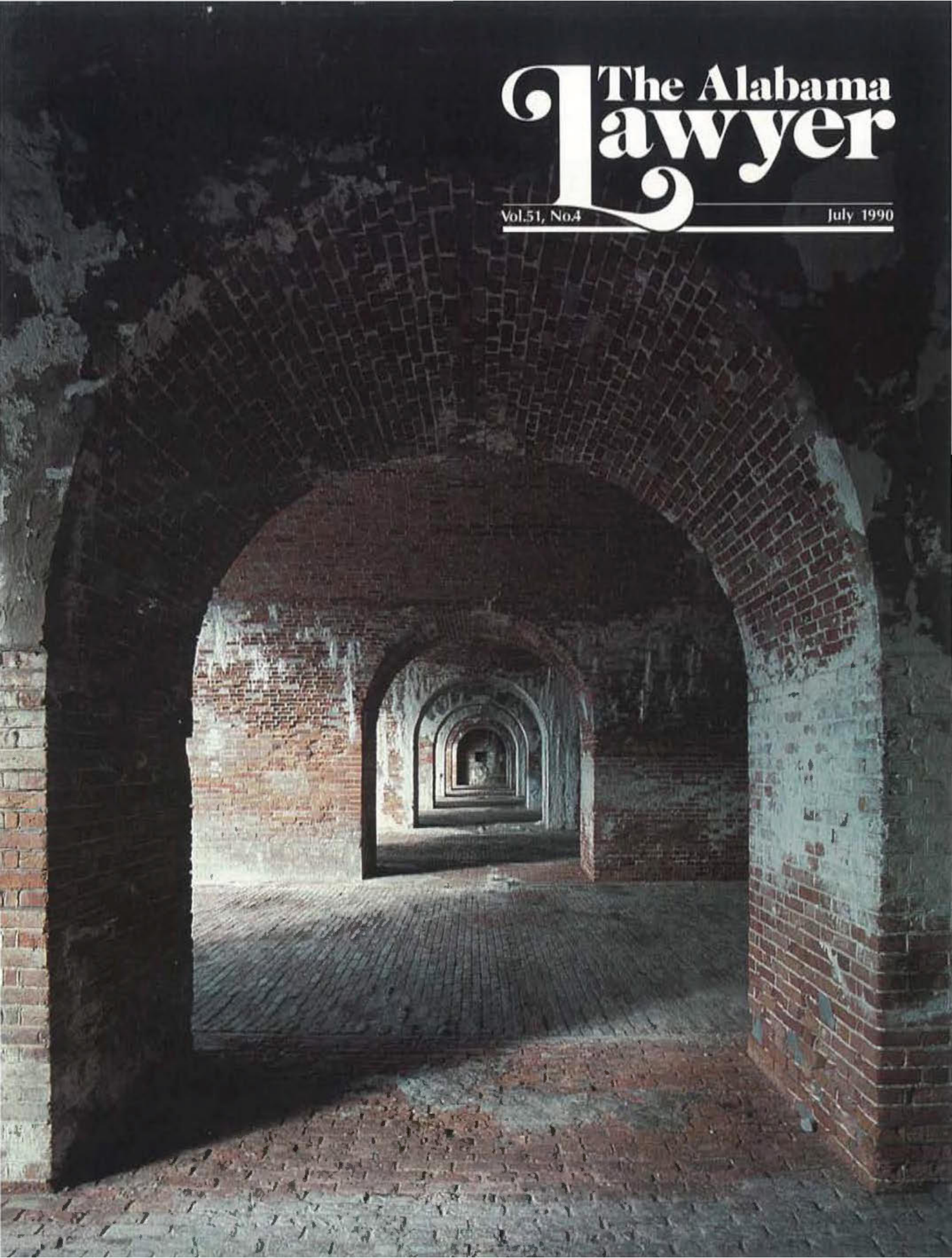

The Alabama Lawyer

Vol.51, No.4 July 1990

While some malpractice insurance policies can be an incomplete puzzle...

One company puts together all the pieces.

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The Alabama Lawyer

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In Brief

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Robert A. Huffaker—Editor
Susan Shirock DePaola—Associate Editor
Margaret Murphy—Managing Editor

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ON THE COVER — Featured is Fort Morgan, the last Confederate fort to fall. Admiral Farragut issued his famous command, "Damn the torpedos . . . full speed ahead," during the Battle of Mobile Bay. Mobile is the site of this year's annual meeting. Photograph by Ed Malles, Photo Options Stock Agency, Birmingham

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President's Page

CAINE

This is my last column, the final chapter in what has been for me one of the great experiences of my life . . . that of working with lawyers. Not persons with law degrees, but real lawyers whose blood is the practice of law and whose life is an external testament to justice.

On this page over the past year I have attempted not to lecture but to share some candid thoughts on issues I feel worthy of discussion. My work this year has afforded me a greater opportunity to listen and observe the practice of law from a perspective I have never before experienced.

One observation is that America is losing its professionals. The great sister professions of law and medicine are experiencing a dropout rate as never before witnessed in this country. We are told that enrollment in our medical schools across the country is on the decline and that a number of the lesser known schools are closing or having to lower standards in order to maintain a student population sufficient to meet operating costs. The basis of discontent seems to lie in the dissatisfaction with the quality of life of doctors and with the failed expectations of young men and women choosing medicine as a career. I raise this concern because I fear a similar fate for the legal profession.

Though law school applications currently are at an all-time high, larger numbers of practicing lawyers across the country are dropping out of practice and the reasons seem to be the same. Billable hours, fax machines and high office overhead all compound the pressures and demands of modern-day law practice. As one lawyer put it, "There are no buffers anymore." A client calls one day and expects a complicated package of closing documents faxed by tomorrow morning. As clients become less and less loyal to certain lawyers and law firms, lawyers have to produce to remain in business.

There is precious little time anymore for intellectual creativity, for reflection and more important, for family and community life. So much of the work lawyers do today is routine and mechanical, often without having ever met the client face-to-face, thus shutting out any chance of establishing a long-term personal relationship which in turn ensures client loyalty. Today, lawyers receive files of work with deadlines attached with the only thank-you a mild critique of the bill. In some large law firms, time sheets are recorded in 15-minute increments. Courthouses are now computerized in order to meet time standards which require that cases are processed within a designated number of months. Active trial lawyers literally walk out of one courtroom and into another with no time to catch their breath. As one defense lawyer told me recently after completing an exhausting week's trial he called the claims supervisor to tell him that the jury had acquitted their client only to be told that, "He expected that result—they didn't have a case anyway."

My greatest fear is that the pressure will result in lawyers turning on one another, on the courts and, finally, on themselves. We now realize that the public image of the legal profession comes mainly from how lawyers treat one another and the court.

Part of the cure, I believe, comes from acknowledging that the problem exists and that solutions are out there and relief is in sight. I believe that the time has come for our bar to face the problem head on and to do something about it.

Many state bars are sponsoring retreats where lawyers can get away to think, reflect and openly discuss the issue of lawyer dissatisfaction. I believe the time has come for our bar to undertake such a program. Preaching professionalism will not remedy the problem if the thorns are not removed.

Another observation is that lawyers tend to take the state bar for granted. We sometimes forget what Justice Holmes

(continued on page 198)

Executive Director's Report

Law Firms, Retirement and Thanks

HAMNER

Law firms

The American Bar Association Board of Governors held its April meeting in Alabama. As is customary, bar leaders from the surrounding area where the meetings are held were invited. The state bar leaderships of Alabama, Florida, Georgia, Louisiana, Mississippi and Tennessee were included on the guest list, as was the Supreme Court of Alabama. The Saturday morning program was a dual presentation by former Dean Robert McKay of New York University and Tom Clay of the Altman & Weil consulting firm. These two speakers addressed the changes in the way law is being practiced and made suggestions to deal with the future they see in the practice of law. Their comments could be categorized broadly as a new emerging professionalism.

The remarks of Clay, in talking about law firms, were particularly impressive to me. He mentioned six characteristics of the successful law firm. I had never really thought about what a firm does to achieve the "successful" label. Clay emphasized that in the 1990s these characteristics would be essential for firm survival.

Dean McKay discussed the recent events where the mega-firms are dissolving into smaller 40- and 50- person firms and noted the difficulties that some of these new firms were facing in their fight for survival.

Clay noted that those firms that will survive in the 1990s are going to need a culture of their own. They will need to define goals and objectives and engage in strategic management. He sees these same firms as being an external force in their communities and being client-driven. The final characteristic that these survivors will have is quality from top to bottom. This includes talent, service, work product, external support and client relations.

Some of these six characteristics seem so basic to any successful undertaking that I had not really viewed their applicability to law firms per se. These six, however, when overlaid with firm practices in today's legal market, were certainly attention-getters with the bar leaders who heard the presentation.

Retirement option

The Alabama State Bar is represented in the American Bar Association's House of Delegates and because of that fact, our member firms and their employees are eligible to participate in the American Bar Association's Members Retirement Program.

The ABRA Program provides full-service pension and profit sharing plans (including a 401(k) feature) that include a variety of funding options. The program investment funds are as follows:

Guaranteed Rate Accounts
Money Market Guarantee Account
Growth Equity Fund
Aggressive Equity Fund
Balanced Fund
Real Estate Fund

Today, the program has over $1.4 billion in assets representing over 5,000 law firms and 27,000 participants nationwide. The Alabama State Bar has 9,000 members, and 257 are presently participating in the ABA Member Retirement Program.

The program is underwritten and administered by The Equitable Life Assurance Society. For further information on the program, you may write to the American Bar Retirement Association, 750 North Lake Shore Drive, Chicago, Illinois 60611. The telephone number is (312) 988-5740.

In addition to the address noted above, if you would like to discuss enrollment in the program, a retirement program specialist would be available through a toll-free line. You may call 1-800-523-1125, extension 1230.

This information may be of some assistance to those of you who wish to establish some type of personal retirement plan for you and your firm's employees.

Thanks on behalf of Coffee County lawyers

The generosity of Alabama law firms in helping the Coffee County attorneys whose practices were flooded has been deeply appreciated. Your donation of books and law office equipment as well as assistance in file reconstruction have been most helpful and meaningful. Your acts of kindness have helped ease the devastating losses which the members of the Coffee County Bar have suffered.

President's Page

(continued from page 196)

taught us—that a fearless and independent bar is the pride and joy of every civilized country. Throughout the year I have heard lawyers across the state ask, "What can the state bar do for me?" The question is a proper one and must be answered. My response is that the state bar is every lawyer's common ground, an organized effort to be of service to lawyers and to the public whose rights we hold in trust.

The legal profession is one of the last, if not *the* last, of the great professions to remain self-regulating. I hesitate to think of our profession ever losing this independence. Lawyers are, and by their very nature, independent, and the state bar is simply an extension of this spirit. Though we may differ in our thinking as to what is the best approach to take in a particular situation, we nevertheless started out together—taking the same oath—and we must finish the same way.

We have in the past and I hope will in the future continue to take stands on questions touching on the administration of justice. Your bar commissioners have never been timid or afraid to speak out when circumstances required their voice be heard. I believe every lawyer has a right to be proud of our state bar and should continue to support its efforts through the giving of their time and energy. The great questions of appellate court restructuring, non-partisan election of judges and election of judges from single member districts have not yet been resolved. The underlying causes have not gone away and someday must be settled. I have faith that lawyers have the talent and ability to find the right answer. Your state bar will always be there to provide the common ground for this to be accomplished.

Our challenge as members of this great bar is to say, "Here am I, send me." ■

Executive Director's Report

Continued from page 197

If others of you have items which may be of assistance to members of the Coffee County Bar, you may bring this fact to my attention and I will communicate it to the appropriate persons in Coffee County.

Congratulations

Two staff members of the state bar are due congratulations for recent important events in their lives. Margaret Lacey, managing editor of *The Alabama Lawyer*, became Mrs. Kevin Murphy on May 19. Ruth Strickland at the Center for Professional Responsibility has earned her master's degree in criminal justice at Auburn University at Montgomery. Her degree was conferred June 2. Congratulations to these two fine employees on special happenings in their lives. ■

IOLTA Grants Awarded

The Alabama Law Foundation has awarded a total of $525,592 to 40 applicants in its second round of grants. The amount awarded is more than twice that given last year and will be used to help provide legal aid to the poor, improve the administration of justice, provide law-related education to the public and support law libraries.

Funds for grants were provided through the Interest on Lawyers' Trust Accounts (IOLTA) program, which allows attorneys to convert their pooled client trust accounts to NOW accounts. Financial institutions then forward the interest earned to the Alabama Law Foundation. Currently 63 percent of those attorneys eligible to participate in IOLTA are doing so. This is one of the highest participation rates in the country.

A total of $83,350 was distributed to 23 law libraries.

Regarding the improvement of the administration of justice, $170,742 was awarded to six applicants. The Child Advocacy Center in Mobile, the Madison County Court Appointed Juvenile Advocate Program and the Tuscaloosa Children's Center are projects working with abused children. The YWCA Family Violence Center in Birmingham received funding to hire an advocate to help make victims of spouse abuse aware of their rights and to explain to them how to proceed in the criminal justice system. The Mitigation Program of the Alabama Prison Project and the Alabama Capital Representation Resource Center also received grants in this category.

The sum of $184,500 was awarded to help provide legal aid to the poor. The Mobile Bar Association received funds for its pro bono program. Legal Services received funding to hire attorneys for domestic violence cases, and the Tuscaloosa Bar Association received a grant for its mitigation project.

In the category of law-related education, $87,000 was awarded. The Birmingham Bar Association received funding for a phone-in law line. The Association for Retarded Citizens received funding to hold workshops for parents and guardians of mentally retarded adults. Other grantees were the YMCA/Young Lawyers' Section Youth Judicial Program, the Big Brothers/Big Sisters of Tuscaloosa, the Alabama Center for Civic and Legal Education and the Alabama Disabilties Advocacy Program.

These grants present an example of how IOLTA funds are being put to use. If you are not already participating in IOLTA and would like to, contact Tracy Daniel at (800)392-5660. ■

Bar Briefs

University of Alabama Law Students win national trial competition finals in Denver

Michael Mulvaney, Sid McAnnally, Denise Avery and Andy Wear, students from the University of Alabama, won the National Finals of the Association of Trial Lawyers of America's 1990 National Student Trial Advocacy Competition, held April 5-8, 1990, in Denver. The students, assisted by advisor and coach Bob Prince, a Tuscaloosa attorney, were undefeated in all five rounds of competition.

Eight teams from around the country qualified for the finals by winning a regional competition against six to nine other law schools, 67 in all. The teams earning bids at the title were the University of Akron School of Law, Akron, Ohio; the University of Alabama School of Law, Tuscaloosa, Alabama; Creighton University, Omaha, Nebraska; Franklin Pierce Law Center, Manchester, New Hampshire; Gonzaga Law School, Spokane, Washington; South Texas College of Law, Houston, Texas; Stetson University College of Law, St. Petersburg, Florida; and the University of Virginia College of Law, Charlottesville, Virginia.

Denver district court judges, county court judges and Colorado Court of Appeals judges participated as presiding judges of the competition. Practicing attorneys did the scoring based upon the students' advocacy skills.

The second place winner was the University of Akron. Semi-finalists were the University of Virginia and Stetson University.

All teams had to submit a trial brief as well. The winners of the brief writing competition were American University Washington College of Law, Washington, D.C., first place; Creighton University, second place; and Western New England College School of Law, Springfield, Massachusetts, third place.

The competition used the fact pattern from an actual civil case involving a man who was severely burned when the protective clothing covering his street clothes ignited.

Sweeney elected chairperson of national school attorney group

Donald B. Sweeney, Jr., a partner in the Birmingham firm of Rives & Peterson, has been elected 1990-91 chairperson of the Council of School Attorneys, a major component of the National School Boards Association, headquartered in Alexandria, Virginia. He served the past year as first vice-chairperson.

Sweeney represents 23 school systems in Alabama; he will serve also as an ex-officio member of NSBA's 24-member board of directors.

He received his law degree from the University of Alabama. A member of the Birmingham, Alabama State and American bar associations, Sweeney also served as president and founder of the Alabama Council of School Board Attorneys. He is state president of the National Organization on Legal Problems in Education. ■

Letter to the Editor

Canons of Judicial Ethics

The Canons of Judicial Ethics adopted by the Supreme Court of Alabama, October 10, 1975, found in 294 Ala. Reports, omit the provision found in such canons promulgated in over 30 other jurisdictions, prohibiting candidates in popular elections for judgeships from soliciting or accepting campaign funds from members of the bar. Hence, I received solicitations for campaign funds from judicial candidates in the June primaries, for all of the courts with jurisdiction in Mobile. I now shudder to think of appearing before the elected judges in cases where opposing counsel contributed more funds to the election of the judge than I did.

Since our Canons of Judicial Ethics, adopted in other jurisdictions, prohibit such solicitations from members of the bar, why can't our supreme court adopt this prohibition in Alabama? What is there about our popular elections of judges which makes us different from all of the others who are subject to the same Code of Ethics?

J. Edward Thornton,
Thornton & McGowin
Mobile, Alabama

About Members, Among Firms

ABOUT MEMBERS

Earl V. Johnson and **W. Bartlett Taylor** announce that the firm of **Sikes, Johnson & Taylor,** Andalusia, Alabama, has been dissolved.

Also, they are no longer professionally associated and each are engaged in their own private practice of law in Andalusia. Earl V. Johnson's office is located at 29 South Court Square, Suite A, and W. Bartlett Taylor's office is located at 29 South Court Square, Suite B, Andalusia, Alabama.

■

Thomas M. Haas announces the relocation of his practice to 258 State Street, Mobile, Alabama 36603. Phone (205) 432-0457.

■

William S. LaBahn, formerly of 56 Thomas Street, New York City, announces the opening of his new offices at 401 East 10th Avenue, Suite 440, Eugene, Oregon 97401. Phone (503) 343-1473. He is a member of the Alaska, New York and Alabama State bars.

■

F. Timothy Riley, formerly associated with the firm of Carnes & Carnes, now is **assistant district attorney for Marshall County,** Alabama. His new office is located at the Marshall County Courthouse, Guntersville, Alabama. The mailing address is Marshall County District Attorney, P.O. Box 458, Guntersville, Alabama 35976.

■

Michael E. Wallace announces the opening of his office at Brown Marx Tower, Suite 700, 2000 First Avenue North, Birmingham, Alabama 35203. Phone (205) 251-6300.

■

Milton G. Garrett announces the relocation of his offices to Brown Marx Tower, Suite 700, 2000 First Avenue North, Birmingham, Alabama 35203. Phone (205) 251-6300.

■

Michael A. Newsom announces the relocation of his office to Suite 245, 200 Office Park Drive, Mountain Brook, Alabama 35223. Phone (205) 879-8559.

■

Blake A. Green announces the opening of **The Law Office of Blake A. Green** at 100 Court Street, Wetumpka, Alabama 36092. Phone (205) 567-0040.

■

L. Scott Johnson, Jr., announces his election as town clerk/court clerk for the Town of Orange Beach, Alabama, effective April 12, 1990. His mailing address is P.O. Box 1555, Orange Beach, Alabama 36561.

■

AMONG FIRMS

Martinson & Beason, P.C., of Huntsville, announces that **Douglas C. Martinson, II,** has become associated with the firm. He received his J.D. from Washington and Lee Law School and his LL.M in Taxation from Boston University. Offices are located at 115 North Side Square, P.O. Box 2675, Huntsville, Alabama 35804-2675. Phone (205) 533-1666.

■

Vaughn M. Stewart, II, and **Julian Stephens, III,** announce the opening of their law offices at 24 East Twelfth Street, Anniston, Alabama. Phone (205) 238-1986.

■

Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves announces that **Duane A. Graham** and **Robert J. Mullican** have become members of the firm, and **James A. McGhee, Clifford C. Brady** and **Richard W. Franklin** have become associated with the firm. Offices are located at 1300 AmSouth Center, P.O. Box 290, Mobile, Alabama 36601.

■

The firm of **Reneau & Reneau** announces that **John R. Thornton,** formerly chief assistant district attorney, 19th Judicial Circuit, now is associated with the firm. Offices are located at 114 South Main Street, P.O. Box 160, Wetumpka, Alabama 36092. Phone (205) 567-8488.

■

The firm of **Parkman & Brantley** announces that **L. Sharon Egbert** has become associated with the firm. Offices are located at 401 North Foster Street, Dothan, Alabama 36303. Phone (205) 793-9009.

■

Reams, Vollmer, Philips, Killion, Brooks & Schell, P.C. announces that **A. Lewis Philips, III,** an associate member of the firm, is now licensed to practice law in the states of Mississippi and Florida. Offices are located at 3662 Dauphin Street, Mobile, Alabama 36608. Phone (205) 344-4721.

■

The firm of **Huie, Fernambucq & Stewart** announces that **Prisca M. DeLeonardo** and **David Leon Smith, III,** have become associated with the firm. Offices are located at 8th Floor, First Alabama Bank Building, Birmingham, Alabama 35203. Phone (205) 251-1193.

