]

In *Soule,* the plaintiff sustained ankle injuries when a collision fractured a wheel assembly, and drove it into the slanted floorboard area beneath the foot pedals, deforming it into the passenger compartment. The jury had been instructed upon the consumer expectation test. California law allows a manufacturer to defend by proving that its design met reasonable standards under a risk/utility test and GM argued that *only* risk/utility was suitable for a crashworthiness case. The Court agreed that the jury should have been instructed solely on risk/utility and not consumer expectation, but affirmed the verdict because plaintiff's proof was sufficient under either theory. It explained the *manufacturer's* proof burden under the risk/utility test:

> The manufacturer need only show that given the inherent complexities of design, the benefits of its chosen design outweigh the dangers. Moreover, modern discovery practice neither redresses the inherent technical imbalance between manufacturer and consumer nor dictates that the injured consumer should bear the primary burden of evaluating a design developed and chosen by the manufacturer.[27]
>
> Hawaii, Arizona, Ohio and Illinois also have expressly recognized that a product's design is defective if it either violates the minimum safety expectations of an ordinary consumer or contains dangers that outweigh its benefit.[28]

Nebraska, Arizona, Colorado, Indiana, New Jersey, Iowa, and Missouri have accomplished much the same thing by giving manufacturers a state of the art defense if they can meet the burden of establishing that their designs satisfy the requirements of each state's defense.[29] Nebraska has interpreted its consumer expectation test as including the design process as much as the design itself, finding that a reasonable consumer, for example, may reasonably expect a manufacturer to conduct a minimum number of "tests and inspections to assure" safety of a product.[30]

The themes that repeat themselves in these cases are two: (1) Judge Learned Hand's reasoning that "a whole calling may have unduly lagged in the adoption of new and available devices,"[31] and (2) Professor Wade's admonition that consumers are not sufficiently protected by a test which is limited to commonly understood dangers, because the consumer often does not "know what to expect because he would have no idea how safe the product could be made."[32]

So What's the Difference?

What are some of the implications of a shift toward a risk/utility methodology of judging "defect?" In the jurisdictions that follow consumer expectation tests, the open and obvious nature of a danger will sometimes defeat recovery.[33] In a risk/utility analysis, an open and obvious hazard does not defeat liability, but is merely a factor to be taken into consideration.[34] Should the jury be told about the list of seven factors which are utilized in the risk/utility test?

> The answer should normally be no. The problem here is similar to that in negligence. The Restatement of Torts has analyzed negligence, describing it as a balancing of the magnitude of the risk against the utility of the risk, and listed the factors which go into determining the weight of both of these elements. This analysis is most helpful and can be used with profit by trial and appellate judges,

and by students and commentators. But it is not ordinarily given to the jury. Instead, they are told that negligence depends upon what a reasonable prudent man would do under the same or similar circumstances. Occasionally, when one of the factors has especial significance, it may be appropriate for the judge to make reference to it in suitable language. For example, in factor number 6, if the dangerous condition of the product is perfectly apparent, the judge might refer to this in telling the jury that they are to decide whether a reasonable prudent man would put the product on the market, or whether its danger was so great that it ought not to be marketed at all, despite the obviousness of the danger.[35]

Professor Wade has suggested the following jury instruction for product design cases:

> A [product] is not duly safe if it is so likely to be harmful to persons [or property] that a reasonably prudent manufacturer [supplier], who had actual knowledge of its harmful character, would not place it on the market. It is not necessary to find that this defendant had knowledge of the harmful character of the [product] in order to determine that it was not duly safe.[36]

By contrast, the Eleventh Circuit Pattern Jury Instructions for products liability cases contain the following consumer expectation definition of defect:

> A product is in a defective condition, unreasonably dangerous to the user, when it has a propensity or tendency for causing physical harm beyond that which would be contemplated by the ordinary user, having ordinary knowledge of the product's characteristics commonly known to the foreseeable class of persons who would normally use the product.[37]

Where a product liability design case proceeds from a risk/utility analysis, there is little difference between strict liability and a negligence case. As Professor Wade explained, moreover, that makes it more suitable for design cases in the first place:

> *Improper design.* There is little difference here between the negligence action and the action for strict liability. This is true, at least for the manufacturer, who normally either knows of the danger which the design creates or should know (i.e., is negligent in not knowing of it); it is less true of a supplier, who may take the product from the manufacturer without inspecting it in detail. Under design is included the failure to make proper safety devices. Design may include the parts or elements which do or do not go into the makeup of a product, if it is intended to be in that condition. [Citations omitted].[38]

The consumer expectation test is suitable, and virtually universally used, in cases aimed at a particular flaw in a single product.

Elsewhere, Professor Wade makes it clear that the liability "is imposed on an objective basis, without having to find negligent conduct...."[39] He predicted:

> The time will probably come when courts are ready to declare that one who sells a products which is unduly unsafe is negligent per se. Selling a product which is not duly safe is negligence within itself, and no more needs to be proved. Whether this is called negligence or strict liability is not really significant.[40]

It makes sense that there would be different tests for judging a manufacturing defect than for judging a design defect. The consumer expectation test is suitable, and virtually universally used, in cases aimed at a particular flaw in a single product. Where a manufacturer's design is challenged, so that the case might have nationwide implications and possibly lead to findings of collateral estoppel, the consumer expectations of a given community are not as logical a test as the weighing process of risk/utility.

> The difficulty comes when it is not just the single article which is to be classed unsafe because something went wrong in the making of it, but a whole group or class or type which may be unsafe because of the nature of the design. It is here that the policy issues become very important and the factors which were enumerated above must be collected and carefully weighed. It is here that the court — whether trial or appellate — does consider these issues in deciding whether to submit the case to the jury. If a plaintiff sues the manufacturer of a butcher knife because he cut his finger on the sole ground that the knife was so sharp that it was likely to cut human flesh, the court would probably take the case out of the hands of the jury and not give it the opportunity to find that the knife was unsafe. Similarly with an aspirin manufacturer, when an

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> ordinary tablet stuck to the lining of the plaintiff's stomach and caused a hemorrhage, or the manufacturer of the Pasteur treatment for rabies, when there were untoward reactions. The problem in these cases is likely to be called one of law and decided by the court. Court control of jury action is more extensive here than in the ordinary negligence action. And yet, of course, if the court decides that it would be reasonable to allow the jury to find for the plaintiff, the issue of lack of due safety will be submitted to the jury even in these cases.[41]

Under the risk/utility analysis, the design of the product must be weighed against an available alternative design that would have prevented or lessened the severity of the injury.[42] Under the Alabama analysis the burden of proving the availability of that design rests on the plaintiff.[43] Some states have rejected the consumer expectation test in design cases.[44] Other states expressly recognize that a product's design is defective if it either violates the minimum safety expectations of an ordinary consumer or contains dangers which outweigh its benefits.[45] In *Soule,* the California Supreme Court justified a continuing role for the consumer expectation test in design cases:

> We fully understand the dangers of improper use of the consumer expectation test. However, we cannot accept GM's insinuation that ordinary consumers lack any legitimate expectations about the minimum safety of the products they use. In particular circumstances, a product's design may perform so unsafely that the defect is apparent to the common reason, experience and understanding of its ordinary consumers. In such cases, a lay jury is competent to make that determination.[46]

States which follow the consumer expectation test, other than Alabama, do not require proof of a safer, practical, alternative design in order to establish defectiveness.[47] Other states allow the state of the art defense by statute or court decision, although placing the burden of showing that the challenged design met state of the art on the manufacturer.[48] If Alabama is to take the suggestion of the Eleventh Circuit in *Richards,* and impose a burden to prove the existence of a safer alternative design in product design cases, then the following policy issues must be addressed:

(1) Will Alabama continue to allow the consumer expectation test to be an optional basis for proving design defect? If so, what role will be played, if any, by evidence of alternative, safer designs, and where will Alabama place the burden of proving the existence of such design?[49]

(2) Will the risk/utility analysis be used for all cases alleging defective design? This would expand use of APJI 32.22 beyond crashworthiness cases to all design defect cases, to establish excessive preventable danger. On the other hand, the risk/utility weighing process in APJI 32.22 is *not* the consumer expectation test, and reference to consumer expectation should be removed from that charge.

(3) Assuming that Alabama adopts a risk/utility analysis for product liability design cases, then what are the proof requirements of a feasible alternative safe design?[50]

Conclusion

Product liability design cases in Alabama which have required the plaintiff to prove the existence of a feasible alternative design have, in effect, introduced the risk/utility analysis into Alabama product liability law. The consumer expectation test is not entirely consistent with that analysis, since a consumer does not know how safely a product can be made. There are occasions when there may exist available technology, guards, or alternative designs whose lack of use justifies the finding of defect. To date, Alabama case law has not clearly delineated the difference between consumer expectation and risk/utility tests, whereas other states have distinguished the two methods of analysis. The primary role in Alabama for the continued use of the consumer expectation test should be in manufacturing defect cases, or where the product's design contains a safety defect of such import as to fail the intended or foreseeable use of the product. In such a

case, proof of a feasible alternative design is not necessary under the analysis of the consumer expectation test used by most states, or by Alabama's Uniform Commercial Code.

The direction of product liability design cases is toward a risk/utility analysis. This requires the proof of the existence of a feasible alternative design. Such a design must, at minimum, have lessened the plaintiff's injury and made the product safer, in order to establish existence of excessive preventable danger. ■

