# The Alabama Lawyer

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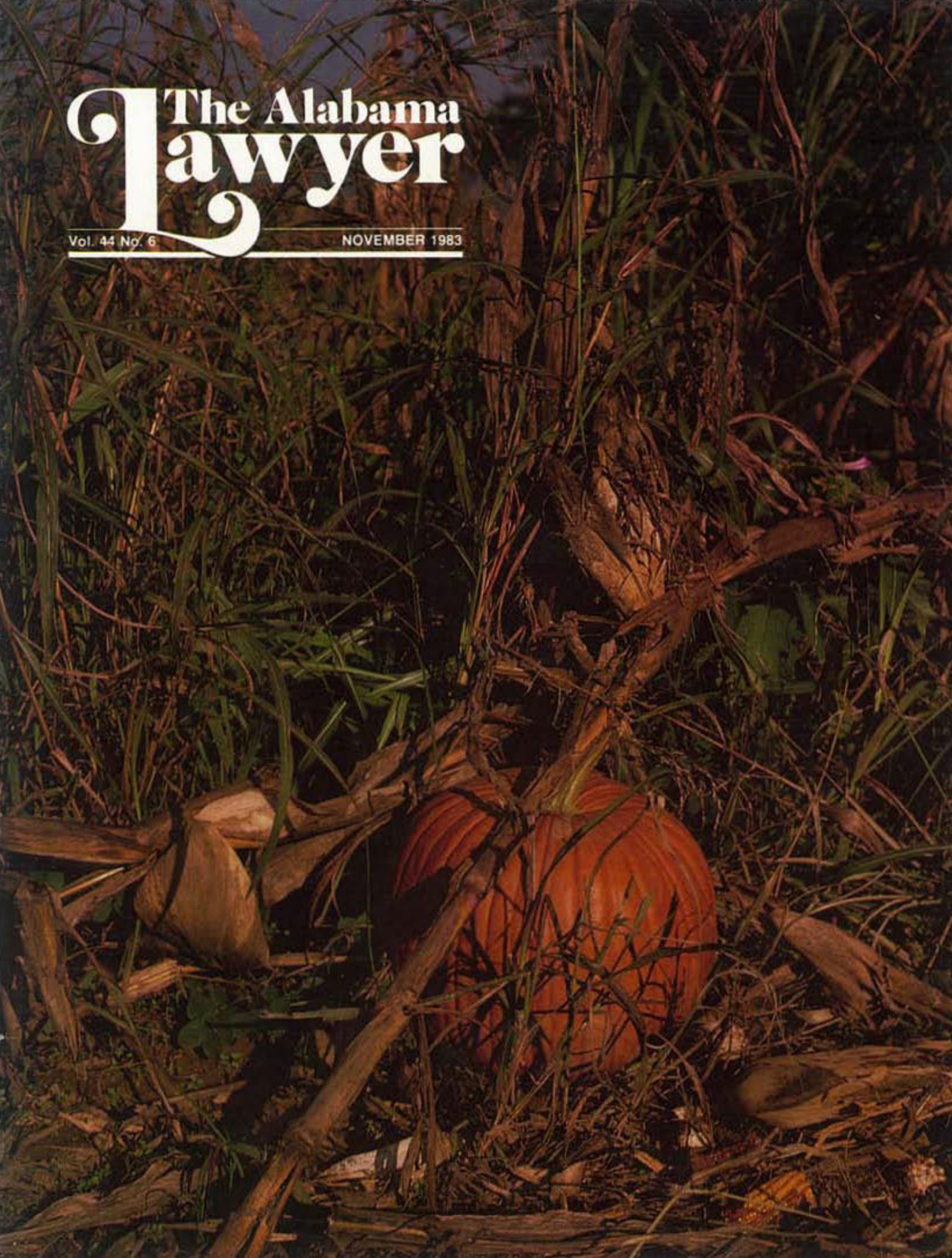

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## GENERAL INFORMATION

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# THE NOVEMBER


### Book review—*A Lawyer's Guide to Secured Transactions*

—pg. 302

A professor at the University of Alabama Law School has authored a new book on Article 9 of the Uniform Commercial Code. This volume should gain national recognition in the field of secured transactions.

### Covenants subject to a test of reasonableness

—pg. 306

Many commercial agreements and employment contracts contain covenants not to compete. Are these restrictive covenants valid under Alabama law?

### On the cover

John F. Proctor, a partner in the Scottsboro law firm of Thomas & Proctor, is the photographer of the front cover harvest scene. Proctor presently serves on the Board of Bar Commissioners representing the 38th Judicial Circuit.

# 1983 ISSUE IN BRIEF

**Alabama supreme court practice—avoidable errors and oversights** —pg. 320

The consequences of failing to perfect properly an appeal to the Alabama Supreme Court can be disastrous. Avoid an untimely dismissal of the appeal by insuring that all procedural requisites have been met.


**Differences in federal and state income tax laws** —pg. 332

While Alabama income tax laws track their federal counterpart in most respects, there are some substantive distinctions between the state and federal laws.

**Waiting on pulitzer prize story** —pg. 343

We can't offer fame—or fortune—but we do invite interested attorneys to enter *The Alabama Lawyer* short story contest. Selected stories will be published. See details inside.

**Regular Features**



*A special thank-you is extended to these special contributors who helped get information for this issue together: Judge Elias C. Watson, Jr., Nancy Callahan, Rayanne M. Stamper, Euel A. Screws, Jr., Beth Carmichael, Louise Livingston and Dorothy Norwood.*

Hairston

# President's Page

This is my second opportunity to report to you on the operations of your Bar since our last annual meeting.

I am amazed at the amount of the time that lawyers have been giving to our profession. The amount of activity created by our committees has Mary Lyn Pike working from dawn to second dark. Our headquarters building is getting an excellent workout. As one committee comes in the front door, another is leaving out the back. We might even start talking about double decking the parking lot.

I will not attempt to report on the committees here. They will be reported about on other pages of this and later publications. They will all be prepared to report fully at the Midyear Meeting of the Bar to be held in Montgomery on March 9 and 10, 1984.

Midyear Meeting committee chairman Dexter Hobbs of Montgomery reports some exciting plans that are on the burner. You need to make your plans to be a part of this exciting part of the Bar's work.

A Birmingham attorney filed a petition with the Supreme Court asking the Disciplinary Rules be revised to permit lawyer advertising on the T.V. The program envisioned in the petition is to go after the early morning crowd tuned in to a local country music show. Makes you wonder if the "Breakfast Club" is the battlefield that gives rise to many of our divorces. Our Task Force to Evaluate Lawyer Advertising and Solicitation and our Task Force on Disciplinary Functions are working on the problem (advertising, not breakfast problems). Their recommendations will be forthcoming.

We knew this was going to happen. Several months ago there was an editorial in the Alabama Broadcaster's Association to the tune of "The Alabama State Bar Is Not Our Friend" that stated a movement was under way to get a lawyer to file suit about this type advertising.

*"While it (lawyer advertising) provides an immediate financial benefit to the advertising media, it is not likely to do so for the legal profession."*

Personally, I'm against lawyer advertising. While it provides an immediate financial benefit to the advertising media, it is not likely to do so for the legal profession. I recently saw a want ad in a Nashville paper touting divorces for $70 plus cost. You just can't do a professional job for this return. Society would be better off if the Nashville advertiser turned his "skills" toward some other field. We cut our own throats when we lower the standards of our profession.

I congratulate Frank O. Burge on his selection by the Birmingham Legal Secretaries Association as "Lawyer of the Year." In his selection it was said:

> He has gained my admiration, respect and dedication as a lawyer, boss and friend.

That is pretty powerful advertising.

The Task Force to Study the Proposed Constitution, working under tight time restraints, did as professional a job as you can find anywhere. Makes you proud to be a part of a profession that produces folks of this caliber. To chairman Harold (Fish) Herring of Huntsville, and the rest of the Committee, we thank you. □

William B. Hairston, Jr.

# Executive Director's Report

Hamner

Membership cards at last—for one and all! The Alabama State Bar has issued membership cards to its Special Members for a number of years. Special Members are those attorneys who are exempt from the purchase of the annual license required by Section 40-12-49 of the *Code of Alabama*. Generally, Special Members include those public officials holding a legal position who are prohibited from the practice of law by virtue of the office, i.e., judges, district attorneys, U.S. attorneys, and persons, who though admitted to practice law in Alabama, choose to pursue a vocation or profession that does not involve the practice of law, but who wish, nonetheless, to maintain their membership in the State Bar. Special Members currently pay dues in an amount of $50. These dues are payable between October 1 and October 31 of each year as are the annual licenses.

Those attorneys who are required to buy the annual license because they do engage in the practice of law purchase their license from either a probate judge or license commissioner in one of the sixty-seven counties in the state. Since the monies are paid to these designated public officials and ultimately work their way to the State Bar Trust Fund at the Capitol, the State Bar Headquarters has no way of knowing who has purchased an annual license until well into the fiscal year when the State Revenue Department and the State Treasurer make available the license list. As a result, it has not been possible to issue a membership card to these persons though we have had numerous requests for same.

The 1983-84 year will be different. We will not be able to issue each license holder a membership card automatically for the same reason we have not been able to issue them in past years; namely, we would not know when you had purchased your license until later in the year. With the beginning of the 1983-84 license year, however, we will mail to each person requesting same, and providing our office with a copy of your current 1983-84 license, a membership card which will not only bear your name and a certification of membership in good standing but will, in fact, be a facsimile of the license which is issued to you by the appropriate authority.

There will be no charge for this card. All you need do is write requesting same and providing proof of purchase of your 1983-84 license.

The most frequent need advanced in support of a membership card is for identification purposes for an attorney to identify him or herself when visiting a client in either a jail or one of our state penal institutions.

These cards could be issued automatically upon payment of your license fee if in fact the monies were paid directly to Alabama State Bar Headquarters as is the case with the special membership dues.

Those new admittees to the Bar, who are required to neither purchase the license or pay special membership dues (all persons admitted subsequent to October 1, 1982, are currently exempt from the payment of any state dues) may write to this office and request a membership card.

All attorneys are required to purchase an annual license from the state if engaged in the practice of law between the dates of October 1 and October 31 of each year, unless otherwise exempt. It is not unusual when we receive the list from the Revenue Department to find between 400-600 lawyers who have failed to purchase these licenses. It is not infrequent that an attorney's right to appear in court is now being challenged by either the judge or an adverse party when it is discovered that the person does not hold a current license.

All attorneys are reminded that while they may be exempt from the purchase of the state license, usually municipal licenses carry no exemption, and even though an attorney may have been admitted subsequent to October 1, 1982, liability for the purchase of a local license attaches with admission to the Bar. You should check with your local licensing authority in this regard. □

Reginald T. Hamner


Robert L. Potts

# A Lawyer's Basic Guide to Secured Transactions

By

Donald W. Baker
ALI-ABA
Philadelphia, Pennsylvania 1983. Pp. 342

Professor Don Baker of the University of Alabama Law School faculty has taken another step toward establishing himself as the preeminent authority in the United States on Article 9 of the Uniform Commercial Code. His recent book, *A Lawyer's Basic Guide to Secured Transactions,* published by the American Law Institute and American Bar Association Committee on Continuing Professional Education, firmly establishes him as the legitimate successor to the late Professor Grant Gilmore, whose classic treatise, *Security Interests In Personal Property,* is currently being revised and updated by Professor Baker pursuant to an agreement with Professor Gilmore before his death.

To appreciate the significance of Professor Baker's new book, one must put it in historical perspective. It is a recent part of one of the great success stories in American legal history, the saga of the Uniform Commercial Code.

The idea of a Uniform Commercial Code was conceived in 1940 by William A. Schnader of the Pennsylvania Bar, while he was president of the National Conference of Commissioners on Uniform State Laws. Previous "uniform" acts relating to commercial transactions, dating from 1896, had become outdated because of new patterns in commercial activity, lack of universal acceptance by state legislatures, and non-uniform amendments, both legislative and judicial.

The Code, after the American Law Institute agreed to co-sponsor it with the National Conference of Commissioners on Uniform State Laws, was nurtured by its chief reporter, Professor Karl N. Llewellyn, and his equally able wife, Soia Mentschikoff, associate chief reporter. From 1944 through 1951, an editorial board of nine members labored to produce the first official draft. (The principal draftsmen of Article 9 on Secured Transactions were Grant Gilmore and Allison Dunham.) This collaborative effort resulted in the 1952 Official Text of the Code, which was promptly adopted by Pennsylvania. New York then conducted an intensive study of the Code which resulted in the 1957 Official Text. Minor revisions occurred in 1958 and 1962, resulting in the 1962 Official Text. By 1968, the Code had been adopted by forty-nine states, the District of Columbia and the Virgin Islands. Louisiana, due to its Civil Law heritage, was the only non-conforming state.