■

Richard F. Pate, P.C. announces that **J. Barry Ahston** has become associated with the firm at 56-58 South Conception Street, Mobile, Alabama 36602. Phone (205) 433-0300.

■

Jay E. Emerson has become a partner in the firm of **Higgs & Conchin,** and the firm's new name is **Higgs, Conchin & Emerson.** Offices are located at 405 Franklin Street, Huntsville, Alabama 36801. Phone (205) 533-3251.

■

The Law Office of John W. Parker announces that **L. Bratton, III,** has joined the firm as an associate. Offices are located at 4332 Boulevard Park South, Suite D, Mobile, Alabama 36609. Phone (205) 341-1020.

■

The firm of **Najjar, Denaburg, Meyerson, Zarzaur, Max, Wright & Schwartz, P.C.** announces that **Marvin Franklin** and **Marvin L. Stewart, Jr.,** have become members of the firm. Offices are located at 2125 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 250-8400.

■

The firm of **Simmons, Brunson & McCain, P.A.,** announces that **James T. Sasser,** formerly a partner with the firm of Wood & Parnell, P.A., in Montgomery, has joined the firm as a partner and that **William B. Ogletree** has joined the firm as an associate. Offices are located at 1411 Rainbow Drive, Gadsden, Alabama 35901. Phone (205) 546-9205.

■

Lange, Simpson, Robinson & Somerville announces that **Gaile Pugh Gratton, James C. Wilson** and **Duncan B. Blair** have become partners in the firm at its Birmingham office; that **Daniel B. Smith, Richard Eldon Davis, Michael B. O'Connor, Alice W. Durkee,** and **Richard Tishler** have become associated with the firm at its Birmingham office; that **David R. Pace** and **Robert V. Rodgers** have become associated with the firm at its Huntsville office; and that **Joseph H. Johnson, Jr.,** and **David W. Spurlock** have joined the Birmingham office.

■

Gordon, Silberman, Wiggins & Childs, P.C. announces that **John C. Alexander, Milton G. Avery, Samuel Fisher, Timothy C. Gann** and **Scotty Greene** have become associates of the firm. Offices are located at 1400 SouthTrust Towers, Birmingham, Alabama 35203, phone (205) 328-0640, and 100 Washington Street, Suite 2, Huntsville, Alabama, 35801, phone (205) 551-0974.

■

Bond & Botes, P.C. announces the relocation of its offices to 4518 Valleydale Road, Suite 201, Charleston Gate Office Park, Birmingham, Alabama 35242. Phone (205) 995-8588.

■

David P. Shepherd announces that **Frank T. Hollon** has joined the firm as an associate. Offices are located at 913 Plantation Boulevard, Fairhope, Alabama 36532. Phone (205) 928-4400.

■

The firm of **Schoel, Ogle, Benton, Gentle & Centeno** announces that **David O. Upshaw** has joined the firm as an associate. The firm also announces the relocation of its offices to 600 Financial Center, 505 North Twentieth Street, Birmingham, Alabama 35203. Phone (205) 521-7000.

■

McDavid, Noblin & West announces that **Stephan Land McDavid** and **William G. Cheney, Jr.,** both members of the Alabama State Bar, have become associates with the firm. Offices are located at Suite 1000, Security Centre North, 200 South Lamar Street, Jackson, Mississippi 39201. Phone (601) 948-3305.

■

Barber Sherling, Richard E. Browning and **Jay A. York** announce the formation of a firm in the name of **Sherling, Browning & York, P.C.** Offices are located at 2864-A Dauphin Street, P.O. Box 16207, Mobile, Alabama 36616. Phone (205) 476-8900.

■

The firm of **Pope & Natter** announces the relocation of their offices to 1650 Financial Center, Birmingham, Alabama 35203. Phone (205) 252-8473.

■

The firm of **Burr & Forman** announces that **Carol H. Stewart** and **David D. Dowd, III,** have become partners in the firm, and **William R. Corbett, Harri J. Haikala, Victor L. Hayslip** and **F. Hampton McFadden, Jr.,** have joined the firm as associates. The Huntsville office has added **J. Jawan Olive** as an associate.

■

Farmer & Farmer, P.A., announces that **Wallace Davis Malone, III,** has become a partner of the firm. The firm name has been changed to **Farmer, Farmer & Malone.** Offices are located at 112 West Troy Street, P.O. Drawer 668, Dothan, Alabama 36302. Phone (205) 794-8596.

■

The firm of **Rives & Peterson** announces that **Robert L. Shields, III,** has joined the firm. Shields is a graduate of the University of Alabama and a *cum laude* graduate of the Cumberland School of Law. Offices are located at 1700 Financial Center, Birmingham, Alabama 35203-2607. Phone (205) 328-8141.

■

Watson & Harrison announces that **Thomas W. Holley** has become a partner in the practice, which will continue under the name of Watson & Harrison, 1651 McFarland Boulevard, North, Tuscaloosa, Alabama 35406-2212.

■

Vowell & Meelheim, P.C. announces that **D. Lewis Terry, Jr.,** has become associated with the firm, and the firm has relocated its offices to 1900 SouthTrust Tower, 420 North Twentieth Street, Birmingham, Alabama 35203-3200. Phone (205) 252-2500.

■

The firm of **Webb, Crumpton, McGregor, Sasser, Davis & Alley** announces that **Craig S. Dillard** has become associated with the firm at Colonial Financial Center, One Commerce Street, Suite 700, Montgomery, Alabama. The firm also announces the opening of an additional office at Interstate Park Center, 2000

Interstate Park Drive, Suite 409, Montgomery, Alabama. Phone (205) 834-3176 and (205) 277-3176.

■

Vaughan Drinkard, Jr., Mark R. Ulmer, C. Gary Hicks and **Francis E. Leon, Jr.,** announce the formation of a partnership for the practice of law, along with **Randolph B. Walton,** associate, and **J. Langford Floyd,** of counsel. The firm will be known as **Drinkard, Ulmer, Hicks & Leon,** and will continue its location at 1070 Government Street, Mobile, Alabama 36604. Phone (205) 432-3531.

■

The firm of **McPhillips, DeBardelaben & Hawthorne** announces that **Kenneth Shinbaum** has become a partner in the firm. Offices are located at 516 South Perry Street, P.O. Box 64, Montgomery, Alabama 36101. Phone 262-1911.

■

Charles N. Parnell, III, and **G. Barton Crum,** members of the firm of **Wood & Parnell, P.A.,** announce that **Charles L. Anderson** has become a member of the firm, and the firm name has been changed to **Parnell, Crum & Anderson, P.A.**

The firm also announces that **Mark N. Chambless,** formerly a shareholder in McInnish, Bright & Chambless, P.C., has become a member of the firm, and **A. Richard Pyne,** formerly counsel for Blount Development Corporation, and **William C. Elliott** have become associated with the firm.

■

Wilson & Pumroy announces that **T. Boice Turner, Jr.,** has become associated with the firm. Offices are located at 1431 Leighton Avenue, Anniston, Alabama 36201. Phone (205) 236-4222.

■

Miller, Hamilton, Snider & Odom announces that **Robert Bruce Rinehart** has become associated with the firm in their Montgomery office located at Suite 802, One Commerce Street, Montgomery, Alabama 36104. Phone (205) 834-5550.

■

Colton & Boykin announces that **Joseph J. Levin, Jr.,** has become a partner in the firm. Offices are located at 1025 Thomas Jefferson Street, N.W., Washington, D.C 20007. Phone (202) 342-5400.

■

The firm of **Henslee, Bradley & Robertson, P.C.,** announces that **Ralph K. Strawn, Jr.,** has joined the firm as an associate. Offices are located at 754 Chestnut Street, P.O. Box 246, Gadsden, Alabama 35902-0246.

■

The Birmingham firm of **Maynard, Cooper, Frierson & Gale** announces that former Chief Justice **C.C. Torbert** became a member of the firm effective June 1. He is admitted to practice in Alabama, the District of Columbia, and before the Supreme Court of the United States. Torbert served as chief justice of the Supreme Court of Alabama from 1977 to 1989. Offices are located at Suite 2400, 1901 6th Avenue, North, Birmingham, Alabama 35203-2602. Phone (205) 254-1000.

■

Jerry W. Kennedy has joined the firm of **Duncan, Weinberg, Miller & Pembroke, P.C.** in Washington, D.C. Kennedy is a member of the Alabama State Bar and was a government relations advisor for the past three years at Heron, Burchette, Ruckert & Rothwell. ■

Agreement Reached to Form New LEXIS® Membership Group

The Alabama State Bar has reached an agreement with Mead Data Central, provider of the LEXIS® computerized research service, to establish a LEXIS® membership group for bar members.

Most of the Alabama State Bar's 6,500 practicing members are in firms of ten attorneys or less. This program is designed to make the LEXIS® service affordable to those attorneys who cannot pay high monthly overhead charges. It is also a benefit for any firm which does not do searches on a regular basis.

Instead of the regular $125 monthly subscription charge, Alabama State Bar members will pay only $25 per month. Regular use charges will apply, along with a small membership group search surcharge. This program will provide smaller firms with the legal research resources many large firms now enjoy.

Members joining the program by August 31, 1990, will receive communications software, free training and four hours of free use. Software is normally $25 per package and training is normally $75 per person. Bar members will be receiving additional information by mail on the LEXIS® membership program.

Members will be able to utilize the LEXIS® service from their own homes or offices. Using a personal computer and modem, or MDCs leased equipment, the member can search and read or print the full text of federal and state case law, statutes, law reviews, ALR annotations, newspapers and wires, medical journals, SEC filings, patents, and more.

For further information, call Kendall Jones at 1-800-368-5868. Mead Data Central will have a hospitality suite at the annual meeting in Mobile with computer terminals set up to demonstrate LEXIS® research services. ■

Spring 1990 Admittees

James Barry Abston ..... *Mobile, Alabama*
Tori Letezia Adams ..... *Montgomery, Alabama*
John Cary Alexander ..... *Birmingham, Alabama*
Steven Lee Atha ..... *Birmingham, Alabama*
Daniel Turpen Bankester ..... *Robertsdale, Alabama*
Richard Hughes Batson, II ..... *Birmingham, Alabama*
Ben Mark Baxley ..... *Tuscaloosa, Alabama*
Robert Leon Bowden ..... *Louisville, Alabama*
Alison Ann Bridges ..... *Birmingham, Alabama*
Hycall Brooks, III ..... *Birmingham, Alabama*
Gregory Delona Brown ..... *Anniston, Alabama*
William Joseph Bruckel, Jr. ..... *Birmingham, Alabama*
John Douglas Buchanan ..... *Tampa, Florida*
Michael Wade Carroll ..... *Birmingham, Alabama*
Rosemary Clark ..... *Huntsville, Alabama*
Neil Richard Clement ..... *Birmingham, Alabama*
David Terence Cobb ..... *Jackson, Mississippi*
John Wylie Cowling ..... *Mobile, Alabama*
Billie Jean Crane ..... *Homerville, Georgia*
Paul Swanson Crawford ..... *Montgomery, Alabama*
Alice George Davidson ..... *Birmingham, Alabama*
Michael Thomas Dawkins ..... *Jackson, Mississippi*
Sharon Slawson Day ..... *Huntsville, Alabama*
Mignon Mestayer Delashmet ..... *Mobile, Alabama*
Wilbur Pemble Delashmet ..... *Mobile, Alabama*
Priscilla Moore Deleonardo ..... *Birmingham, Alabama*
Peter Anthony dEsarro, III ..... *Birmingham, Alabama*
Karen Nelson Dice ..... *Tuscaloosa, Alabama*
Howard Yielding Downey ..... *Birmingham, Alabama*
Nancy Diana Dukes ..... *Samson, Alabama*
John Fergus Edwards ..... *Florence, Alabama*
Lisa Sharon Egbert ..... *Dothan, Alabama*
Doyle Carlton Enfinger, II ..... *Tallahassee, Florida*
John Mark Englehart ..... *Montgomery, Alabama*
Cherie Diane Feenker ..... *Irondale, Alabama*
Jerry Douglas Fields, Jr. ..... *Birmingham, Alabama*
Linda Gail Flippo ..... *Florence, Alabama*
Ruth Elissa Friedman ..... *Atlanta, Georgia*
John Alfred Gant ..... *Birmingham, Alabama*
James Wyman Gladden, Jr. ..... *Hattiesburg, Mississippi*
Jon Craig Goldfarm ..... *Birmingham, Alabama*
Cem Samim Goral ..... *Birmingham, Alabama*
Laury Lea Gordon ..... *Vestavia, Alabama*
William Kenneth Grisham, Jr. ..... *Lawrenceburg, Tennessee*
Mary Ena Heath ..... *Huntsville, Alabama*
Samuel Huntington Heldman ..... *Birmingham, Alabama*
Amy Louise Herring ..... *Huntsville, Alabama*
Linda Carol Hinson ..... *Atlanta, Georgia*
John Thomas Horn ..... *Birmingham, Alabama*
Brockway Jackson Jones ..... *Birmingham, Alabama*
Donald Rush Jones,Jr. ..... *Jackson, Mississippi*
Jeffery Wayne Kelley ..... *Montgomery, Alabama*
Alva Manson Lambert ..... *Dothan, Alabama*
John Samuel Langley ..... *Beaumont, Texas*
William Davis Lawley, Jr. ..... *Pasadena, California*
Deidre White Lee ..... *Fairhope, Alabama*
Rachel Virginia Lee ..... *Montgomery, Alabama*
Martin Howard Levin ..... *Pensacola, Florida*
Oliver Winston Loewy ..... *Montgomery, Alabama*
Jan Reese Loomis ..... *Pinson, Alabama*
Kate Love Magoffin ..... *Mobile, Alabama*
Pamela Ruth Marks ..... *Florence, Alabama*
Vlinda Mae McCafferty ..... *Farmington Hills, Michigan*
James Terry McCollum, Jr. ..... *Montgomery, Alabama*
David Elliott McGehee ..... *Huntsville, Alabama*
Ruth Elizabeth McInish ..... *Dothan, Alabama*
Frederick Mitchell McNab ..... *Northport, Alabama*
Wilson Daniel Miles, III ..... *Birmingham, Alabama*
Andrea Lynne Miller ..... *Huntsville, Alabama*
Christie Carol Morgan ..... *Birmingham, Alabama*
Michael Allan Mosley ..... *Thomasville, Alabama*
Todd Britton Murrah ..... *Birmingham, Alabama*
David Butler Norton ..... *Birmingham, Alabama*
Valerie Lynne Palmedo ..... *Anniston, Alabama*
Phyllis Feaster Parke ..... *Camp Hill, Alabama*
William England Pritchard, III ..... *Mobile, Alabama*
Anna Swindle Ray ..... *Birmingham, Alabama*
George Dewitt Robinson ..... *Anniston, Alabama*
Mark Anthony Sanderson ..... *Birmingham, Alabama*
Fritz Eugene Schell, III ..... *Chatom, Alabama*
Steven Jeffrey Shaw ..... *Huntsville, Alabama*
Donna Richardson Shirley ..... *Birmingham, Alabama*
Stephen Gregory Shrewsbury ..... *Birmingham, Alabama*
Roland McCreight Slover ..... *Madison, Mississippi*
Christopher Adam Smith ..... *Florence, Alabama*
Ernest Wray Smith ..... *Montgomery, Alabama*
Gregory Grant Smith ..... *Birmingham, Alabama*
Susan Allen Smith ..... *Birmingham, Alabama*
Robert Joel Solomon ..... *Tucker, Georgia*
Michael Keith Tedder ..... *Atlanta, Georgia*
Luther Moorman Thompson ..... *Jackson, Mississippi*
Melinda Thompson ..... *Huntsville, Alabama*
John Hawthorne Ufford, II ..... *Guntersville, Alabama*
Rodney Lawson Ward ..... *Gadsden, Alabama*
Linda Joan West ..... *Pelham, Alabama*
Elmer Ellsworth White, III ..... *New Orleans, Louisiana*
Michael James Wiggins ..... *Orlando, Florida*
Coleman Kenneth Wilson ..... *Montgomery, Alabama*
Lauren Alane Wilson ..... *Florence, Alabama*
Sharon Ann Woodard ..... *Raleigh, North Carolina*
Clifton Earl Wright ..... *Sheffield, Alabama*
Mark Stephen Zimlich ..... *Montgomery, Alabama*

SPRING 1990 ADMITTEES

Lawyers in the Family

Anna Swindle Ray (1990); Borden M. Ray, Jr. (1989); Martin Ray (1960); Don Madison (1984) (admittee, husband, father-in-law, cousin)

David Butler Norton (1990); J.C. Norton (1965); John W. Norton (1969) (admittee, father, uncle)

Marvin A. Wilson (1956); Lauren Alane Wilson (1990) (father, admittee)

Sam Heldman (1990); Alan W. Heldman (1961) (admittee, father)

John A Gant (1990); Andrew M. Grant, Jr. (1965) (admittee, father)

Christopher A. Smith (1990); Gary P. Smith (1960) (admittee, uncle)

A. Evans Crowe (1989); R.M. Crowe (1954) (admittee, father)

Fritz E. Schell, III (1990); Sidney H. Schell (1968) (admittee, uncle)

Daniel T. Bankester (1990); Claude E. Bankester (1953) (admittee, father)

Ruth Elizabeth McInish (1990); H. Dwight McInish (1949); Peter A. McInish (1983) (admittee, father, brother)

February 1990 Bar Exam Statistics of Interest

Number sitting for exam	174
Number certified to supreme court	99
Certification rate	57%
Certification percentages:	
University of Alabama	79%
Cumberland	65%
Alabama non-accredited law schools	24%

Consultant's Corner

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

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

The small urban law firm—what lies ahead?

Small (with ten or fewer lawyers) urban law firms need to take a hard look at where they are going in the '90s. Unfortunately, there is no single strategy that will suit everyone. One must distinguish between a so-called small firm in a minor urban area (where they are, in fact, a big time firm) and the small firm in a major urban area (where they are just a small firm). One needs to generalize and the other needs to specialize.

The small firm in a major urban area

I will undoubtedly stir up more than a few chambers of commerce by trying to define "minor" urban areas. Therefore, I will try to dodge the inevitable bullet by saying that Birmingham, Mobile, Huntsville and Montgomery are major urban areas and all other urban areas are minor.

The small firm, in a major urban area, is at risk in the '90s if it continues to perceive itself as a general practice firm. It is probably doomed to be a jack of all trades and master of none. There are a number of reasons why this is likely to come to pass, unless such firms adopt a focused strategy that concentrates on one major area and one or two minors.

There are at least four reasons for this gloomy scenario:

— population shifts,
— inroads of the chains and prepaid plans,
— increasing competition from the major firms and
—the specter of certification.

Small urban firms traditionally have served many individuals as well as some small corporate clients. As individuals drift away from major urban areas to suburbs, they are increasingly likely to seek out providers in the suburbs, not downtown. Sad to say, many law firms are more loyal to their clients than clients are to the firms that served them for years.

In the suburbs, these former clients of the downtown firms are within arms reach of the chains (Joel Hyatt, for example) which typically open offices in suburban strip malls and provide what is reputed to be very good legal service in the areas where they practice. They are

Bornstein

growing at a healthy clip and might well colonize Alabama in the near future. Prepaid legal plans (legal HMOs) are another threat to the small firm, since they contract out with various providers for specialized services at fixed (often lower) rates.

The major firms are not sitting idly by either. Their profits are slowly eroding from the pressure of inexorably rising overhead costs associated with urban location. They are developing market strategies, even hiring marketing directors, to go after clients they never before courted. Some of these targets are presently clients of small firms.

Certification, when (not if) it comes, will be expected by urban clientele, just as they expect to find it in their doctors. How can the small generalist firm proclaim expertise in numerous fields with just six attorneys? Will they all be certifiable in multiple areas? Not likely. Most certification boards will almost certainly require substantial, if not total, concentration in the certified field.

Survival and growth strategy

Is there a place for the small firm in a major urban area? Most definitely! As a specialist firm you can, first of all, point to the specialist departments of the major firms and say, "They have a department to handle tax work. We have a whole firm!"

Second, there are substantial economies to be achieved in a specialist firm which allows you to still be profitable, while charging less than your major competitors. Think, for a moment, about library expense, support and professional staff interchangeability. Where do these specialization opportunities lie? What sort of secondary focus areas are synergistic?

— collections and creditor bankruptcy representation;
— corporate bankruptcy and tax;
— commercial real estate and environmental law;
— divorce and tax;
— white collar criminal defense and tax; and
— insurance defense and selected P.I.

There are other synergistic combinations that undoubtedly would work. This brief list of possibilities is intended to merely get the "grey cells working." Remember, the competitive factors working against you, and remember the competitive factors working for you. ■

This is not your Father's old Mobile!

Grand Hotel at Point Clear

by Forrest S. Latta

Welcome again to Mobile! To those of you who have feasted on the abundant local seafood, sipped your favorite nectar under the ancient oaks or danced beneath the stars on the *USS Alabama* during past bar conventions, Mobile needs no introduction. Bar members and guests attending the 1990 Alabama State Bar Convention on July 19-21 again will experience the genteel charm reminiscent of centuries past, still preserved along Mobile streets that were first carved from the river banks by French Colonials who settled on the present site in 1711 during the reign of King Louis XIV.