ENDNOTES

1. *Banks, et al v. ICI America's, Inc.*, 450 S.E.2d 671, 673 (Ga. 1994) ["Therefore, because the risk/utility analysis is consensus consistent with Georgia law and represents the overwhelming consensus among courts deciding design defect cases,...we conclude the better approach is to evaluate design defectiveness under a test balancing the risks inherent in a product design against the utility of the product so designed. Hence, we hereby adopt the risk-utility analysis."]; *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss. 1993) ["A product is unreasonably dangerous" if "a reasonable person would conclude that the danger-in-fact, whether forseeable or not, outweighs the utility" of the design.]
2. Preliminary draft number 1, Restatement (3rd) of Torts (April 20, 1993).
3. O'Reilly & Cody, *The Products Liability Resource Manual* (General Practice Section of the Bar Association (1993) §6.04, p.66.
4. *Casrell v. Altec Industries, Inc.*, 335 So.2d 128, 133 (Ala. 1976).
5. Comment i reads: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."
6. *Welch v. Outboard Marine Corp.*, 481 F.2d 252 (5th Cir. 1973), cited in *Casrell*, supra, 335 So.2d at 133 n. 2.
7. Alabama Pattern Jury Instruction 32.12.
8. *Deere & Co. v. Grose*, 586 So.2d 196, 198 (ala. 1991), quoting from *ex parte Morrison's Cafeteria of Montgomery, Inc.*, 431 So.2d 975, 978 (Ala. 1983).
9. *Sears, Roebuck & Co., Inc. v. Haven Hills Farm, Inc.*, 395 So.2d 991, 994 (Ala. 1981). [Held: in order to establish proximate cause, testimony of an expert witness will be needed in most AEMLD cases.
10. *Sears, Roebuck & Co., Inc. v. Haven Hills Farm, Inc.*, 395 So.2d at 995.
11. John Wade, *On the Nature of Strict Tort Liability For Products*, 44 Miss. L.J. 825, 829 (1973). Professor John W. Wade at the time of the *Mississippi Law Journal* article was a distinguished professor of law at Vanderbilt University, Reporter of the Restatement (Second of Torts) and co-author of Prosser & Wade, *Cases & Materials on Torts (5th Ed.)*, 1971.
12. John Wade, supra, 44 Miss. L.J. at 837-38. See also, *Wade on Product Design Defects and Their Action Ability*, 33 Vand.L.Rev. 551, 552 (1980).
13. *Cepeda v. Cumberland Engineering Co., Inc.*, 386 A.2d 816, A25-29 (N.J. 1978) [a product is defective if "a reasonable person would conclude that the magnitude of the scientific perceivable danger as it is proved to be at the time of trial outweighed the benefits of the way the product was so designed and marketed."] See also, *Suter v. San Angelo Foundry & Machine Co.*, 406 A.2d 140, 151-153 (N.J. 1979) [quoting Professor Wade, who rejects Restatement definition of defect because "it may suggest an idea like ultra-hazardous, or abnormally dangerous, and thus give rise to the impression that the plaintiff must prove that the product was unusually or extremely dangerous."].
14. *General Motors Corp. v. Edwards*, 482 So. 2d at 1191 (Ala. 1985). As the Court said elsewhere in the opinion, "such a weighing process is necessary in 'crashworthiness' cases...." 482 So.2d at 1188. In citing *Dawson*, the *Edwards* opinion did not acknowledge that the seven factors originally were suggested by Professor Wade.
15. 2 M. S. Madden, *Products Liability* § 6.12 at 233; See also, *Huddell v. Levin*, 537 F.2d 726, 737 (3rd Cir. 1976).
16. *Beech v. Outboard Marine Corp.*, 584 So.2d 447, 450, (Ala. 1991) [answering certified questions agreeing with *Elliott* decision of 11th Circuit, which addressed the subject of propeller guards under the *Edwards* analysis]; *Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1507 (11th Cir. 1990), *cert* denied 498 U.S. 1048 (1991) [reversing plaintiff's jury verdict on basis that proof did not sufficiently establish feasibility of propeller guards, and finding that Alabama law would not recognize such an action because of the obvious nature of the hazard].
17. *Dennis v. American Honda Motor Co., Inc.*, 585 So.2d at 1340 (Ala. 1991) ["the products liability claim in the instant case is consistent with the 'crashworthiness doctrine' referred to in *General Motors Corp. v. Edwards*, 482 So.2d 1176 (Ala. 1985)." Held: contributory negligence at to cause of the accident not a defense where safety product at issue was the helmet, not the motorcycle].
18. 21 F.3d 1048 (11th Cir. 1994).
19. 21 F.3d at 1056. In fact, the Court distinguished its own AEMLD tire/rim mismatch decision of *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 470 (11th Cir. 1993) on the basis that Reynolds was an AEMLD case. Thus *Richards* can be read as requiring proof of feasible alternative design only in negligence cases rather than AEMLD cases. The common factor in *Richards, Beech* and *Elliott* were that all three contained a wanton count seeking punitive damages. *Beech* and *Elliott*, however, were clearly decisions based on interpretation of the AEMLD.
20. In product design cases, the plaintiff challenges not a single product or a manufacturing flaw but the design of all similar products as having an inherent safety hazard that makes them unreasonably dangerous (e.g., absence of guard, lack of suitable warning, design flaw, etc). See, e.g., cases collected at 2A Louis Frumer & Melvin I. Friedman, *Products Liability* § 2.16[3] (1994 & supp.); R.B. Hogan, *The Crashworthiness Doctrine*, 18:1 *American Journal of Trial Advocacy* 37 (1994); Issac Montal, Note, *The Consumer Expectation Test in New Jersey: What Can Consumer's Expect Now?* 54 Brook. L. Rev. 1381 (1989); Kim Larsen, Note, *Strict Products Liability and the Risk/Utility Test for Design Defects: An Economic Analysis*, 84 Colum. L. Rev. 2045, 2046 (1984); [in recent years the risk/utility test has replaced consumer expectation test in design defect cases]; James Henderson & Aaron Twerski, *Star Gazing: The Future of American Products Liability Law*, 66 N.Y.U. L. Rev. 1332 (1991); W. Kip Viscusi, *Wading Through the Muddle of Risk-Utility Analysis*, 39 Am. U. L. Rev. 573, 574 (1990). See generally, W. Page Keeton, et al., *Prosser & Keeton on the Law of Torts*, 698-99 (5th Ed. 1984), and note 3, supra.
21. *Banks v. ICI Americas, Inc.*, 264 Ga. at 733, 450 S.E.2d at 673 (1994).
22. 450 S.E.2d at 673.
23. *Sperry-New Holland v. Prestage*, 617 So.2d 248, 254 (Miss. 1993) [applying the risk utility test rather than the consumer expectation test to future strict liability cases in Mississippi].
24. *Id.*
25. *Soule v. General Motors Corp.*, 34 Cal. Rptr.2d 607, 882 P.2d 298 (Cal. 1994) [plaintiffs may recover if they establish that the product either falls below consumer expectation as to safety or, if it meets ordinary consumer expectations, the jury determines that product's design embodies excessive preventable danger because the risk of danger inherent in the challenged design outweighs the benefits of such design].
26. 34 Cal. R.2d at 618.
27. 34 Cal. R.2d at 620. Upon proof of harm caused by the alleged defective product, California thus shifts the burden of justifying the safety of its design to the manufacturer as the one best in position to prove that the benefits outweighed the risks.
28. *Masaki v. General Motors Corp.*, 780 P.2d 566, 578-79 (Haw. 1989); *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 878-880 (Ariz. 1985); *Knitz v. Minster*

Notice

An appellate seminar moderated by Chief Judge Gerald Bard Tjoflat will be presented in conjunction with the upcoming Eleventh Circuit Judicial Conference in Asheville, North Carolina. The seminar, "How to Catch an Appellate Judge's Attention, and How to Lose It", will be held Thursday, May 25, 1995 from 2 p.m. to 5 p.m. at the Grove Park Inn. The focus of the program will be two-pronged: (1) How is the perspective from the federal appellate bench different from the perspective of the district court, state appellate court and practicing lawyers, and (2) How can appellate lawyers improve their performance and their chances of prevailing on appeal? Judges Lanier Anderson, Joel Dubina and Rosemary Barkett will participate on a panel with Steve Kinnar, senior conference attorney for the Eleventh Circuit, and two experienced appellate practitioners. Information about this appellate seminar and the Eleventh Circuit Judicial Conference is available from the Circuit Executive, United States Court of Appeals, 56 Forsyth Street, NW, Atlanta, Georgia 30303. Phone (404) 331-5724.

Machine Co., 432 N.E.2d 814, 818 (Ohio 1982); *Palmer v. Avco Dist. Corp.*, 412 N.E.2d 959, 962, 965 (Ill. 1980).