The permanent editorial board for the Code, established in 1961, spent a great deal of time and effort revising Article 9, in the late 60s and early 70s. The revision was undertaken because the conceptually revolutionary approach to secured transactions in personal property and fixtures, adopted by the original draftsmen of the Code, created some problems in application and resulted in numerous non-uniform amendments to Article 9 in various jurisdictions. In 1972, a revised Article 9 was incorporated into a new 1972 Official Text of the Code.

Revised Article 9 has now been adopted by forty-two jurisdictions. Alabama adopted Revised Article 9 during the 1981 Regular Session of the Alabama Legislature, after a Committee of the Alabama Law Institute, of which Professor Baker was the reporter, studied revised Article 9 in depth from 1975 through 1978. It became effective in Alabama on February 1, 1982. See Baker, *An Overview of the Proposed Amendments to Article 9 of the Alabama Uniform Commercial Code,* 42 Ala. Law. 51 (1981).

Professor Baker's new book is nationally significant because it is the best concise treatment of revised Article 9 now on the law book market. It is written specifically for the busy practitioner and student, to give them, in concise and easy to understand terms, readily available information on secured transactions in personal property and fixtures. In the work there is an amazing amount of information clearly and logically organized in orderly and functional fashion. Some of the positive attributes of the book include the frequent use of diagrams and illustrations (especially in connection with the complex subject to priorities) a com-

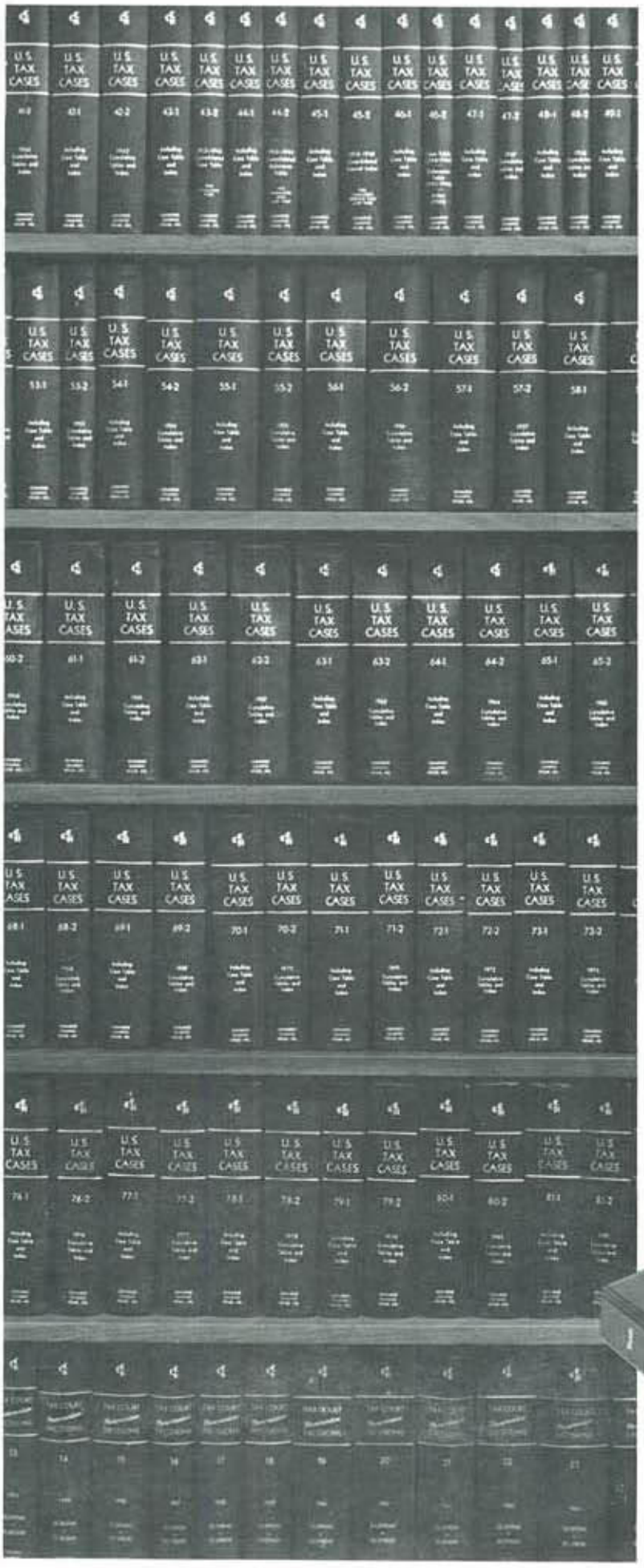
prehensive table of contents, an explanation of the policy behind the rules, and a limited number of forms. One of the most helpful areas of the book is a ten-page section on researching Article 9 problems, which contains an up-to-date bibliography.

The book is basically one of statutory analysis. The author discusses very few cases interpreting Article 9 and has included no discussion of the Alabama variations in Article 9, since the book addresses a national audience.

However, all substantive and procedural aspects of secured transactions are examined in considerable depth in the book. Included are sections on types of collateral, creation of the security interest, perfection of the security interest, priorities, the Article 9 creditor versus the bankruptcy trustee, multiple state transactions, and default.

Professor Baker has brought credit both to himself and to the University of Alabama School of Law with the publication of this monograph. It should be acquired for every law library, large or small. □

*Robert L. Potts, reviewer of* ***A Lawyer's Basic Guide to Secured Transactions,*** *is a practicing attorney and partner in the law firm of Potts, Young, Blasingame & Suttle, in Florence. In addition to serving as current chairman of the Corporation, Banking and Business Law Section of the Alabama State Bar, and as chairman of the Alabama State Board of Bar Examiners, he served as a member of the Alabama Law Institute Committee on Revised Article 9 of the Alabama Uniform Commercial Code.*

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# Bar Plays Significant Role in Proposed Constitution Focus

In the past several weeks not a day has come and gone without news regarding the new proposed constitution, which passed the Alabama Legislature during the regular session. Many questions immediately were voiced concerning the proposed document which was set to come before the voters of the state on November 8. It follows that the most often heard were "What does it say?" and "How can the public vote for, or against, a document they know nothing about?"

Shortly after those initial questions were being asked, another very important question arose—"Will the constitution be placed on the ballot?" At the time this publication went to press, the Alabama Supreme Court was hearing oral arguments in the lawsuit Rick Manley, a state representative and bar commissioner, brought against the State of Alabama (the source of this question) and a decision would not be reached for several days.

One of those expressing concern about the uncertainty of the contents of the proposed constitution was Alabama State Bar President William B. Hairston. He added yet another question to the numerous others—"What can the Alabama State Bar do?" Hairston took action. On August 12, he appointed a 22-member task force, chaired by Harold Herring of Huntsville, to study and evaluate the 57-page document. He called a press conference and told the news media of the bar association's plans to tell the voters of the state what was before them.

The task force, composed of attorneys knowledgeable in Alabama Constitutional Law, got to work on the proposed constitution in both plenary sessions and sub-committee meetings. The task force's last meeting was held on Monday, October 3, in Birmingham, four days before their final report was to be given to the Board of Bar Commissioners. Although the group had agreed not to discuss the report until the Friday meeting, newspapers the following morning indicated the task force had rejected the document by a 14-1 vote. No details of the report were given.

On Friday, October 7, when the task force met to make their final report, the press was invited to attend. Harold Herring commended the effort and diligence of the 1983 legislature, in particular those legislators on the Senate Committee on Governmental Affairs and the House Committee on Constitution and Elections, and their legal advisors, on their work in producing the proposed new constitution. He said their product is a significant step in constitutional revision; however, the task force found the proposed constitution seriously deficient in enough of its important provisions to warrant its rejection by the people, should it be submitted to a vote.

The task force conducted an article by article comparison of the proposed constitution of 1983 with the applicable provisions of the Constitution of Alabama of 1901 as amended. They determined what changes had been made and the significance of the changes.

The following are some of the changes the task force reported:

1) A change to the Declaration of Rights could be construed to exclude persons and entities previously covered, such as minors, corporations and other legal entities;

2) a change in the Taxation and Debt Limitation article could raise questions about the security of the state's bonded indebtedness and attend to result in an increase in the rate of interest;

3) a change to the section relating to the Legislative Department would allow the legislature to authorize lotteries or gift enterprises for charitable purposes; and

4) a new provision could confer standing on any citizen to assert constitutional issues in state court in cases where no standing to sue would otherwise exist.

Those interested in a complete copy of the task force's report may write the Alabama State Bar, P. O. Box 671, Montgomery, Alabama 36101.

*Following the October 7 commissioners meeting where the Task Force to Evaluate the Proposed Constitution gave their report, Jim Merlini of Alabama Information Network (ALANET) questions Larry Dumas (seated) and, chairman of the task force, Harold Herring about particular portions of the document.*

# COVENANTS NOT TO COMPETE IN ALABAMA

**Michael L. Edwards**

*Michael L. Edwards is a partner in the Birmingham law firm of Berkowitz, Lefkovits, Isom, Edwards & Kushner. He received both his undergraduate and law degrees from the University of Alabama.*

This article discusses situations in which one person or entity covenants not to compete with another person or entity. The enforceability of such a covenant is restricted by statute in Alabama and many other states. Even when the covenant is of a type not expressly disallowed by the statute in Alabama, it still is subjected to a test of reasonableness. An attempt is made in this article to present examples of different situations in which such covenants have been used and subsequently considered by the courts. However, the reader should remember that there is no paucity of authority in this area and that no attempt has been made in this article to cite all the cases. As one court noted regarding the law on this subject:

> This is not one of those questions on which the legal researcher cannot find enough to quench his thirst. To the contrary there is so much authority it drowns him. It is a sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strained support for anything, if he lives so long. This deep and unsettled sea pertaining to an employee's covenant not to compete with his employer after termination of employment is really Seven Seas . . . .

*Arthur Murray Dance Studios of Cleveland v. Witter,* 105 N.E.2d 685, 687 (Ohio C.P. 1952), quoted in *Hill v. Rice,* 259 Ala. 587, 67 So. 2d 789, 793 (1953). At least one judge faced with the duty of deciding a case involving a covenant not to compete declined to embark upon this "Seven Seas" of authority:

> Because of a demanding caseload, family responsibilities and a desire to consider other matters in life, this court has been dissuaded from reading all of the available authorities.

Unpublished memorandum opinion entered in *Consultants & Designers Inc. v. Butler Service Group, Inc.,* No. CV 80-PT-0754-S (N.D. Ala. Nov. 3, 1981).

The Alabama statute applicable to covenants not to compete provides that:

> (a) Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind otherwise than is provided by this section is to that extent void.
>
> (b) One who sells the good will of a business may agree with the buyer and one who is employed as an agent, servant or employee may agree with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city or part thereof so long as the buyer, or any person deriving title to the good will from him, or employer carries on a like business therein.
>
> (c) Upon or in anticipation of a dissolution of the partnership, partners may agree that none of them will carry on a similar business within the same county, city or town, or within a specified part thereof, where the partnership business has been transacted.

*Ala. Code* § 8-1-1 (1975). This statute is copied verbatim from statutes enacted in California and Oklahoma, so cases construing the statutes in those jurisdictions are persuasive authority. *Yost v. Patrick,* 245 Ala. 275, 17 So. 2d 240, 243-44 (1944). The Alabama statute begins in subsection (a) by making void *all* contracts by which anyone is restrained from exercising a lawful profession, trade or business. In analyzing a problem involving a covenant not to compete governed by Alabama law, one should begin with the proposition that all such contracts are void, except as subsections (b) or (c) exempt the covenant from the blanket prohibition of subsection (a). Actions on contracts containing covenants not to compete, in addition to consideration of the enforceability of the covenant itself, are subject to the same defenses as any other contract action. See, *e.g., Advance Industrial Security v. William J. Burns International Detective Agency,* 377 F.2d 236 (5th Cir. 1967) (covenant void because party seeking enforcement had not qualified to do business in Alabama); *McNeel Marble Co. v. Robinette,* 259 Ala. 66, 65 So. 2d 221 (1953) (covenant void because signed on Sunday).