Fort Conde, on Royal Street one block from the hotels, is Mobile's "Official Welcome Center." There, on the site of the first colonial fort, one can glimpse the 18th century lifestyle of French and Spanish colonization amidst a full-scale reconstruction of the fort. Fort Conde is an excellent first stop for visitors wishing to load up on brochures describing activities and landmarks in the Mobile area. As you soon will discover, Mobile is still "as good as you remember."

What the infrequent visitor may not realize, however, is that Mobile has entered a new era of economic growth and revitalization sparked by new local government leadership and a dynamic Chamber of Commerce which has achieved nationwide acclaim. Mobile's new Waterfront Convention Center will soon begin construction, with site preparation already visible across Water Street from the Riverview Plaza Hotel. Plans have been finalized for a new Interstate spur from I-65 southward along the river to downtown Mobile. And a new Navy homeport, which will service ships from the *USS Wisconsin* battle group, is 50 percent completed and awaiting final funding.

Mobile currently leads the state in private business and industrial growth. In addition, one of the fastest growing and most fashionable places to live continues to be the beautiful Eastern Shore area of Baldwin County, including Spanish Fort, Daphne, Montrose, Fairhope and Point Clear. It also is home to the internationally renowned **United States Sports Academy.** And Mobile was cited this past April by *U.S. News and World Report* as having the fourth best housing market in the nation. Such progress has sparked a new spirit of local pride, prompting today's Mobilians to modify a popular advertising slogan: "This is not your father's old Mobile!" It is a wonderful place to live, and an especially exciting place to visit!

As many state bar members have discovered, the convention in Mobile makes for a perfect "mini-vacation," beginning early and extending through the weekend. Here are a few suggestions of local attractions and places to eat, but do not hesitate to recruit a private tour guide from the local bar association for more details and personal recommendations.

The journey can be half the fun

For those who have not experienced it, Amtrack's "Gulf Breeze" rail service to Mobile is an unparalleled adventure. Board in Birmingham or Montgomery and the train will deposit you at the foot of Government Street directly across from the Stouffer Riverview Plaza Hotel.

Seating is more spacious than a first-class airline cabin, and the trip is thoroughly enjoyable and relaxing. The club car, which serves sandwiches and snack food, offers a great place for conversation and new acquaintances. Round-trip fare from Birmingham is a reasonable $60. A ticket from Montgomery is $10 less, and from other towns it is barely the price of cab fare.

As you will see below, the trip from Birmingham takes approximately six and one-half hours, with Montgomery two hours closer. It seems even shorter, because of the ability to read, relax and move around, and you will be positively entranced by the windows. Here is the daily schedule:

Train 519		Train 520
Lv. 11:40 a.m.	Birmingham	Ar. 1:31 p.m.
Lv. 2:12 p.m.	Montgomery	Lv. 10:54 a.m.
Lv. 3:16 p.m.	Greenville	Lv. 9:55 a.m.
Lv. 4:05 p.m.	Evergreen	Lv. 9:03 a.m.
Lv. 5:15 p.m.	Atmore	Lv. 7:56 a.m.
Ar. 6:21 p.m.	Mobile	Lv. 7:00 a.m.

Any travel agent can arrange Amtrack tickets. There is open seating and all baggage is carry-on, so pack accordingly. Call the hotel in advance and a bellman will meet your train to transfer baggage straight to your room. All aboard!

Dining in-town

Regardless of your transportation mode you will be famished when you arrive, so begin making your first night's dining plans now. Here are some suggestions, with due apologies to local colleagues whose personal favorites may be omitted.

Bienville Club

Spectacular panoramic view of Mobile Bay from the 34th floor of the First Na-

tional Bank Building. Gourmet beef, seafood, fowl and veal. Members of affiliated clubs in Huntsville, Birmingham and Montgomery can make reservations directly. Others will need a local member to make the arrangements. Proper attire and reservations suggested. Royal Street one block north of the Riverview. 433-4977.

Roussos

One of Mobile's oldest and best all-around seafood restaurants for lunch or dinner. Formerly on the Causeway before the hurricane. Greek-style dishes are among the specialty. Next to Fort Conde, two blocks from the Riverview and Admiral Semmes. 433-3322.

Wintzell's Oyster House

An ever-popular landmark since 1938. Legendary for serving oysters "fried, stewed and nude." Over 6,000 placards of humorous quips and quotes cover the walls. Good selection of fried seafood, gumbo, shrimp loaves and, of course, oysters. For oysters on the half-shell, sit at the oyster bar where some of Mobile's finest lawyers hold records for oyster consumption. Closed Sunday. 605 Dauphin Street. 433-1004.

The Pillars

Regarded by many as the finest dining in Mobile. Excellent continental cuisine, including seafood, beef and lamb. The restaurant is housed in a beautiful turn-of-the-century Greek revival mansion on Government Street across from the cannon at Memorial Park. The "Epicurean Dinners," which include a recommended appetizer, entree, side dish and dessert, are popular. Proper attire and reservations suggested, 1757 Government Street. 478-6341.

Ruth's Chris Steak House

Originated in New Orleans, with locations in Houston, Beverly Hills, Palm Beach and numerous other cities. Believe me, the best steak you have ever tasted, basted in seasoned butter and served on a sizzling platter. All prime cuts that melt in your mouth. Filet mignon and thick rib-eyes are favorites, with great baked potato. Reservations suggested. One block off Airport Boulevard near "the loop" in midtown. 271 Glenwood Street. 476-0516.

Weichman's All Seasons Restaurant

A nationally recognized favorite, and the only Mobile restaurant serving Constantine's original recipes. Famous for crabmeat specialties la Louisiana, a la Rector and shrimp and crabmeat au gratin, as well as juicy prime rib. Reservations accepted. Near Airport Boulevard at I-65. 168 South Beltline Highway, next to the Ramada. 344-3961.

Hemingway's

A trendy uptown cafe featuring gourmet seafood and beef prepared in New Orleans haute cuisine style. Several dishes created by Eddie Prudhomme, the late chef of Gulf Shores' Hemingway's and cousin of New Orleans' "K-Paul" Prudhomme. Great gourmet desserts include bread pudding and chantilly. Just off Government Street at the intersection of Airport Boulevard and Old Government. 479-3514.

S.S. Marina

Feast on fantastic Gulf seafood as you watch the shrimp boats and pleasure craft pass through the drawbridge at sunset. Outstanding fried seafood in a secluded and superbly relaxed atmosphere. Ask for a table by the window. Dinner only. Off Dauphin Island Parkway at Dog River. Drive past the Mobile Yacht Club and across the drawbridge, then look for the signs directing you to the S.S. Marina at Grand Mariner Marina. 443-5700.

Michael's Midtown Cafe

"One of the best restaurants you will ever find in an old gas station." Relatively new and quite popular among the young lawyer crowd. Cajun, Jamaican and other ethnic specialties, the menu generally reflects the inspiration *de la chef*, who is notoriously spontaneous. 161 South Florida Street, across from T.P. Crockmier's. 473-5908.

American Steamer

The new Mobile counterpart of Wintzell's Old Bay Steamer in Fairhope (see below under Causeway/Eastern Shore Dining) featuring the same fabulous steamed seafood. Great steamed snow crab with drawn butter. Also serves raw oysters, steaks and cold beer. Specials include the Bucket Deal, featuring a bucket full of shrimp and four ice cold beers. One-half block south of Airport Boulevard at 364 Azalea Road. 342-9622.

Causeway/Eastern Shore dining

Captain's Table

Adjacent to the Battleship entrance, owner John Word personally presides over one of Mobile's favorite seafood restaurants in a nautical atmosphere. Life preservers from ocean vessels around the world adorn the walls. Also known for eye-popping huge rib-eye steaks, of which John takes great pride. For appetizers, order the West Indies Salad, a bowl of delicious marinated crabmeat. Battleship Parkway. 433-3790.

Pier 4

Featuring the largest menu of seafood entrees on the Gulf Coast, served in a dining room overlooking Mobile Bay. Cocktails in the lounge or dining room. Great fried crab claws, stuffed shrimp and broiled seafood. Alligator sightings not uncommon. Always crowded. Battleship Parkway. 626-6710.

Blue Gill

An ever popular no-frills Causeway restaurant, oozing with local color, known for its great fried seafood, and also serving excellent broiled selections. Regarded by many as the best fried seafood anywhere and especially popular among the local democratic politicos, who repair here to unwind over a platter of fried crab claws, soft shell crabs and a pitcher of ice cold beer. "All known Republicans should be accompanied by a personal food taster!" Dinner only. Credit cards not accepted. Battleship Parkway. 626-9852.

Original Oyster House

Increasingly popular seafood restaurant featuring 87-item seafood menu as well as chicken and steak. Specialities are seafood gumbo and blackened or broiled fish, with the recent addition of a steamed seafood menu downstairs in

Forest S. Latta is a 1983 graduate of Cumberland School of Law and a partner in the Mobile firm of Barker & Janecky. He presently serves on the editorial board of ***The Alabama Lawyer.***

Part of Amtrak's "Gulf Breeze" service.

the Half-Shell Steamer and Oyster Bar. Excellent seafood platters for the indecisive. Casual. Battleship Parkway. 626-2188.

Cock of the Walk

Enormously popular and entertaining restaurant specializing in huge platters of fried freshwater catfish filets, chicken filets and hush puppies. The original restaurant in West Mobile became so popular, a second location was opened in Daphne. Great homemade cornbread, which the waiters will flip high in the air and catch in an iron skillet. (Caution—don't sit under a ceiling fan.) Try the fried dill pickles on the side. Just off the I-10 bayway at Daphne exit. Open daily for dinner. 621-0006.

Nautilus

Popular seafood restaurant with great shrimp spaghetti and other seafood pasta dishes. Extensive menu features daily seafood specials, prime rib, lobster and the Nautilus' famous seafood scampi. Tranquil bayview dining room is great for lunch or dinner. Highway 98 in Daphne at I-10 exit. 626-0783.

Wintzell's Old Bay Steamer

Owned by the Wintzell family, a unique and cozy restaurant specializing in, you guessed it, fabulous steamed seafood spiced with Old Bay Seasoning. Atmosphere reminiscent of upper Atlantic coast. Favorites include the Big Steamer, an unbelievable platter piled with steamed oysters, shrimp, snow crab legs, king crab legs and crab claws, with potatoes and corn on the cob. A wonderful escape in downtown Fairhope. 312 Fairhope Avenue. 928-5714.

Budget dining ("cheap eats")

Morrison's Cafeteria

Mobile is the corporate hometown of Morrison's Cafeterias, which now boasts over 160 cafeterias nationwide, not to mention the other Morrison-owned restaurant divisions. The "big bosses" eat here, so it's a guaranteed good meal. Airport Boulevard at I-65 in the west parking lot of Springdale Mall in front of Gayfer's. Open daily.

Tommy's Terminal Restaurant

Just north of the International Trade Center, and across from the GM&O railroad terminal on Water Street, a Mobile landmark since 1917. Favorite of both the business crowd and the hard-hats. Also popular among local judges and politicians, who often stage kick-off rallies and fundraisers here. Breakfast and lunch only. 416 North Water Street. 432-4159.

Riverview Plaza Hotel

Dew Drop Inn

Claiming the distinction of "Mobile's oldest restaurant." A traditional favorite with the lunch crowd. World famous hot dogs, cheeseburgers and onion rings, along with good seafood sandwiches and ice cold drinks. 1808 Old Shell Road. 473-7872.

The Back Porch

Housed in a historic cottage on Royal Street, one block south of Fort Conde. Muffalettas, shrimp poboys, red beans and rice and other creole specialties. A favorite of state court jurors when court is in session. Weekday lunch only. 200 South Royal Street. Open 10:30 a.m. to 3 p.m. Monday-Saturday 432-5876.

Entertainment & nightlife

Mobile Greyhound Park

The birthplace of parimutuel greyhound racing in Alabama where "Casey," named after a legendary Mobile Bar member, wins every race. The clubhouse dining room (reservations suggested) has an excellent reputation, especially for seafood. Post-time 7:45 p.m. Monday-Saturday with matinees Saturday at 1:45 p.m. I-10 West at Theodore/Dawes Exit. 653-6040.

Entertainer Dinner Theatre

Featuring the live musical comedy "Lucky Stiff" during the bar convention. Excellent buffet dinner begins serving at 7 p.m., show starts at 8:30 p.m. Reservations 473-8611, 421 Holcombe Avenue, one-half block off Government Street just beyond Dauphin Island Parkway in the loop area.

Trinitys

Perennially popular tavern for afternoon drinks, or nighttime dancing with live music from the loft. Favorite "meeting" place of the Mobile young lawyers crowd. S.R.O. after 10 p.m. Across from the Mobile Civic Center, 456 Auditorium Drive. 432-0000.

Lumber Yard Cafe

The favorite "after work" watering hole for the professional crowd, especially on

Thursdays and Fridays. Frequently hosts live rock and R&B bands from the '60s and '70s. "Make sure you get into the right BMW or Volvo when leaving...there can be confusion." 2617 Dauphin Street 471-1241.

Ivanhoe's/G.T. Henry's

Mobile's newest and hottest nighttime taverns, featuring live rock'n'roll and your favorite cold beer, one-half block apart in two historic buildings on Dauphin Street, six blocks west of the Riverview. Just listen for the music wafting through the streets. 450 Dauphin and 462 Dauphin. Ivanhoe's 432-0400 and G.T. Henry's 432-0300.

Judge Roy Bean's

No trip to a bar convention would be complete without a visit to Judge Roy Bean's on Scenic 98 in Daphne, just across the bay. There one can relax and enjoy a favorite refreshment in a rustic setting, amidst the folklore of the most notorious judge west of the Pecos. It is the hottest place around on Sunday afternoon among the pilgrims returning from the Gulf.

Sightseeing attractions

Battleship Memorial Park—The state's #1 tourist attraction features the battleship *USS Alabama*, the submarine *USS Drum*, and a gigantic B-52 Bomber, along with various other aircraft and military exhibits. Site of numerous Hollywood film scenes from movies such as "Tora! Tora! Tora!" and "War and Remembrance." Interesting gift shop for souvenirs. Located across the river from the downtown hotels, take the tunnel to Battleship Parkway, which also is home to some great seafood restaurants for lunch or dinner. Open daily 8 a.m. 'til sunset. Admission charge. 433-2703.

Bellingrath Gardens and Home—July is the season of roses at the world famous Bellingrath, a 900-acre estate once the fishing retreat of a Coca-Cola magnate. Its 65 beautifully landscaped acres feature 2,500 rose bushes in a semi-tropical setting along the Dog River. Bellingrath also is home to one of the world's largest displays of priceless Boehm procelain art. Open daily, Bellingrath is a great place for children and takes about one-half day to tour the gardens and home. Excellent gift shop. Admission charge. Take I-10 to the Theodore South exit, then Highway 90 to Bellingrath Road and follow the signs. Open 7 a.m. until dusk. 973-2217.

Mobile River Cruise

Enjoy a morning or afternoon sightseeing voyage on the Mobile River aboard the tourboat *Commander*, operated by Alabama Cruises. Fascinating perspective of the Mobile Bay and river delta, as well as ships from around the world docked in Mobile Harbor. Daytime cruises take one and one-half hours departing throughout the day. An evening dinner cruise departs at 7 p.m. Admission charge. Board at Battleship Park. 433-6101.

Museum of the City of Mobile

Housed in a gracious Italianate townhouse constructed in 1872, the Mobile City Museum features historic exhibits spanning all periods of Mobile's fas-

The Rue home

The Allen home

The Coleman home

USS Alabama

The Uzzelle home

cinating history from pre-colonial days, to the Civil War era and through the present. Interesting artifacts, historic maps and numerous displays. No admission charge. 66 Government Street. 438-7569.

Oakleigh Mansion

Magnificent Greek revival antebellum mansion located on three and one-half acres in the center of the historic Oakleigh Garden District. Beautifully furnished with fine period collections of furniture, portraits, silver, china, jewelry, interesting kitchen implements, and toys. Daily tours, admission charge. Just off Government Street near downtown. (Take a walking tour of the Oakleigh Garden District while you are there.) 432-1281.

The Royal Street Trolley/Greyline Tours

Open-air sightseeing tours through downtown Mobile and the historic districts. Departs daily from Fort Conde, one block from the hotels. Interesting and informative riding tours of the area's oldest streets, churches and homes. Reservations requested. 432-2229.

Bragg-Mitchell Mansion and "Exploreum" Museum

One of Mobile's most impressive examples of antebellum architecture. Constructed in 1855 by Judge John Bragg on Springhill Avenue, the Bragg-Mitchell has recently been restored and beautifully furnished with period antiques. Open for tours. Admission charge. 471-6364. Located on the grounds of the Bragg-Mitchell Mansion you will find the Exploreum, a children's "hands-on" museum where kids can experience the fascinating worlds of science, technology and the humanities. Admission charge. 476-6873.

Historic Mobile churches

One of Mobile's greatest assets is its historic churches, some dating back to the early 19th Century. The well-known **Cathedral of the Immaculate Conception** is a minor basilica constructed in 1835 and best known for its stained glass windows and polished marble. Daily tours. Located at the corner of Dauphin and Claiborne. 434-1565. A beautiful example of Greek revival architecture is **Christ Episcopal Church,** constructed in 1838. Contains Tiffany stained glass windows in addition to Cenzo windows depicting the baptism of Christ. Church Street, one block west of Fort Conde. 433-1842. Other historic Mobile churches include **Government Street Presbyterian Church,** constructed in 1831; **First Baptist Church of Mobile,** constructed in 1909 and adjacent to the home of Admiral Raphael Semmes; and **Government Street United Methodist Church,** known as the "Beehive" for its unique architectural style, constructed in 1890. All three are located along Government Street in the historic downtown area.

(NOTE: The Mobile Bar Auxiliary is planning a tour of four local historic homes followed by a luncheon at the Bragg-Mitchell Home on Friday, July 20, during the bar convention. Tickets are $25 for the tour and luncheon, with bus transportation provided from the Riverview.)

Golf, fitness and recreation

Fitness

Do not miss a workout. Bring along your gear bag and enjoy the extensive facilities of the modern **Downtown Mobile YMCA,** where many a Mobile lawyer combines work and workout. Some even say there are certain lawyers you can find at the "Y" during lunch with whom telephone contact is impossible! Ambitious joggers can get directions to the Azalea Trail 10K race course. All non-Mobile YMCA members have guest privileges, as do guests of the Riverview, Admiral Semmes and Hilton. The Downtown YMCA is two blocks from the Riverview on Water Street. 438-1163.

Tennis

The Mobile Tennis Center, owned by the City of Mobile, features 34 competition-grade lighted courts. Grass, composite and hard surfaces. Call ahead at least four hours and try to reserve "Center Court." Located on Caillard Drive on the western side of Langan Park, access via Springhill Avenue to Langan Park and drive around the lake to 851 Gaillard Drive. 342-7462.

Mobile Golf

For those whose sticks are standard equipment, the Mobile area features several excellent daily fee golf links. The city-owned **Azalea City Golf Club,** once named among the top 25 public courses in the country, is situated on the western side of Langan Park on Gaillard Drive. Tee times 342-4221. The newly redesigned **Springhill College Golf Course** graces the hillside just below the college, with the main clubhouse entrance on Dauphin Street just west of the I-65 overpass. 343-2356. The **Gulf Pines Golf Course** offers several excellent holes directly on Mobile Bay, located inside the Brookley complex off I-65. 431-6413. And **The Linksman,** owned by the Edwin Watts golf company, features a fine pro shop and interesting layout among the backwaters of Dog River where many a golf ball has found its final resting place. Take Halls Mill Road to Riviere Du Chien, turn left and follow the signs. 661-0026.

Eastern Shore Golf

The town of Fairhope recently opened **Quail Creek,** a sprawling well-kept 18-hole layout generously devoid of sand bunkers, but beautiful and challenging nonetheless. 990-0217. The **Lakeview Country Club** in Foley, home of golf pro Ralph DeRoy formerly of Mountain Brook, features a Bruce Devlin layout reminiscent of St. Andrews in Scotland. Open to public, just off Highway 59. 943-8000. Arnold Palmer designed the **Cotton Creek Golf Club** at Craft Farms and considers it one of his finest. The Gulf Coast headquarters of "Arnie's Army," this course always is in great condition. 968-7766. One of Alabama's most beautiful courses is nestled among the oaks and pines at **Gulf State Park,** where wide fairways and generous greens keep the tourists coming back. 948-4653.

Saltwater Fishing Charters

Landlocked anglers with a fever for saltwater adventure may find a fishing trip just the cure. Both Dauphin Island (home of the world-famous Dauphin Island Deep Sea Fishing Rodeo) and Orange Beach (with a fast growing rodeo of its own) have excellent fishing charters, which generally take you to their own secret reefs for a bountiful catch. Half and full day charters are available, usually carrying groups of four-six. Check with any Mobile or Baldwin County lawyer/fisherman to help arrange an outing with a favorite charter captain, or call the marinas and charter services for a recom-

mendation. If you are not with a group, they often can make room for you. Rates include bait, tackle, ice and, for a nominal fee, your fish will be cleaned and fileted for the trip home. **David McKeithen's Gulf Charters,** 981-4470; **Bobby Walker's Charter Boats,** 981-6159; **Orange Beach Marina Charters,** 981-4510; **Perdido Pass Marina Charters,** 981-6481.