29. Neb. Rev. Stat. § 25-21, 182; Ariz. Rev. Stat. Ann. § 12-683; Colo. Rev. Stat. Ann. § 42-12-104 (West 1990) (state of the art equals rebuttable presumption); Ind. Code Ann. § 33-1- 1.5-4(B)(4) (Burns 1992); N.J. Stat. Ann. § 2(a): 58(c)-(2) (West 1987) (complete defense in design cases, but not failure to warn cases); *Hillrichs v. AVCO Corp.*, 514 N.W.2d 94, 98 (Iowa 1994) (holding that conformity with industry state of the art is a defense against design defect claim); Mo. Ann. Stat. § 537.764(2) (Vernon 1988) (complete defense in failure-to-warn cases but not design defect cases).
30. *Hancock v. Paccar, Inc.*, 283 N.W.2d 25, 34 (Neb. 1979). Nebraska, by statute, allows the manufacturer to establish a state of the art defense by proving that the design used "was the best technology reasonably available at the time." Neb. Rev. Stat. § 25-21,182. The burden of proof would be on the manufacturer.
31. *T. J. Hooper*, 60 F.2d 737 (2nd Cir. 1932) ["Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages, courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."]. See, for example, *Hancock v. Paccar, Inc.*, 283 N.W.2d 25, 27 (Neb. 1979), where after quoting Judge Hand, the court stated, "the question therefore is not whether anyone else was doing more, although that may be considered, but whether the evidence disclosed that anything more could reasonably and economically be done."
32. John Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 829 (1973). See for example, *Soule v. General Motors Corp.*, 882 P.2d 298 (Cal. 1994), where after quoting Professor Wade, the court said: "A product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines the product's design embodies 'excessive preventible danger,' or in other words, if the jury finds that risk of danger inherent in the challenged design outweighs the benefits of such design."
33. E.g., *Poppell v. Waters*, 126 Ga. App. 385, 190 S.E.2d 815 (Ct. App. 1972) [a manufacturer has no duty to guard against injury from obvious peril]; *Toney v. Kawasaki Heavy Ind.*, 975 F.2d 162, 165 (5th Cir. 1992) [a product with open and obvious danger is not more dangerous than contemplated by the consumer, and hence not unreasonably dangerous under the consumer expectation test applied in Mississippi], overruled by *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss. 1993).
34. See e.g., *Sperry-New Holland*, 617 So.2d at 256. [obviousness of hazard part of weighing process].
35. Wade, supra, 44 Miss. L.J. at 839-840. But Alabama explains the factors in crashworthiness cases. *See Alabama Pattern Jury Instruction* 32.22.
36. *Id.* at 839-840.
37. State Claims Instruction 2.1, *Products Liability, U.S. 11th Cir. Dist. Judges Assoc., Pattern Jury Instructions* (West, 1990 Ed.) at 138.
38. *Wade*, supra, 44 Miss. L.J. at 841.
39. *Id.* at 847-48 ["...and the standard of due safety involves a weighing of the enumerated factors."].
40. *Id.* at 850. Alabama utilized this same fault-based logic in explaining the AEMLD. See *Atkins v. American Motors Corp.*, 335 So.2d 134, 140 (Ala. 1976) [Quoting 1965 Dean Wade article].
41. *Id.* at 838-839. It is not unprecedented that the Alabama Supreme Court has acted on policy reasons to remove certain design issues from jury consideration. In *Schwartz v. Volvo North American Corp.*, 554 So.2d 927 (Ala. 1989), the court refused to "recognize a claim for injuries based on an automobile manufacturer's failure to install air bags absent a legislative mandate directing such installation." 554 So.2d at 928; In *Dentson v. Edins & Lee Bus Sales, Inc.*, 491 So.2d 942 (Ala. 1986), the court affirmed dismissal of a claim for failure to install seat belts on a school bus.
42. In *Beech*, supra n.13, the court alluded to the risk/utility test in *Edwards*, finding that in design cases a feasible alternative design must not only be conceivable but available.
43. *General Motors Corp. v. Edwards*, 48 So.2d at 1191. See discussion in *Richards* at 21 F.3d at 1056-1057. Some states, although leaving the burden of proof with plaintiff, shift the burden of going forward to defendant to show the absence of a safer alternative design. E.g., *Kudlacek v. Fiat, S.P.A.*, 244 Neb. 822, 834, 509 N.W.2d 603, 612 (1994) [discussing alternative safe design in terms of "state-of-the-art"]; *Soule v. General Motors Corp.*, supra n.20, 882 P.2d 298, 34 Cal.R.2d 607, 620 ["We explained in *Barker* that placement of the risk-benefit burden on the manufacturer is appropriate because the considerations which influence the design of its product are 'peculiarly within...[its] knowledge.'" Quoting from 573 P.2d 543].
44. E.g., *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 185-186 (Mich. 1984) [adopting pure negligence theory for product design theories]; *Turner v. General Motors Corp.*, 584 S.W.2d 844, 851 (Tex. 1979); *Banks v. ICI Americas, Inc.*, supra n.1.
45. See citations at n. 23.
46. 34 Cal.R.2d at 618. The court went on to find, however, that a crashworthiness case would present design issues beyond the reasonable expectations of an ordinary consumer, and that the issue of whether a design condition was a crashworthiness defect should be decided solely based on the risk/utility test. California refuses to use "unreasonably dangerous" as a definition of defect. In California a design is defective if it embodies "excessive preventable danger," and this determination involves technical issues of "feasability, cost, practicality, risk and benefit" as well as manufacturer's evidence of "competing design considerations." *Soule*, supra, 34 Cal.R.2d at 616.
47. E.g., *Lenhardt v. Ford Motor Co.*, 683 P.2d 1097, 1100- 01 (Wash. 1984) ["When a plaintiff establishes at trial that a particular design allows a certain event to occur and alleges that event is not reasonably safe based upon reasonable consumer expectation concerning the product, the defendant may not introduce evidence that his design comports with the design of other manufacturers i.e. industry custom, and therefore is reasonably safe because the other designs allow the same event to occur. If a product as designed is not reasonably safe, liability attaches and a defendant is liable no matter how reasonable his conduct."]; *Greenwood v. Eastman-Kodak Co.*, 1994 W.L. 133464 (Conn. Super. Ct.) [A state of the art defense to a defective product claim would impermissibly shift the fact finder's focus from the challenged product to the defendant's conduct]; *Beacon Bowl, Inc. v. Wisconsin Electric Power Co.*, 501 N.W.2d 788, 809 (Wis. 1993) [A product may be defective and unreasonably dangerous even though there are no alternative, safer designs available]; *Kams v. Emerson Electric Co.*, 817 F.2d 1452, 1457 (10th Cir. 1987) [Design alternatives and industry custom are not essential elements of a product liability plaintiff's case].
48. See note 24 *supra*.
49. Georgia, for example, stated in *Banks v. ICI Americas, Inc.*, supra n. 1, that it will continue to apply its consumer expectation analysis to "inadverent design errors which, as distinguishable from conscious design choices, are treated in the same way as manufacturing defects..." 450 SE.2d at 673 n. 2.
50. It is clear that at a minimum the alternative design must reduce the risk and make the machine safer. In *Vines v. Beloit Corp.*, 631 So.2d 1003, 1006 (Ala. 1994), summary judgment was affirmed against the plaintiff who did not offer evidence that the alternative design would have made the machine safer overall, even though it might have prevented the plaintiff's accident. Similarly, in *Elliott v. Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), *cert* denied 498 U.S. 1048 (1991), the 11th Circuit ruled that the plaintiff's verdict must be reversed because a propeller guard, although it might have prevented the plaintiff's accident, might present other safety problems. By contrast, in *Volkswagen of America v. Marinelli*, 628 So.2d 378 (Ala. 1993), the court affirmed a plaintiff's verdict against Volkswagen where the plaintiff's proof showed that a vehicle should have been designed with its center of gravity one inch lower in order to be reasonably stable and avoid a rollover accident. Similarly, in *Edwards*, the court affirmed a verdict against GM which was based in part on contention that the gas tank of the Chevrolet Chevette was not located out of the "crush zone." In most instances, it would appear the court would and should leave contested issues of feasibility to the jury.

Real Estate Mortgages and Chapter 13 Bankruptcy Practice in Alabama—

Current Overview and Practice Suggestions

By M. Donald Davis, Jr.

The recent enactment of the Bankruptcy Reform Act ("Act") and decisions of United States District Courts and Bankruptcy Courts in Alabama, the Eleventh Circuit Court of Appeals and the Supreme Court of the United States during the past two years have prompted considerable discussion about the rights and remedies of holders of residential real estate mortgages in the Chapter 13 context in Alabama. The topics of interest include: (1) the ability of a Chapter 13 debtor to cure a *pre-petition* mortgage default in the course of the typical non-judicial mortgage foreclosure procedure; (2) the ability of a Chapter 13 debtor to "strip down" the debt secured by a home mortgage to the value of the home; (3) the right of fully secured mortgage holders to receive interest on pre- and post-petition arrearages; (4) the ability of a debtor to cure *post-confirmation* defaults; and (5) the effect of a confirmation order on motions seeking relief from the automatic stay and requests for adequate protection.

Pertinent Bankruptcy Statutory Provisions

Section 1322 of the Bankruptcy Code is the key statutory provision affecting treatment of secured claims involving residential real estate mortgages in a Chapter 13 case. Section 1322(b) provides in relevant part as follows:

> [T]he plan may -
>
> * * *
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
>
> (3) provide for the curing or waiving of any default;
>
> * * *
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any . . . *secured claim* on which the last payment is due after the date on which the final payment under the plan is due (emphasis added).

Section 1322 was amended by the Act. A new subsection (c) was added and in conjunction therewith, the existing subsection (c) was redesignated. The new subsection (c) provides as follows:

> Notwithstanding subsection (b)(2) and applicable law -
>
> (1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph(3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and
>
> (2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to 1325(a)(5).

Section 1325 of the Bankruptcy Code concerns confirmation of a Chapter 13 plan and it specifies the standards the bankruptcy courts are to use in determining whether to confirm such a plan. Section 1325(a)(5) provides as follows:

> [W]ith respect to each allowed secured claim provided for by the plan -
>
> (A) the holder of such claim has accepted the plan;
>
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
>
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder ....

Cure of pre-petition defaults

Prior to the enactment of the Act, the Eleventh Circuit had not ruled at what point a Chapter 13 debtor lost the right to decelerate a mortgage. Courts and members of the bar in Alabama developed differing views on this issue. All seem to agree that prior to the actual foreclosure sale, the Chapter 13 debtor can cure and reinstate a real estate mortgage.[1] At the point of the foreclosure sale, divergence of opinion arises. One view is that the right to decelerate continues until the foreclosure sale is completed and title passes to the purchaser.[2] Another view was that the right to decelerate continues after foreclosure as long as the debtor has a legal or equitable interest in the property (even if that interest was only the statutory right of redemption).[3] These rulings continue to have significance in their respective districts as the amendment to Section 1322 was not retroactive in application. However, the debate should end soon as the Eleventh Circuit presently has the issue before it in the *Commercial Federal Mortgage* case.

Most Alabama bankruptcy practitioners familiar with this debate have assumed that the debate has been resolved given the recent amendment to Section 1322. However, closer review of the statute and the accompanying legislative history indicate possibly otherwise. Section 1322(c), as amended, states that the right to decelerate and cure ends when the residential property is sold at a foreclosure sale conducted in accordance with applicable nonbankruptcy law. However, the legislative history accompanying this provision clouds the situation.[4]

Under Alabama law, at a foreclosure sale of mortgaged property, legal title vests in the purchaser at the sale.[5] However, in order for title to transfer, a conveyance of the lands sold must occur.[6] A *parol* sale of lands under a power of sale clause contained in a mortgage has been held to be a nullity,[7] although it has been held that execution of a deed is not necessary to vest the purchaser at a foreclosure sale with equitable title to the foreclosed real property.[8] Between confusing Alabama law in terms of when a foreclosure sale is concluded and the legislative history accompanying the recent amendment to Section 1322 by the Act, the issue of when the right to decelerate and cure in the Chapter 13 setting will likely continue. *The best advice that can be given to those who do not want a Chapter 13 debtor to decelerate and cure a mortgage default is to have the foreclosure deeds prepared and filed of record as quickly as possible.*

Restructure of mortgage debt coming due during life of Chapter 13 plan

The Act also clarifies how Chapter 13 debtors can restructure home mortgage debt when the mortgage debt matures and becomes payable during the life of the Chapter 13 plan. For example, the mortgage debt may include a balloon payment feature that comes due 18 months after the Chapter 13 case is commenced. Under the pre-Act version of Section 1322(b)(2), extension of the balloon payment due date was considered an impermissible modification of the mortgage debt. The revised provision permits the payment of the mortgage debt extended throughout the life of the plan. It should be noted that if a debtor is attempting to extend a balloon payment over the life of a proposed Chapter 13 plan, the debtor must still meet the requirements for the treatment of secured claims under Section 1325(a)(5).

Stripdown of debt secured by home mortgage liens

Generally, the singlemost event prompting individuals to seek Chapter 13 relief is the commencement of a foreclosure proceeding involving the debtor's home. Logically, one of the primary purposes of Chapter 13 is to enable debtors to cure their mortgage defaults and retain their homes. However, the ability to cure, as discussed above, is not unlimited. Prior to 1993, a nationwide debate existed as to whether an undersecured creditor's claim could be bifurcated, with the debtor satisfying the full amount of the secured portion of the claim plus interest and the unsecured portion being treated similar to other unsecured claims in the debtor's Chapter 13 plan. In such an instance, the unsecured portion of the claim ultimately would be discharged.

In *Nobleman v. American Savings Bank*,[9] the Supreme Court of the United States unanimously held that Section 1322(b)(2) prohibits a Chapter 13 debtor from relying on Section 506(a) to reduce an undersecured homestead mortgage to the fair market value of the mortgaged premises. The Court concluded that Chapter 13 debtors may not "strip down" a home mortgage debt to the value of the home.

In *Nobleman* the debtors' Chapter 13 plan proposed to make payments equal to the value of the secured claim pursuant to the terms of the mortgage and the plan did not alter the mortgage holder's right as the holder of a secured claim. Additionally, the debtors' Chapter 13 plan provided for partial payment of the unsecured portion of the mortgage holder's debt. In *Nobleman* the parties agreed that modification of the rights of the mortgagee was prohibited

by Section 1322(b)(2). The debtors argued: (1) their plan did not propose a modification; (2) that Section 1322(b)(2) only protected the mortgage holder's "secured claim;" (3) that under Section 506(a) the secured claim only equalled the value of the property; and (4) that the unsecured portion was not protected by Section 1322(b)(2). The debtors' arguments were rejected with Justice Clarence Thomas finding that their interpretation failed to take into account Section 1322(b)(2)'s focus on "rights" rather than "claims." While it was correct to look at Section 506(a) to properly value and determine the nature of the mortgage holder's claim, the *Nobleman* Court held that such did not mean that the "rights" of the mortgagee, which were protected by Section 1322(b)(2), were limited by the valuation.