While this article focuses chiefly on the validity of covenants not to compete, practitioners should be aware that litigation in this area often includes other claims asserted in connection with the covenant. For example, in *James S. Kemper & Co. Southeast v. Cox & As-*

*sociates, Inc.*, 17 ABR 2756 (July 1, 1983), the former employer sued its former employee and his new employer, asking for injunctive relief to enforce the covenant, damages against the former employee for breach of contract, and damages against the new employer for knowing and intentional interference with the contractual relationship. The Supreme Court of Alabama ruled that the former employee was liable for damages for breach of contract and the new employer was liable for damages for intentional and knowing interference with the contractual relationship between the plaintiff and its former employee. In addition to damages, injunctive relief to enforce the covenant was ordered.

For purposes of discussion, the covenants not disallowed in Alabama may be divided into two categories: (1) employee-employer and (2) sale of the good will of a business or partnership dissolution. However, courts in Alabama have considered the applicability of the above statute in other contexts. In *Hibbett Sporting Goods v. Biernbaum*, 391 So. 2d 1027 (Ala. 1980), the court considered a landlord's agreement with the tenant not to lease space in a shopping center to another sporting goods store. The court upheld the covenant, stating that:

> "Every contract . . . which at all restrains trade is not void; it must injuriously affect the public weal; that it may affect a few or several individuals engaged in a like business does not render it void."

391 So. 2d at 1029. See also, *Alabama-Tennessee Natural Gas Co. v. City of Huntsville*, 275 Ala. 184, 153, So. 2d 619 (1963) (contract giving city exclusive rights to sell gas within county upheld).

## Employer-Employee Covenants

Frequently employees will agree not to compete with their employer after the termination of their employment. These contracts usually are restricted as to time and territory. If they are not so restricted, the court itself will define the restrictions (see discussion below). Alabama courts look with disfavor on contracts restraining employment, because such restraint tends not only to deprive the public of efficient service, but risks impoverishing the individual and making him a charge at the expense of the taxpayer. *White Dairy Co. v. Davidson*, 283 Ala. 63, 214 So. 2d 416, 419 (1968). The Supreme Court of Alabama asks these questions in determining the reasonableness of a contractual provision in restraint of employment:

> Is the purpose to be obtained a fair and conscionable one; will it do greater harm to the employee than good to the employer; and, if it is reasonable as between the parties, does it so injuriously affect the public as to make it void as against public policy?

214 So. 2d at 419-20.

In *DeVoe v. Cheatham*, 413 So. 2d 1141 (Ala. 1982), the court held that, in addition to the previously announced requirements, the employer must have a "protectable interest" to be enforced through the use of a covenant. In the *DeVoe* case, the employer hired an inexperienced employee and trained the employee to install vinyl tops on automobiles. The employee later was discharged and the employer sought to enforce a restrictive covenant prohibiting the employee from working for a competitor for five years within a fifty mile radius of Decatur. The court held that the restriction was not enforceable because the employer had no protectable interest, noting that in order for a protectable interest to exist, "the employer must possess 'a substantial right in its business sufficiently unique to warrant the type of protection contemplated by [a] noncompetition agreement.'" The court stated that:

> DeVoe learned no more than the normal skills of the vinyl top installation trade, and he did not engage in soliciting customers. There is no evidence that he either developed any special relationship with the customers or had access to any confidential information or trade secrets. A simple labor skill, without more, is simply not enough to give an employer a substantial protectable right unique in his business. To hold otherwise would place an undue burden on the ordinary laborer and prevent him or her from supporting his or her family.

413 So. 2d at 1143. See also, *Cullman Broadcasting Co. v. Bosley*, 373 So. 2d 830, 836 (Ala. 1979); Restatement (Second) of Contracts § 188 comment b (1981).

The contract must be mutually binding and provide consideration to the employee as well as the employer in order to be enforceable. In *Hill v. Rice*, 259 Ala. 587, 67 So. 2d 789 (1953), the employee dance instructor agreed not to compete after termination of his employment, but the employer in the contract before the court did not agree to provide the employee with any minimum hours or compensation. The court held that such a contract lacked mutuality and remanded the case to the circuit court for a determination as to whether reasonable employment in fact had been provided to the employee before the relationship terminated.

The fact that the convenant not to compete was made at some point after the employment commenced does not necessarily render it invalid for lack of consideration. In *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 229 So. 2d 480 (1969), a gas company sued its former branch manager-routeman to enforce a contract not to compete signed after the employment had commenced. The employment relationship continued for eight months thereafter, at which time the employee left voluntarily. The supreme court held that the "continued employment" of the employee after the signing of the covenant constituted sufficient consideration. The covenant was enforced by injunction, because the employee knew his former employer's customers, who were located in hard-to-find rural areas. However, in *Mason Corp. v. Kennedy*, 286 Ala. 639, 244 So. 2d 585 (1971), the court considered a case in which the covenant had been signed after seven years of employment; the salesman employee was terminated seven months after signing the covenant. The employee was forced to sign another restrictive covenant after termination before being given money to which he was entitled under the employer's profit sharing plan. The supreme court affirmed the trial court's denial of an injunction requested by the employer, noting that the former employee had not competed with the employer for a period of two years and four months after his termination. See also, *Robinson v. Computer Servicenters*, 346 So. 2d 940 (Ala. 1977) (covenant signed after employ-

ment commenced; injunction denied employer, because at the time the contract was signed, the employer intended to terminate the employee as soon as a replacement could be found).

In accordance with the wording of the Alabama statute, which allows restrictive covenants only as to "an agent, servant or employee," no covenant not to compete by an independent contractor will be enforced. In *Premier Industrial Corp. v. Marlow,* 292 Ala. 407, 295 So. 2d 396 (1974), the court refused to enforce such a covenant, holding that the covenantor was an independent contractor, not an employee. To distinguish an independent contractor from an employee, the court noted that an employer retains the right to direct an employee in the manner in which business is done as well as the result to be achieved. See also, *C & C Products v. Fidelity & Deposit Co. of Maryland,* 512 F.2d 1375, 1377 (5th Cir. 1975); *Blalock v. Perfect Subscription Co.,* 458 F. Supp. 123 (S.D. Ala. 1978), *aff'd,* 599 F.2d 743 (5th Cir. 1979).

Despite the restrictive language used in the above Alabama decisions, the Alabama courts have enforced covenants not to compete by employees in numerous cases. See, *e.g., James S. Kemper & Co. Southeast v. Cox & Associates, Inc.,* 17 ABR 2756 (July 1, 1983) (vice president for Alabama); *Cullman Broadcasting Co. v. Bosley,* 373 So. 2d 830 (Ala. 1979) (radio announcer); *Courington v. Birmingham Trust National Bank,* 347 So. 2d 377 (Ala. 1977) (restrictive covenant in bank's employee profit sharing plan enforced); *D. B. Clayton & Associates v. McNaughton,* 279 Ala. 159, 182 So. 2d 890 (1966) (tax return preparer); *Parker v. Ebsco Industries,* 282 Ala. 98, 209 So. 2d 383 (1968) (vice president-national sales manager); *Stokes v. Moore,* 262 Ala. 59, 77 So. 2d 331 (1955) (branch manager of small loan company); *Rush v. Newson Exterminators,* 261 Ala. 610, 75 So. 2d 112 (1954) (pest control technician); *Slay v. Hess,* 252 Ala. 455, 41 So. 2d 582 (1949) (pest control technician); *Shelton v. Shelton,* 238 Ala. 489, 192 So. 55 (1939) (dry cleaning routeman); *Dixon v. Royal Cup, Inc.,* 386 So. 2d 481 (Ala. Civ. App. 1980) (coffee salesman).

Alabama courts will not enforce any contract provision restricting the practice of a profession. This refusal to enforce such contracts is based upon the provision in *Ala. Code* § 8-1-1(a) (1975) that "Every contract by which anyone is restrained from exercising a lawful profession . . . otherwise than is provided by this section is to that extent void." Neither subsection (b) nor subsection (c) of the statute exempt contracts restricting the practice of a profession from the declaration in subsection (a) quoted above that such contracts are void. Moreover, in *Odess v. Taylor,* 282 Ala. 389, 211 So. 2d 805 (1968), the court refused to enforce a covenant by an employee doctor not to compete with the employer doctor on the additional ground that an injunction must protect the interest of society as a whole, and that the acute shortage of physicians and surgeons in Alabama made the covenant not to compete unenforceable as being contrary to public policy. In *Associated Surgeons v. Watwood,* 295 Ala. 229, 326 So. 2d 721 (1976), the court held void as a restraint on the practice of a profession a provision for liquidated damages in the event the doctor employee competed after termination of his employment.

In defining "profession," the Supreme Court of Alabama in *Odess v. Taylor,* 282 Ala. 389, 211 So. 2d 805, 812 (1968), quoted from Dean Roscoe Pound's *The Lawyer from Antiquity to Modern Times:*

> The term refers to a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art is the purpose. *Gaining a livelihood is incidental, whereas, in a business or trade it is the entire purpose.*

211 So. 2d at 812 (emphasis supplied).

In *Gant v. Warr,* 286 Ala. 387, 240 So. 2d 353 (1970), the court held that a certified public accountant is a professional and that any contract provision restricting the practice of such a professional is void. In *Burkett v. Adams,* 361 So. 2d 1 (Ala. 1978), the court held that a public accountant who is not a certified public accountant also is a professional. However, in *Dobbins v. Getz Exterminators of Alabama,* 382 So. 2d 1135 (Ala. Civ. App. 1980), the court held that a pest control technician is not a professional, rejecting the argument that the technicians were accorded such status by a statute referring to them as "persons engaged in professional services."

## Sale of the Good Will of a Business or a Partnership Dissolution

Subsection (b) of the Alabama statute permits the seller of the good will of a business to agree with the buyer to refrain from carrying on or engaging in a similar business. Subsection (c) of the Alabama statute provides that partners upon or in anticipation of a dissolution of the partnership may agree that none of them will carry on a similar business where the partnership business has been transacted. Alabama courts considering covenants not to compete executed in such situations have not been nearly so restrictive in construing such covenants as the courts have been in construing covenants executed by employees. This probably is due to the fact that covenants executed in connection with the sale of good will or the dissolution of partnerships are done so by individuals capable of arms length bargaining and who usually receive greater consideration for their covenants than do employees.

In order for a covenant not to compete to be valid when executed in connection with a sale of a business, it is not necessary that the contract of sale specifically state that the transaction is a sale of good will. In *Maddox v. Fuller,* 233 Ala. 622, 173 So. 12 (1937), the court held that it is sufficient if the contract is clear that the buyer is taking over a going business. However, a covenant not to compete in the sale of a business must be express, because there is no implied covenant not to compete when such a sale is being made. *Joseph v. Hopkins,* 276 Ala. 18, 158 So. 2d 660 (1963) (sale of optometry business).

The party seeking enforcement of the covenant must be the party for whose benefit the covenant runs. In *J. L. Davis, Inc. v. Christopher,* 219 Ala. 346, 122 So. 406 (1929), plaintiff purchased the good will of an insurance business from defendant. The defendant seller agreed not to compete in the sale of fire, tornado and theft insurance. Plaintiff buyer subsequently sold the business to a third party, but then brought the action itself to protect the third party's rights. The supreme court affirmed the trial court's

denial of relief, holding that relief will be granted only at the instance of the owner of the good will.

A merger of one corporation into another can be a sale of good will. In *First Alabama Bancshares v. McGahey,* 355 So. 2d 681 (Ala. 1978), the court considered a transaction in which a local bank was merged into a holding company. The major stockholder, who also was the president of the local bank, agreed not to compete with the holding company, but then violated his covenant. The former stockholder-president contended that his personal sale of stock to the holding company was not a transfer of the good will, which he said was owned only by the corporation itself. The court rejected this contention, holding that the stockholders of an Alabama corporation are the equitable owners of the assets of the corporation and can themselves transfer these assets, including the good will.

Just as contracts restricting the practice of a profession by professional employees are void, so also are such contracts void when executed by a professional in connection with the sale of a business. In *Thompson v. Wiik, Reimer & Sweet,* 391 So. 2d 1016 (Ala. 1980), an accountant sold her accounting business and agreed not to compete for a period of time, during which she was to receive a share of the profits from the purchaser. The contract specifically provided that the payments were not for good will. The purchasers failed to make the payments and the seller sought damages. The court held void the covenant not to compete and the provision for payments for such covenant, citing its previous cases holding contracts restricting the practice of a profession to be void. The court rejected the seller's contention that these provisions of the Alabama statute were unconstitutional as an unreasonable classification.