Antique hunting

As one might expect from a port city, cargo containers of period European furniture and antiques arrive fairly regularly via ship. Mobile is blessed with an abundance of excellent antique shops, which almost are as prevalent as law offices.

Atchison Imports

A charmingly restored historic warehouse full of French and English pine antiques, iron beds, plaster pedestals, garden accents and other interesting pieces. Dauphin Street one-half block west of Broad. 921 Dauphin Street, 438-4800.

Antoinette's Antiques

In the heart of Springhill adjacent to Springhill College on Old Shell Road. Beautiful English furniture, porcelain, silverplate and accessories. 4401 Old Shell Road. 344-7636. (Have lunch at Hello Deli next door or Unknown Jeromes across the street.)

Plantation Antiques

Hugh selection of linen presses, oriental rugs and other period pieces of excellent quality and condition. (Please do not invite my wife!) 3750 Government Boulevard. West of I-65 on the right. 666-7185.

Yellow House Antiques

Superb 18th and 19th century furniture, accessories, silver and porcelains of investment quality. On Government just beyond the cannon, 1902 Government Street. 476-7382.

Plunderosa Antiques

Along the Highway 59 beach route just south of Loxley, two enormous buildings of wall-to-wall, floor-to-ceiling European and Scandinavian antique furniture, accessories, stained glass, books, photographs, etc. Highway 59 in Loxley. (An unusual herb garden across the road.)

Eastern Shore/Gulf Shores side trip

Getting there

If you are going straight to Gulf Shores, and want to enjoy an adventurous journey off the beaten path, consider the Mobile Bay Ferry between Dauphin Island and Fort Morgan. Excellent perspective of Mobile Bay where Civil War sea battles were fought between the twin fortresses of Fort Morgan and Fort Gaines. This is where Union Admiral David Farragut shouted his famous order, "Damn the torpedoes, full speed ahead!" The ferry departs approximately every one hour 20 minutes between 8 a.m. and 6:40 p.m. 1-800-634-4027. The usual four-lane route to Gulf Shores follows I-10 to the Loxley exit, and then southward on Highway 59 through Loxley, Robertsdale, Foley and Gulf Shores. Another popular route is Highway 98 through Daphne, Fairhope, Magnolia Springs, and Foley, then southward on Highway 59 to Gulf Shores. If time permits, take the scenic route along the beautiful eastern shore of Mobile Bay all the way to Point Clear, and then cut over to Foley. The bayfront cottages and homes near Montrose, Fairhope and Point Clear are where many Mobilians spend leisure time "over the bay." One may also want to explore Magnolia Springs, a mossy village along Fish River where most residents' mail is delivered via water route, and Bon Secour, a charming fishing village known in many parts of the world.

Eastern Shore shopping

The main focus of shopping along the Eastern Shore these days is in two main areas. Downtown **Fairhope,** home to one of the south's largest arts and crafts shows during March, always offers excellent shopping with unique stores and boutiques. Highlights are described in Judge Arthur Briskman's article in the July 1987 *Alabama Lawyer.* Be sure to drive down to the Fairhope pier if the weather is nice and take a stroll.

The newest shopping "mecca" is **Riviera Centre,** a glitzy new fashion outlet mall on Highway 59 between Foley and Gulf Shores. Riviera Centre features more than two dozen factory outlet stores, including Bass Shoes, J.G. Hook, Eagles Eye, Oneida, Toys Unlimited, Calvin Klein, Dansk, Guess, Liz Claiborne, Oshkosh B'Gosh, Pfaltzgraff, Polo/Ralph Lauren, and many others. One of the interesting things about all of southern Baldwin County, of course, is that one may happen upon a quaint boutique, antique shop or art studio nearly anywhere, so keep your eyes open.

Restaurants (also see Causeway Eastern Shore dining)

The hottest new Gulf Shores restaurant is the **West Beach Cafe** featuring chefs Eric Reser and Vern Montgomery, formerly of Highlands Bar & Grill in Birmingham. The menu, which features grilled and sauteed specialties, changes daily according to fresh seafood availability. Fabulous desserts. Reservations accepted. Top floor of Gulf Shores Surf & Racquet Club on West Beach Boulevard in Gulf Shores. 948-3085.

The main dining room of **Marriott's Grand Hotel** at Point Clear hosts a truly magnificent Sunday brunch featuring a buffet that one might expect to find aboard the Queen Elizabeth II. Almost every kind of food imaginable, beautifully prepared and displayed amid ice carvings on a seemingly endless buffet. You will gasp with delight when you see it. Reservations unnecessary. 928-9201.

Other favorites in the Foley/Gulf Shores area include **Wolf Bay Lodge, Hemingway's at Orange Beach Marina,** the **Perdido Pass Restaurant,** the **Perdido Beach Hilton** Dining Room, and the **Gift Horse** in Foley. Also, Birmingham residents may fondly remember **Niki's,** which now features two locations in Gulf Shores specializing in Gulf seafood. Finally there is, of course, the obligatory stop at the **FloraBama Lounge,** home of the annual mullet-throwing contest and other unusual events, where one can "straddle the line" with a foot in each state. New boardwalk and beachside bar features homemade burgers and munchees, and your favorite cold drinks. ■

Some of the accompanying photos courtesy of Thigpen Photography of Mobile.

FOOTNOTES

1. Many thanks to Hon. Arthur B. Briskman, United States Bankruptcy Judge for the Southern District of Alabama, whose feature in the July 1987 *Alabama Lawyer,* entitled "Mobile—as Good as You Remember," provided the foundation for this article. Some of Judge Briskman's most colorful comments appear in quotation marks throughout the article.

Building Alabama's Courthouses

by Samuel A. Rumore, Jr.

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

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

Blount County

On August 30, 1813, Creek Indians attacked Fort Mims, in what is now southern Alabama, and massacred its garrison. In response to this attack and after appeals for help, Governor William G. Blount of Tennessee sent Andrew Jackson with nearly 2,000 Tennessee volunteers into the territory. Jackson defeated the Indians in 1814, and forced them to give up much of their land. Many of Jackson's men were impressed with the countryside they saw during this expedition. They would later come back to make homes on the "southern frontier."

Two of the earliest settlers in the area that became Blount County were John Jones and his brother-in-law, Caleb Fryley. They came from Madison County. Jones settled in what became known as Jones Valley near present-day Bessemer. Fryley took up residence in a valley north of Jones at the abandoned cabin of an Indian chief thought to be named Bear Meat. His settlement became known as Bear Meat Cabin.

In the next few years many former soldiers from Tennessee returned to the area. By February 7, 1818, there were enough people that the Alabama Territorial Legislature created a new county. It was named Blount in honor of the Tennessee Governor who aided the pioneer settlers during the Creek Indian War.

When it was created, Blount County covered a much greater area than today. And the act establishing the county provided that courts would be held at the home of Major Moses Kelley in Jones Valley, a part of present-day Jefferson County. It is interesting to know that this site is within two miles of the present Jefferson County Courthouse. Thus, it can be said that the first courthouse in what is now Jefferson County was the Blount County Courthouse.

On December 13, 1819, Jefferson County was created. Since the designated county seat for Blount County was located within Jefferson, the Blount courthouse had to be moved. Another interesting sidenote is that the earliest records of Blount County are maintained today at the Jefferson County Courthouse, having been retained in the new county.

In February 1820, a meeting was held at the home of Colonel Gabriel Hanby near present day Locust Fork, at which a commission was appointed to choose a new county seat for Blount County. On December 18, 1820, Bear Meat Cabin was selected as the site, and the name of the settlement was changed to Blountsville, again in honor of Governor William Blount. It is believed that a wooden courthouse was first built, and then a brick courthouse and jail were constructed in 1833.

In the years following the Civil War, the courthouse at Blountsville fell into disrepair. There was also a movement to remove the county seat to a more centralized location. The Governor of Alabama appointed a commission to solve the problem. These commissioners awarded a contract for a new courthouse in Blountsville that cost $16,200. It was completed in 1888. The courthouse was a two-story brick structure that contained first and second floor porches.

The people in Blount County were upset over the decision made by the appointed commission. They felt that they should have been given a voice in the location of the courthouse before a new one was built. An enterprising candidate for the House of Representatives in the State Legislature recognized the discontent of the rural Blount County citizenry and he campaigned on the platform of letting the people vote on the location of their courthouse. He won the election and the Legislature passed a bill setting up a vote.

The first election took place in August 1889. The question was "Removal" or "No Removal." Removal won.

A second election took place in September 1889. Nine communities had their eye on the prize of becoming the Blount County seat. They were Blountsville, Oneonta, Bangor, Blount Springs, Chepultepec, Nectar, Hood's Store, Brooksville, and Anderton (now Cleveland). No place received a majority.

The runoff election was held in October 1889 between Blountsville and

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.

Blount County Courthouse

Oneonta. Oneonta won by a margin of 368 out of the 3,052 votes cast.

Unfortunately, the bill setting a county election did not contemplate all contingencies. No provision or deadline was made for the removal of the courthouse to its new location. Oneonta had the title of county seat, but no building. Blountsville had a new building but had lost the title. There was still strong opposition to the move. It is said that the Blount County records were furtively removed to Oneonta under cover of darkness. The courthouse building at Blountsville soon became Blount College. This building burned in 1895.

The L&N Railroad played a major role in establishing the town of Oneonta. An ore branch line was built from Birmingham to the Chapman Ore Mines in 1888. Lots were platted near the tracks, and this settlement became Oneonta. It was named by William Newbold, superintendent of the L&N Railroad in Birmingham, who declared that the mountains around the town reminded him of his boyhood home of Oneonta, New York.

When the courthouse was moved to Oneonta in 1889, the town consisted of a train depot, post office, telegraph office, three stores, 12 homes, and the Farmer's Alliance Warehouse. The warehouse was the only building suitable to house the county records, and it was rented for county use on October 24, 1889.

A courthouse was built in Oneonta in 1890. It was a three-story brick building topped by a tower. This building was remodeled in 1935. At that time its plain brick porch was replaced by a Greek Revival portico with Corinthian columns.

In February 1891, Blount County established a branch courthouse in the town of Bangor. This was done to serve the western section of the county due to poor roads and the distance from that section of the county to Oneonta. Bangor was named for Bangor, Maine, the city from which its developers came. This branch courthouse was a two-story wooden building that served the county until 1910.

By 1954 the Oneonta courthouse was no longer adequate for the needs of Blount County. The county needed more space and the building had been condemned as unsafe. A new structure was built on the site of the former courthouse. Birmingham architect J. Martin Lide designed the modern office-type building. The contractor was Andrew, Dawson & Shenesen. The courthouse was dedicated January 8, 1955, by the Governor-elect of Alabama, James E. Folsom.

The cost of the building was approximately $1,000,000. However, Blount County had to be creative to build its new courthouse. The County Board of Revenue was without funds for the project, and the county already exceeded its debt limit so a bond issue could not be used.

An act of the Legislature authorized the county to deed the courthouse property to a group of private citizens who in turn mortgaged it and sold bonds to raise money for a new structure. The six-person committee, known as the Blount County Public Building Authority, owned the building. Rent payments from the county were used to pay off the debt. The local legislation precluded the county from using any other building for county government.

An addition to the courthouse was constructed in 1984. The contractor was Stone Building Company. Project architect was P. Lauren Barrett of Birmingham. ■

Opinions of the General Counsel

by Alex W. Jackson, assistant general counsel

QUESTION:

Is it a violation of the *Code of Professional Responsibility* of the Alabama State Bar for a lawyer to file a lawsuit in one county when he knows that venue for the action does not lie in that county?

ANSWER:

This question has been previously considered by the Disciplinary Commission and most recently Opinion RO-84-102, a copy of that opinion being attached hereto, was decided by the Commission. In Opinion RO-84-102 the Commission held as follows:

> "There is nothing unethical, per se, in an attorney knowingly filing a lawsuit in a wrong venue. However, it is unethical for a lawyer to require a party to present testimony or evidence in support of a sworn plea in abatement or motion for change of venue where there is no genuine issue of any material fact concerning proper venue."

On reconsideration we hereby rescind Opinion RO-84-102 and once again endorse and adopt the conclusion of ABA Informal Opinion 1011 that it is unethical to knowingly file a lawsuit in the wrong venue if it is done to harass the defendant or take advantage of the absence of the opposing party.

Disciplinary Rules 7-102(A)(1) and (2) provide as follows: "DR 7-102 ***

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

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another;

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."

In our opinion Disciplinary Rule 7-102(A)(2), as set hereinabove, when read together with the provisions of Rule 11 of the Alabama Rules of Civil Procedure and Rule 11 of the Federal Rules of Civil Procedure, clearly indicates that the higher standard set forth in ABA Informal Opinion 1011 is the appropriate standard. Rule 11 of the Federal Rules of Civil Procedure says in pertinent part as follows:

> "The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other papers; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation . . . ."

Comments to the Federal Rules indicate that the reasonable inquiry required by the Rule may depend on such factors as:

> ". . . how much time for investigation was available for the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the Bar."

Rule 11 of the Alabama Rules of Civil Procedure differ somewhat from the Federal Rule. Nonetheless, Rule 11 of the Alabama Rules still provides that:

> "The signature of an attorney constitutes a certificate by him that he has read the pleading, motion, or other papers; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay."

Ethical Consideration 7-10 provides as follows:

> "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."

It is our opinion that when an attorney who knows, or reasonably should know, that a lawsuit has been filed in one county when that is the wrong venue, the attorney has, in fact, counseled or assisted his client in conduct that the lawyer knows to be fraudulent and that he has knowingly made a false statement of law or fact [DR 7-102(A)(5) and DR 7-102(A)(7)] in the course of his representation of the client.

Certain provisions of Disciplinary Rule 7-102(A) make special reference to false representations regarding the residency of parties to suits for divorce in Alabama. Disciplinary Rules 7-102(A)(9) and 7-102(A)(10) state as follows, to-wit:

"DR 7-102 ***

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

***

(9) File or prosecute or aid in the filing or prosecution of any suit, cross-bill, or proceedings seeking a divorce in a court in Alabama as attorney or solicitor for a complainant or cross-complainant therein or serve as referring or forwarding attorney for such complainant or cross-complainant with knowledge or reasonable causes to believe that neither party to such suit, cross-bill, or proceeding is at the time of the filing of the bill of complaint or cross-bill of complaint therein, a bona fide resident of the State of Alabama;

(10) While acting as attorney for either party in any suit for divorce in any court in Alabama, represent to the court or conspire with any party, attorney, or person to represent to the court that either party to such is a bona fide resident of Alabama, knowing such representation to be false."

We feel that the same standard is appropriate in other civil actions and adopt the result in ABA Informal Opinion 1011. [RO-89-117] ■

Riding the Circuits

Randolph County Bar Association

The newly-formed Randolph County Bar Association elected officers. They are:

President: W. Patrick Whaley, Wedowee
Vice-president: Lewis Hamner, Roanoke
Secretary/Treas.: Oliver Kitchens, Roanoke

Robert S. Vance Memorial Fund

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

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

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

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

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

Request for Information

The Supreme Court of Alabama, in its effort to preserve judicial history, is attempting to identify the portraits of all past chief justices and associate justices. We find that we are without the following portraits for past chief justices and associate justices:

Chief Justices

E. Wolsey Peck 1868-73
Samuel D. Weakley 1906

Associate Justices

Henry Y. Webb 1820-23
Richard Ellis 1820-31
Anderson Crenshaw 1821-31
Henry Minor 1823-31
John White 1825-31
John M. Taylor 1825-34
Sion L. Perry 1828-31
Perry I. Thornton 1834-36
John J. Ormond 1837-47
David P. Ligon 1851-54
Lyman Gibbons 1852-54
Richard W. Walker 1859-64
. 1891-92
Thomas J. Judge 1865-68
. 1874-76
Amos R. Manning 1874-80
David Clopton 1884-92
Thomas W. Coleman 1890-98
W.S. Thorington 1892
J.B. Head 1892-98
Jonathan Haralson 1892-09
Henry A. Sharpe 1898-06
N.D. Denson 1904-09
J.J. Mayfield 1909-20
A.A. Evans 1909-10
B.M. Miller 1921-27
Norman T. Spann 1956-57

The supreme court requests that if you have any information of these past justices or of their families, please notify the Clerk's Office of the Supreme Court of Alabama, 445 Dexter Avenue, Montgomery, Alabama 36130, or phone (205) 242-4609.

Robert G. Esdale
Clerk
Supreme Court of Alabama

cle opportunities

july

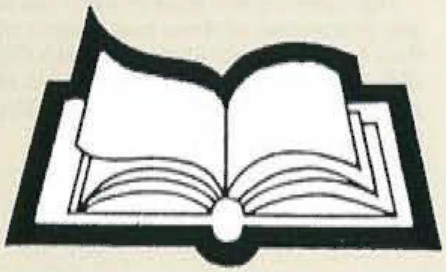
12 thursday

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

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

13 friday

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



16-19

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

19-21

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

FIDUCIARY LAW INSTITUTE
St. Simons Island
Institute of Continuing Legal Education in Georgia
Credits: 12.0 Cost: $145
(404) 542-2522

23-27

ESTATE PLANNING SHORT COURSE
Westin Hotel, Dallas
Southwestern Legal Foundation
(214) 690-2377

26-29

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

27 friday

CLOSELY HELD BUSINESSES
Harbert Center, Birmingham
Birmingham Bar Association
Credits: 3.0
(205) 251-8006

august

9 thursday

LABOR & EMPLOYMENT LAW IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $108
(715) 835-8525

10 friday

LABOR & EMPLOYMENT LAW IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0 Cost: $108
(715) 835-8525

16-18

ADVANCED SEMINARS
The Westin, Vail
Association of Trial Lawyers of America
(800) 424-2725

17 friday

COMPUTER ASSISTED LEGAL RESEARCH
Civic Center, Mobile
Alabama Bar Institute for CLE
Credits: 3.5
(205) 348-6230

20-21

LEGAL SEMINAR XXX
Opryland Hotel, Nashville
National Rural Electric Cooperative Association
Credits: 10.3 Cost: $500
(202) 857-9652

24 friday

GOVERNMENT CONTRACTS
Botanical Gardens, Birmingham
Cumberland Institute for CLE
Credits: 6.0
(205) 870-2865

september

6-7

ANNUAL REVIEW SEMINAR
Convention Center, Memphis
Tennessee Law Institute
Credits: 12.0 Cost: $275
(615) 544-3000

7 friday

WILL DRAFTING
Harbert Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

BANKRUPTCY
Pickwick Center, Birmingham
Cumberland Institute for CLE
Credits: 6.0
(205) 870-2865

13-14

BANKRUPTCY LAW AND CORPORATE AND PARTNERSHIP GOVERNANCE
Westin Hotel, Dallas
Southwestern Legal Foundation
(214) 690-2377

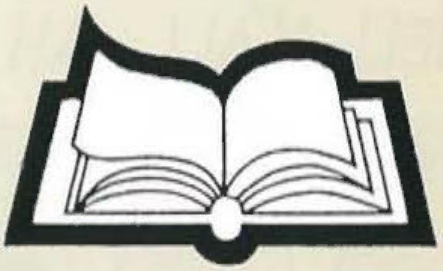
13 thursday

DIVORCE LAW
Civic Center, Huntsville
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

14 friday

DIVORCE LAW
Harbert Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

S CORPORATIONS
Pickwick Center, Birmingham
Cumberland Institute for CLE
Credits: 6.0
(205) 870-2865



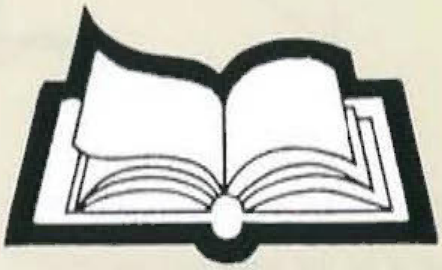
20 thursday

DIVORCE LAW
Riverview Plaza, Mobile
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