Nobleman is significant concerning the Supreme Court's discussion about the term "rights," which it noted was not defined in the Bankruptcy Code. Without controlling federal law, Justice Thomas stated that it would be assumed that Congress left the controlling determination of property rights in assets of the bankruptcy estate to state law since those property interests are created and defined by state law. These rights were noted as including the right to repayment of principal in monthly installments over a fixed terms at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and proceed against the debtors' residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure.[10] Justice Thomas reasoned that while these rights might be affected by the initiation of a bankruptcy case, the statutory limits were independent of the debtor's plan, which itself is prohibited from modifying those rights by Section 1322(b)(2).

While discussing *Nobleman* several additional points deserve comment. First, the limitation to modification applies only to the rights of holders of security interests in real property that is the debtor's principal residence. Second, as a result of the Supreme Court's decision in *Johnson v. Home State Bank*,[11] a debtor may not circumvent application of *Nobelman* by filing a Chapter 7 case and obtaining a Chapter 7 discharge before seeking Chapter 13 relief.

Curing post-confirmation mortgage defaults

The ability of a debtor to cure a post-confirmation default of a residential real estate mortgage has been the subject of much debate and five published decisions, four of which emanated from the Western Division of the Northern District of Alabama.[12] In each instance[13] the Bankruptcy Courts permitted the cure of a post-confirmation defaults in a Chapter 13 cases. On appeal to the District Court, different results occurred. Recently, in the case of In *Re Hoggle (Greentree Acceptance, Inc. v. Hoggle)*,[14] the Eleventh Circuit Court of Appeals, in three consolidated cases concerning claims secured by mobile homes and real estate that were the primary residences of the debtors, held that the bankruptcy court had the authority to modify a confirmed Chapter 13 plan to allow a debtor to cure a post-confirmation default with reference to a secured claim on a debtor's house. The Eleventh Circuit based its ruling upon the "plain meaning" of Section 1322 and 1329 of the Bankruptcy Code. The Court noted that although Section 1322(b)(2) prohibits modification of the rights of home mortgage lenders, Section 1322(b)(5) of the Bankruptcy Code "expressly authorizes plans to provide for the timely curing of any default and maintenance of payments during the life of the plan." The Court stated:

> Congress could have easily inserted the word prepetition to modify default but failed to do so. The omission is significant. The plain meaning of Section 1322(b)(5) permits cure of any default whether occurring prior to the filing of the petition or subsequent to confirmation of the plan. Thus, Section 1322(b)(5) would permit cure of post-confirmation defaults.[15]

Objecting to Chapter 13 plans and motions seeking relief from the automatic stay

The manner in which Chapter 13 plan confirmation hearings are handled varies amongst the bankruptcy courts in the state. In some areas the practice of creditors holding a real estate mortgage on the principal residence of a Chapter 13 debtor when a plan contains objectionable provisions, has been to ignore objecting to the Chapter 13 plan and proceeding to file a motion seeking relief from the automatic stay to foreclose on the property. The effect of the filing of such a motion was for the debtor to negotiate with the secured creditor in order to keep the residence. Often this resulted in side agreements between the debtors and their creditors. The bankruptcy judges of the Southern District of Alabama have indicated their concern about this practice because the order of confirmation of a Chapter 13 plan has *res judicata* and/or collateral estoppel effect as to issues regarding whether a secured creditor's interests are adequately protected. Quoting *Colliers On Bankruptcy*, one bankruptcy court has held:

> It is therefore incumbent upon creditors with notice of the chapter 13 case to review the plan and object to the plan if they believe it to be improper; they may ignore the confirmation hearing only at their peril . . .. [Creditor] may not take cation to collect debts which are inconsistent with the method of payment provided in the plan . . .. Once the plan is confirmed the only cause for relief from the stay that may be validly asserted is the debtor's material failure to comply with the plan.[16]

Thus, provisions in a proposed Chapter 13 plan concerning cure of a default (pre- or post-petition) payment of inter-

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est have gained new significance, at least within the Southern District of Alabama. *A lawyer for a creditor holding a real estate mortgage as collateral needs to be alert to the provisions of a proposed Chapter 13 plan and act on a timely basis to protect his or her client's interests in conjunction with the confirmation process.*

Interest on arrearages

Prior to June 1993, Chapter 13 debtors in the Eleventh Circuit were not required to pay interest on pre-petition arrearages on secured claims that were being cured through their plans. This rule changed in *Rake v. Wade*[17] and was later modified by the Act. In *Rake*, the United States Supreme Court held that Chapter 13 debtors who cure a default on an oversecured home mortgage must pay post-petition interest on the arrearages, even though the mortgage itself did not provide for arrearage interest. This ruling resolved a split between various circuit courts of appeal on the issue.[18] The Court relied upon its earlier decision in *United States of America v. Ron Pair Enterprises, Inc.*[19] and Section 506(b) of the Bankruptcy Code, which states that oversecured creditors with allowed claims should include "interest" on such claim, and any reasonable fees, costs, or charges under the agreement under which such claim arose. In *Rake*, payment of interest was held to not constitute a modification of the mortgage, prohibited by Section 1322(b)(2). Additionally, the *Rake* Court held that Section 1325(a)(5) required that the Chapter 13 plan provide secured creditors with a stream of future payments that must equal the present dollar value of the claim as of the plan confirmation date, which implies the payment of interest.[20]

The Act modified Section 1325 to provide that the amount necessary to cure default (which could include interest) shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.[21] The Act significantly curtailed the scope of *Rake*. It should be noted that the new amendment applies only to agreements entered into after October 22, 1994. *Schriveners would be wise to review their mortgage documentation to specifically provide for interest on arrearages as a part of curing a default.* ■

ENDNOTES

1. See *In re Saylors*, 869 F.2d 1434 (11th Cir. 1989) and *In re Hoggle (Greentree Acceptance, Inc. v. Hoggle*, 12 F.3d 1008 (11th Cir. 1994).
2. *See In re Detter*, 141 B.R. 221 (Bkrtcy.M.D.Ala. 1991) and *In re McKinney*, 174 B.R. 330 (Bkrtcy.S.D.Ala. 1994).
3. See *In re Ragsdale*, 155 B.R. 578 (Bkrtcy.N.D.Ala. 1993) and *Commercial Federal Mortgage Corp. v. Smith*, 170 B.R. 708 (N.D.Ala. 1994).
4. The legislative history states:
   This section of the bill [§301 of H.R. 5116] safeguards a debtor's rights in a Chapter 13 case by allowing the debtor to cure home mortgage defaults at least through completion of a foreclosure sale under applicable nonbankruptcy law. However, if the State provides the debtor more extensive "cure" rights (through, for example, some later redemption period), the debtor would continue to enjoy such rights in bankruptcy. The changes made by this section [§301 of H.R. 5116], in conjunction with those made in section 305 of this bill [H.R. 5116], would also overrule the result in *First National Fidelity Corp. v. Perry*, 945 F.2d 61 (3d.Cir. 1991) with respect to mortgages on which the last payment on the original payment schedule is due before the date on which the final payment under the plan is due. In that case, the Third Circuit held that subsequent to foreclosure judgment, a Chapter 13 debtor cannot provide for a mortgage debt by paying the full amount of the allowed secured claim in accordance with Bankruptcy Code section 1325(a)(5), because doing so would constitute an impermissible modification of the mortgage holder's right to immediate payment under section 1322(b)(2) of the Bankruptcy Code. 140 Cong. Rec. H.R. 10769 (Oct. 4, 1994).
5. Vesting of title occurs, pursuant to *Ala. Code* § 35-10-1 (1975), subject to the mortgagor's election to exercise the statutory right of redemption.
6. *Id.*
7. *Jackson v. Scott*, 67 Ala. 99 (1880).
8. *Ritter v. Moseley*, 226 Ala. 648 (1933).
9. ___ U.S. ___, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993).
10. 113 S.Ct. at 2110.
11. 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991).
12. The fifth remaining decision also arose out of the Northern District of Alabama, Southern Division.
13. See *In Re Hollis*, 105 B.R. 1003 (N.D.Ala. 1989); *In Re Thomas*, 121 B.R. 94 (N.D.Ala. 1990); *In Re Stafford*, 121 B.R. 109 (Bkrtcy.N.D. Ala. 1990); *In Re Stafford*, 123 B.R. 415 (N.D.Ala. 1991). *SouthTrust Mobile Services Inc. v. Englebert*, 137 B.R. 975 (N.D.Ala. 1992).
14. 12 F.3d 1008 (11th Cir. 1994).
15. *Id.* at 1010.
16. *In re Payne*, Case No. 93-12042 (Bkrtcy.S.D.Ala. March 23, 1994), *quoting 5 Collier On Bankruptcy* ¶ 1327.01 (15th ed. 1993).
17. ___U.S. ___, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993).
18. The Sixth and Tenth circuits had held that payment of interest was required, while the Third, Fourth, Ninth and Eleventh circuits had held that under Section 1322(b), a mortgagee was not entitled to interest on the arrearage.
19. 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). In *Ron Pair* the Court held that the right to post-petition interest under Section 506(b) was "unqualified" and existed regardless of whether the agreement giving rise to the claim provided for interest. 489 U.S. at 241.
20. 113 S.Ct. at 2193.
21. 11 U.S.C. § 1322(e).

YOUNG LAWYERS' SECTION

By HERBERT HAROLD WEST, JR.

By the time this article is published, several of the Young Lawyers' Section's major projects will be underway. The **Minority Participation Conference** is scheduled for May 5, 1995, in Montgomery, Alabama. The conference allows minority high school students to meet with minority lawyers and judges to learn more about career opportunities in the legal profession. This is only the second year of the conference, but the number of high school students participating is expected to exceed 150. **Fred Gray, Jr.** chairs the committee responsible for putting on the conference, and he and the other members of the committee are to be commended for their efforts.

The Annual **Sandestin Seminar** at the beach is scheduled for May 19 and 20, and the attendance at this year's seminar may even exceed last year's record attendance. At the time of this writing, Sandestin had completely booked the block of rooms reserved for the seminar and was attempting to reserve additional rooms. To my knowledge, the section has never before booked all the reserved rooms in the seminar's history.

HAL WEST

In prior years, the YLS sponsored the seminar, but much of the organization and administration of the seminar was undertaken by ABICLE. Two years ago, in an effort to get more young lawyers involved in the section's activities, the section took responsibility for the entire seminar. Since that time the number of young lawyers involved in putting on the seminar has dramatically increased. Along with greater involvement has come increased interest and the seminar has grown from averaging less than 200 registrants to over 280 registrants last year.