## Reasonableness of Restrictions as to Territory and Time

The Alabama statute requires that a contract executed in connection with the sale of good will or by an employee be limited to "a specified county, city or part thereof so long as the buyer . . . or employer carries on a like business therein." A covenant not to compete executed in connection with the dissolution of a partnership must be limited to "the same county, city or town, or . . . part thereof, where the partnership business has been transacted." Even though the singular word "county" is used in the statute, a restriction may cover a wider area if reasonable. *McNeel Marble Co. v. Robinette,* 259 Ala. 66, 65 So. 2d 221, 223 (1953). The Alabama courts have been flexible in limiting the effect of a covenant to a reasonable time or territory even if the restrictions in the contract itself are not so limited. In *Yost v. Patrick,* 245 Ala. 275, 17 So. 2d 240 (1944), the court considered a covenant executed in connection with the sale of a business which contained no territorial or time restrictions. The court held that such a contract would be enforced for a reasonable time and within a reasonable geographic area. In *Ivey v. Massey,* 262 Ala. 365, 78 So. 2d 926 (1955), the contract provided for a restriction over a large geographic area, but the proof at trial was that the business whose good will was sold operated only within a smaller area. The court held that an injunction could be issued restricting the covenant to the geographic area proved to be reasonable at trial.

What constitutes a reasonable geographic area depends upon the proof of what protection the business needs. In *Daughtry v. Capital Gas Co.,* 285 Ala. 89, 229 So. 2d 480 (1969), the court limited the territorial restriction to be enforced by injunction to one county in which ninety percent of the employer's customers were located. In *James S. Kemper & Co. Southeast v. Cox & Associates, Inc.,* 17 ABR 2756 (July 1, 1983), the court held the employer was entitled to an injunction including the entire state. In *Parker v. Ebsco Industries,* 282 Ala. 98, 209 So. 2d 383 (1968), the court held that the geographic area subject to the restriction covered the entire United States, except for those states west of the Rocky Mountains.

Few Alabama cases discuss what period of time is reasonable for a valid restriction. Covenants executed in connection with the sale of the good will of a business were enforced for five years in *Tyson v. United States Pipe & Foundry Co.,* 286 Ala. 425, 240 So. 2d 674 (1970), and in *First Alabama Bancshares v. McGahey,* 355 So. 2d 681 (Ala. 1978). In *Mason Corp. v. Kennedy,* 286 Ala. 639, 244 So. 2d 585 (1971), the court refused to enforce a five year covenant against a former employee, noting that he already had refrained from competing for two years and four months immediately following his termination. Other Alabama cases and the period of time the restriction was enforced include *James S. Kemper & Co. Southeast v. Cox & Associates, Inc.,* 17 ABR 2756 (July 1, 1983) (vice president for Alabama; two years); *Daughtry v. Capital Gas Co.,* 285 Ala. 89, 229 So. 2d 480 (1969) (gas branch manager-routeman; two years); *Parker v. Ebsco Industries, Inc.,* 282 Ala. 98, 209 So. 2d 383 (1968) (vice president-national sales manager; one year); *Slay v. Hess,* 252 Ala. 455, 41 So. 2d 582 (1949) (pest control technician; by implication, five years held reasonable, although case was before the court only for review of grant of preliminary injunction); *Dixon v. Royal Cup, Inc.,* 386 So. 2d 481 (Ala. Civ. App. 1980) (coffee salesman; one year). For other cases on this subject, see Annot., 45 A.L.R. 2d 77 (1956) and Annot., 61 A.L.R. 3d 397 (1975).

## Remedies for Violation

The normal remedy for one seeking to enforce a covenant not to compete is an injunction prohibiting the covenantor from violating the agreement. See *e.g., First Alabama Bancshares v. McGahey,* 355 So. 2d 681 (Ala. 1978). An injunction can be issued even if the contract allows liquidated damages. *Maddox v. Fuller,* 233 Ala. 622, 173 So. 12, 14 (1937). Although one Alabama case holds that damages and an injunction will not be awarded for the same violation, *Stokes v. Moore,* 262 Ala. 59, 77 So. 2d 331, 334 (1955), a more recent case holds that damages and injunctive relief can be awarded in the same case. *James S. Kemper & Co. Southeast v. Cox & Associates, Inc.,* 17 ABR 2756 (July 1, 1983). A new employer also may be enjoined from employment of the covenantor in violation of the covenant, *Daughtry v. Capital Gas Co.,* 285 Ala. 89, 229 So. 2d 480 (1970), or may be assessed damages for interference with the covenant. *James S. Kemper & Co. South-*

*east v. Cox & Assoc., Inc.*, 17 ABR 2756 (July 1, 1983).

### Law to be Applied

Quite often, a contract of employment or other contract might provide that it is subject to the laws of one state, but performance is in another state. The court considered such a situation in *Blalock v. Perfect Subscription Co.*, 458 F. Supp. 123 (S.D. Ala. 1978), *aff'd*, 599 F.2d 743 (5th Cir. 1979), in which a magazine salesman agreed not to compete with the publisher after termination of the relationship. The contract provided that it was subject to the laws of the Commonwealth of Pennsylvania. The magazine salesman was an independent contractor, but this fact would not affect the validity of the covenant under the laws of Pennsylvania. However, as noted above, a covenant not to compete by an independent contractor is void under the laws of Alabama. The court in *Blalock* held that, since the contract was to be performed in Alabama, it was subject to Alabama law because the Alabama statute [*Ala. Code* § 8-1-1 (1975)] states the "fundamental policy" of Alabama and that Alabama has a "materially greater interest" than Pennsylvania in regulating the provisions of such a contract to be performed in Alabama.

## Antitrust Implications

A number of federal courts have found that post-employment agreements not to compete, or those ancillary to the sale of a business, *can* violate Section 1 of the Sherman Act, 15 U.S.C. § 1. E.g., *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1277 (1982) (covenant ancillary to sale of business upheld; case provides good summary of the law in this area.); *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978) (brokerage firm partners' noncompetition clause upheld); *Golden v. Kentile Floors, Inc.*, 512 F.2d 838, 843-44 (5th Cir. 1975) (covenant providing for forfeiture of deferred compensation if former employee competes upheld). There appear to be no cases which actually hold such a covenant to be a Section 1 violation, however. See *Bradford v. New York Times Co.*, 501 F.2d 51, 59 (2d Cir. 1974).

Such restrictive covenants are subject to the "rule of reason," rather than being illegal *per se*. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 689 (1978); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 at 365; *Alders v. AFA Corp. of Florida*, 353 F. Supp. 654, 656 (S.D. Fla. 1973), *aff'd mem.*, 490 F.2d 990 (5th Cir. 1974) (covenant ancillary to sale of business upheld). In applying the rule of reason to covenants not to compete, the courts consider much the same factors as are applied in determining "reasonableness" under state law. Under the rule of reason, however, an adverse impact on competition, rather than simply an injury to a competitor or the employee, must also be proved before a violation of Section 1 can be found. E.g., *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d at 268-69; *H&B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 246 (5th Cir. 1978) (discussing requirements of the rule of reason in a different factual context).

## Conclusion

As may be evident from this article, it often is difficult to predict where a trial court may draw the fine line between reasonable protection of an employer's or purchaser's business and undue hardship. Where there is a protectable interest to be served by a restrictive covenant, courts have the power to limit unreasonable time and territory restriction and enforce them as modified. In such cases, it is generally safe, when representing employers or purchasers, to seek and enforce covenants drawn as broadly as is believed necessary to protect the business. Where there is some doubt as to whether a protectable interest would be found, the antitrust authorities must be considered in deciding whether to seek or enforce a covenant at all. While this article is in no way exhaustive, it is hoped that its embarkation on "one sea" of authority will provide some guidance in these decisional processes and some assistance to counsel who may be drawn in after litigation commences. □

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# Bar Briefs

## Don't shortchange yourself on CLE hours

The CLE Annual Report of Compliance form, mailed to Alabama State Bar members in September, contains an error. While posting credits of those who have already returned their forms, we found that many of the carryover hours were calculated incorrectly—probably as a result of the misstatement on the form.

Those who have not returned their CLE compliance form need to alert themselves to line five under "1983 Credit Summary," which reads as follows:

> "Hours in excess of 12 *earned in 1983* to be carried forward for credit in 1984."

This is a misstatement of Rule 4.B of the Rules for Mandatory Continuing Legal Education. Line five should read as follows:

> "Extra credits *earned in 1983* to be carried forward for credit in 1984."

If twelve or more credits were carried forward from 1982, twelve of those credits will be used to meet the 1983 requirement. Any credits in excess of twelve *from 1982* will be lost due to the one year limit on carryover of credits earned in a given year. All credits *earned but not needed in 1983* may be carried forward for 1984. These credits must, however, be reported and designated as credits to be carried forward for 1984. If they are not reported in 1983, they will be lost.

If less than twelve credits were carried forward from 1982, credits earned in 1983 will be added to them to meet the current twelve hour requirement. Any remaining credits earned in 1983 may then be designated as credits to be carried forward for 1984. As above, if they are not reported in 1983, they cannot be used to meet the 1984 requirement.

## Birmingham bar exec appointed delegate to NABE

Beth Carmichael, executive director of the Birmingham Bar Association, has been appointed as a delegate to the ten-member Executive Committee of the National Association of Bar Executives (NABE).

On October 4, 1983, Carmichael became one of the four bar executives, elected nationwide, that serve as delegates to the NABE. She will fill the unexpired term of a former local bar executive from the Memphis Bar Association. Carmichael joins delegates Terrence M. Murphy of the Chicago Bar, William J. Carroll of the New York Bar, and Robert J. Elfers of the Oregon Bar.

## Nominations open for distinguished service to justice award

Nominations for the second annual Edward J. Devitt Award for Distinguished Service to Justice are now open, according to an announcement by West Publishing Company, sponsor of the award. It will be made to a living federal judge who is deemed to have made extraordinary contributions to the advancement of the cause of justice.

Any person may submit nominations, which should be in writing and include supporting material. This material might cite a federal judge's scholarly writings, leadership in improving court administration, effectiveness in improving discovery practice, or accomplishment of any professional activity contributing to the advancement of justice. All members of the federal judiciary appointed under Article III of the Constitution are eligible.

The award, which carries an honorarium of $10,000, is made to call attention to the significant contributions made to the country by the federal bench. It was created by West in 1982 in recognition of the longtime distinguished services of Edward J. Devitt, who has spent thirty-six years in the District of Minnesota, mostly as chief judge and now as senior judge, and who himself made substantial contributions to the cause of justice.

Judge Devitt, along with two other judges from federal courts, will select the award winner for 1983.

Recipient of the Edward J. Devitt Award for 1982 was the Honorable Albert B. Maris, senior judge of the U.S. Court of Appeals for the Third Circuit. His distinguished career spanned forty-six years of service. He was selected for the award by Judge Devitt, along with Judge Gerald B. Tjoflat of the Eleventh Circuit and Supreme Court Justice Byron R. White.

Nominations for the 1983 award should be submitted by December 31, 1983, to: Devitt Distinguished Service to Justice Award, P.O. Box 43810, St. Paul, MN 55164.

## Unauthorized practice of law by title company

In a decision rendered on September 23, 1983, the Alabama Supreme Court construed Section 34-3-6, *Code of Alabama* 1975, which defines the "practice of law," to bar a title company from conducting closings and filling in the blanks on preprinted deed forms. The Court rejected the argument that Section 34-3-6 was constitutionally infirm because it violated the title company's right to due process. In a concurring opinion, Chief Justice Torbert cautioned that the majority opinion should not be read as imposing a blanket finding that a title company is engaged in the unauthorized practice of law when conducting a closing of a real estate transaction. Rather, the specific acts constituting the unauthorized practice of law must be determined on a case by case basis.

Phillip W. Norwood, individually and as chairman of the Unauthorized

Practice of Law Committee of the Alabama State Bar, filed a petition for a writ of quo warranto initiating this action in the circuit court of Coffee County.

## Two new rules of criminal procedure proposed

The Supreme Court of Alabama, on October 3, 1983, gave its tentative approval to two new rules of criminal procedure. Temporary Rule 17 (Appeal by State from Pre-trial Ruling) is based on Rule 15.7 of the recommendations by the Court's advisory committee on criminal rules. Temporary Rule 18 (Discovery) is based on Rule 16 of the advisory committee's recommendations.

The full text of these two proposed rules as tentatively approved will be published in the Southern Reporter advance sheet. Interested persons will have until December 14, 1983, to inform the Court of any comments or criticisms regarding these two rules. Comments should be addressed to the Clerk of the Court, P.O. Box 157, Montgomery, Alabama 36101.

If the Court, following the cut-off date for comments, gives its final approval, the rules would become effective March 1, 1984.