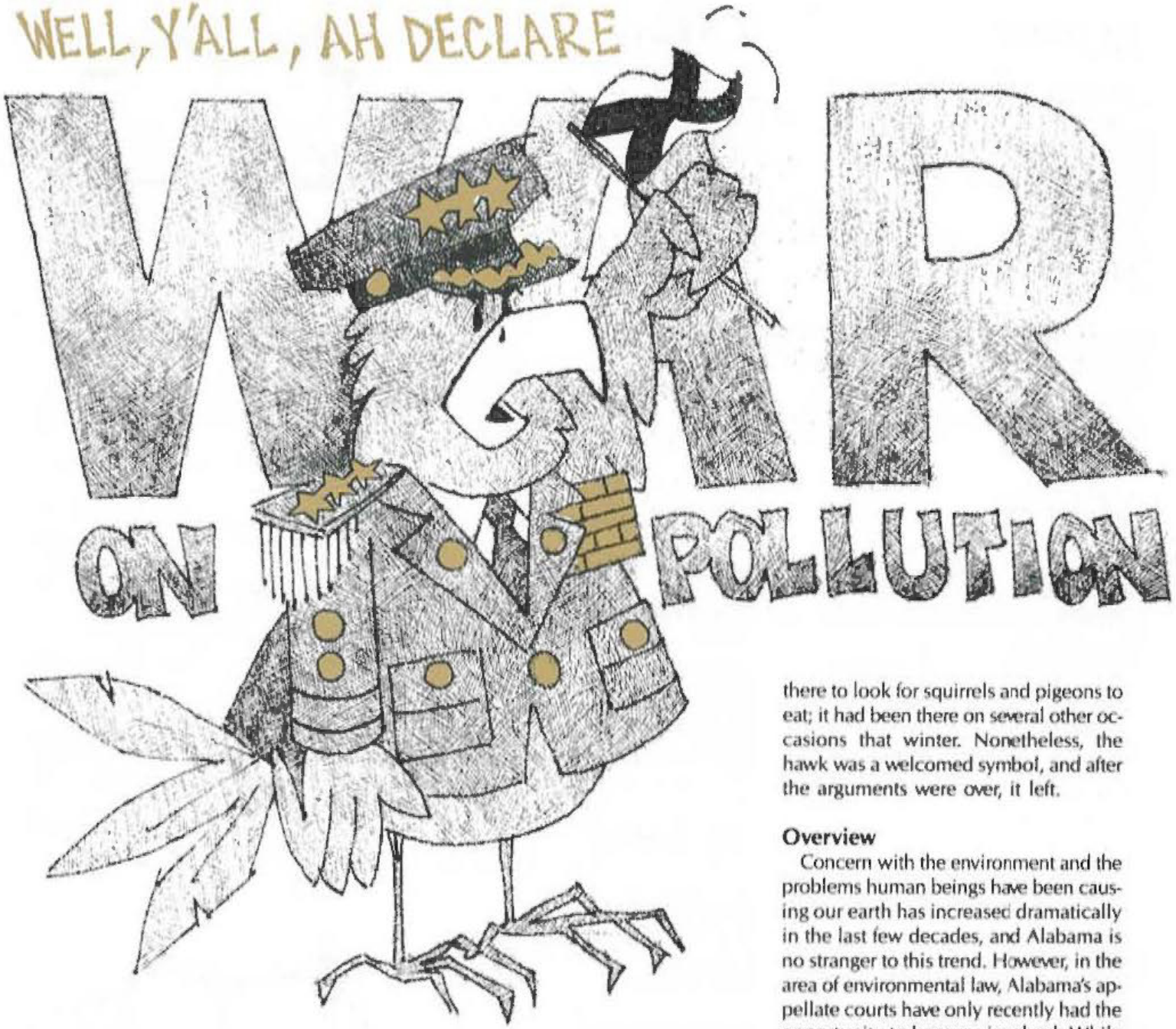
21 friday

DIVORCE LAW
Civic Center, Montgomery
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

PRACTICING BEFORE LEGISLATIVE AND ADMINISTRATIVE AGENCIES
Pickwick Center, Birmingham
Cumberland Institute for CLE
Credits: 6.0
(205) 870-2865



The Hawk Outside the Judicial Building: Recent Environmental Cases in Alabama



by Ray Vaughan

On December 14, 1987, the Supreme Court of Alabama heard oral arguments in one of the first major environmental cases to come before that court. Prior to the arguments, a red-tailed hawk perched in the pecan tree outside the chief justice's office in the front of the Judicial Building; there in downtown Montgomery was a powerful embodiment of the wild. Some considered the hawk to be an omen, a harbinger of good fortune for the case and for Alabama's environment. In all likelihood, the hawk was there to look for squirrels and pigeons to eat; it had been there on several other occasions that winter. Nonetheless, the hawk was a welcomed symbol, and after the arguments were over, it left.

Overview

Concern with the environment and the problems human beings have been causing our earth has increased dramatically in the last few decades, and Alabama is no stranger to this trend. However, in the area of environmental law, Alabama's appellate courts have only recently had the opportunity to become involved. While the federal judiciary and the courts of many of the larger states have been dealing with environmental cases for several decades and developing a large body of environmental jurisprudence, active litigation over environmental issues has just begun in Alabama. During the last

few years, the appellate courts of Alabama have dealt with a number of environmental cases involving a wide range of issues; however, most of the important cases have been decided in the last few months.

This article will review these Alabama environmental cases and their implications and how they fit into the background of federal environmental law. The legislative enacting of environmental laws, both at the state and the federal level, is an ongoing and ever-evolving process and has a great impact on everything in America. However, it is the interpretation of the statutes by the courts that gives guidance to the agencies charged with administering the acts and to the public in their efforts to protect the environment.

Early cases

The courts of our state have had to deal occasionally with various health statutes and with environmental problems addressed by the torts of nuisance and respass. See *Rushing v. Hooper-McDonald, Inc.*, 293 Ala. 56, 300 So.2d 94 (1974) (a trespass can be committed by discharging pollutants at a point beyond the boundary of the realty), and *Borland v. Sanders Lead Co.*, 369 So.2d 523 (Ala. 1979) (compliance with the Alabama Air Pollution Control Act does not shield a polluter from liability for damages under the torts of trespass and nuisance). However, cases under the modern federal and state environmental statutory scheme are a recent development.

In *State ex rel. Graddick v. Jebsen S. (U.K.) Ltd.*, 377 So.2d 940 (Ala. 1979), the State attempted to collect a civil penalty provided by the Alabama Water Improvement Act[1] for an intentional discharge of pollutants into state waters without a permit. The court held that the State had failed to state a claim upon which relief could be granted for the facts alleged in the complaint clearly showed that the discharge was accidental. Indeed, the discharge was due to a ship colliding with a terminal and thereby severing pipelines that discharged pollutants into the water. Since the statute was penal in nature, the court strictly construed the language of the statute to limit its application to intentional conduct. A different section of the act provided for recovery for accidental discharges of pollution, but the State had not elected to proceed under that section.

In *Ross Neely Express, Inc. v. Alabama Dept. of Environmental Management*, 437 So.2d 82 (Ala. 1983), the supreme court held that two Alabama Department of Environmental Management ("ADEM") regulations were unconstitutional. The regulations at issue dealt with fugitive dust emissions from roads. Ross Neely trucks using an access road maintained by Ross Neely were throwing dust into the air, and ADEM sought an injunction to prevent those dust emissions. In finding both regulations unreasonably overbroad and overly restrictive of a property owner's right to use his property in a reasonable manner, the court stated:

> "While the above matters are clearly subject to the policy power, and while the control of air pollution is greatly to be desired, we find that the restraint imposed by the two regulations before us, as written, imposes a restraint upon the use of private property that is disproportionate to the amount of evil that will be corrected. Thus, they fail the test of constitutionality under *City of Russellville v. Vulcan Materials Co.*, [382 So.2d 525 (Ala. 1980)]."

437 So.2d at 85-86.

The court of civil appeals ruled on the constitutionality of the appeals procedure in the Alabama Environmental Management Act[2], the act that created ADEM, in *Dawson v. Cole*, 485 So.2d 1164 (Ala. Civ. App. 1986). Dawson appealed a National Pollution Discharge Elimination System ("NPDES") permit that had been issued by ADEM to a developer in Baldwin County, and Dawson wanted to enjoin the commencement of the administrative hearing by attacking the constitutionality of the procedures for that hearing. The court held that the lack of any mechanism to postpone the "commencement" of a hearing on an appeal from an ADEM decision does not make the statute and the corresponding regulation violative of due process. Finding that the 45-day deadline for the "commencement" of a hearing was designed to ensure an aggrieved party a timely hearing, the court noted that ADEM regulations provided for a continuance of the hearing once it had been commenced, should any party so require. Dawson had also attacked the lack of prehearing discovery in the appeal process. Following federal interpretation of administrative proceedings, the court held that there is no basic constitutional right to prehearing discovery in such a situation. Further, the act did indeed provide for some discovery.

The merits of Dawson's appeal of the permit issued to the Baldwin County developer were addressed in *Dawson v. Alabama Dept. of Environmental Management*, 529 So.2d 1012 (Ala.Civ.App.), cert. denied, *Ex parte Dawson*, 529 So.2d 1015 (Ala. 1988). There, the court set forth the rules that a decision of the Alabama Environmental Management Commission ("AEMC"), which oversees ADEM, be taken as *prima facie* just and reasonable, that a presumption of correctness attaches to that decision, and that a reviewing court may not substitute its judgment for that of AEMC as to the weight of the evidence on questions of fact. Deferring to the expertise of ADEM in environmental matters, the court upheld the issuance of the permit. The court also upheld AEMC's interpretation of the state's water antidegradation policy. In denying certiorari, the supreme court stated that the denial should not be construed as approving statements of the court of civil appeals regarding the scope of review. The denial of certiorari was based upon the fact that *Dawson* was raising constitutional claims in the petition for certiorari that were raised for the first time on appeal. The fact that the supreme court denied certiorari for some reason other than approval of the reasoning of the court of civil appeals would later become critical, because the portion of *Dawson* upholding AEMC's interpretation of the water antidegradation policy would be overruled in the later

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case of *Ex parte Fowl River Protective Ass'n.*, [Ms. 88-561, May 25, 1990] ____So.2d____ (Ala. 1990) (discussed below).

The Shell Oil Drilling Mud Case

The first major environmental case to gain much state-wide publicity was *Ex parte Baldwin County Comm'n*, 526 So.2d 564 (Ala. 1988), the case where the hawk was outside the judicial building during oral arguments. This case began with the decision of ADEM to issue to Shell Offshore Inc. (a subsidiary of Shell Oil) an NPDES permit. Required by the federal clean water act[3] and the state clean water act[4], an NPDES permit is a necessary requisite for any discharge into water. The name is somewhat of a misnomer, for although the system is called "Pollution Discharge *Elimination* System" it provides a vehicle for *new* pollution sources to begin legally. Such was the application from Shell; it sought the first permit to discharge drilling muds from an offshore drilling rig into Alabama waters. Due more to interagency confusion than to design, Alabama had maintained a "no-discharge" policy as to drilling muds for approximately ten years. After the consolidation of the various state environmental agencies into ADEM in 1982, Shell was the first applicant to ask that the no-discharge policy be abolished.

After many months of study, ADEM decided to abolish the no-discharge policy and grant Shell a permit to discharge drilling muds and other wastes from its rig. This decision was appealed to AEMC by the Baldwin County Commission with support from the Alabama Chapter of the Sierra Club. After a hearing officer recommended that ADEM's permit to Shell be adopted by AEMC, on August 5, 1987, AEMC voted 4-3 to disapprove ADEM's action, and an order denying the permit was entered August 10. Shell filed a motion for reconsideration, and on September 8, 1987, AEMC decided 4-3 that it had the power to reconsider its prior decision and then voted 4-3 to reverse its prior order and to approve the issuance of the permit to Shell.

Intertwined with the actions of AEMC was a lawsuit filed by the Baldwin County Commission in Montgomery Circuit Court to prevent AEMC from reconsidering its denial of the permit. The circuit court ruled prior to September 8 that the issue was not ripe, as AEMC had not yet decided that it could conduct a rehearing. On September 8, once AEMC had decided that it could reconsider its prior action, Baldwin County filed a petition for a temporary restraining order with the circuit court minutes later. Rather than wait for the court to hold a hearing, AEMC went ahead and reconsidered its prior decision and reversed it. Only hours later, the court entered an order enjoining AEMC from continuing.

Shell petitioned the court of civil appeals for a writ of mandamus to the Montgomery Circuit Court to prevent the circuit court from considering Baldwin County's petition. The court of civil appeals granted Shell's petition and held that since AEMC had already reconsidered its prior action, then the proper method for Baldwin County to proceed was for it to appeal the granting of the permit. Baldwin County petitioned the supreme court for a writ of certiorari, which was granted.

In a 6-3 decision, the supreme court reversed the decision of the court of civil appeals and held that due to the unique statutory design of AEMC (such as its exemption from portions of the Administrative Procedure Act[5]), AEMC was without jurisdiction to reconsider its order denying the permit. The court's holding was:

> "AEMC was wholly without any authority to grant a rehearing or to take further action of any kind in the matter. All actions thereafter taken by AEMC, including its order of September 8, 1987, were null and void. Since there was no appeal [by Shell] from the order of August 10, 1987, the order denying Shell a permit to dump drilling waste is reinstated as the final order of AEMC."

526 So.2d at 568.

While never reaching the substantive issue of the propriety of a permit for the discharge of drilling muds into Alabama's coastal waters, the decision represented the first major court victory for a group seeking to protect the environment in the appellate courts of Alabama. An ironic note to the case is that Shell had nearly finished its drilling operations prior to the date of the supreme court's decision; thus, most of the drilling muds and other wastes that Shell had wanted to discharge into the water had already been discharged. Even though Shell discharged these wastes without a permit, as the supreme court's opinion held, no state agency or environmental group has ever sued Shell for those unpermitted discharges. Therefore, while the pro-environment side won in court, the victory was a paper one. Now Shell and Exxon have both applied to ADEM for several more permits to discharge drilling muds from other rigs in Alabama coastal waters. Those permits are presently being contested, and thus, the supreme court may yet have the opportunity to rule on the merits of granting a permit to discharge drilling muds into Alabama's coastal waters.

Other recent civil cases

While an important case, *Ex parte Baldwin County Comm'n* was little more than an opportunity for Alabama's appellate courts to get their feet wet in the vast sea of environmental law. Other recent cases have delved much more deeply into the substantive issues of environmental management and protection.

In *Marshall Durbin & Co. of Jasper, Inc. v. Environmental Management Comm'n*, 519 So.2d 962 (Ala.Civ.App. 1987), the court of civil appeals upheld ADEM's 7Q10 standard over a less stringent 30Q5 standard proposed by Marshall Durbin. The 7Q10 standard is used for water design flow criteria and represents the minimum seven-day low flow that occurs once in ten years; this standard is used to help determine the discharge limits placed on an NPDES permit. Using the 7Q10 standard, ADEM issued an NPDES permit to the Jasper Utilities Board for the city's sewage plant; Marshall Durbin was a customer of the city's sewer service, and its fees for that use would increase in order to provide funds for the construction of a new sewage plant that would meet the 7Q10 standard. Prior to the issuance of that permit, Marshall Durbin petitioned ADEM for a change in the administrative standard from 7Q10 to 30Q5, the minimum 30-day flow that occurs once in five years. The court held:

> "The practical effect of Durbin's petition would be to permit more pollution to be discharged into the two streams, which result would not promote the purpose of the

> Alabama Water Pollution Control Act. In applying its expertise to Durbin's petition, the Commission was also justified in finding that the petition was not sufficiently supported by proper evidence. The Commission was further warranted in finding that the rule change from 7Q10 to 30Q5 would be detrimental to the Department's overall regulatory scheme. The Commission exercised its discretion in choosing the method of achieving legislative objectives, *Alabama Board of Nursing [v. Herrick]*, 454 So.2d 1041 [(Ala.Civ.App. 1984)], and we must give great weight to its decision. *City of Birmingham [v. Jefferson County Personnel Board]*, 468 So.2d 181 [(Ala.Civ.App. 1985)]."

519 So.2d at 965. This holding demonstrates the widely accepted rule that matters within the environmental agency's area of expertise will be left to the agency's discretion, and it gives strong support to the reason behind the state's clean water act: to reduce water pollution.

Marshall Durbin got a second bite at the apple, in effect, when the supreme court held in *Ex parte Marshall Durbin & Co. of Jasper, Inc.*, 537 So.2d 496 (Ala. 1988), that Marshall Durbin had standing to appeal ADEM's issuance of the final NPDES permit to the Jasper Utilities Board. The court reasoned that, as a customer of the board, Marshall Durbin's increased sewage fees needed to pay for the new sewage facility made Marshall Durbin an "aggrieved" party under the applicable statute and regulation.[5] Thus, Marshall Durbin got to challenge the 7Q10 standard in a petition for an administrative rule change and in an appeal from the actual permit involved. This opinion shows that the Supreme Court of Alabama interprets the state's environmental statutes and ADEM's regulations liberally in giving those industries and parties regulated thereunder ample opportunity to participate in the decision-making processes of ADEM.

In another case dealing with NPDES permits, the court of civil appeals had the opportunity to set forth the doctrine of exhaustion of administrative remedies as it applied to ADEM. The court held in *Save Our Streams, Inc. v. Pegues*, 541 So.2d 546 (Ala.Civ.App. 1988), that NPDES permits must be final before issues surrounding them are ripe for judicial review. There, the plaintiff environmental group tried to enjoin ADEM from issuing a modified NPDES permit to one party and from issuing another permit to the Shelby County Commission. The plaintiff's issues as to the first permit became moot when ADEM agreed to suspend the party's original permit and agreed to hold more hearings on the proposed modified permit. As to the permit for the Shelby County Commission, it had not even been issued when the plaintiffs filed suit; thus, any issues surrounding it were not ripe. The plaintiff petitioned the supreme court for a writ of certiorari to review the holding of the court of civil appeals, but that petition was denied with an opinion that pointed out that the plaintiff had failed to comply with Rule 39(k), A.R.App.P. *Ex parte Save Our Streams, Inc.*, 541 So.2d 549 (Ala. 1989). The supreme court's opinion on how to comply with Rule 39(k) so that review by certiorari can be had is very important, because many environmental cases in Alabama will be an appeal from an action of ADEM, and thus, as an appeal from an administrative action, it must usually go through the court of civil appeals before it can reach the supreme court.

Several of the permits involved in *Save Our Streams* were at issue in *Water Works & Sewer Board of City of Birmingham v. Alabama Dept. of Environmental Management*, 551 So.2d 268 (Ala. 1989). There, a permit issued to Daniel Realty Corporation was transferred to D & D Water Renovators, Inc., and then Shelby County agreed to operate the facility permitted to D & D. After Shelby County agreed to be an agent for D & D, the location of the facility, but not the discharge point, was altered so that the facility was located in a watershed of Lake Purdy, a major drinking water source for Birmingham. The Birmingham Board argued that Shelby County was operating this facility without a proper permit. The supreme court rejected this argument by holding that the agency relationship between the county and D & D did not in-

validate the permit held by D & D for the discharge point, and that a change in facility location will not necessarily invalidate a permit that was issued for a facility in another location as long as the *discharge point* has not been changed. The court stated that a change in facility location could cause a permit to be rescinded and would necessitate that the permitting procedure be done again if that alteration presented a hazard.

An important point in *Water Works* was that the court held that ADEM did have the authority to consider facility location and design in making its decision on whether to grant a permit. Throughout its history, ADEM has always interpreted its authority in a very narrow way; without specific guidance from the legislature or the courts, ADEM has usually declined to act beyond being a permitting agency. In this case, ADEM argued that it could not consider such factors as facility location and design in its permit decision. It contended that it could consider only the effect of the discharge at the discharge point. Quoting extensively from the hearing officer's findings, the court found that ADEM's authority is more expansive than ADEM had interpreted it to be and stated:

> "The hearing officer determined that ADEM has the *authority* to consider the facility location, although he found that ADEM is not under a mandate to do so. What then is the effect on the permit of altering something that may or may not figure into ADEM's issuance of a permit? Certainly, if the facility location were altered and that alteration presented a hazard to the State's water supply, then ADEM would have the authority to rescind the issued permit. However, if the facility location is altered with ADEM's knowledge and that alteration does not prove hazardous or out of line with ADEM regulations, then we are of the opinion that the permit is valid." (Emphasis original.)

551 So.2d at 271. The far-reaching effect of this case is to show ADEM that it can implement a more expansive interpretation of its authority than just being a permitting agency. The various acts that ADEM operates under have the express purposes of protecting the environment and comprehensively managing the state's resources[7], yet ADEM has long taken the position that its authority extends only to the strictly technical computations involved in the isolated activity sought by an applicant. This case now gives ADEM the guidance it had previously lacked on how its interpretation of its authority should be broadly defined in order to achieve the goals set forth in the state's environmental statutes.

Two other recent cases worth noting are *McCord v. Green*, 555 So.2d 743 (Ala. 1989), and *Rice v. Alabama Surface Mining Comm'n*, 555 So.2d 1079 (Ala.Civ.App. 1989), cert. denied, 555 So.2d 1079 (Ala. 1990).

In *McCord*, the supreme court ruled on a more traditional area of environmental law: nuisance. An injunction against an anticipated nuisance (a creosote plant) was reversed for the failure of the plaintiffs to prove that the plant would be a nuisance per se, that is, at all times

and under any circumstances. The plaintiffs hoped to enjoin the plant's construction by attempting to prove it would be a nuisance due to the air and noise pollution it would create; however, their level of expert testimony was not sufficient to make their case, and they made no attempt to prove damage to surface and ground water. *McCord* illustrates the heavy burden involved in showing environmental cause and effect so as to prove that an activity will be a nuisance.