Another project the section organizes in May is the **spring admissions ceremony.** The ceremony is scheduled for May 23, 1995 at the Montgomery Civic Center. Of all the projects in which the section is involved, the admissions ceremony probably requires the most work. **Tom Albritton** and **Brian Horsley** were responsible for organizing last fall's admissions ceremony and are also organizing the spring admissions ceremony. They are commended for their efforts.

One project we did not have to undertake this year is the **emergency response program** in cooperation with the Federal Emergency Management Administration. The section is responsible for providing lawyers to answer victims' questions in the event of an emergency. This year an emergency has not occurred requiring the section to provide lawyers, but we must be prepared to do so on short notice. Let's hope this trend continues.

I look forward to seeing you at the beach and at the July **state bar convention** in Birmingham. ■

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DISCIPLINARY REPORT

Disbarments

• **Michael Stanley Sheier**, a Birmingham lawyer, was disbarred from the practice of law by order of the Disciplinary Board, Panel II, for engaging in conduct involving dishonesty, fraud, deceit and misrepresentation in violation of Rule 8.4(c); for failing to safeguard client property, for failing to promptly deliver funds to a client belonging to that client and for failing to maintain client funds in a separate account in violation of Rule 1.15(a), (b) and (c); for willfully neglecting a legal matter entrusted to him in violation of Rule 1.3; for failing to provide competent representation to a client in violation of Rule 1.1; for failing to keep a client reasonably informed in violation of Rule 1.4(a); for terminating representation of a client without protecting that client's interests in violation of Rule 1.16; by knowingly making a false statement of a material fact in a disciplinary matter in violation of Rule 8.1(c); and for failing to respond to a lawful demand for information from a bar disciplinary authority in violation of Rule 8.1(b). Sheier was found guilty by the Disciplinary Board after hearing in the following matters:

COMPLAINT ONE [ASB No. 94-066]-In 1992, Sheier was retained in an estate matter by the executrix of the estate. At that time, the estate consisted of a house, bank account or accounts, securities, U.S. Government retirement benefits and personal property of an undetermined amount. The following year Sheier caused the house to be sold for approximately $71,198. Although the four beneficiaries of the estate promptly returned documents sent to them for execution, they heard nothing further regarding the estate until the latter part of 1993. During this time, the beneficiaries made numerous requests of Sheier for information to which he did not respond. In November 1993, Sheier sent each beneficiary a check in the amount of $10,000 but they heard nothing thereafter. In February 1994, the beneficiaries filed a complaint with the Alabama State Bar against Sheier for failing to complete the probation of the estate and for failing to provide any information regarding the estate, including its size. Sheier was sent a copy of the complaint and requested to respond to it but failed to do so. He was sent a second request by regular and certified mail and again failed to respond. At the hearing, Sheier admitted that he converted the remainder of the estate assets to his own use. Discipline imposed-DISBARMENT.

COMPLAINT TWO [ASB No. 94-092]-Sheier was retained to incorporate a business and paid a fee of $600. He failed to incorporate the business and did not return the fee to his client. The client filed a complaint with the bar in this matter in March 1994. Although the complaint was sent to Sheier with a request to respond on two different occasions, he failed to do so. Discipline imposed-suspension from the practice of law for six months.

COMPLAINT THREE [ASB No. 94-119]-In November 1993, Sheier was retained to file habeas corpus for a client and received a fee of $1,500. He performed no legal services on behalf of his client nor did he refund any of the fee. The client filed a bar complaint in April 1994. Thereafter, Sheier was requested to respond to the complaint but failed to do so. Discipline imposed-DISBARMENT.

COMPLAINT FOUR [ASB No. 94-099]-In June 1992, Sheier agreed to represent a client in a Social Security disability appeal. Over the next 16 months, the client attempted to contact Sheier several times a month and could only leave messages on his answering machine. Sheier did not return his client's calls. In August 1993, Sheier informed his client that he had a meeting with an appeals judge in October and would contact his client concerning when and where to meet. In December 1993, the client called the Social Security Administration Office and was informed that his file was inactive and had been returned to Baltimore, Maryland. He asked that the file be returned to the local Social Security Office and, after reviewing it, determined that no appeal to his denial of disability had ever been filed nor had any other information been requested. The client filed a bar complaint in March 1994 to which Sheier did not respond after being requested to do so. Discipline imposed-suspension from the practice of law for six months.

COMPLAINT FIVE [ASB No. 94-180]-In February 1994, Sheier was appointed to represent a criminal defendant in the appeal of his criminal conviction. In May 1994, the clerk of the court of criminal appeals informed Sheier by letter that the appellate brief should have been filed in that court on May 2, 1994. He was also advised that if he did not file a brief within seven days, the Disciplinary Commission of the Alabama State Bar would be informed. Sheier failed to file a brief and the case was remanded to the circuit court with instructions that Sheier be removed from the case for cause and a new counsel be appointed. Discipline imposed-DISBARMENT.

COMPLAINT SIX [ASB No. 94-190(A)]-In July 1992, Sheier was retained to represent a criminal defendant charged with trafficking in cocaine. On advice of Sheier, the criminal defendant plead guilty to a lesser charge and was sentenced to seven years confinement. After the plea of guilty, Sheier charged the criminal defendant an additional $6,500 to appeal his conviction. He charged this fee knowing that there was little or no

chance for a successful appeal. During 1992, the criminal defendant was forced to sell a home that he had inherited from his parents to pay Sheier's fee. During his incarceration, the criminal defendant gave Sheier power of attorney to handle the proceeds from the sale. He also stored his household goods and made arrangements with Sheier to pay storage payments of $70 per month. Sheier failed to pay the storage payment and the household goods were sold at public auction. Although the defendant has attempted to contact Sheier on numerous occasions, Sheier would not return his telephone calls. Sheier alleges there is no money left in the criminal defendant's account. However, he had refused to provide any accounting of these funds. Discipline imposed-DISBARMENT.

COMPLAINT SEVEN [ASB No. 94-108]-In 1990, the Alabama Department of Mental Health contracted with Sheier to incorporate ten support groups and was paid a fee of $750 per group. Sheier failed to provide the Alabama Department of Mental Health with copies of the Articles of Incorporation of each support group although requested to do so on numerous occasions. One of the support groups to be incorporated was the Obsessive Compulsive Disorder Support Group of Alabama. In June 1994, Sheier was contacted by the vice-president of that group and informed that the group had not received the Articles of Incorporation or Bylaws and that the organization was not listed by the Alabama Secretary of State. Sheier admitted that the Articles of Incorporation were not on file in the probate court in Jefferson County but that the original documents were still in his computer. He provided the client with a copy of the Articles of Incorporation at that time. Upon review, the client determined that the Articles of Incorporation provided were not the Articles of Incorporation of the Obsessive Compulsive Disorder Support Group but were Articles of Incorporation of an entirely different group. In his response to a bar complaint, Sheier submitted a copy of the Articles of Incorporation of the Obsessive Compulsive Support Group. The articles submitted by Sheier were actually Articles of Incorporation for the Support Group of Mentally Ill Artists which had been altered by Sheier to appear to have been prepared for the Obsessive Compulsive Disorder Support Group. Discipline imposed-suspension from the practice of law for six months.

COMPLAINT EIGHT [ASB No. 94-090]-In July 1993, Sheier was retained by a client to file a bankruptcy petition and paid a fee of $320. The client explained to Sheier that he wanted to file bankruptcy in order to protect his truck from being repossessed. After Sheier was retained, the client called him on numerous occasions but Sheier would not return his calls. Sheier did not file a bankruptcy petition on behalf of his client and the client's truck was repossessed. Discipline imposed-DISBARMENT.

COMPLAINT NINE [ASB No. 94-211]-In July 1993, Sheier was retained in a divorce/custody matter and paid a fee of $868. Within 48 hours, the client informed Sheier that she no longer desired to pursue the matter and wanted a refund. Sheier agreed to refund the fee less court costs which would be approximately $100. Thereafter, he did not refund any of the fee and refused to return the client's phone calls or to accept registered mail from her. Discipline imposed-DISBARMENT.

Sheier was removed from the Roll of Attorneys and disbarred from the practice of law by order of the Supreme Court of Alabama dated February 7, 1995, effective January 26, 1995. (Prior public discipline considered: two three-year suspensions)

• Birmingham attorney **William Eugene Rutledge** was disbarred from the practice of law in the State of Alabama effective January 20, 1995, by order of the Supreme Court of Alabama. Rutledge's disbarment was based upon his having executed an Affidavit and Consent to Order of Disbarment based upon his felony conviction in federal court.

On June 12, 1992, Rutledge was found guilty in the United States District Court on charges of making false statements to a government agency, making a false statement on a loan application, and embezzlement from an employee pension benefit plan. [Rule 22(a)(2), Pet. 92-02]

Suspensions

• Birmingham attorney **J. Scott Langner** was suspended from the practice of law in the State of Alabama for a period of 30 days, effective February 7, 1995, by order of the Supreme Court of Alabama. Langner's suspension was based upon his plea of guilty to charges that he had engaged in ethical misconduct as a lawyer. [ASB Nos. 92-493, 92-544, 93-232, 93-373(B) & 94-031]

• Pelham attorney **Nickey John Rudd, Jr.** has been suspended from the practice of law by the Disciplinary Commission of the Alabama State Bar for noncompliance with the 1994 Client Security Fund Assessment. Rudd practiced law in Birmingham. The suspension is effective February 15, 1995. [CSF No. 94-04]

• Montgomery attorney **David Coleman Yarbrough** was suspended for a period of 45 days beginning February 21, 1995. Yarbrough plead guilty to willfully neglecting a legal matter entrusted to him. The Disciplinary Board imposed the suspension following a hearing on the discipline issue. Yarbrough agreed to handle a serious car/truck accident case for an out-of-state plaintiff. Between July 1989 and August 1992 he communicated infrequently with the client, but always assured that things were being handled properly. In August 1992, the plaintiff's father requested a copy of Yarbrough's file. After receiving the file, he learned that the case had never been filed. The statute of limitations had expired on May 21, 1991. In the file was a letter which Yarbrough ostensibly had sent to an insurance adjuster declining a $75,000 settlement offer. The letter was dated nine months after the statute had already expired. Yarbrough had professional liability insurance, but never notified his insurance carrier of the possible claim. [ASB No. 93-103]

• Birmingham attorney **Donald T. Trawick** was suspended from the practice of law by order of the Supreme Court of Alabama for a period of 181 days, said suspension effective November 14, 1994. The Disciplinary Board of the Alabama State Bar, after a hearing, found Trawick guilty of failing to provide competent representation to his clients, willfully neglecting legal matters entrusted to him, failing to adequately communicate with his clients, and failing to respond to a lawful demand for information from a disciplinary authority in violation of Rules 1.1, 1.3, 1.4(a) and 8.1(b) of the Rules of Professional Conduct of the Alabama State Bar. [ASB Nos. 93-073, 93-133 & 94-212]