Wood

## Wood appointed district judge

On Monday, August 1, 1983, Phillip Wood was sworn in office as district judge of Autauga County. He was appointed by the governor to assume the post vacated by the retirement of Judge James Loftis.

Wood received a B.A. degree from Auburn University and is a 1977 graduate of the University of Alabama School of Law. Prior to his appointment, he had been in private practice in Prattville for five years.

## Future Alabama lawyers proving themselves top-notch

The Student Bar Association (SBA) at Cumberland School of Law is making people sit up and take notice.

At the American Bar Association (ABA) Annual Meeting held in August in Atlanta, the Cumberland SBA was voted most outstanding in the nation by the Law Student Division of the ABA.

Other national laurels included the first place SBA Project Award for its freshman orientation program, and, for the eighth time in ten years, they received the Best Law Day Award. Crockett Cobble, president of the Cumberland SBA, brought further recognition to the school when he was elected president of the National Student Bar Association.

Cobble, a senior from Chattanooga, Tennessee, is the second Cumberland SBA president to serve in the NSBA's top post. He succeeds former Cumberland SBA president Barney F. Lovelace, Jr., a 1983 admittee to the Alabama State Bar now practicing in Decatur.

## Real estate lawyers beware

An increasing cause of malpractice claims in the area of real estate practice is the failure of attorneys to give required notice to the Internal Revenue Service *before* foreclosing on property subject to a federal tax lien. Section 7425(b)(1) of the Internal Revenue Code provides for such notice in nonjudicial sales where the tax lien has been filed in the place required by law thirty days before such sale. The purpose of the Section is to prevent discharge of federal tax liens by reason of foreclosure before the United States has the opportunity to protect its interests. The Internal Revenue Code also provides that failure to satisfy the notice requirement will (1) prevent the disturbing of the government's interest irrespective of the foreclosure, and (2) promote the government's tax lien to senior status.

This legal malpractice claims alert is provided as part of the Bar's continuing risk management program.

## Bar's response to proposed change in appellate rules requested

The Standing Committee to the Supreme Court on the Alabama Rules of Appellate Procedure would like to receive comments from the bar regarding a proposed amendment to Rule 10, ARAP, which has been suggested by the Alabama Shorthand Reporters Association.

The basic changes would provide that the record on appeal, including both the clerk's record and the reporter's transcript, be on letter-size paper instead of legal-size paper; that the record be bound on the lefthand side instead of the top; and that the pages be numbered in the upper righthand corner instead of in the center at the bottom.

The proposed changes would conform to the requirements of papers on appeal in the Federal Courts, as adopted by the Judicial Conference of the United States. They would, however, result in an estimated increase of about $66 in the fees of the court reporters for every 200 page volume of the record on appeal. This estimate is based on 25 lines per page on letter-size paper and 30 lines per page on legal-size paper, resulting in 40 additional pages for each 200 page volume of the record on appeal. Using the fee of $1.65 per page, as provided for in Rule 40 of the Rules of Judicial Administration, this would amount to an increase of $66 per volume. This estimate does not take into account the additional space that would be lost by binding the record on the lefthand side instead of at the top.

All comments concerning the proposed changes should be sent before December 31, 1983, to:

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Anniston, AL 36202

## Can you handle another client?

The Lawyer Referral Service, operated by the Alabama State Bar, continues to enjoy a very favorable success with both clients who use the service and those lawyers who are panel members. According to Gale Skinner, lawyer referral secretary, approximately 380 referrals are made each month and that number continues to increase. This number does not include Birmingham, Mobile and Huntsville which have local referral services.

Although most counties are represented on the panel, there are no lawyers who belong to the Lawyer Referral Service in the following counties: Bibb, Bullock, Cherokee, Chilton, Cleburne, Conecuh, Coosa, Crenshaw, Geneva, Greene, Hale, Henry, Lowndes, Marion, Monroe, Perry, Pickens, Randolph, St. Clair, Sumter and Washington.

As a consequence, any potential client seeking to employ an attorney in these counties through the referral service has to be referred to an attorney in an adjacent county, but, hopefully, in the judicial circuit in which the client's problem exists. Lawyers in counties without panel members are losing fees to attorneys in the adjacent counties; furthermore, clients are having to travel substantial distances to obtain legal advice when they would prefer to have matters handled by local attorneys.

The service cannot make a referral to an attorney who does not belong to the service. Those attorneys interested in joining the Lawyer Referral Service should call Mrs. Skinner for an application at 1-800-392-5660. She will be glad to answer any questions concerning the service.

Help yourself and the residents of your county by joining the Alabama State Bar Lawyer Referral Service for the 1984 year.

Esdale

## Supreme court selects clerk

On November 21, 1983, Robert G. Esdale (Bob) of Birmingham will be making a move to Montgomery where he will make his new home in the Office of the Clerk of the Supreme Court of Alabama. He will fill the position vacated when the Honorable J. O. Sentell retired on June 30, 1982.

Esdale is a graduate of the University of Alabama. He received his LL.B. from the University of Alabama School of Law in 1954 and began private practice that same year. Esdale comes to the court after having served as vice-president and general counsel of Homecrafters Centers, Inc., (formerly Moore-Handley) for the past ten years.

Since J. O. Sentell's retirement, Dorothy Norwood has served as acting clerk of the court. She will continue to serve in the capacity of deputy clerk. Norwood has been employed by the court since 1969.

## Lawyer challenges advertising rules

Birmingham lawyer R.B. Jones is challenging Alabama State Bar rules that restrict attorney's advertising to the print media. He has petitioned the Supreme Court of Alabama to amend DR 2-102 to allow lawyers to advertise in the broadcast media.

He says the rule allowing lawyers to run certain ads in the print media but not on radio or television is unconstitutional.

Before petitioning the court, Jones had requested an ethics opinion from the bar's general counsel. In his request, Jones stated that the proposed ad would be run on Birmingham's Channel 6 during the Country Boy Eddie Show which is televised weekdays from 5:00 a.m. to 6:30 p.m. He was advised that his proposed ad would violate disciplinary rules which expressly limit advertising to the print media.

The Supreme Court has referred the petition to the Board of Bar Commissioners for its comments and recommendations. The bar's Task Force on Disciplinary Functions and the Task Force to Evaluate Lawyer Advertising and Solicitation, appointed by President Bill Hairston, will study the bar's advertising rules and make recommendations as to any changes that need to be made, if any, in the rules.

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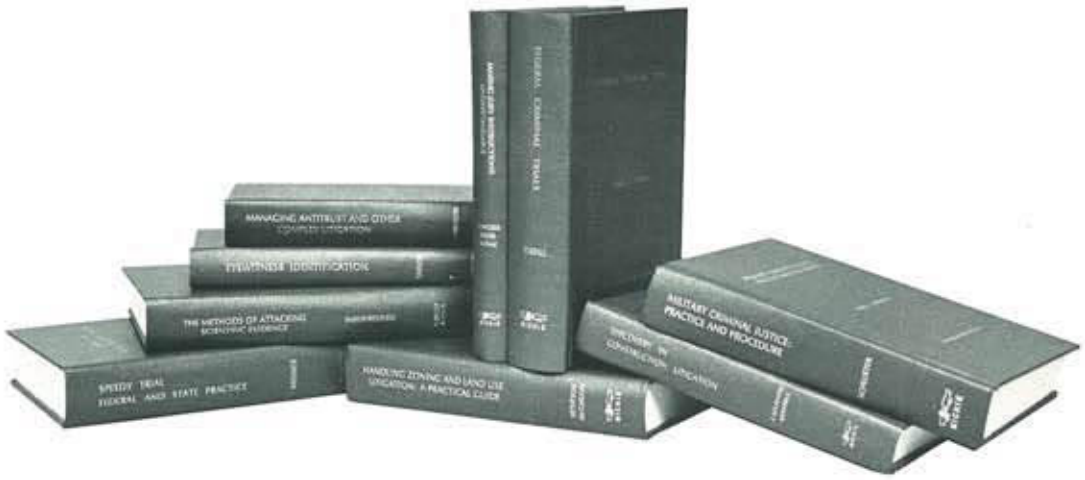

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# Riding the Circuits

## Birmingham Bar Association

The Birmingham Bar Association wound down a long, hot summer with a "Pink Crustacean" party for its members on September 9th. Unfortunately all who attended were not able to partake of the shrimp since, in 2 1/2 hours, 300 pounds of shrimp and five kegs of "suds" were consumed. "The Committee" promises not to turn away any member at the festivities scheduled for December 9 in conjunction with the BBA Annual Meeting.

Despite the heat and seemingly unendless summer, BBA committees have continued their dedicated service to the association. Mid-year reports reveal that the Grievance Committee has investigated 130 complaints filed against lawyers; the Ethics Committee has responded to nine inquiries; the Fee Arbitration Committee has resolved two fee disputes; the Speakers Bureau has arranged approximately seventy-five speaking engagements in addition to the usual "Law Day" speeches; the Memorial Committee is in the process of memorializing seven members who passed away this year; the Criminal Justice Committee is preparing for a new lawyer orientation seminar; the Membership Committee has recommended approval of fifty-eight new members; and, the CLE Committee has sponsored eighteen seminars with two additional seminars planned for November and December.

As mentioned above, the Annual Meeting and elections will be held on Friday, December 9, 1983. This will be a special meeting in that several different groups of individuals will be honored for their service to the association.

## Cullman County Bar Association

The Cullman County Bar Association has recently elected officers for the 1983-84 year. They are:

President: Juliet G. St. John
Vice president: Ralph Bland

So far as we know, Juliet St. John is the first woman attorney to serve as president of a local bar association in Alabama.

St. John

## Dale County Bar Association

Recently elected officers of the Dale County Bar Association are:

President: Robert H. Brogden
Vice president: Stanley Garner
Secretary: Fred R. Steagall
Treasurer: Bob Lanier

On September 22, 1983, in preparation for the dedication and open house of the new courtroom addition of the thirty-third judicial circuit Dale County Courthouse in Ozark, the Dale County Bar Association held a joint luncheon with the Geneva County Bar Association. Judge Sam Taylor, of the Alabama Court of Criminal Appeals, was guest speaker for the occasion.

Following the luncheon, the group adjourned to the Dale County Courthouse to take part in the dedication of the new courtroom facilities. Circuit Court Judge P.B.

McLauchlin, Jr. welcomed those in attendance; the invocation was given by Dale County Probate Judge William Snellgrove; and the presiding judge in new Courtroom No. 3, the Honorable Charles L. Woods, dedicated the new facilities. Judge Sam Taylor, also making dedicatory comments, referred to the new courtroom as a workroom where "the end product is justice" and Dale County Commissioner Don Turner cut the ribbon.

Other local and state dignitaries attending the ceremony included State Senator Foy J. Covington, Jr., Representatives G. James Sasser and Nolan Williams, District Court Judge Val L. McGee, and District Court Judge George A. Black.

Thanks are extended to Candice A. Sullivan, Mary M. Woods, and Rachel L. Hood who prepared refreshments for this very special occasion.

*Circuit Court Judge Charles L. Woods (33rd Judicial Circuit) looks on as Don Turner, chairman of the Dale County Commission, cuts the ribbon at the dedication ceremony for the new courtroom addition in the Dale County Courthouse.*

## Dallas County Bar Association

The Dallas County Bar Association celebrated Law Day with a luncheon at the Tally Ho Dinner Club on May 3, 1983. At the meeting the Bar honored veteran Selma attorney Harry W. Gamble for his many years of active service in the practice of law and to the bar. Speaker for the meeting was Alabama State Bar Executive Director Reginald T. Hamner, who spoke to the members of the bar on the activities of the State Bar Association and current matters and activities of interest to the State Bar.

On May 19, 1983, the Dallas County Bar Association held its annual meeting. The following officers were elected:

President: Cartledge W. Blackwell, Jr.
Vice president: Charles H. Morris III
Secretary/Treasurer: John E. Pilcher

The association made a monetary contribution, at the behest of former Dallas County Bar Association President M. Alston Keith, Jr., to help enable the moving of the law office of James Martin Calhoun (1805-1877) to Heritage Village near Sturdivant Hall in Selma. The structure was donated to the Selma-Dallas County Historic Preservation Society by Judge Calhoun's great-grandson Andrew P. Calhoun, Jr.

The Dallas County Bar Association held a quarterly meeting on October 11, 1983. Speaking to the bar was Alex Jackson of the Alabama State Bar Association, who spoke on disciplinary matters and proceedings.