The court of civil appeals held in *Rice* that agents for strip mine permittees can be held personally liable under a section of the Alabama Surface Mining and Reclamation Act[8] for a failure of the permittee to reclaim the land. Such a holding agrees with other jurisdictions in imposing liability for damage to the environment in an expansive manner. Indeed, since no Alabama court had ever interpreted that section before, the court relied upon the interpretation given the federal statute[9] (upon which the Alabama statute was based) by the Sixth Circuit Court of Appeals in *United States v. Dix Fork Coal Co.*, 692 F.2d 436 (6th Cir. 1982).

Criminal cases

Very little enforcement of the criminal sanctions in Alabama's environmental statutes has been undertaken. While a few indictments have been brought in the past few years, the only case to reach the appellate level has been *State v. Clayton*, 492 So.2d 665 (Ala.Cr.App. 1986), wherein the defendant was charged with causing the formation of an "unauthorized dump" under the Alabama Solid Wastes Disposal Act.[10] The district court found the statutes prohibiting the formation of unauthorized dumps to be unconstitutionally vague. Relying upon the rule that health regulations adopted under the state's police power are to be given great latitude, the court of criminal appeals reversed and held that the statutes were not unconstitutionally vague, because they did give a reasonable description of what wastes fell under the prohibition.

The latest cases

One of the biggest environmental cases to come before the supreme court was *Ex parte Lauderdale County*, [Ms. 88-557, 88-583, February 16, 1990] ____So.2d____(Ala. 1990), a case involving the constitutionality of the state's solid waste act.[11] In April 1987, the Lauderdale County Commission authorized Waste Contractors, a subsidiary of Waste Management, Inc., to operate a solid waste landfill near Zip City. The commission took this action without any notice to the public or opportunity for a hearing. Later, the commission rescinded its approval for the landfill without any notice to Waste Contractors. Waste Contractors sued, alleging that its due process rights had been violated and that the one subsection[12] of the state solid waste act giving counties the power to approve or disapprove disposal sites was unconstitutional in that it failed to provide specific guidelines or standards for a county to follow. The state solid waste act provides that both ADEM and the county involved must permit a solid waste landfill site before the landfill can be constructed; at the time of this action by Lauderdale County, the act was arguably lacking in standards, but the act has since been amended to provide more specific guidelines. However, the resolution of

this case turned on whether the solid waste act as it existed in 1987 was constitutional.

Because Waste Contractors had attacked the validity of the solid waste act, the State was allowed to intervene to defend the constitutionality of the statute.[13] The State argued before the trial court that the court should not read the one isolated subsection which Waste Contractors was attacking in a vacuum and that although the solid waste act was not as specific as it could be in its standards, when read in its entirety, it did contain sufficient standards to guide a county in its decision-making process on a landfill permit. The trial court agreed with this argument and upheld the act and the actions of the County.

On appeal, the court of civil appeals reversed because that court determined that the state solid waste act was unconstitutionally vague. After granting the writ of certiorari, the supreme court reversed and, in an 8-0 decision, held that the act did have sufficient standards, when read in its entirety and when read in light of ADEM and health department regulations which a county could not violate. The court went on to state that the county did violate Waste Contractors' due process rights by rescinding the approval without notice and a hearing; however, the court also noted that the initial approval without notice and a hearing violated the public's due process rights. In addition to those holdings, the court went on to uphold parts of the county's sanitary landfill license requirements (adopted after it had rescinded the approval for Waste Contractors' site) that the court of civil appeals had struck down. These included the license fee and the requirement that any applicant receive their ADEM permit before it could get permission from the county.

The decision in *Lauderdale County* illustrates the supreme court's inclination to interpret environmental statutes so as to fully effectuate the legislative intentions of protecting the environment and human health and of allowing full participation in the decision-making process by both the public and the regulated parties.

The latest environmental case to come before the supreme court was also its largest to date. In *Ex parte Fowl River Protective Assn.*, [Ms. 88-561, May 25, 1990] ____So.2d____ (Ala. 1990), the court was faced with an extremely complicated factual situation involving the construction of an industrial sewage outfall in Mobile Bay. Involved in the case was an NPDES permit issued by the Alabama Water Improvement Commission (a predecessor agency to ADEM) to the Board of Water and Sewer Commissioners of the City of Mobile for the discharge of up to 25 million gallons per day of treated industrial sewage. Despite the long history of this permit battle and the complexity of the facts, basically two issues were before the supreme court: whether AEMC's interpretation of the state's antidegradation policy was proper and whether the evidence contained in the record warranted the granting of the permit.

The court of civil appeals had ruled that AEMC's interpretation of the antidegradation policy was correct and that the issuance of the permit was proper. In reversing the decision of the court of civil appeals, the supreme court held that the AEMC's interpretation of the policy was clearly erroneous. Based upon the federal antidegradation policy,[14] the state policy is an ADEM regulation that serves "to conserve the waters of the State of Alabama and to protect, maintain and improve the quality thereof...."[15] All waters of the state are classified by ADEM as to their quality, according to their uses, and the highest classification ADEM currently gives to water is public water supply. ADEM and AEMC had interpreted the state's antidegradation policy to mean that water quality could be degraded within a classification without any showing and that water quality could be degraded from its present classification to a lower classification upon a showing of economic or social necessity. This interpretation was in line with *Dawson v. Alabama Dept. of Environmental Management, supra*, wherein the court of civil appeals had upheld that interpretation as reasonable. Referring to the federal antidegradation policy for guidance, because ADEM and AEMC's water regulations must conform to federal ones, the court

held in *Fowl River* that AEMC's interpretation of the policy was incorrect and overruled *Dawson* inasmuch as it upheld that interpretation. The court stated:

> "A careful comparison of the statement in *Dawson* to the antidegradation policy reveals that they conflict. *Dawson* states that the antidegradation policy allows degradation of waters within a classification, but not degradation from a higher to a lower classification without a showing of necessity. Accordingly, under *Dawson*, it would be permissible to degrade water from one water use classification to another, if there were a showing of necessity. The antidegradation policy, on the other hand, provides that water may be degraded *within its classification* if there is a showing of economic or social necessity. In that degradation, however, the policy requires that the water quality be maintained to 'protect existing uses fully.' Furthermore, the policy in another provision explicitly commands that existing water uses and the level of water quality necessary to protect the existing uses 'shall be maintained and protected.' The policy does not say or even imply that water may be degraded from one classification to another, as *Dawson* states. Thus, if there is a showing of economic or social necessity, water may be degraded within its classification, but water may never be degraded from one classification to a lower one." (Emphasis original.)
>
> ____So.2d at____.

In addition to giving the state's water antidegradation policy an interpretation more in line with protecting the state's waters, the court ruled that a further AEMC interpretation on the policy was erroneous. AEMC and the hearing officer involved in the appeal before AEMC in this case had both stated that the antidegradation policy did not apply to waters which were not of a quality higher than the public water supply use classification. Since the highest classification ADEM currently gives to water is public water supply, AEMC's interpretation of the antidegradation policy that it applied only to waters higher in quality than public water supply meant that the policy applied to no waters in Alabama. The supreme court held that such an interpretation was a clear violation of the policy.

After striking down AEMC's interpretations of the antidegradation policy, the supreme court went on to address the merits of the permit itself. Finding that the two-dimensional computer model used to predict effluent behavior and to set the permit limits could not predict the impact of the discharge on the real-life, three-dimensional Mobile Bay, the court determined from the record that ADEM had vastly overestimated the amount of effluent that could be discharged into the bay without degrading water quality. In particular, the court found that the dissolved oxygen water quality standard most likely could not be met with the discharge limits in the permit. The fatal flaw in the computer model was that its two-dimensional calculations completely failed to take into account the stratification of the water in Mobile Bay due to varying water and effluent densities. Because the evidence clearly showed that the real water was much more dynamic than the simple two-dimension computer model, the computed effluent limits were much too high, and the permit would probably allow water quality violations to occur. After coming to this conclusion, the supreme court reversed the holding of the court of civil appeals that affirmed the permit and ordered that the permit be denied.

It is important to note that the court stated in a footnote that the restrictive interpretation given to standing under Alabama's environmental laws by the Eleventh Circuit Court of Appeals was incorrect. In *Save Our Dunes v. Alabama Dept. of Environmental Management*, 834 F.2d 984 (11th Cir. 1987), the Eleventh Circuit ruled that a person does not have standing, under Alabama law, to challenge an action of ADEM unless that person has a property interest directly affected by the action. The supreme court made it clear that standing under Alabama's environmental laws was not so re-

strictive and that the Eleventh Circuit's interpretation was erroneous. "[M]atters of environmental protection and regulation are of great significance to the citizens of Alabama, and a citizen's statutory right to appeal an ADEM decision should be interpreted broadly." ____So.2d at____ n. 3.

Fowl River is a strong statement that the Alabama Supreme Court will interpret environmental statutes and regulations broadly so as to fully implement their purpose of protecting the environment. A clear signal was sent to ADEM and AEMC that they are to be vigorous in their protection of Alabama's environment and that any interpretations of their enabling statutes or regulations should be biased toward environmental protection and enhancement. *Fowl River* gives ADEM unmistakable guidance in how it should enforce the state's environmental laws.

Conclusion

Although only a few environmental cases have come before Alabama's appellate courts, the courts have already set the tone for how they will handle these kinds of cases in the future. The supreme court has taken a progressive and reasonable stance that gives an expansive interpretation to environmental statutes; the course set by the court ensures that all affected parties, whether the public, environmental groups or the regulated industries, will have a full opportunity to participate in the decision-making processes of ADEM and of any other governmental entity dealing with the environment. Also, the court has clearly come down in favor of giving full effect to the purpose of Alabama's environmental laws to protect and enhance the state's environment; the holdings of the court give much needed guidance to the agencies charged with protecting our environment. Even though environmental cases are relatively new to Alabama's judiciary, the position taken by the supreme court in just the last two years has established Alabama as one of the foremost jurisdictions in the handling of environmental cases. Perhaps the hawk was a good sign.

Footnotes

1. *Ala. Code* 1975, §22-22-9(o).
2. *Ala. Code* 1975, §§22-22A-7.
3. Federal Water Pollution Control Act, 33 U.S.C. §§1251 *et seq.*
4. Alabama Water Pollution Control Act, Ala. Code 1975, §§22-22-1 *et seq.* When a state's water statutes and regulations are "equivalent" to the federal scheme under the guidelines of the Environmental Protection Agency, the EPA will certify the state scheme, and an applicant for an NPDES permit will have to go only to the state environmental agency for the permit, rather than to both the state and the EPA. Alabama's water act program has been certified by the EPA.
5. *Ala. Code* 1975, §§41-22-1 *et seq.*
6. *Ala. Code* 1975, §22-22A-7(c), and ADEM Admin. Code Rule 335-2-1-.03.
7. See *Ala. Code* 1975, §22-22-2, 22-22A-2, 22-27-40, 22-28-3, 22-30-2, 22-30A-1, and 22-35-1.
8. *Ala. Code* 1975, §9-16-93(f).
9. 30 U.S.C. §1271(c).
10. *Ala. Code* 1975, §§22-27-2(6) and -4(b).
11. *Ala. Code* 1975, §§22-27-1 *et seq.* (prior to the 1989 amendments).
12. *Ala. Code* 1975, §22-27-5(b).
13. Any time the constitutionality of a state statute is attacked by a party, the attorney general must be given notice and must be allowed the opportunity to defend the constitutionality of the statute. See *Ala. Code* 1975, §6-6-227, and *Fairhope Single Tax Corp. v. Rezner*, 527 So.2d 1232, 1237 (Ala. 1987).
14. 40 C.F.R.§131.12.
15. ADEM Admin. Code Chap. 6-10, at 10-3. ■

Legislative Wrap-up

by Robert L. McCurley, Jr.

Legislative session—1990

There were 259 general bills passed during the Regular Session with 69 percent of them House bills and 31 percent originating in the Senate. Ninety-six of these bills were appropriation bills, and 23 were constitutional amendments approved to be voted on by the people. Of the remaining bills several were of interest to lawyers and their clients.

Adoption Revision—Act 90-554, effective January 1, 1991

One provision effective June 1, 1990, reduces the $1,000 fee previously required to be paid the court for private placement adoptions to a $300 investigation fee payable to the Department of Human Resources and only when they perform the home study. See March 1990 *Alabama Lawyer* for summary.

Securities Revision—Act 90-527

This act will become effective January 1, 1991. See May 1989 *Alabama Lawyer* for a summary.

Alabama Condominium Act—Act 90-551

This law is a complete revision of the current Condominium Act which was passed in 1971. The Act will become effective January 1, 1991.

Mechanic or Materialman Lien—Act 90-98, effective February 23, 1990

This reverses the "Douthit" case by amending *Ala. Code* §35-11-211 and generally affects unperfected liens at the time of a mortgage foreclosure.

Eviction—Act 90-258

This act amends *Alabama Code* §6-6-332 and §35-9-82 with regards to service of process for evictions. This act became effective April 10, 1990.

District Court—Act 90-382

This act amends *Alabama Code* §§12-11-30 and 12-11-31 to provide that the district court has exclusive jurisdiction over civil actions under $2,000. Previously, jurisdiction was $500 and $1,000, respectively, under these code sections. The change became effective April 17, 1990.

Lemon Law—Act 90-479

This act requires the manufacturer of a motor vehicle to replace the motor vehicle or to refund its purchase price to the consumer purchasing such vehicle in the event the vehicle fails to conform to the manufacturer's express warranty.

Exemptions from Execution—Act 90-561

Section 19-3-1 is amended relating to express trusts to exempt from attachment, execution, seizure or bankruptcy the debtor's pension and retirement funds.

Tax Conformity Amendment—Act 90-583

Sections in Chapter 18 of Title 41 were amended to provide conformity in the Alabama income tax laws with the current Internal Revenue Code.

Federal Lien Registration Amendments—Act 90-636

Amends *Ala. Code* §§35-11-46 and 35-11-47 to provide that federal liens will be indexed in both the real property and personal property records.

Divorce Venue—Act 90-666

Amends *Ala. Code* §30-3-5 and establishes the venue for a broader number of situations in divorce proceedings including post-minority benefits. ■

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Building Contractor's Recovery for Incomplete Performance

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by Christopher Lyle McIlwain

I. Introduction

In Alabama, in the absence of contract provisions to the contrary, a contractor's ability to recover compensation for performance of construction activities, as well as the theory and measure of re-

covery, is determined by the degree to which he has performed his obligations under the construction contract. Depending on the circumstances, the contractor may be entitled to recover absolutely nothing for performance of a large part of the work under the contract. On the other hand, the contractor may be entitled to recover virtually all of the agreed consideration under the contract even though he has not completely performed.

This article analyzes a contractor's remedies where he has not fully performed a construction contract for one reason or another. As will be discussed hereinbelow, the Alabama courts have gradually moved from a position of totally denying recovery to a contractor who has failed to fully perform a construction contract without adequate excuse, to a position of allowing recovery for somewhat less than full performance even though the contractor has no adequate excuse for non-performance.

II. Requirement of full performance

The longstanding general rule in this state is that unless the contractor fully performs his obligations under the construction contract, the contractor is not entitled to recover *anything* for his labor and materials in an action on the express contract or even in an action on an implied-in-law contract or quantum meruit for work and labor done or materials supplied. *Saliba v. Lunsford*, 268 Ala. 307, 106 So.2d 176 (1958) (recovery denied where heating system did not comply with guarantee that it would heat "satisfactorily"); *Braswell v. Malone*, 262 Ala. 323, 78 So.2d 631 (1955); *Becker Roofing Co. v. Little*, 229 Ala. 317, 156 So. 842 (1934) (recovery denied where workmanship on roofing job did not comply with guarantee that workmanship would be "of the highest grade"); *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658 (1916); *Maxwell & Delehomme v. Moore*, 163 Ala. 490, 50 So. 882 (1909); *Papot v. Howard*, 154 Ala. 306, 45 So. 581 (1908); *Carbon Hill Coal Co. v. Cunningham*, 153 Ala. 573, 44 So. 1016 (1907); *Higgins Mfg. Co. v. Pearson*, 146 Ala. 528, 40 So. 579 (1906); *Aarnes v. Windham*, 137 Ala. 513, 34 So. 816 (1903); *Kirkland v. Oates*, 25 Ala. 465 (1854) (owner terminated contract upon material breach by contractor); *Hawkins v. Gilbert & Maddox*, 19 Ala. 54 (1851); *Merriweather v. Taylor*, 15 Ala. 735 (1849); *Thomas & Trott v. Ellis & Co.*, 4 Ala. 108 (1842); *Dickson v. Ala. Mach. & Supply Co.*, 17 Ala. App. 195, 84 So. 416 (1919); A.P.J.I. 10.20.

This rule denying recovery in the absence of full performance is held to apply regardless of the fact that the work and labor was beneficial to the owner. *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658 (1916).

The policy behind the rule is said to be that:

> "Any other rule would tend to encourage bad faith and lessen the obligation of contracts into which the parties must be presumed to enter with a full understanding of their necessary implications."

Id., 71 So.2d, at 658.

The requirement of full performance applies only where the contract is entire, as opposed to being severable. If the contractor completes a severable portion of a severable contract, he may recover for that part even if he does not complete the remainder of the contract. *Blythe v. Embry*, 36 Ala. App. 596, 61 So.2d 142 (1952).

The inequity and harshness of this doctrine requiring full performance was recognized early on and the Alabama courts have devised a limited number of exceptions.

III. Exceptions

A. Acceptance

As indicated above, if the contractor fails to perform his contract, the owner may reject the work entirely and escape all liability to pay for it. *Parker v. I.T. Law & Sons*, 194 Ala. 693, 69 So. 879 (1915); *Walstrom v. Oliver-Watts Constr. Co.*, 161 Ala. 608, 50 So. 46 (1909). Moreover, if he desires to avoid liability, the owner is required to reject the work if he can do so without detriment to himself. *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658 (1916).

Consequently, if the owner voluntarily "accepts," instead of rejecting, partial, incomplete or inadequate work by the contractor, and this work is of some benefit to the owner, the contractor is entitled to recover the fair market value of the work and labor performed and material supplied in an action for quantum meruit. *Montgomery Co. v. Pruett*, 175 Ala. 391, 57 So. 823 (1911); *R.D. Burnett Cigar Co. v. Art Wall Paper Co.*, 164 Ala. 547, 51 So. 263 (1909); *Higgins Mfg. Co. v. Pearson*, 146 Ala. 528, 40 So. 579 (1906); *Matthews v. Farrell*, 140 Ala. 298, 37 So. 325 (1904); *Aarnes v. Windham*, 137 Ala. 513, 34 So. 816 (1903); *Florence Gas, Elec. Lt. & Power Co. v. Hanby*, 101 Ala. 15, 13 So. 343 (1893); *Davis V. Badders*, 95 Ala. 348, 10 So. 422 (1892); *Bell v. Teague*, 85 Ala. 211, 3 So. 861 (1888); *English v. Wilson*, 34 Ala. 201 (1859); *Hawkins v. Gilbert & Maddox*, 19 Ala. (1851); *Merriweather v. Taylor*, 15 Ala. 735 (1849); *Thomas & Trott v. Ellis & Co.*, 4 Ala. 108 (1842).

This doctrine is said to be "in consonance with the principles of justice." *Hawkins v. Gilbert*, 19 Ala. 54, 57 (1851). Liability rests upon an implied agreement deducible from the delivery and acceptance of a valuable service or thing. *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658 (1916). Recovery is not based upon the terms of the contract, and recovery on the contract is still precluded. *Id; Merriweather v. Taylor*, 15 Ala. 735 (1849). Therefore, the contractor's failure to comply with a contractual condition precedent to payment does not prevent recovery. *Catanzano v. Jackson*, 198 Ala. 302, 73 So. 510 (1916) (failure to obtain architect's certificate of completion was not fatal).

Acceptance may be express or implied. *Davis v. Badders*, 95 Ala. 348, 10 So. 422 (1892); *Bell v. Teague*, 85 Ala. 211, 3 So. 861 (1888). As a result, it is often difficult to determine how and by what circumstances a voluntary acceptance may be shown. *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658 (1916). Hence, whether an acceptance has occurred is normally a jury question. *Aubrey v. Helton*, 276 Ala. 134, 159 So.2d 837 (1964); *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658 (1916); *Bell v. Teague*, 85 Ala. 211, 3 So. 861 (1888).

Use and/or occupation of the work can lead to a finding of acceptance. For example, the owner's use of a well dug by the contractor, even after rejection of the well, has been held to constitute acceptance. *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658 (1916); *Parker v. I.T. Law & Sons*, 194 Ala. 693, 69 So. 879 (1915). The owner's moving into or renting a house constructed by the contractor and remaining there up until the trial has also been held to constitute an acceptance. *Davis v. Badders*, 95 Ala. 348, 10 So. 422

(1892); *Bell v. Teague*, 85 Ala. 211, 3 So. 861 (1888).