• Birmingham lawyer **Clarence Dortch, III** was publicly reprimanded on March 17, 1995. In August 1993, Dortch accepted a $1,500 retainer to assist a former government employee with problems regarding his retirement pay. Between September 1993 and April 1994, the client was unable to get in touch with Dortch about the status of his legal problem. The client called regularly. Dortch ignored a certified letter in February 1994. In view of the fact that Dortch did little or nothing on the matter, the Disciplinary Commission found that Dortch had neglected a legal matter entrusted to him, and failed to respond to reasonable request for information by a client. In addition to the public reprimand with general publication, Dortch was ordered to refund the $1,500 retainer. [ASB No. 94-154]

• Opelika lawyer **John Snow Thrower, Jr.** was publicly reprimanded on March 17, 1995. The Disciplinary Commission determined that Thrower had violated Rules 1.15(b) and 1.15(d) of the Rules of Professional Conduct. Thrower accepted that decision and the discipline imposed. Thrower incurred $17,570 in costs between 1992 and 1993 in connection with work done by a vocational rehabilitation expert. This expert provided services to several of Thrower's worker's compensation clients. As certain cases were settled, Thrower did not pay the expert. By August 26, 1993, Thrower had only paid $995 on the outstanding balance. On that date, Thrower issued a check on his trust account for invoices totaling $2,380. This check was refused twice by Thrower's bank. Thrower paid $4,760 in November 1993 and promised to "hand deliver" the balance of the invoices by April 26, 1994. He failed to do so, and a lawyer representing the consultant filed a complaint in the matter. [ASB No. 94-236]

• On February 3, 1995, Anniston attorney **G. Coke Williams** received two separate public reprimands with general publication. The two public reprimands were based on Williams' pleading guilty in two separate matters to having violated his profession's code of ethics.

In one matter, Williams agreed to represent a client in a criminal matter. However, he failed to quote a fee to the client, telling the client not to worry about his fee until the matter had been concluded. The client was also led to believe that the criminal matter would be resolved with the client's receiving a possible fine and being placed on the SIR program. Based upon Williams' advice, the client pled guilty, but was sentenced to incarceration.

Thereafter, the client and his wife experienced substantial difficulty in communicating with Williams about the matter. The wife made repeated requests of Williams to submit a final bill for his services. Finally, Williams forwarded a statement to the client demanding a fee of $10,000 plus costs. The client's wife then requested an itemized statement from Williams. He failed to provide any such itemized statement.

Formal charges were filed against Williams in this matter. He subsequently entered a plea of guilty, admitting that he had violated Rules 1.5(a) and 1.4(b), Alabama Rules of Professional Conduct, in that he entered into an agreement for, or charged a clearly excessive fee, and, further, that he failed to explain a matter to the extent necessary to permit his client to make informed decisions regarding his representation.

In the second matter, Williams agreed to pursue a client's attempts to prevent operation of a business in the client's residential neighborhood. Williams filed initial pleadings on behalf of the client. However, the client experienced increased difficulty in communicating with Williams about the status of his case.

The client subsequently discovered that his case had been dismissed with prejudice due to a lack of diligent prosecution. The client then filed a formal complaint against Williams with the Alabama State Bar. As of the date of the filing of the complaint by the client, Williams had still failed to notify the client that his case had been dismissed. Further, Williams failed to file a timely response to the bar grievance.

Williams, following the filing of formal charges against him, entered a guilty plea. In said plea, Williams admitted that he had willfully neglected a legal matter entrusted to him [DR 6-101(A)], that he had failed to keep his client reasonably informed about the status of a matter and promptly comply with reasonable requests for information [ARPC 1.4(a)], that he failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation [ARPC 1.4(b)], and that he knowingly failed to

respond to a lawful demand for information from a disciplinary authority [ARPC 8.1(b)]. [ASB Nos. 92-190 & 92-384]

• On February 3, 1995, Anniston attorney **Grant Allen Paris** received a public reprimand without general publication. Paris handled a loan transaction wherein the borrower pledged as collateral land jointly owned by the borrower and his wife. Thereafter, it was discovered that the borrower's wife's signature on the mortgage and note were forged. A review of those documents disclosed that Paris had notarized the mortgage deed, and witnessed the mortgage note without actually acknowledging and witnessing the borrower's wife's signatures.

The borrower subsequently died. The lender then learned that the mortgage deed and mortgage note contained the forged signatures of the borrower's wife. Paris then paid to the lender the remaining balance on the loan note and became the owner of the mortgage on the property in question. Paris then filed a claim against the deceased borrower's estate for the amount of the mortgage. In a deposition subsequently conducted in the matter of the estate of the deceased, Paris testified that he did not actually see the borrower's wife sign the documents in question.

A hearing was held on formal charges filed against Paris in this matter. The Disciplinary Board found Paris guilty of violating Disciplinary Rules 1-102(A)(4) & (6), in that he engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or willful misconduct, and that such conduct adversely reflected on his fitness to practice law. [ASB No. 92-162]

• Ashland attorney **Jeffrey Alan Willis** was publicly reprimanded, without general publication, on March 17, 1995.

Willis had been retained to appeal a decision of the U.S. Parole Commission denying his client's parole request. The client advanced to Willis the stated fee. Thereafter, the client attempted unsuccessfully to contact Willis both by telephone and by letter.

Eventually the client learned that Willis was no longer in private practice, but had become an assistant district attorney. The client then filed a bar complaint against Willis contending that he had paid him a fee to represent him in the parole appeal, and also to seek a reduction of his sentence through the federal court.

A copy of the bar complaint was sent to Willis with the request that he provide a written response thereto. Willis failed to timely respond to the complaint, even though two more letters were sent to him from the Disciplinary Commission demanding a response to the bar grievance.

Willis demanded formal charges, but subsequently withdrew his request for a due process hearing, agreeing to accept the decision of the Disciplinary Commission that he receive a public reprimand without general publication.

The Disciplinary Commission determined that Willis had violated several provisions of the Alabama Rules of Professional Conduct, specifically, Rule 1.4(a), as he failed to keep his client reasonably informed about the status of his representation, Rule 1.4(b), in that Willis failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, Rule 1.5(b), for failing to adequately communicate to the client the basis or rate of his fee for representation, and Rule 8.4(g), for engaging in conduct that adversely reflects on his fitness to practice law. [ASB No. 93-416]

• Mobile attorney **William Grover Jones, III** was administered a public reprimand without general publication March 17, 1995.

In September 1990, Jones agreed to represent a client in pursuing collection of certain open accounts. Even though the client provided Jones with the necessary information to pursue these claims, Jones failed to do so, and failed to adequately communicate with the client about the matter.

The client filed a grievance against Jones. In responding to that grievance, Jones admitted that he had failed to adequately communicate with his client, contending that his failure to do so was due to personal problems he was experiencing at the time.

The Disciplinary Commission determined that Jones' conduct violated four separate provisions of the Alabama Rules of Professional Conduct, specifically, Rule 1.3, in that he willfully neglected a legal matter entrusted to him, Rule 1.4(a), in that he failed to keep his client reasonably informed about the status of the matter, Rule 1.4(b), in that he failed to explain a matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation, and Rule 8.4(g), in that he engaged in conduct that adversely reflects on his fitness to practice law. [ASB No. 94-225] ■

RECENT DECISIONS

By DEBORAH ALLEY SMITH and WILBUR G. SILBERMAN

SUPREME COURT OF ALABAMA

OSHA inspection report admissible as exception to hearsay rule

Smith v. International Paper Co., MS 1921699 (February 17, 1995).The plaintiff appealed from summary judgment for the defendant premises owner in a wrongful death action. The plaintiff's decedent, an employee of an independent contractor, died when a brick wall collapsed on him. The plaintiff alleged that the premises owner breached its duty to provide a safe place to work when it did not provide bracing for the contractor to install against the brick wall.

The issues raised on appeal were whether the circuit court erred in holding there was no issue of fact as to a breach of duty, and in granting a motion *in limine* precluding introduction of a report made by an inspector for the Occupational Health & Safety Administration (OSHA). The OSHA inspector's report included a statement that an employee of the premises owner had told an employee of the contractor that the wall did not need to be braced. The trial court granted the premises owner's motion *in limine* to preclude the accident report on the ground that the report contained hearsay. On appeal, the Court noted that a common law exception existed to the hearsay rule for written records and reports of public officials under a duty to make them. The Court also noted that although both the employee of the contractor and the employee of the premises owner denied that the statement had been made, there was no evidence of any motivation on the part of the OSHA inspector to falsify his report. Thus, there was no indication that the report was not trustworthy.

The Court therefore held that the circuit court erred in holding that the OSHA report was inadmissible. The report provided substantial evidence that the premises owner advised the contractor as to whether it should brace the wall and thereby undertook to provide the decedent with a safe place to work.

Bad faith claim properly submitted to jury

Auto-Owners Insurance Co. v. Ogden, MS 1930368 (February 10, 1995). Auto-Owners appealed from a judgment entered on a jury verdict awarding damages for bad faith refusal to pay an insurance claim for personal property destroyed in a fire. The rented home of the plaintiffs, Mr. and Mrs. Ogden, caught fire and one of their three sons was killed and another seriously injured. They had a $25,000 policy of insurance covering their personal property with Auto-Owners. When their claim under the policy remained unpaid five months after the fire, the plaintiffs sued Auto-Owners alleging breach of contract and bad faith refusal to pay or to timely investigate the claim. Auto-Owners defended the action on the policy raising the defense of arson.

Auto-Owners presented the testimony of the regional and deputy state fire marshals who testified, based upon "spalling" of concrete in the room where the fire started, that the origin of the fire was incendiary. However, the evidence indicated that samples taken by the state investigators were negative for accelerants and that a dog trained in sniffing out accelerants was brought to the house and did not detect any accelerants. The defendant's expert testified that the fire was incendiary in origin but was unable to identify the actual ignition source, or offer any direct or indirect evidence that either of the plaintiffs set the fire. The evidence offered by Auto-Owners showed only that the Ogdens were present in the house when the fire started and that they had the opportunity to set the fire.

In an effort to show a motive for setting the fire, Auto-Owners offered evidence that the Ogdens had had financial difficulty and had filed for bankruptcy four years earlier and that Mr. Ogden had recently applied for additional term life insurance for himself and $25,000 on each of his children. The Ogdens, however, testified that they had never been in better financial condition. In addition, it was undisputed that the Ogdens were not informed until after the fire that the life insurance policies had been approved. Further, the undisputed evidence indicated that the value of the personal property destroyed in the fire exceeded $50,000.

Auto-Owners moved for directed verdict on the bad faith claim and the Ogdens moved for directed verdict on the contract claim. The trial court

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Al Polizzotto, III has practiced law in partnership with his father for four years and is a New York MVP subscriber.

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denied both motions. The jury returned a verdict for the Ogdens both as to the breach of contract and bad faith claims, assessing $80,000 in compensatory damages for breach of contract and $500,000 in punitive damages for bad faith.