## Huntsville-Madison County Bar Association

Recently elected as the 1983-84 officers of the Huntsville-Madison County Bar Association are:

President: Harvey Morris
Vice president: William Griffin
Secretary: George Royer
Treasurer: Laura Jo Wilbourn

## Mobile Bar Association

At the August monthly meeting of the Mobile Bar Association, Ben H. Kilborn was unanimously elected vice president of the MBA, filling the vacancy created by the death of H.P. Feibelman, Jr. Our guest speaker was the Honorable Edward E. Carnes, assistant attorney general, chief of Death Penalty Division and draftsman of Alabama Death Penalty Statute.

The Mobile Bar Association sponsored a four-day exhibit of the *Magna Carta* in conjunction with THE BRITISH FAIRE which was held in Mobile October 1 and 2, co-sponsored by the Mobile Branch of the English Speaking Union and the City of Mobile. Members of the Young Lawyers and the MBA Auxiliary gave of their time to "sit" with and answer questions about the *Magna Carta* while it was on display here in Mobile.

Dr. C. Warren Hollister, professor of history at the University of California, and one of the world's foremost scholars on the *Magna Carta,* was the featured speaker at the MBA's September monthly meeting. Dr. Hollister spoke on the 768-year-old treaty, the "Great Charter," which affirmed important legal principles that now are entrenched in democratic law.

We welcome the following new members to the MBA: Sheryl T. Dasco, J. Gregory Fagan, G. Edgar Downing, R. Boyd Miller, Desmond B. Toler, Jay W. Weber, John P. Furman, George C. Garikes, Gregory J. Robinson, Franklin G. Shuler, Jr., Richard A. Wright, Susan S. Leach and John Day Peake, Jr.

## Montgomery County Bar Association

Since the Montgomery County Bar Association last reported, much activity has taken place.

At the August luncheon meeting the Honorable M. Lewis Gwaltney, United States Magistrate, made an informative presentation on "Ineffective Assistance of Counsel."

Diane Davenport, a freelance video operator, presented the program "Use of Video in a Law Practice" at the September meeting of the MCBA. The membership is reminded that the MCBA owns video equipment located at our association's office and can be leased by bar members for $50 for the first hour and $25 for each additional hour. The person leasing the equipment is responsible for obtaining a qualified operator. Gloria Waites keeps a list of qualified operators at the MCBA office.

The association's annual barbeque was held on September 24, 1983, at the Sports Acres facility with Country's Barbeque furnishing the food. Over 150 members and guests attended and the affair was a great success.

In other local bar projects, Larry Kloess has undertaken a project to prepare a composite of pictures of all our past bar presidents. This composite will be displayed both in the Courthouse and the Montgomery County Bar Association office. Winston Sheehan, also, continues his excellent job in leading and conducting our Continuing Legal Education Program.

## THANKS FROM MALS

The Montgomery Association of Legal Secretaries would like to thank H. Mark Kennedy, circuit judge of Montgomery County; Randall Morgan, H. E. (Chip) Nix, Jr., and Robert C. Black of Hill, Hill, Carter, Franco, Cole & Black; Robert D. Segall of Copeland, Franco, Screws and Gill; and Jeanette Harris, Julie Ewing, and Mark Chambless of Judge Kennedy's office for their participation in making our Annual Night-In-Court a success once again. The mock trial was held October 7, 1983, at 7:00 p.m. in the Montgomery County Courthouse in honor of Court Observance Week. Students from area high schools and colleges were invited and actually participated in the jury trial. Although the shoplifter/defendant was found guilty by the jury and everyone enjoyed the courtroom antics, the hard work of all participants and the Legal Education Committee of MALS made the evening informative as well as entertaining.

## Local Bar Meeting Schedules

**Geneva County Bar Association:** Regular luncheon meetings of the Geneva County Bar Association are held on the first Monday of each month at the Chicken Box Restaurant in Geneva. Members of the state bar are invited to attend the meeting which begins at noon.

**Houston County Bar Association:** Regular meetings of the Houston County Bar Association are held the fourth Wednesday of every month at 12:00 noon at the Sheraton Inn in Dothan. Visiting members of the State Bar and judiciary are invited to attend the meeting without reservations.

**Huntsville-Madison County Bar Association:** The Huntsville-Madison County Bar Association meets the first Wednesday of the month at 12:15 p.m. at the Huntsville Hilton.

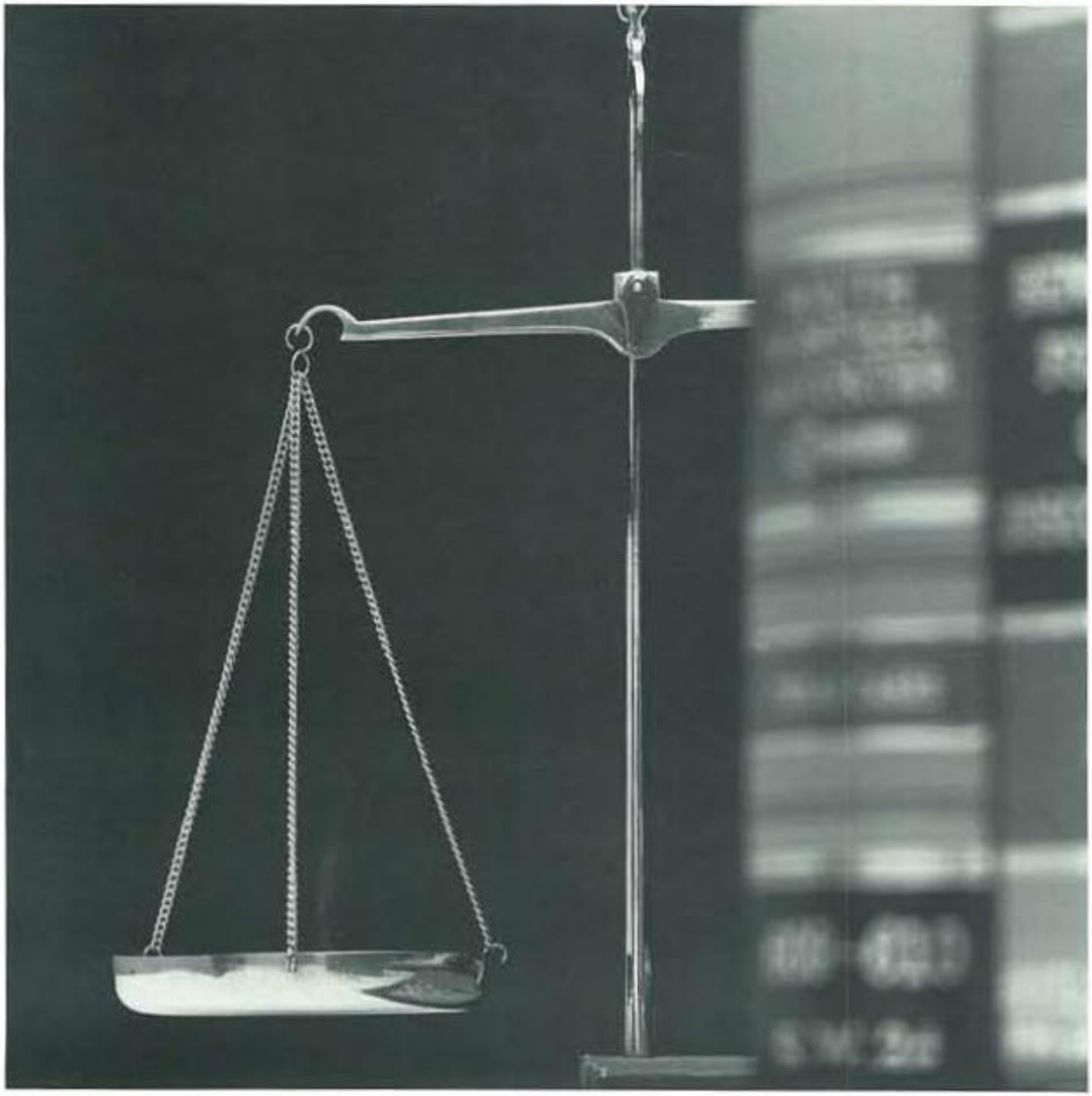
**Lee County Bar Association:** The monthly luncheon meeting of the Lee County Bar Association is held on the third Friday of each month at the Auburn-Opelika area Elk's Club.

**Mobile Bar Association:** Monthly meetings of the Mobile Bar Association are held the third Friday in each month at the Mobilian, located at 1500 Government Boulevard. All attorneys, local and visiting, are invited to attend the meeting and luncheon. No reservation is required.

**Mobile Bar Association Women Attorneys:** The regular monthly luncheon meeting is held the first Tuesday of each month at the International Trade Club. No reservation necessary.

**Montgomery County Bar Association:** The monthly meetings of the Montgomery Bar Association generally are held the third Wednesday in each month at 12:00 noon at the Whitley Hotel.

Local bar associations can have their regular monthly meetings listed by sending a notice to *The Alabama Lawyer,* P.O. Box 4156, Montgomery, Alabama 36101.



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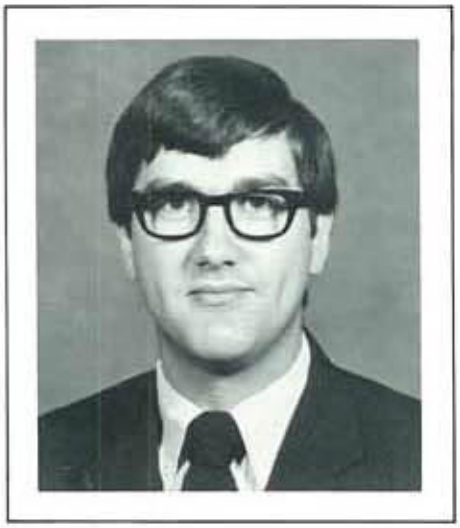
# ALABAMA SUPREME COURT PRACTICE—AVOIDABLE ERRORS AND OVERSIGHTS

By Bruce J. McKee



*Bruce J. McKee received his undergraduate degree from the University of Alabama and J.D. degree from Columbia University School of Law. He, presently, is working on a Master of Laws degree at the University of Virginia after having served as staff attorney to the chief justice of the Supreme Court of Alabama.*

***This article is the result of information gathered during the past several months in my capacity as a staff attorney within the Supreme Court clerk's office. My job duties required that I see almost every brief, petition, motion, and record filed with the Court ("Court" is used to refer to the Alabama Supreme Court). My comments do not pretend to reflect the opinion of the Court and are not to be taken as authoritative.***

***These remarks are primarily directed to young practitioners with little appellate experience. Hopefully, experienced attorneys will also find these hints and warnings valuable as reminders. My intent is to serve the Bar by alerting lawyers to common pitfalls in appellate practice, thereby helping them to improve their appellate advocacy skills and to avoid dismissal or sanction.***

***The article is divided into two parts. Part One concerns five broad categories of jurisdictional problems that can result in dismissal or transfer of the appeal. The five sections, and their subsections, appear in approximate order of the problems' relative frequency. Part Two contains some loosely connected comments principally directed to errors and violations of form in briefs. For further study, I recommend a book by the Alabama Bar Institute for Continuing Legal Education,* Alabama Appellate Practice *(1979) (currently undergoing revision).***

## PART ONE: JURISDICTION

### Final Judgment

(a) ***Language of Adjudication.*** Many appeals are dismissed for lack of a final judgment. Rule 58(b), A. R. Civ. P., states that no formal language is required to create a final judgment as long as the order, considering the whole record, indicates an intention to adjudicate. Thus, deciding whether an order meets the standards of final judgment is a question of individual case analysis. Often, the only judgment entry is a cryptic abbreviation on the case action summary sheet or an unsigned, typed copy of a minute book entry. The Court's advisory committee on civil procedure has recommended that Rule 58(b) may be amended to require at least the judge's signature or initials on the judgment entry.

One common example of insufficient judgment language is a dated bench note entry signed by the judge reading, "Jury and verdict for the plaintiff and against the defendant for the sum of $20,000." There is no entry of judgment by the court, only a statement of the jury verdict. Additionally, judgments in multiple party litigation are often unclear because the judgment uses the word "defendants" rather than spelling out the name of each defendant against whom judgment is entered.

Another common problem is an oral directed verdict. In a case involving multiple defendants, the judge may grant a directed verdict for one defen-

dant at the close of the evidence. This event may be apparent from the trial transcript, but the order granting the directed verdict may not be reduced to writing by the judge. To avoid a final judgment problem, the interested attorney should ask the judge to sign such an order for the clerk's record. Otherwise, to avoid dismissal, the appellate court must find that the record as a whole indicates a clear intention to adjudicate as to all the parties and claims.