However, the mere occupancy or use of the work does not always warrant an inference of acceptance because "acceptance within the contemplation of this doctrine, presupposes an option or choice to reject or accept..." *Town of Clanton v. Chilton Co.*, 205 Ala. 103, 87 So. 345, 346 (1920). This principle frequently comes into play in cases where rejection of the work would require the owner to virtually abandon his property, as where the contractor's work involves only repair, remodeling or modification of an existing facility. In such cases, continued use of the facility does not constitute acceptance of the contractor's work so as to render the owner liable. *Becker Roofing Co. v. Little*, 229 Ala. 317, 156 So. 842 (1934) (roof on house); *Town of Clanton v. Chilton Co.*, 205 Ala. 103, 87 So. 345 (1920) (road improvements); *Mountain Terrace Land Co. v. Brewer & Jones*, 165 Ala. 242, 51 So. 559 (1910) (roads, sidewalks and gutters); *Walstrom v. Oliver Watts Constr. Co.*, 161 Ala. 608, 50 So. 46 (1909); *Higgins Mfg. Co. v. Pearson*, 146 Ala. 528, 40 So. 579 (1906) (screens on house); *Aarnes v. Windham*, 137 Ala. 513, 34 So.2d 816 (1903); *Kirkland v. Oates*, 25 Ala. 465 (1854).

In addition to establishing a voluntary acceptance by the owner, the contractor must prove that the work is beneficial to the owner. In this regard, the contractor must show that the value of work done or materials furnished exceed the damages resulting from the contractor's failure to comply with the contract. *Walstrom v. Oliver-Watts Constr. Co.*, 161 Ala. 608, 50 So. 46 (1909). The contractor also must establish that the value of the work exceeds the amount, if any, that has already been paid by the owner. *Mountain Terrace Land Co. v. Brewer & Jones*, 165 Ala. 242, 51 So. 559 (1910).

The measure of the contractor's recovery is the fair market value of the work, labor and materials. *Denson v. Acker*, 201 Ala. 300, 78 So. 76 (1917). Thus, the contractor must furnish some proof of that value or he is only entitled to nominal damages. *Gray v. Wood*, 220 Ala. 587, 127 So. 148 (1930); *Parker v. I.T. Law & Sons*, 194 Ala. 693, 69 So. 879 (1915). The contractor's recovery may not exceed the contract price with the owner. *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658 (1916).

A finding that the owner has accepted the work does not preclude the owner from recovering damages from the contractor for breach of the contract. *Aubrey v. Helton*, 276 Ala. 134, 159 So.2d 837 (1964); *Walstrom v. Oliver-Watts Constr. Co.*, 161 Ala. 608, 50 So. 46 (1909); *Aarnes v. Windham*, 137 Ala. 513, 34 So. 816 (1903); *Florence Gas, Elec. L. & Power Co. v. Hanby*, 101 Ala. 15, 13 So. 343 (1893); *English v. Wilson*, 34 Ala. 201 (1859). The measure of his recovery will be the greater of either (1) the difference between the value of the work furnished or building constructed and the value of that contracted for, or (2) the reasonable value of the extra work occasioned by the owner in making the building conform to the contract stipulations. *Bonds v. Akins*, 284 Ala. 273, 224 So.2d 630 (1969); *Aubrey v. Helton*, 276 Ala. 134, 159 So.2d 837 (1964); *Fox v. Webb*, 268 Ala. 111, 105 So.2d 75 (1958); *Walstrom v. Oliver-Watts Constr. Co.*, 161 Ala. 608, 50 So. 46 (1909). The owner also may recover for any damages caused by the defective work to his other property. *Dickson v. Ala. Mach. & Sup. Co.*, 17 Ala. App. 195, 84 So. 416 (1919) (leaks in roof ruined crops stored in barn).

B. Mutual abandonment or rescission

Closely related to the doctrine of acceptance is the principle that if the owner and contractor mutually agree to rescind or abandon the contract prior to completion and the owner agrees that the contractor will be paid for the partial performance, the contractor is entitled to recover even in the absence of complete performance. If the parties agree on the amount to be paid for partial performance, the amount agreed upon is the measure of recovery. *Wigfield v. Akridge*, 207 Ala. 560, 93 So. 612 (1922). If it is not agreed, the contractor is entitled to recover the reasonable value of the work performed. *Wigfield v. Akridge*, 207 Ala. 560, 93 So. 612 (1922) (allowing imposition of lien); *Catanzano v. Jackson*, 198 Ala. 302, 73 So. 510 (1916); *Andrews v. Tucker*, 127 Ala. 602, 29 So. 34 (1900); *Kirkland v. Oates*, 25 Ala. 465 (1854).

C. Prevention of performance

Where the contractor's failure to complete performance is caused by the owner's breach of contract or other wrongful act, the contractor is not barred from recovery. *Braswell v. Malone*, 262 Ala. 323, 78 So.2d 631 (1955); *Maxwell & Delehomme v. Moore*, 163 Ala. 490, 50 So. 882 (1909); *Carbon Hill Coal Co. v. Cunningham*, 153 Ala. 573, 44 So. 1016 (1907); *Bates v. Birmingham Paint & Glass Co.*, 143 Ala. 198, 38 So. 845 (1905). Examples of such situations would include where the owner fails to make payments called for under the contract without adequate excuse. *Braswell v. Malone*, 262 Ala. 323, 78 So.2d 631 (1955); *Baker Sand & Gravel Co. v. Rogers Plumbing & Heating*, 228 Ala. 612, 154 So. 591 (1934). Under these circumstances, the contractor may either sue on the contract, or treat the contract as rescinded and sue on a quantum meruit. However, he may not recover under both theories. *Hardaway-Wright Co. v. Bradley Bros.*, 163 Ala. 596, 51 So. 21 (1909); *Smith v. Davis*, 150 Ala. 106, 43 So. 729 (1907).

The Alabama courts have developed two measures of compensatory damages applicable to the contract theory, both of which attempt to place the contractor in the position he would have occupied had the contract been fully performed.

Under the first measure, the contractor is entitled to recover: (1) "an amount equal to a proportion of the contract price which he has earned," (2) lost profits on the uncompleted portion of the contract, (3) plus interest, (4) less any payments received by him. *Braswell v. Malone*, 262 Ala. 323, 78 So.2d 631, 636 (1955); *Danforth v. Tenn. & C. R. Co.*, 93 Ala. 614, 11 So. 60, 63 (1891). The desirability of using this approach will be determined by the degree of difficulty of calculating the "proportion of the contract earned." For example, where the performance called for under the contract is divided into units, with each unit having been assigned a particular value under the contract, this measure of recovery could be used with relative ease. Absent such divisibility, proof of this measure may be difficult.

Under the second measure of damages, the contractor may recover (1) the expenditures actually made in part performance, less the value of materials on hand but unused, (2) profits, if any, he would have earned by performing the whole contract and (3) interest from the date of the breach, (4) less any payments received by him. *Cobbs v. Fred Burgos Constr. Co.*, 477 So.2d 335 (Ala. 1985) (profits); *Bates v. Birmingham Paint & Glass Co.*, 143 Ala. 198, 38 So. 845 (1905) (profits); *Peck-Hammond Co. v. Heifner*, 136 Ala. 473, 33 So. 807 (1903) (expenses, profits, interest); *Danforth v. Tenn & C. R. Co.*, 93 Ala. 614, 11 So. 60 (1891) (expenses, profits, interest); *J.B. Anderson & Co. v. Brammer*, 4 Ala. App. 596, 58 So. 941 (1912) (profits); *U.S. v. Behan*, 110 U.S. 338, 4 S.Ct. 81, 28 L.Ed. 168 (1884). In calculating the expenses and losses recoverable, the contractor is not entitled to recover expenses incurred by him in securing or obtaining the contract. *Peck-Hammond Co. v. Heifner*, 136 Ala. 473, 33 So. 807 (1903). The contractor is also not entitled to recover the "lost time" after the breach, such as where the contractor is unable to secure other work for a period of time. *J.B. Anderson & Co. v. Brammer*, 4 Ala. App. 596, 58 So. 941 (1912) ("the question of plaintiff's being able to secure or not to secure work could have no proper place in estimating the damages he might be entitled to recover for a breach of contract").

In the alternative, the contractor may treat the contract as rescinded and sue on a quantum meruit and recover the full reasonable value of that work and labor done and the materials furnished. *Braswell v. Malone*, 262 Ala. 323, 78 So.2d 631 (1955); *Carbon Hill Coal Co. v. Cunningham*, 153 Ala. 573, 44 So. 1016 (1907). Recovery on a quantum meruit is not limited by the contract price and the contractor may select the theory of recovery, breach of contract or quantum meruit that is most advantageous to him. *Braswell v. Malone*, 262 Ala. 323, 78 So.2d 631 (1955). For example, if the contractor would have suffered a loss on the contract even in the absence of wrongful conduct by the owner, it would normally be more advantageous to the contractor to proceed under a quantum meruit theory.

D. Substantial performance

The final exception is the somewhat nebulous doctrine of substantial performance which provides that where a contract is made for an agreed exchange of two performances, one of which is to be rendered first, substantial performance rather than exact, strict or literal performance by the first party of the terms of the contract is adequate to entitle the party to recover. *Brown-Marx Associates, Ltd., v. Emigrant Savings Bank*, 703 F.2d 1361 (11th Cir. 1983).

This doctrine was first introduced in Anglo-American jurisprudence in 1777 in a land sale case, *Boone v. Eyre*, 1 H. Bl. 273, 126 Eng. Rep. 160 (K. B. 1777). *Bruner v. Hines*, 295 Ala. 111, 324 So.2d 265 (1975). Although alluded to in some early Alabama cases, the doctrine was first applied in a construction contract context in this state in 1911 in the case of *Alexander v. Smith*, 3 Ala. App. 501, 57 So. 104 (1911). See also, *Walstrom v. Oliver-Watts Constr. Co.*, 161 Ala. 608, 50 So. 46 (1909); *Thomas & Trott v. Ellis & Co.*, 4 Ala. 108 (1842).

The policy considerations underlying the doctrine give some insight into its parameters:

> "The doctrine arose to mitigate the harsh results that could flow from constructive conditions of exchange in those contracts which require one party to render performance before the other party's reciprocal promise is enforceable. If constructive conditions had to be literally performed, the party

whose duty is enforceable only after his promisor's performance is rendered would have an absolute defense to an action on the contract whenever a trivial portion of his promisor's performance is incomplete.

"A good example of how the doctrine of substantial performance operates to prevent such injustice is found in the building construction situation. The doctrine is especially useful in building contracts because of the difficulty of reproducing on the construction site the precise specifications of blue print drawings. Often comparable materials of different brands will have to be substituted for specified but unobtainable brands, and foundation specifications on drawings will bend somewhat to the realities of pouring concrete. If the owner's duty to pay were strictly conditioned upon literal compliance with the contract, construction contractors would rarely be paid because dissatisfied owners could usually point to some discrepancy between the contract specifications and the finished product. Under the substantial performance doctrine, the builder may be held liable in damages for any discrepancy, but if his performance substantially fulfills the main purpose of the contract, he can enforce the owner's promise to pay.

"The doctrine of substantial performance is a necessary inroad on the pure concept of freedom of contracts. The doctrine recognizes countervailing interests of private individuals and society; and, to some extent, it sacrifices the preciseness of the individual's contractual expectations to society's need for facilitating economic exchange. This is not to say that the rule of substantial performance constitutes a moral or ethical compromise; rather, the wisdom of its application adds legal efficacy to promises by enforcing the essential purposes of contracts and by eliminating trivial excuses for nonperformance.

"Because both the individual and societal interests are vital coordinates in a private enterprise system, the compromise of full performance should be kept minimal, and compensation should be paid whenever a party's bargained-for exchange is not fulfilled."

Bruner v. Hines, 295 Ala. 111, 324 So.2d 265, 268-269 (1975).

"The intent of the doctrine is equitable: to prevent unjust enrichment or the inequity of one party's getting the benefit of performance, albeit not strictly in accord with the contract's terms, with no obligation in return."

Brown-Marx Assoc., Ltd., v. Emigrant Sav. Bank, 703 F.2d 1361, 1367 (11th Cir. 1983).

Given the equitable basis of the doctrine, it may be understandable that the Alabama courts have never enunciated a practical, "bright-line" test for determining whether a contractor has substantially performed his contract. The only guidelines usually given are that:

"Substantial performance does not contemplate a full or exact performance of every slight or unimportant detail but performance of all important parts."

Miles v. Moore, 262 Ala. 441, 79 So.2d 432 (1955). See also, *Mac Pon Co. v. Vinsant Painting & Dec. Co.*, 423 So.2d 216 (1982); *Bruner v. Hines*, 295 Ala. 111, 324 So.2d 265 (1975); *Wilson v. Williams*, 257 Ala. 445, 59 So.2d 616 (1952); A.P.J.I. 10.21. Moreover, it is said that "immaterial" deviations from the contract will not prevent a recovery. *Huffman-East Dev. Corp. v. Summers Elec. Sup. Co.*, 288 Ala. 579, 263 So.2d 677 (1972); *Alexander v. Smith*, 3 Ala. App. 501, 57 So. 104 (1911).

From this, it appears that in order to show a substantial compliance with the contract, the contractor must prove that he has substantially fulfilled the main or essential purpose of the contract. He must further show that he has performed all of the important parts of the contract. Finally, he must establish that any deviations from the contract are immaterial, slight, unimportant and trivial, as opposed to being material. *Huntsville and Madison County Railroad Authority v. Alabama Industrial Railroad, Inc.*, 505 So.2d 341 (Ala. 1987).

Although there is some indication in the case law that the contractor must also show "acceptance" by the owner, no Alabama case has been found that denied recovery based upon a failure to prove acceptance. Compare *Miles v. Moore*, 262 Ala. 441, 79 So.2d 432 (1955) ("we hold that where a contract is substantially performed by one party and the benefits thereof retained by the other...") and *Gray v. Wood*, 220 Ala. 587, 127 So. 148 (1930) (where a building is "accepted as in substantial compliance with the contract...") with *Wilson v. Williams*, 257 Ala. 445, 59 So.2d 616 (1952) (substantial performance found although no evidence that owner accepted house); *Nelson v. Littrell Lumber Co., Inc.*, 512 So.2d 1340 (Ala. 1987) (same).

In accordance with the equitable basis of the doctrine, the Alabama courts have indicated that the contractor's failure to render complete performance must have been in good faith and not due to bad faith, willfulness or gross negligence. *Huntsville and Madison County Railroad Authority v. Alabama Industrial Railroad, Inc.*, 505 So.2d 341 (Ala. 1987); *Miles v. Moore*, 262 Ala. 441, 79 So.2d 432 (1955) (finding that contractor acted in good faith); *Brown-Marx Associates, Ltd., v. Emigrant Savings Bank*, 703 F.2d 1361,

1367 (11th Cir. 1983) ("The courts will allow recovery under the contract, less allowance for deviations, where a party *in good faith* has substantially performed its obligation"); 13 Am.Jur. 2d, *Building and Construction Contracts*, §42 (1964).

Whether the elements of the doctrine of substantial performance have been satisfied is generally a jury question to be determined with reference to the facts and circumstances of the case. *Mac Pon Co. v. Vinsant Painting & Dec. Co.*, 423 So.2d 216 (Ala. 1982); *Silverman v. Charmac, Inc.*, 414 So.2d 892 (Ala. 1982); *Bruner v. Hines*, 295 Ala. 111, 324 So.2d 265 (1975); *Wilson v. Williams*, 257 Ala. 445, 59 So.2d 616 (1952); *Alexander v. Smith*, 3 Ala. App. 501, 57 So. 104 (1911).

A review of the cases that have applied the doctrine of substantial performance does not reveal any consistent, tangible, common thread supporting the decisions. Although some may be said to be attributable to a comparison of the contract price of the entire work to the cost of remedying the defects, *Huffman-East Dev. Corp. v. Summers Elec. Sup. Co.*, 288 Ala. 579, 263 So.2d 677 (1972) (substantial performance of apartment construction contract found where cost of completion was only $1,000), *Miles v. Moore*, 262 Ala. 441, 79 So.2d 432 (1955) (substantial performance of house construction contract found where contract price was $11,960.36 and the cost of remedying defects was only $100), *Wilson v. Williams*, 257 Ala. 445, 59 So.2d 616 (1952) (substantial performance of house construction contract found where contract price was $10,000 and the cost of correction was $300), other cases look at the percentage of completion, *Medical Clinic Bd. of the City of Birmingham-Crestwood v. Smelley*, 408 So.2d 1203 (Ala. 1981) (finding of substantial performance where subcontractor had completed 90 percent of the work), or to a determination of whether the purpose of the contract had been fulfilled, *Mac Pon Co. v. Vinsant Painting & Dec. Co.*, 423 So.2d 216 (Ala. 1982) (substantial performance of painting contract found), *Saliba v. Lunsford*, 268 Ala. 307, 106 So.2d 176 (1958) (finding of substantial performance of contract to install a heating system in a residence held not warranted where the contractor had guaranteed that it would heat "satisfactorily" and there was testimony that it did not); *Alexander v. Smith*, 3 Ala. App. 501, 57 So. 104 (1911) (substantial performance of ditch-digging contract held to be a jury question where ditch was dug deeper than specified but there was evidence that this did not affect the utility of the ditch), and it is apparent that the opinions in these cases have been characterized by an unfortunate lack of precise, logical analysis and a clear statement of rationale. See, e.g., *Gray v. Wood*, 220 Ala. 587, 127 So. 148 (1930).

Where the doctrine of substantial performance is satisfied, the contractor is not relegated to recovery of the reasonable value of the work on a quantum meruit theory. *Gray v. Wood*, 220 Ala. 587, 127 So. 148 (1930). Rather, the contractor is entitled to recover the contract price, less the amount required to indemnify the owner for damages caused by deviations or lack of full performance. *Huffman-East Dev. Corp. v. Summers Elec. Sup. Co.*, 288 Ala. 579, 263 So.2d 677 (1972); *Gray v. Wood*, 220 Ala. 587, 127 So. 148 (1930); *Alexander v. Smith*, 3 Ala. App. 501, 57 So. 104 (1911); A.P.J.I. 10.22.

IV. Conclusion

If a contractor fully completes his construction contract, he may recover the price in an action on the contract or he may recover the reasonable value of the work in quantum meruit.

With certain exceptions, a contractor is not entitled to any recovery if he fails to fully complete a construction contract. These exceptions include acceptance, mutual rescission, prevention and substantial performance.

If the owner voluntarily accepts the work and it is of value to him, the contractor may recover under a quantum meruit theory the fair market value of the partial performance. The owner would be entitled to recoupment for the damages he suffered.

Similarly, the contractor is entitled to recover for partial performance if he and the owner mutually agree to rescind or abandon the contract prior to full performance.

Recovery for partial performance is also allowed where the owner prevents full performance. In this case, the contractor may recover on either a breach of contract or quantum meruit theory.

Finally, substantial performance in good faith of the contract will entitle the contractor to recover the contract price, less the damages caused by deviations from the contract. ■

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

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

Recent Decisions

by John M. Milling, Jr.,
David B. Byrne, Jr.,
and Wilbur G. Silberman

Recent Decisions of the Supreme Court of Alabama

Civil procedure . . .

Denial of motion to compel arbitration appealable within 42 days

Thompson v. Clark, 24 ABR 931 (January 26, 1990). Clark, a stock broker, sued Thompson, a fellow stock broker, alleging defamation based on comments made by Thompson to Clark's clients. Clark had signed an agreement to arbitrate any dispute between him and another broker. Thompson moved the trial court for a stay and for an order compelling Clark to consent to arbitration. The trial court denied the motion, and Thompson appealed. Clark moved to dismiss the appeal, claiming the appeal was from an interlocutory order involving an injunction which must be filed within 14 days. The supreme court disagreed.

In a case of first impression, the supreme court held that the 42-day time limit for an appeal is applicable to appeals from an order denying a motion to compel arbitration under 9 U.S.C. §15. The court noted that a denial of arbitration is not an interlocutory order regarding an injunction and that there is a strong federal policy favoring arbitration. The court also noted that 9 U.S.C. §15 is a recent amendment to the Federal Arbitration Act which gives the right to appeal the denial of a motion to arbitrate, and therefore mandamus is no longer available to challenge a denial of a motion to compel arbitration.

Insurance . . .

UM stacking limited

State Farm Mutual Automobile Ins. Co. v. Faught, 24 ABR 1192 (February 16, 1990). Faught was injured when the Subaru in which he was a passenger, which was owned and operated by Waits, was hit by a car driven by Prescott. Waits' Subaru was insured by State Farm. Prescott's car was insured by Hartford. Both State Farm and Hartford offered their policy limits. Waits had a second policy with State Farm covering a Toyota. McMurray, a relative of Waits who resided in his household, owned a Buick which was also insured by State Farm. Because Waits' medical expenses exceeded the limits of those policies, he sought to recover under policies covering his Toyota and McMurray's Buick. The trial court allowed Faught to stack all three State Farm policies. The supreme court reversed.

The supreme court found that Faught was not insured under either of the two State Farm policies. He was not named in the declaration; he was not the spouse or related to any per-

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

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

son named in the declarations; and, he was not occupying either the Toyota or the Buick at the time of the wreck. Because the car was owned by Waits and McMurray was not covered under one multi-vehicle policy, and because Faught was not an "insured" under the other two State Farm policies, Faught was not entitled to stack those coverages.