Auto-Owners argued on appeal that because the trial judge denied plaintiffs' motion for directed verdict on their contract claim, the plaintiffs did not make out a *prima facie* case of bad faith and that the trial court erred in submitting that claim to the jury. The supreme court noted that even if the insured is not entitled to a directed verdict on a contract claim, the bad faith claim should be submitted to the jury if the plaintiff presents evidence that the insurer intentionally or recklessly failed to properly investigate the claim or to subject the results of the investigation to a cognitive evaluation and review. The Court held that the evidence raised factual issues with respect to whether Auto-Owners deliberately refused to pay or deliberately failed to investigate within a reasonable time, and whether Auto-Owners genuinely relied upon a belief that the Ogdens set the fire based upon reasonable evidence of arson by the Ogdens. The Court stated:

> The trial court correctly recognized that under the facts of this case the jury could conclude that arson was raised as a defense not because the facts supported that defense, but merely as an excuse for failing to promptly investigate the claim. Auto-Owners elected to stand on a defense that the jury was authorized to reject under the facts here. It could have protected itself from tort liability in the event the jury rejected its defense on the contract by depositing the amount of the claim under the policy with the court until its liability under the policy was determined. Much as liability carriers frequently defend actions under a reservation of rights until liability is determined where coverage issues are presented.

Thus, the Court affirmed the entry of judgment in favor of the plaintiffs.

False statements in insurance application do not necessarily bar recovery for breach of contract and bad faith

Miller v. Dobbs Mobile Bay, Inc., MS 1921552 (February 24, 1995). Ford Life Insurance Co. denied payment on a credit life policy issued to plaintiff's deceased husband contending that a health certificate executed by plaintiff's decedent was false and that he had been in bad health when he purchased the insurance. Plaintiff sued Ford Life and an automobile dealership claiming fraud, breach of contract and bad faith refusal to pay.

Mr. Miller purchased an automobile from the automobile dealership and during the negotiations concerning the sale the representatives of the dealership and Ford Life insisted that Miller needed credit life insurance despite his reluctance to buy it and despite his advice that he had health problems. The Ford Life representative stated that if Miller did not buy the credit life coverage he could not buy the car and indicated that the insurance would be effective notwithstanding the state of his health. Consequently, Miller signed the necessary paperwork for the credit life insurance coverage, including a health certificate stating that he was in good health. Miller was diagnosed with lung cancer shortly after purchasing the car and died approximately eight months later.

Central Bank had financed the car and was the primary beneficiary of the credit life policy. Upon Miller's death, Central Bank filed a claim with Ford Life which Ford Life denied contending that Miller had not been in good health when he bought the policy. The bank then repossessed the vehicle, sold it and sued Miller's estate for the deficiency balance. Mrs. Miller then sued the automobile dealership and Ford Life claiming fraud, breach of contract and bad faith refusal to pay. The trial court granted summary judgment, and Mrs. Miller appealed.

The Court affirmed the entry of summary judgment as to the fraud claims on the basis that they did not survive Mr. Miller's death. The Court also affirmed the entry of summary judgment on the breach of contract claim against the automobile dealership because the dealership was acting only as an agent for Ford Life and could not be held liable for its principal's breach of contract.

With respect to the claims against Ford Life, the trial court had held that the credit life insurance contract was unenforceable because Mr. Miller made fraudulent statements concerning his health. The Supreme Court noted that although Miller had signed a certificate stating that he was in good health, knowing that he was not in good health, the facts alleged in the complaint took the case out of the ordinary situation. The Court stated that the evidence viewed in the light most favorable to the plaintiff indicated that Miller never contended that he was in good health, that he told the defendants' representatives that he did not want credit life coverage because he was sick, and that he purchased the insurance only after the Ford Life representative insisted that his poor health would not be a problem. The Court noted that an insurance company could not defend its refusal to pay benefits on the ground that the insured

made a misrepresentation in the application if the misrepresentation was the fault of the agent without the participation by the insured.

The Supreme Court disagreed with the trial court's conclusion that the Ford Life representative as a soliciting agent could not legally bind Ford Life, noting that the evidence viewed in the light most favorable to the plaintiff indicated that the Ford Life representative knew that Miller had health problems but issued the policy anyway. Therefore, the Court reversed the entry of summary judgment in favor of Ford Life on the breach of contract claim and the bad faith claims.

Court establishes rules for challenges to jury service of employee of party

CSX Transportation, Inc. v. Dansby, MS 1921512 (February 24, 1995). Dansby, a retired employee of CSX Transportation, sued CSX for damages under the FELA alleging that he had sustained a hearing loss from exposure to air horns and locomotive noise during his employment as a locomotive engineer with CSX. The jury returned a verdict in favor of Dansby for $105,000 in compensatory damages and CSX appealed.

On appeal, CSX argued that the trial court erred in refusing to remove for cause a prospective juror who was employed by CSX. CSX eventually exercised one of its peremptory strikes to remove the juror. The Court noted that at common law an employee of a party was subject to challenge for cause. However, the Court held that the better view was that if the employer makes the challenge it must make a showing of prejudice or bias on the part of its employee when it challenges for cause the employee's qualifications for serving as a juror. Without such proof, the trial court could not strike the employee for cause. On the other hand, the party opposing the employer of the prospective juror should be allowed to challenge for cause the prospective juror under the common law rule without a showing of bias or prejudice.

The Court explained the two-pronged approach as a recognition of the unique relationship between an employer and its employee. The Court held that the relationship implies a partiality on the part of the employee in favor of his employer and that the court must presume that the employer and the employee have a friendly working relationship. If that relationship does not exist the employer must show the court what the true relationship is, in order to challenge the employee for cause. In contrast, the party opposing the employer should not be required to show prejudice in order to challenge the employee because prejudice in favor of the employer must be presumed to exist, and the trial court is therefore left without discretion in ruling on the challenge for cause. The Court therefore rejected CSX's claim that the trial court erred in failing to remove the juror for cause because none of the employee's voir dire responses demonstrated that he would be biased in favor of or against CSX.

BANKRUPTCY AMENDMENTS

Professional fees after 1994 amendments

Bankruptcy Code Section 330, which amended effective October 22, 1994, applies only to cases filed on or after that date.

In the original 1978 legislation, the bankruptcy lawyer was entitled to be compensated at rates the same as that charged for comparable non-bankruptcy services. Prior to the 1978 Code, bankruptcy attorneys were paid on a theory of "economy of administration". Rates at that time were lower than those of comparable non-bankruptcy legal services. Accordingly, bankruptcy practice generally was not sought out, and as a matter of fact, was looked upon with some disdain by the "ivory-towered" law firms who simply did not encourage bankruptcy expertise among its members.

Section 330 of the 1978 Code was enacted to place bankruptcy practice on a par, but with the 1994 amendments, we may be retrogressing. The amended section which, after allowing reasonable compensation for actual necessary services and reimbursement for actual necessary expenses, states that in determining reasonable compensation in addition to time spent and rates charged, contains added factors to include (1) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of the case; (2) whether the services were performed within a reasonable amount of time commensurate with complexity, importance and nature of the problem, issue or task addressed; and (3) finally, whether the compensation is reasonable based on customary compensation charged by comparably skilled practitioners in cases other than in bankruptcy.

The amended act then sets out a negative that the court shall not allow compensation for unnecessary duplication, or for services not reasonably likely to benefit the debtor's estate or necessary to the administration of the case. It does provide for being paid for preparation of a fee application, but limits such to an amount based on the level and skill reasonably required to prepare the application. The question has been considered as to how this is different from what was formerly practiced by the courts. My reaction is that formerly the cases varied considerably according to the particular judge and that this practice probably will continue. However, now the court has an admonition that if the services are not reasonably likely to benefit the debtor's estate, or if they were not necessary to the administration of the estate, no compensation

Deborah Alley Smith

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Wilbur G. Silberman

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

should be allowed. Formerly, it was discretionary with the court as to whether to allow a fee for defending a debtor in an objection to discharge or excepting a debt from discharge. Certainly, there is no benefit to the estate in such a defense and even if it might be considered necessary for the administration of the case, the prohibition is written in the disjunctive and not in the conjunctive. Thus, it would seem that if the services did not meet either test, no compensation would be allowable.

Another question which could arise is that of an attorney for the trustee losing a voidable transfer case. Should this occur, there is then the decision of whether the services were necessary to the administration, or were beneficial at the time rendered toward the completion of the case. I suppose this would depend upon the opinion of the court as to the merits of the case when filed. One can visualize the lawyer being in a dilemma as to whether to file a marginal action. The lawyer might be guilty of malpractice if the action is not filed, and conversely receive no compensation if the case is not decided favorably. Perhaps this has always been the law, but the revision of Section 330 certainly causes a focus on these points.

RECENT BANKRUPTCY DECISIONS

Eleventh Circuit interprets rights of debtor as to funds originating under anti-assignment act

First Bank of Linden v. Sloma, 43 F.3d 637 (11th Cir. Jan. 30, 1995). Sloma accepted an award of $180,000 by receipt of an annuity structured for payments over a 20-year period, payable by an insurance company. The payment was due by reason of a negotiated settlement under the Longshore and Harbor Workers Compensation Act which contained an anti-assignment provision, probably similar to most federal acts. Even in the face of the anti-assignment provision, First Bank of Linden accepted an assignment from Sloma of the annuity payments. Later, Sloma, after a failure of the business for which the money was borrowed, filed a Chapter 7 petition in which he claimed exemption of the payments due from the insurance company. He also had notified the insurance company to discontinue payments to the bank and to send them to him. First Bank did not contest the exemption claim. In an adversary proceeding filed by Sloma, Bankruptcy Judge Briskman held the assignment *void ab initio* with the annuity payments being exempt. The district court affirmed, but the Eleventh Circuit, in a two-to-one decision in reversing, ruled that the assignment was valid because once the award was made and the payments were fashioned by purchase of the annuity, there was no real difference than if the $180,000 had been paid directly to Sloma who would have had the absolute right to do as he pleased with the money. As to the exemption claim, the Eleventh Circuit stated that it was not necessary to rule on this because if the assignment to the bank were valid, Sloma had no claim whatsoever to the funds which would obviate the necessity for a claim of exemptions.

Comment: Circuit Judge Hatchett, in an extremely strong dissent, referred to the Tenth Circuit case of *In re Delgado*, 967 F.2d 1466 (10th Cir. 1992) as a precedent for his position. In my opinion, as it may take the U.S. Supreme Court to decide the issues, lenders should be careful in accepting assignments in the face of an anti-alienation statute.

May local government collect post-petition penalties, costs and attorneys' fees for failure to pay taxes—if not, is there violation of Tenth Amendment?