(b) ***Rule 54(b), A. R. Civ. P.*** As most of you are aware, the most prevalent type of dismissal is based on the lack of a valid Rule 54(b) order. In litigation involving multiple parties and/or multiple claims, any order(s) adjudicating fewer than all the parties and claims is not appealable unless the trial judge makes "an express determination that there is no just reason for delay and . . . an express direction for the entry of judgment." Rule 54(b). The requirement most often omitted is the express determination that there is no just reason for delay. For example, the Court recently dismissed an appeal for lack of a final judgment, although the attempted 54(b) order read as follows:

> "Plaintiff's motion for certification of judgment having been filed and duly considered, it is hereby,
>
> ORDERED, ADJUDGED, AND DECREED that said motion should be and hereby is, granted, and the prior judgment of this court rendered on July 19, 1982, in favor of the plaintiff and against the defendants is hereby deemed a final adjudication of the issues between those parties and subject to appeal."

It is the duty of appellant's attorney to make certain there is an appealable order. If the attempted 54(b) order does not contain the proper language, present the trial judge with a proposed order that is in correct form. Remember that valid 54(b) orders create final judgments as to the parties and claims involved, and any appeal as to these parties and claims must be taken within 42 days. To be safe, one may wish to file a notice of appeal, even if one believes the 54(b) order is not valid, so as to make the judgment final. Finally, note that a judgment in an action that is severed pursuant to Rule 21, A. R. Civ. P., can be final without regard to whether there is still pending any proceeding in the other portion of the severed action, but cases involving separate trials under Rule 42, A. R. Civ. P., require 54(b) orders to make final a judgment which does not dispose of all claims as they relate to all parties. *Key v. Robert M. Duke Insurance Agency,* 340 So. 2d 781 (Ala. 1976).

(c) ***The Abandoned Counterclaim.*** Counterclaims are sometimes neglected in the course of litigation. The defendant may not seriously press the counterclaim, and the trial court may never enter an order denying the counterclaim. In this situation, the final order and the trial transcript may make no mention of the counterclaim. Absent a 54(b) order, is the judgment final? In *Poston v. Gaddis,* 372 So. 2d 1099, 1101 (Ala. 1979), the Court concluded "that when no evidence is presented concerning a claim, the court's oral charge to the jury makes no mention of such claim and judgment is rendered on all other issues presented and covered by the oral charge, then the judgment will be considered a final judgment as to all issues." The problem, of course, can be avoided if the lawyer bringing the appeal takes care to examine the clerk's record and obtains any necessary written orders from the judge denying or striking such abandoned counterclaims.

(d) ***Rule 60(a), A. R. Civ. P.*** During the pendency of an appeal, a lawyer may discover that a party or claim was not clearly adjudicated by a written order appearing in the clerk's record. To avoid possible jurisdictional problems, the use of a Rule 60(a) petition for writ of certiorari to supplement and correct the record on appeal should be considered. This is especially true if a purely clerical mistake is involved, or if the judge's intent to adjudicate the issue is deducible from other documents and events. Rule 60(a) is not a cure-all to prevent dismissal for lack of final judgment. A Rule 60(a) corrected order will probably be given effect only as of the date of the correction, not as of the date the order should have been originally entered. See *Continental Oil Co. v. Williams,* 370 So. 2d 953, 955-7 (Ala. 1979) (Torbert, C. J., concurring specially).

(e) ***Appealable Orders.*** Even if proper words of adjudication are used, in compliance with Rule 54(b), for example, some orders are not appealable as a matter of substantive law. Recent examples are cases involving the granting of a Rule 60(b) motion for relief from judgment (generally not appealable), and the refusal to certify a class action (not appealable).

## Untimely Appeals

(a) ***Rule 59.1, A. R. Civ. P.*** Ninety days from the timely filing of a post-trial motion (not from the date of the judgment), the motion is denied by operation of law in the absence of effective action by the trial court. The 42-day appeal period runs from the 90th day. When a case is dismissed because of the application of Rule 59.1, the decision to dismiss is rarely a difficult one; the appellant's attorney usually has simply overlooked the running of the 90-day period. By all means, tickle your files for the 90th day after filing any post-trial motion. Amendments to post-trial motions complicate the issue and may not work to extend appeal time. See *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Boswell,* 430 So. 2d 426 (Ala. 1983).

There are two exceptions to Rule 59.1. One is the express consent on the record of all parties to extend the 90 days. It is strongly suggested that this consent be in writing and filed in the trial court before the 90th day because the consent must be unambiguous. *Harrison v. Alabama Power Co.,* 371 So. 2d 19 (Ala. 1979). An extension of time from the appellate court may be requested, but the motion must be filed with the appellate court before the 90th day. *Coosa Marble Co. v. Whetstone,* 294 Ala. 408, 318 So. 2d 271 (1975). Absent a valid consent to extend the 90-day period or an extension by the appellate court, any action by the trial court after the 90th day is a nullity. *Sparks Construction, Inc. v. General Mutual Insurance Co.,* 334 So. 2d 897 (Ala. 1976). This may be true even if the parties consent to a continuance of the hearing on the post-trial motion until a date past the 90th day in the absence of a clear, express consent to extend the 90-day period.

(b) ***Motions to Reconsider.*** The words "motion to reconsider" do not appear in the Alabama Rules of Civil Procedure and use of such terminology should be discouraged. Regardless of

terminology, appellate courts will usually look to the substance of the motion and review it as if it were a proper Rule 60(b) motion or post-trial motion pursuant to Rule 50(b), 52(b), 55(c), or 59, A. R. Civ. P. See *City of Birmingham v. City of Fairfield*, 396 So. 2d 692 (Ala. 1981) (a 60(b) motion was reviewed as a 59(e) motion). If a "motion to reconsider" is timely filed within 30 days of judgment, it will toll the running of the time for appeal if a correctly titled motion would have done so. But note that presently a motion seeking the setting aside of a default judgment will not toll the running of the time for appeal.

However, fatal jurisdictional defects occur with the use of additional "motions to reconsider." Typical courses of proceedings are reported in *Pierson v. Pierson*, 347 So. 2d 985 (Ala. 1977), and *Wilger v. Department of Pensions and Security*, 343 So. 2d 529 (Ala. Civ. App. 1977). Both appeals were dismissed as untimely filed.

Motions to "reconsider" denials of post-trial motions are nullities. They never toll the running of appeal time, even if the trial judge holds hearings and renders decisions on the motions. Fortuitously, even in cases containing void "motions to reconsider," most appeals are taken within 42 days of the denial of the proper post-trial motion. But some appeals have been dismissed on this point in the past few months, and other appellants have unknowingly come dangerously close to the 42-day limit.

(c) ***Entry of Judgment.*** The committee comments to Rule 58, A. R. Civ. P., state that "the rule departs substantially in form from the federal rule in order to clarify the procedure as to rendition of judgments, and to preserve traditional Alabama practice of 'bench notes.'" Rule 58 only partially clarifies; the Rule's alternative methods of entering judgment causes a good deal of confusion for one attempting to determine if an appellate court has jurisdiction. Rule 4(a)(1), A. R. A. P. states that the notice of appeal must be filed "within 42 days of the date of the entry of the judgment." When does appeal time begin to run in a case where the judgment is entered on bench notes, noted on a separate case action summary sheet, and written in a separate document that is later stamped "filed" by the clerk—and each of these events takes place on a different date? I submit that Rule 58 does not provide the answer. *Lacks v. Stribling*, 406 So. 2d 926, 930 (Ala. Civ. App.), *cert. denied*, 406 So. 2d 932 (Ala. 1981), resolves a similar conflict in favor of the date of filing of a separate written judgment "even if the filing date is several days, weeks, or even months later than the date reflected on the judgment." Adding to an appellant's worries is Rule 77(d), A. R. Civ. P., which provides that lack of notice of the entry of judgment generally does not affect the running of appeal time. *Thompson v. Keith*, 365 So. 2d 971 (Ala. 1978).

(d) ***Premature Appeals.*** The quoted language from *Lacks* points out an additional difficulty with Rule 58(c), A. R. Civ. P. It appears that a trial court clerk can extend the date for the running of appeal time by later filing a separate written judgment signed by the judge. Roughly half of the separate orders in records on appeal have been filed by the clerk; others are merely signed and dated by the judge. A recent question presented to the Court was posed by the following sequence of events:

> 7/14/82—Separate order signed by trial judge granting defendant's motion for directed verdict (assume it was otherwise a valid final judgment) . .
>
> 7/28/82—Plaintiff's notice of appeal.
>
> 9/10/82—Trial court clerk stamped the order of 7/14/82 "filed."

Per Rule 58(c), final judgment was entered on 9/10/82. The appeal was not dismissed. Similarly, *Board of Water and Sewer Commissioners of the City of Mobile v. Alabama Power Co.*, 363 So. 2d 304 (Ala. 1978), gave effect to a premature "motion for reconsideration" (reviewed as a Rule 59(e) motion) and allowed it to suspend the running of the time to appeal. What is said in this paragraph concerning "premature appeals" does not apply to appeals from faulty 54(b) orders, as such cases do not contain a properly formulated final judgment.

An appellant with a premature notice of appeal might consider filing a new notice of appeal, a supplemental notice of appeal, or a motion in the Supreme Court to determine the validity of the notice of appeal. To be safe, file such a notice or motion before the 42 days runs from the "official" entry of judgment per Rule 58(c), if possible.

(e) ***Default Judgments.*** Rule 55(c), A. R. Civ. P., allows the trial court to set aside a default within 30 days. The present rule does not mention motions to set aside defaults, nor is Rule 55(c) listed in Rule 59.1, A. R. Civ. P., or Rule 4(a)(3), A. R. A. P. Thus, the time in which appellate review must be sought in cases of refusals to set aside defaults is unclear.

Appellate opinions recognize that defendants in default cases do file motions to set aside, although such motions are not directly provided for in the rules. Motions must be filed within 30 days of entry of judgment; and, if the trial judge sets aside the default judgment, he must do so within the 30 days following the judgment. It is not enough that a motion be filed within 30 days. Also, if a 55(c) motion is not ruled on within the 30-day period, relief can only be granted under the standards of Rule 60(b), A. R. Civ. P. *Wiggins v. Tuscaloosa Warehouse Groceries, Inc.*, 396 So. 2d 91 (Ala. 1981).

These problems will be cured if the Court adopts amendments to Rules 55 and 59.1, which have been recommended by its advisory committee on civil procedure. Rule 55(c) would be amended to make motions to set aside defaults exactly like other post-trial motions, and references to Rule 55(c) would be added in Rules 59.1 and 4(a)(3). The holding of *Wiggins* would be overruled by the proposed rule change.

(f) ***Dismissals of Complaints With Leave to Amend.*** *Guilford v. Spartan Food Systems, Inc.*, 372 So. 2d 7 (Ala. 1979), held that orders granting motions to dismiss with leave to amend the complaint are appealable orders, but the Court did not reach the issue of which date triggers the running of the 42-day appeal period—the date of dismissal or the date the time allowed for amending expires. See Rule 78 (final sentence), A. R. Civ. P. In *Hayden v. Harris*, [MS. September 16, 1983] ___ So. 2d ___ (Ala. 1983), the Court held that the 42-day period for appeal begins to run from the date the order is entered and not from the date allowed for amendment.

(g) ***Rule 4(a)(1), A. R. A. P.*** This rule lists four exceptions to the 42-day

rule and requires that appeals in these kinds of cases be taken within 14 days. For example, appeals from the granting or denial of injunctions have been dismissed because the notices of appeal were filed beyond the fourteenth day.

## Subject Matter Jurisdiction

(a) ***Transfer.*** Lack of subject matter jurisdiction is not nearly as serious for the appellant as an untimely appeal because, in the usual case, the appeal will not be dismissed but merely transferred to the Court of Civil Appeals. See § 12-1-4, *Ala. Code* (1975); Rule 3(c), A. R. A. P. A transfer for lack of subject matter jurisdiction will, however, delay the submission to, and a decision by, the proper court. (Because § 12-3-9, *Ala. Code* (1975), gives the Court of Criminal Appeals exclusive jurisdiction of all criminal appeals, a question of which is the proper appellate court for an appeal involving a criminal conviction or act is very rare.)

The most important statute in this area is § 12-3-10, *Ala. Code* (1975). This statute grants to the Court of Civil Appeals exclusive appellate jurisdiction of cases involving (1) less than $10,000; (2) administrative agencies; (3) workmen's compensation; and (4) domestic relations. These provisions are discussed further in the following sections.