Municipal corporations . . .
city not liable under §11-47-190 if employee not liable

Gore v. City of Hoover, 24 ABR 1262 (February 23, 1990). Vining, the magistrate for the City of Hoover, received a complaint from a representative of Western Supermarkets requesting a warrant for the arrest of Carrie J. Gore. Western alleged that Gore presented a worthless check drawn on insufficient funds. Vining used computer information available to her and obtained an address for a Carrie Gore in Lanett, Alabama. Information on the check revealed that Gore lived in Birmingham, Alabama. Vining issued a warrant for the arrest of the plaintiff and when it became clear she was not the person who presented the check, the charges were dropped. Plaintiff sued Vining, alleging negligence, and the City under §11-47-190, *Ala. Code* (1975). The trial court granted defendants' motion for summary judgment and plaintiff appealed. The supreme court affirmed.

The court held that the magistrate was clothed with limited judicial immunity and was not liable on plaintiff's negligence claim. The City could only be liable under §11-47-190 by *respondeat superior*. If the agent is not liable, the principal cannot be liable, either. If the judicial officer cannot be held liable as a matter of public policy for negligent acts, similar considerations of public policy dictate that the municipality itself cannot be held liable.

Torts . . .
§518 Restatement of Torts

King v. Breen, 24 ABR 1423 (March 9, 1990). King, a minor, was bitten on the face by a dog belonging to a neighbor, the Breens. The Breens chained the dog to an old automobile and allowed the neighborhood children to come over and play with the dog. The chain collar had injured the dog's neck. King wandered into Breens' yard and hugged the dog's neck. The dog bit the boy and caused permanent scars. King sued the Breens for negligently caring for and mistreating a dog, so as to cause it to have dangerous propensities that caused injury. The trial court granted Breens' motion for summary judgment and King appealed. The supreme court reversed.

The court recognized §518, *Restatement of Torts*, as stating a cause of action in Alabama. Section 518 provides:

> Except for animal trespass, one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if (a) he intentionally causes the animal to do the harm, or (b) he is negligent in failing to prevent the harm.

The court noted that the dog owners should recognize the normal tendency of dogs to react aggressively to, or to attack, the person touching it in a painful area. In this case, they knew they had chained the dog and the collar became embedded in its neck. There was evidence that they had also mistreated the dog by not feeding it properly. Thus, a jury question is presented as to whether a reasonable person in the exercise of ordinary care would have realized the condition of the dog and kept it from coming into contact with children.

Tort . . .
Civil Damages Act and Dram Shop Act discussed

Parker v. Barbara Enterprises, Inc., 24 ABR 1013 (January 26, 1990). Parker's minor daughter, Small, attended a party hosted by two other minors. Those two minors purchased beer for a party from Barbara Enterprises, Inc. The beer was distributed by the Supreme Beverage Company and manufactured by Miller Brewing Company. Small became intoxicated at the party and attempted to drive an automobile. She lost control and was fatally injured. Parker filed suit under *Alabama Code* (1975), §6-5-70 (the "Civil Damages Act"), §6-5-71 (the "Dram Shop Act") and/or negligence. The trial court granted Rule 12(b)(6) motions to dismiss for all three defendants. Parker appealed. The supreme court affirmed.

Section 6-5-70 gives the parent of a minor the right to bring action against any person who unlawfully "sells or furnishes spiritous liquors" to a minor. Parker argued that a seller who sells two kegs of beer to the two other minors should be said to have furnished the beer to her daughter. She argued that it was illogical that two minors would consume both kegs. The supreme court disagreed and stated that the sellers cannot be said to have furnished beer to her daughter by selling beer to the other two minors. The court also stated that Parker failed to state a claim under §6-5-71 for the same reason, that is, the defendants did not provide alcoholic beverages to the intoxicated person. Finally, the court declined to recognize a common law negligence action for distribution of alcoholic beverages to minors.

Venue . . .
"Means" test applied

Ex parte: Beard and Beard (Re: Beard v. Talladega County Commission, et al., 24 ABR 843 (January 5, 1990). Beard was injured when an automobile in which she was riding left a Talladega County road at a railroad crossing. She sued Talladega County, Southern Railway and Central of Georgia Railroad. The complaint was filed in Coosa County alleging negligent design and construction of the railroad crossing. Southern Railway filed a motion to transfer the case to Talladega County contending that it owned no property in Coosa County and did no business in Coosa County. Southern Railway, however, did own a controlling interest in the stock of Central of Georgia Railroad which did own property and did do business in Coosa County. The trial court granted Southern Railway's motion to transfer, and the Beards petitioned for a writ of mandamus to vacate the trial court's order transferring the case. The supreme court granted the writ.

In its order, the trial court held that there was insufficient evidence to conclude that Central of Georgia was acting as Southern Railways' agent for purposes of determining venue. The supreme court disagreed and stated that when determining venue, "The element of control, or lack thereof, of the principal over its agent is not determinative. If the entity is the 'means' by which the principal is

able to do business in a particular county, then the entity is the 'agent' of the principal for venue purposes." In order to trigger the means test it is not necessary that there be total ownership of a subsidiary. The primary question to be answered is: What corporate purpose does the subsidiary serve for its owner? Based on the evidence, Central of Georgia was the "means" through which Southern Railway performed part of its business functions and was, for venue purposes, doing business as an agent of Southern Railway in Coosa County.

Recent Bankruptcy Decisions

Entitlement to jury trial on fraudulent transfer issue

Granfinanciera S.A. v. Nordberg, 109 S.Ct. 782 (1989); 19 B.C.D. 493. The Supreme Court held that if one has not filed a claim against a bankruptcy estate, such person is entitled to a jury trial upon suit being brought by a trustee in bankruptcy to recover on an alleged fraudulent transfer. The Court reached this conclusion because in eighteenth century England parties suing for monetary damages on a fraudulent transfer would have been entitled to a jury trial. However, the Court said that in bankruptcy if a proof of claim has been filed, the right to jury trial has been lost. The Court discussed public rights as against private rights stating that Congress may only deny trial by jury in actions at law where public rights are being litigated.

Jury demand does not withdraw reference to Bankruptcy Court

City Fire Equipment Co., Inc. v. Amerex Corp., slip. op. No. CV 89-4-1727-S (N.D. Ala. December 7, 1989). In an en banc decision of the judges of the U.S. District Court for the Northern District of Alabama the issue presented was whether reference to the Bankruptcy Court should be withdrawn by reason of jury demand. The Bankruptcy Court held that it did not have jurisdiction of the referred actions. The U.S. District Court disagreed holding that the Bankruptcy Court had jurisdiction with the question being whether the Bankruptcy Court could or should conduct a jury trial. The District Court quoted at length from *Granfinanciera* observing that the mere filing of a jury demand does not mandate the withdrawal of a reference or cause the Bankruptcy Court to lose jurisdiction. The Court explicitly refrained from determining bankruptcy courts' authority to conduct jury trials, but did hold that all proceedings short of the jury selection and trial should be in the Bankruptcy Court. The Court stated that the bankruptcy judges have special knowledge of the matters before them and that there should be no withdrawal of reference until the case becomes ready for jury trial, to wit after discovery is completed, all motions ruled upon and pretrial orders filed.

Insider preferences

Robertson Brothers Drilling, Inc., Debtors Manufacturers Hanover Leasing Corp. v. Lowery, 892 F.2d 850 (10th Cir. 1989) adopting opinion of the District Court reported in 97 B.R. 77. This case in the Tenth Circuit followed *DePrizio* in the Seventh Circuit, in holding that a guarantor of a claim against a debtor is a creditor of the debtor due to the fact that the guarantor holds a contingent claim which is subject to becoming liquidated and non-contingent when guarantor pays the oreditor on the guarantee. This situation makes it a preferential payment if paid within one year of the filing of bankruptcy and may be avoided by the trustee if other requirements are met.

Of course, the guarantor must be an insider. The bankruptcy law provides that insiders are subject to a one-year preference period, and non-insiders are subject only to a 90-day period. In this case, the actual creditor was a non-insider but because the guarantor was an insider, the Court held that there is a one-year period in which the payment can be avoided.

In a recent case from the Sixth Circuit, *In re: C-L Cartage Co., Inc., Debtor*, a principal of the corporate debtor borrowed money from a bank for the benefit of the corporation. The corporation made six payments to the bank on the loan and a single payment on another. The Court held that the individual principal was an insider, that payments to the bank benefited him, and, thus, the period of preferential payment could extend back one year from bankruptcy. The Sixth Circuit expressly rejected the "two transfer" theory, on the grounds that both the insider (the principal), and the outsider (the bank) each benefited from each payment as made.

The case of *Levit v. Ingersall Rand Financial Corp.*, 874 F. 2d 1186 (7th Cir. 1989) which is the forerunner of the above cited case, has been widely discussed throughout the country being profaned by lenders and honored by trustees. Unless a circuit court of appeals decides conversely to the Tenth, Sixth and Seventh circuits, the holdings will remain the law of the country. Sophisticated lenders and their legal staffs have devised various methods of attempting to evade the holding, but it remains to be seen as to whether these devices will be successful.

Notice requirement for filing claims

In re Spring Valley Farms, 21 C.B.C. 2d 651-(11th C.C.A.) This case held that notice to a corporate creditor as to a bar date for filing claims in a Chapter 11 case must be actually transmitted to the corporate creditor, even though the corporate creditor may have knowledge of the bankruptcy. Conceivably this also would be the opinion of the Eleventh Circuit should a corporate creditor not receive notice of the filing of a bankruptcy and the setting of the 341 creditors' meeting.

Turnover doctrine

Austein v. Schwartz, March 13, 1990 (9th C.C.A.) 58 USLW 2559 extended the opinion of the U.S. Supreme Court in *Whiting Pools, Inc.*, 462 U.S. 198 (1983). *Whiting* held that turnover applied against the IRS on a pre-petition levy made on property of the debtor. *Whiting* was a Chapter 11 case which expressly refrained from deciding whether its holding would apply to a Chapter 7 liquidation. In this Ninth Circuit case, the court held that the *Whiting* case also applied in Chapter 7 as to the trustee's power under Bankruptcy §542 to obtain a turnover against a lienholder. The Court stated that Bankruptcy Code Section 541 "comprehensively puts within the estate all the property of the debtor whether reduced to possession or not and whether the estate is being reorganized or liquidated."

Interest payments as preference

CHQ International v. Barclays Bank, 20 B.C.D. 296, (9th Cir. 1990). In this case, the Ninth Circuit held that interest payable on a note made for an antece-

dent debt, although payments were made according to the terms of the note, still constitutes a preference if made within the 90 days of bankruptcy. Such payments do not come within the ordinary course of business exception. However, the reader should be aware that there is a conflict of authorities on this point and, therefore, arguments could be made to the court either way.

No recovery of attorney's fees for successful defense

In re Burns, 20 B.C.D. 192, (N.D. Colo. 1990) The debtor borrowed money to invest in the stock market. The creditor filed an action to determine dischargeability of the debt and lost. The debtor attempted to recover attorney's fees. The Court held that this was not a consumer debt and, therefore, under the law the debtor was not entitled to attorney's fees for a successful defense.

No asset report does not constitute adandonment of cause of action

In re Moore, 20 B.C.D. 221, (C.D. Cal. 1990) held that the trustee's filing of the no-asset report does not abandon the cause of action which is the property of the estate. Any cause of action of debtor becomes property of the estate under §541(a)(1). The trustee is permitted, under §554(a) after notice and hearing, to abandon property burdensome to the estate, and §554(c) provides that unscheduled property not abandoned reverts to the debtor at closing, but this applies only at the closing of the estate. Therefore, the filing of the no-asset report does not operate as an abandonment until the case is closed. In this particular case, there was a lender liability suit which the trustee did not care to pursue. The lender offered the trustee approximately $5,000 for the case. The trustee refused and the Bankruptcy Court said that the trustee had to take some action, as he could not refuse to take any position. ■

Memorials

Wilbur Clarence Atkeison—Prattville
Admitted: 1947
Died: May 18, 1990

Schuyler Allen Baker—Birmingham
Admitted: 1948
Died: May 19, 1990

Earl Dorwin Hendon—Birmingham
Admitted: 1949
Died: April 5, 1990

Dexter Cummings Hobbs—Montgomery
Admitted: 1980
Died: April 22, 1990

Jack McLendon Pate—Birmingham
Admitted: 1968
Died: March 5, 1988

Thomas Benjamin Ward, Jr.—Tuscaloosa
Admitted: 1939
Died: May 23, 1990

ERIS FREEMAN PAUL

There is little that can be said about a man whose life and what he did for others were far more meaningful than words.

Eris Paul began the practice of law in Elba, Alabama, in 1937. His practice was interrupted by World War II. He served his country in the Judge Advocate Department of the United States Army. After the war he returned to his hometown, was elected and served as district attorney for Coffee and Pike counties, the 12th Judicial Circuit. He was elected circuit judge in 1952 and served without opposition until he took supernumerary status in 1976. He continued to serve as a trial judge in the 12th and other circuits. From time to time he sat with the Alabama Supreme Court and Courts of Appeal. He served as president of the Alabama Circuit Judges Association, as a member of the Alabama State Bar Board of Commissioners and as a member of Alabama's Ethics Commission.

Paul was born in 1909 in a rural community near Elba and moved to Elba at a young age. He received most of his grammar and secondary education there. He entered the University of Alabama in 1932 and graduated from law school in 1937. He worked his way through the University as a soda jerk and a sleep-in night watchman at the University Supply Store, the "Supe Store," in the old Union Building.

He married Jean Richardson from Notasulga, Alabama. They had two children, Jeanice Kirkland, Andalusia, and Brice Paul, Enterprise, sheriff of Coffee County.

He became a member of the University of Alabama Board of Trustees in 1954 and served as active and trustee emeritus until his death. The law school recognized his legal ability with its honorary Doctorate of Law. The University honored him with its Distinguished Alumni Award. He was a deacon at the First Baptist Church in Elba.

His life was a many splendored thing or like a jewel with many facets that reflected his abilities and accomplishments.

He never sought to impose any of his predilections on you. His method of giving advice was by asking you deep and searching questions, thereby bringing you face to face with the core of the problem and generally the solution. He only sought to have you be true to the facts, and if a legal problem, true to the law, and true to the highest ideals of your inner self.

He was a profoundly religious person but would be the first to say he had transgressed too much, but actually far less than most.

He was a vigorous prosecutor, but a kind and compassionate judge. He believed in the rule of the law, i.e., what the law was and not what he thought it ought to be, but he believed the spirit of the law was as important as the letter of the law.

Although he worked in the highest halls of justice in the state, and in the halls of one of its great educational institutions, the University of Alabama, he was a man who liked nothing better than to take his bird dog, get in his land rover and go hunting. He enjoyed nothing more than sitting down and talking with friends about their dogs. He kept one all his life. He was truly a man for all seasons.

We have many problems in our state and nation. We need many things, not the least of which is more men and women like Eris Paul. Besides all these fine attributes, he was more fun to be with than any person I have ever known. To turn around Will Rogers' phrase, "I never met a man who did not like him." He loved a good story and he had as many as Abraham Lincoln, so I will end this recollection on the light side. Charlie Brown, ask your friend, Linus, to share his security blanket with us, Eris' friends. We have lost our security blanket.

—Virgil Pittman
Senior United States District Judge
Southern District of Alabama

GILBERT WOODROW NICHOLSON

Longtime Birmingham attorney G.W. Nicholson, 68, passed away February 19, 1990, after a four-year battle with leukemia.

"Nick," as most people called him, often could be seen on the streets of downtown Birmingham sporting his ever-present bow tie, and always ready with a lively comment on the University of Alabama football team, which was his favorite pastime.

Nicholson, a native of Brookwood in Tuscaloosa County, earned his law degree from the University of Alabama School of Law in 1951, following his graduation from the University's School of Commerce. Prior to college, Nicholson served his country as a Marine in World War II, fighting with the First Marine Division at the Battle of Guadalcanal in the South Pacific.

In 1952, he began his law career when he teamed up with law school classmate Ferris Ritchey to open the offices of Ritchey & Nicholson in Birmingham's Frank Nelson Building. Nicholson left the practice of law temporarily in 1964 to pursue some real estate interests. He returned to law full time in 1967 when he and attorney Jim Forstman opened an office in the Brown Marx Building in downtown Birmingham.

From 1973-1988, Nicholson practiced mostly by himself downtown and at a southside location. He served as city attorney of Gardendale during the 1960s. He was a member of the Birmingham Bar Association and the Alabama State Bar.

Nicholson was active in many civic affairs in Birmingham, serving as president for various clubs and organizations, including Jefferson County Council of the American Legion, General Gorgas Post No. 1 of the American Legion, Five Points Lions Club, Wake Island Detachment of the Marine Corps League, Eastern Salesman's Club and Cresthill Civic Club.

Politics was another avid interest of Nicholson's. He ran unsuccessfully for the state House of Representatives in the 1950s. In 1968, he was co-chairperson of Jim Allen's successful U.S. Senate campaign. Nicholson served for many years as chief poll inspector at the Eastwood Mall voting precinct in Birmingham.

Nicholson attended McElwain Baptist Church in Birmingham and considered church activities a top priority. He taught a men's Sunday School class for over 25 years and served as a deacon.

Nicholson is survived by his wife, Perry Lee Sellers Nicholson of Birmingham; one son, Gilbert Nicholson of Birmingham; one daughter, Cece Holt of Locust Fork; three grandchildren, Josh Holt, Jake Holt and Jessica Holt, all of Locust Fork. Other survivors include three brothers and two sisters. ■

Correction:

In the May 1990 issue of *The Alabama Lawyer*, the contributors' names on two memorials were switched.

Patta A. Steel wrote the tribute to David McGiffert Hall, and Lee B. Osborn wrote about Colonel Charles Sterling Babcock.

We regret any inconvenience this may have caused the authors, the families of the deceased or the readers.

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Disciplinary Report

Reinstatement

● **J. Massey Relfe, Jr.,** was reinstated to the practice of law effective March 20, 1990, by supreme court order. [ASB No. 90-03]

Disbarments

● The Supreme Court of Alabama entered an order April 9, 1990, disbarring Alabama lawyer **Quentin C. Crommelin, Jr.,** effective January 26, 1990, based upon a disbarment order entered by the Disciplinary Commission of the Alabama State Bar, pursuant to Rule 14(b), Rules of Disciplinary Enforcement. [Rule 14(b) No. 89-02]

● Decatur lawyer **Homer Crawford Coke** was disbarred, effective March 20, 1990, by order of the Supreme Court of Alabama. Coke had been found guilty of unprofessional conduct by the Disciplinary Board of the Alabama State Bar. His unprofessional conduct included accepting a fee from a client to file a suit but failing to file the suit, failing to pay a filing fee with the bankruptcy court after having been given the fee by clients to pay to the court, forging a client's name to an insurance settlement check and a release, and willfully neglecting a legal matter entrusted to him. [ASB Nos. 88-381, 88-413, 88-595 & 89-70]

Suspension

● **Barry Gordon Terranova,** a former Mobile lawyer, was suspended from the practice of law for a period of 89 days, effective March 21, 1990, by order of the Supreme Court of Alabama. Terranova was suspended for entering into a business transaction with a client where their respective interests were different, representing multiple clients with differing interests, failing to deposit client funds in a trust account, misappropriation of client funds by failing to promptly pay over money collected by him for his client and for conduct involving fraud, misrepresentation, and willful misconduct that adversely reflects on his fitness to practice law. [ASB No. 88-687]

Public Censure

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

THANKS TO STRONG MANAGEMENT, WE'VE KEPT OUR BALANCE FOR NEARLY HALF A CENTURY.

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY CONSOLIDATED BALANCE SHEET March 31, 1990

ASSETS

CASH AND INVESTED ASSETS	
Cash	
Demand Deposits	$ 29,249
Time Deposits	2,410,945
Bonds, at amortized cost (market, $4,558,292)	4,507,637
Stocks	
Preferred, at cost (market, $98,560)	104,457
Common, at market (cost, $254,638)	773,041
Mortgage loans	234,273
Investment income due and accrued	167,295
Total cash and invested assets	8,226,897
OTHER ASSETS	
Accounts and premiums receivable	806,480
Real estate, buildings, furniture and equipment, at cost, less accumulated depreciation of $696,630	381,891
Title plants and records	1,065,926
Investment in affiliated companies	503,643
Sundry	240,228
Total other assets	2,998,168
Total assets	$11,225,065

LIABILITIES AND SHAREHOLDERS' EQUITY

LIABILITIES	
Claim reserves	$ 3,739,133
Fees and taxes	51,228
Payable to affiliated company	111,652
Accounts payable	28,322
Notes payable	4,353
Deferred income taxes	(12,477)
Sundry	722,259
Total liabilities	4,644,470
SHAREHOLDERS' EQUITY	
Common stock, at stated value of $1,550 per share. Authorized 1,600 shares; issued 322.6 shares	500,098
Paid-in capital	4,308,812
Unrealized gain on investments	267,762
Retained earnings	1,597,877
Less treasury stock, at cost, 19.5 shares	(93,954)
Total shareholders' equity	6,580,595
Total liabilities and shareholders' equity	$11,225,065

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