In re Brentwood Outpatient, Ltd., 43 F.3d 256 (6th Cir. 1994). The primary questions in this case were: Assuming the tax lien is over-secured, pursuant to the allowance under §506(b), in a Chapter 11 case may a local government collect costs, attorneys' fees and penalties accruing post-petition, and if so, whether any allowable penalties, costs and fees are due to the time of payment, or if only to the date of filing the Chapter 11 petition? Additionally, is there a Tenth Amendment issue of whether interference with collection of statutory additions to taxes violates the states' reserve powers to tax local property? In August 1989, Brentwood, owner of a $4 million facility, filed a Chapter 11 petition. Ad valorem taxes on the facility became due on October 1, 1980. Under Tennessee law, the taxes became delinquent March 1, 1990 after which there was assessed interest of 1 percent per month and a penalty of 0.5 percent per month, plus costs and attorneys' fees.

By reason of the law, all of these charges were secured by a first priority lien on the property which had a market value in excess of the tax and additional charges. There was a bondholders committee in the case which filed the plan of reorganization. The committee objected to payment of statutory penalties, attorneys' fees and costs. There was no issue as to the payment of post-petition interest. Bankruptcy Judge Lundin allowed the delinquent penalties up to the effective date of the reorganization plan, but disallowed costs and attorneys' fees. The district court affirmed and the Sixth Circuit, on appeal, reversed. It first discussed the background of the rejection of allowances in bankruptcy of interest and penalties. *See Sexton v. Dreyfus*, 31 S.Ct. 256 (1911, Justice Holmes). The exception as to post-petition interest on over-secured claims was allowed by the Supreme Court in *Ron Pair Enterprises*, 109 S.Ct. 1026(1989), but the same opinion stated that in the absence of an agreement, post-petition interest is the only added recovery available to non-consensual lienors. The Sixth Circuit then held that regardless of its own feelings, no penalties were allowable post-petition and, thus, it did not make any difference whether it was to date of accrual or date of payment.

The opinion then discussed whether its ruling impinged on the taxing authority of Tennessee by reason of the reorganization process causing a transfer of real estate free and clear of the county's lien. The court, after giving respect to Tennessee's contention that this violated the Tenth Amendment, rejected such argument stating that although there might be a technical violation, this was subordinate to the supremacy clause of the Constitution. There is nothing in the bankruptcy law which is destructive of state sovereignty or violates any constitutional provisions. ■

• M·E·M·O·R·I·A·L·S •

Macon Weaver

WHEREAS, God, in his infinite wisdom, has taken Macon Weaver from our midst, and,

WHEREAS, Macon was a lifelong resident of Huntsville, Madison County, Alabama, and,

WHEREAS he worked tirelessly in his youth to support his family, and at an early age entered the United States Army from which he was discharged in 1945 as a 1st Lieutenant earning the Purple Heart as well as other medals and citations, and,

WHEREAS, thereafter, he entered the University of Alabama and was graduated from the University of Alabama School of Law and was admitted to practice in the State of Alabama, and,

WHEREAS, his practice was replete with outstanding accomplishments including being District Attorney of Madison County, Alabama, United States District Attorney for the Northern District of Alabama, and United States Magistrate, and in all of his professional undertakings, he stood for the rule of law as the cementing factor in our society and in our government, and,

WHEREAS, during all of this time, Macon Weaver was a loving and devoted husband and father, a friend and companion to many within the bar and many in Huntsville and Alabama, loved and respected for his wit and wisdom, his kindness and reason, and,

WHEREAS, the Huntsville-Madison County Bar Association wishes to acknowledge to ourselves and to our fellows as well as to the family and friends of Macon Weaver, our deep and sad loss.

NOW, THEREFORE, BE IT RESOLVED by the Huntsville-Madison County Bar Association that our bar and our community have suffered a great loss in the passing of our brother lawyer, Macon Weaver, and that we sympathetically join with his wife, Tillie Weaver, daughters, Teri Faulk, Ricky Sheldon and Lennie Hopkins, and other member of his family and loved ones in mourning his passing while honoring his name, and by this resolution, we in some small way extend to his family our sincere and heartfelt sympathy, compassion, and condolence.

Benjamin Russell Rice
President
Huntsville-Madison County Bar Association

William Hutchins Cole
Birmingham
Admitted: 1943
Died: February 12, 1995

William Edgar Davis
Birmingham
Admitted: 1935
Died: February 24, 1995

William Inge Hill
Montgomery
Admitted: 1931
Died: March 24, 1995

Hugh Anthony Nash
Oneonta
Admitted: 1950
Died: February 23, 1995

Virgil K. Sandefer
Birmingham
Admitted: 1946
Died: January 4, 1995

Inger Marie Sjostrom
Metairie, Louisiana
Admitted: 1986
Died: March 14, 1995

John H. Tappan
Point Clear
Admitted: 1941
Died: February 14, 1995

Robert S. Wilbanks, Jr.
Alexander City
Admitted: 1940
Died: February 24, 1995

Please Help Us

The Alabama Lawyer "Memorials" section is designed to provide members of the bar with information about the death of their colleagues. The Alabama State Bar and the Editorial Board have no way of knowing when one of our members is deceased unless we are notified. Please take the time to provide us with that information. If you wish to write something about the individual's life and professional accomplishments for publication in the magazine, please limit your comments to 250 words and send us a picture if possible. We reserve the right to edit all information submitted for the "Memorials" section. Please send notification information to the following address:

Margaret L. Murphy
The Alabama Lawyer
P.O. Box 4156
Montgomery, AL 36101

• M·E·M·O·R·I·A·L·S •

Huntley Johnson

WHEREAS Huntley Johnson, a respected and distinguished member of the Houston County Bar Association, died June 27, 1994, and,

WHEREAS, this Association desires to record this memorial of our colleague and to publicly recognize some of the achievements of his professional career;

NOW, THEREFORE, BE IT RESOLVED THAT Huntley Johnson was a man of many talents and who possessed a keen intellect and sharp wit. After receiving his law degree from the University of Alabama in 1966, he opened a private practice in Dothan, Alabama. Within the legal profession he was respected by his peers for his devotion to his clients. To his extensive clientele he was not only an able attorney but a friend and confidant. He exhibited faithful and dedicated service to the profession and to the courts in which he practiced. As a past president of this bar association, he served the bench and bar with grace and dignity. He was a man who was willing to give of his time, both professionally and personally, to those who sought to embrace the law.

He was uniquely interested in the arts. He listened intently to the Muse of Music and followed his heart in this regard. An accomplished player of numerous string instruments, he often used this talent not only to relax and reflect on his own life, but to entertain us as well as others with his involvement in the Dothan Dixieland Band, the SEACT Orchestra and various Bluegrass bands. He was a gifted teacher of music and his pupils will long cherish the time he spent with them.

Huntley Johnson was also an excellent magician who used his slight of hand and sense of humor to entertain those around him. He lived life to its fullest and shall be remembered not only for his contributions to the community but also for his quick wit and joy of living. He made the lives of those he touched fuller.

A deeply Christian individual, Huntley Johnson was very active in his church. As an elder and clerk of the session, choir member and Sunday School teacher at Evergreen Presbyterian Church, he cared about his religion and its principles. In times of trouble he leaned on his faith and when he saw others in need he used his faith to aid and comfort them. His examples of Christian living have served as touchstones to others.

Our colleague was a fine attorney. He was a devoted husband and father whose loss is felt keenly by all who knew him. His many contributions to our profession and our community qualify him as most deserving of our grateful recollections.

Rufus R. Smith, Jr.
President
Houston County Bar Association

Albert Gordon Rives

WHEREAS, Albert Gordon Rives, an active member of the Birmingham Bar Association, departed this life on September 26, 1994, at age 93; and,

WHEREAS, Albert Gordon Rives was a skilled athlete, having played football at the University of Alabama, where he later served as assistant athletic director; and,

WHEREAS, Albert Gordon Rives was a lifelong resident of Birmingham and was a member of Southside Baptist Church, having served as board chairman, trustee and deacon; and,

WHEREAS, Albert Gordon Rives graduated from the University of Alabama and the University of Alabama School of Law. During World War II he served as lieutenant commander in the United States Navy. He was a 32nd degree Mason, member of the Sons of the American Revolution, and the Alabama Historical Society; and,

WHEREAS, Albert Gordon Rives was a founder of the firm of Smith, Windham, Jackson & Rives, which is now Rives & Peterson. During his early years at the bar, he was engaged primarily as a defense lawyer, but most of his legal career was devoted to the representation of injured railroad employees. Through meticulous preparation, dogged determination, unswerving loyalty, and skillful advocacy, he achieved outstanding results for his clients; and,

WHEREAS, the Executive Committee of the Birmingham Bar Association desires to express our deep regard for Albert Gordon Rives and our profound sense of loss in his passing.

IT IS, THEREFORE, HEREBY RESOLVED, by the Executive Committee of the Birmingham Bar Association, that this Resolution be spread upon the minutes of this Committee, and that copies be sent to his surviving nephew, Robert A. Rives, and to the law firm of Rives & Peterson.

J. Fredric Ingram
President
Birmingham Bar Association

• M·E·M·O·R·I·A·L·S •

Eleanor Oakley Gordy

WHEREAS Eleanor Oakley Gordy, a respected and distinguished member of the Houston County Bar Association, died March 31, 1994, and;

WHEREAS, this Association desires to record this memorial of our colleague and to publicly recognize some of the achievements of her professional career;

NOW, therefore, be it resolved that:

Eleanor Oakley Gordy was a lady of many facets. As a lawyer she was greatly respected by her peers, her clients, and the courts in which she practiced. After receiving her law degree from the University of Alabama in 1931, she and her husband opened a private practice in Dothan, Alabama. She discontinued her practice as she devoted her energy to being a wonderful and caring mother. In 1965 she returned to the active practice of law and in 1966 she became a United States Magistrate for the United States District Court, Middle District of Alabama, a position which she held with distinction until 1978.

As a bank director she cared greatly for the needs of the people of Columbia, Alabama and the surrounding areas. She brought to this position a unique perspective which enriched those with whom she did business.

As a farmer and timber grower she recognized the struggles of those who worked by her side and as a result developed a sense of understanding of an individual's plight which made her decisions while on the bench and before the bar not only grounded in legal principles but also grounded in dignity and moral correctness.

Mrs. Gordy's achievements within her community were numerous and were the result of a tireless effort to serve those who surrounded her. She gave generously of her time in counseling troubled youths. She was a strong supporter of the American Red Cross where she served as executive secretary of the Houston County Chapter, assisted in establishing Water Safety classes at all city and county pools, served as a first aid instructor, and trained key personnel with local industry. She also worked with the Army Community Services and other area service health and welfare agencies to coordinate services for the needy.

Our colleague was a tireless champion of the oppressed and needy. She was a worthy adversary and excellent jurist. She demonstrated a character and integrity that was an example to the entire legal community. Her many contributions to our profession and our community qualify her as most deserving of our grateful recollections.

Rufus R. Smith, Jr.
President
Houston County Bar Association

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Debra Amos Isbell (Isbell & Associates, Mobile)
Jenny M. Dunn (Dunn, King & Kilpatrick, Montgomery)
Roy Isbell (U.S. District Court and Isbell & Associates, Mobile)
Mickey L. Turner (Foshee & Turner, Birmingham)

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