(b) ***Administrative Agencies.*** The question of what are "appeals from administrative agencies" per § 12-3-10, *Ala. Code* (1975), provides more problems than any other area of subject matter jurisdiction. The recent opinion in *Kimberly-Clark Corp. v. Eagerton,* [MS. May 20, 1983] ___ So. 2d ___, (Ala. 1983), attempts to settle this area of the law. A mandamus proceeding in the circuit court against the Department of Revenue led to an appeal to the Supreme Court, which transferred the appeal to the Court of Civil Appeals. The Court said that the Court of Civil Appeals' jurisdiction in the administrative area is not limited to direct appeals from administrative proceedings. The Court wrote, "We hold that § 12-3-10, in referring to 'appeals from administrative agencies,' was intended to grant to the Court of Civil Appeals exclusive jurisdiction of all appeals involving the enforcement of, or challenging, the rules, regulations, orders, actions, or decisions, of administrative agencies."

Another problem arises from several pre-1969 statutes that were codified into the 1975 Code without amendment. Such statutes, usually concerning administrative actions, provide for review in the circuit court and appeal to the "supreme court." This conflicts with the grant to the Court of Civil Appeals of exclusive jurisdiction of administrative cases in § 12-3-10, enacted in 1969. The Court has resolved the conflict by consistently interpreting "supreme court" in these statutes to mean "proper appellate court."

(c) ***Contempt.*** Review of contempt orders is properly obtained by petition for writ of certiorari. *Oyler v. Gilliland,* 382 So. 2d 517 (Ala. 1980). All extraordinary writs in cases otherwise within the Court of Civil Appeals' jurisdiction should go to that court. Thus, one has to look at the underlying case out of which the contempt order arose. If the main case would have been appealed to the Court of Civil Appeals, any later contempt order issued in the case should be reviewed by the Court of Civil Appeals.

There is a distinction between criminal contempt and civil contempt. *Tetter v. State,* 358 So. 2d 1046 (Ala. 1978), held that the Court of Civil Appeals was the proper appellate court to review a criminal contempt order that arose during litigation in a civil domestic relations matter. Again, the deciding factor is the underlying cause of action.

(d) ***Workmen's Compensation.*** When a person covered by the workmen's compensation law is injured, a negligence suit may be filed against co-employees and the workmen's compensation insurance carrier. When workmen's compensation claims are joined with other claims, any appeal should probably go to the Court of Civil Appeals. In *Henson v. Estes Health Care Center, Inc.,* [MS. September 23, 1983] ___ So. 2d ___ (Ala. 1983), which involved an attempt to have a workmen's compensation settlement set aside for fraud, the Court stated that the action was brought pursuant to § 25-5-56, *Ala. Code* (1975), and was a compensation case clearly reviewable by the Court of Civil Appeals.

(e) ***Amount in controversy.*** Very few opinions address questions relating to the amount in controversy, because such issues are usually dealt with in unpublished orders transferring cases between courts. One such unpublished decision involved a $12,000 jury verdict remitted to $5,000 on a motion for JNOV. The plaintiff's appeal was transferred to the Court of Civil Appeals, because the real amount in controversy was only $7,000. In the very common situation of summary judgment for the defendant, the appeal comes to the Supreme Court if the amount claimed by the plaintiff is more than $10,000. Though § 6-5-483, *Ala. Code* (1975), eliminates the use of ad damnum clauses in medical malpractice cases, the Court takes jurisdiction of appeals in such cases as if more than $10,000 had been claimed.

A hybrid exists when a case involves equity claims (such as adverse possession) joined with legal claims ($5,000 for wrongful detention, for example). The Court's practice is that appeals which contain both legal and equitable relief, where the amount in controversy does not exceed $10,000, are transferred to the Court of Civil Appeals.

## The Notice of Appeal

(a) ***Form.*** Rule 3(c), A. R. A. P., sets out the required form of notices of appeal. One should spell out the full name of each appellant and each appellee in the caption and in the body of the notice of appeal. See *Edmonson v. Blakey,* 341 So. 2d 481 (Ala. 1976). Why take the chance of losing your appeal against an unnamed appellee by relying on an "et al." in the caption? Some cases involve 75 or 100 parties, so listing each name in those situations may be impractical. Also, take care to list the dates of judgments from which appeal is being taken. This can be critical, and many notices list incorrect dates.

(b) ***Cross Appeals.*** Rule 4(a)(2), A. R. A. P., allows any party to cross appeal within 14 days of the filing of the first timely notice of appeal by any other party. Any appellee wishing to request relief from a judgment must cross appeal as to the portion of the judgment complaint of. Arguments in an appellee's brief directed to issues not argued by the appellant or asking for relief for the appellee will be disregarded by the Court if

no cross appeal is filed. *Mutual Savings Life Insurance Co. v. Montgomery*, 347 So. 2d 1327 (Ala. 1977).

(c) ***Joint Appeals.*** Rule 3(b), A. R. A. P., allows joint notices of appeal by several appellants from one judgment. Both the rules and Alabama case law are silent as to whether one notice of appeal will suffice in a situation of several consolidated trials and judgments against one defendant-appellant. *Cf. Price v. American National Bank*, 350 So. 2d 328, 330-1 (Ala. 1977) (Faulkner, J., dissenting). To be safe, a notice of appeal should be filed for each judgment.

## Petitions for Writ of Certiorari

My work with the Court did not require that I see many petitions for writ of certiorari, so my comments are brief. Rule 39, A. R. A. P., must be complied with strictly. Many petitions are stricken or denied for failure to comply with this rule. A petition will be considered only if the court of appeals has first overruled an application for rehearing. An untimely application for rehearing in the court of appeals will prevent review by the Supreme Court. Note that Rule 39(b) requires that a brief be filed with the petition.

The most common error in petitions involves Rule 39(k). Only by this method will the Court review asserted facts not contained in the opinion of the court of appeals. Although Rule 39(k) does not precisely address the point, the procedure set out in that rule must normally be utilized to present the Court with reviewable issues in cases in which the court of appeals affirms without opinion. The Court will usually refuse to review a case affirmed without opinion unless a Rule 39(k) set of facts is properly presented.

The timely filing of a petition for writ of certiorari is jurisdictional; therefore, you should be sure that the petition and brief are filed in the Clerk's Office within 14 days from the overruling of the application for rehearing. The petition is considered filed on the day of the mailing if sent by registered or certified mail (Rule 25(a), A. R. A. P.); but if sent by regular mail and received by the clerk after the 14th day, the petition will be stricken as untimely filed.

# PART TWO: RECORDS AND BRIEFS

## Records

The Court is required to consider its jurisdiction *ex mero moto*, and jurisdiction must be apparent from the record. There are some helpful things that appellants can do to make the clerk's record more comprehensible. It is the duty of the appellant to see that the record is complete and timely filed. *Orum v. State*, 286 Ala. 679, 245 So. 2d 831 (1971).

A copy of the case action summary sheet is not always made part of the clerk's record. It is helpful to the appellate court, so one might check with the clerk to ascertain whether it will be part of the record on appeal. Photocopies should clearly show the dates marked on the court's orders.

It is quite common for one of the issues on appeal to be whether a certain issue was presented to the trial court and preserved for appellate review. Most final orders are not contained in detailed memorandum opinions, so it can be difficult for an appellate court to determine whether a particular issue was before the trial court. If one expects to have to appeal a forthcoming decision, a memorandum of law timely filed in the trial court and appearing in the clerk's record might be considered by the appellate court, and such a memorandum could clearly show which issues were raised below.

While working with the Court, I encountered several motions to correct the record filed pursuant to Rule 10(f), A. R. A. P. Most of these motions sought to add material the appellant had thought would be included when the record was designated. Attorneys inexperienced in appellate practice should always double check with the clerk and the court reporter to determine exactly what they plan to make part of the record. Section 12-17-275, *Ala. Code*, (1975), for example, states that arguments of counsel need not be recorded by the court reporter. Another rule sometimes overlooked is Rule 10(a) (4), A. R. A. P. It provides that discovery materials not made part of the trial proceedings are not part of the record on appeal. Although Rule 10(f) does not contain a clear direction on this point, the Court prefers that motions to correct the record be initially filed in the trial court. If the trial court refuses to grant the motion, the motion may be renewed in the appellate court. Failure to use Rule 10(f) when necessary may cause the appellate court to pretermit consideration of one or more issues. *See Harris v. State*, 420 So. 2d 812 (Ala. Crim. App. 1982).

Alternatives to filing the usual two copies of the full record should be considered. Many relatively simple cases are candidates for utilization of the agreed statement procedure provided for in Rule 10(e), A. R. A. P. In almost every case, an appendix in lieu of the full record could be used. Rule 30, A. R. A. P., establishes the straightforward procedure to be followed in this regard. Designating an appendix can be time consuming, but an appendix is usually much more convenient and helpful to the appellate court than a second copy of the full record containing hundreds of pages.

## Briefs

I read several hundred briefs while working for the Court. Mainly, I wish to point out the most common errors of form so that these errors are not acquired or continued by young attorneys. I have talked with many individuals working for the court about their general opinions concerning briefs, so I have a few remarks about style and substance. Lastly, after looking at scores of books and articles on brief writing and appellate advocacy, I compiled a selected bibliography representing my subjective selection of the best books and articles published recently from the standpoint of effectiveness and practical guidance.

Rules 28 and 32, A. R. A. P., contain the requirements for the form of briefs. Surprisingly, at least half the briefs I read violate one or more rules of form. A recent article on this subject reads as follows:

> Whether you agree with the rules or not, your brief should conform to them. You must assume that the rules were promulgated because briefs submitted in such form are helpful to the judges. Failure to comply with the Court's rules demonstrates one of two things: (1) your ignorance of the rules; or (2) your contempt for the

> Court. Neither are matters which you particularly wish to impress upon the people you are trying to persuade.

Griffith, *Effective Legal Writing*, 16 Forum 460, 461 (1981).

Most brief writers seem to overlook Rule 28(f). This rule requires that relevant statutes and rules be appended or quoted in the body of the brief. Even if the statute is set out in the brief, most readers find it convenient, also, to have a copy of it attached to the back of the brief for handy reference.

The language of Rule 32(a)(3), fixing the colors of covers to be used, is not mandatory. For convenience of filing in the clerk's office, and for the benefit of the judge during oral argument or court conference, colored covers are encouraged. To prevent irritating confusion, it is better to use no color than the wrong color.

Another mistake that annoys brief readers is vague statements of issues. Many briefs state the issue to be: "Did the trial court err in granting summary judgment to the defendant?" Issues should be stated in terms of the facts of the case. A good statement of the issue is subtle, yet persuasive, and reads like a proposition or question the reader would want to adopt or reject, as the case may be. Some briefs do not contain a separate statement of the case and statement of facts. A statement of the case is a procedural history; it should not argue the facts and the law. Eliminate references to every irrelevant motion made during protracted litigation, but demonstrate that all parties and claims were adjudicated, unless it is a 54(b) case. Feedback received about statements of the facts indicates the general consensus is that a summary of each witness's testimony is not helpful. A chronological, or otherwise logically ordered, statement of the facts is usually much more effective. Some of the individuals commenting about writing style urge the brief writer to use the active tense whenever possible.

The argument section is limited to 50 pages by Rule 28(g). Neither the conclusion nor a summary of the argument is counted towards the page limitation. Often conclusions do not state the precise relief, including any requests in the alternative, that is requested by the party. The Court can affirm, affirm conditionally, remit, reverse, remand, or dismiss as to the whole case or any particular party or claim.

Rule 34(a), A. R. A. P., requires a short, reasoned request for the granting of oral argument. This statement should be placed on a separate page following the conclusion of your brief. A notice that oral argument is requested must appear on the cover of the brief. In multiple party litigation, I suggest that the title on the cover contain the party's name. For example, if you represent either one of three appellants, or all appellants, it would be more convenient to the reader if the title read "Brief of Appellant Smith" or "Brief of All Appellants," respectively.

I have found that Rules 44 and 47, A. R. A. P., are often disregarded. If the validity of a statute, ordinance, etc., is at issue, the attorney general or other governmental officer must be served with a copy of the brief by the party raising the issue. Rule 47 says that no oral agreement between parties or attorneys shall be alleged.

This Court is loath to forego full review of an appeal on the merits because of a so-called "technicality." But why risk sanctions by filing briefs in improper form or in ungrammatical style? Many exceptionally good briefs are filed every week. Anyone intelligent enough to practice law can put together an excellent brief with a little extra attention to detail. With the ever increasing caseload the justices must cope with, they may in the future have less tolerance for briefs with drastic errors. See, generally, Rule 2(a)(2)(D), A. R. A. P.; Ala. Digest, *Appeal & Error*, Key Nos. 755-774; Annot., 55 A.L.R.Fed. 521 (1981). □

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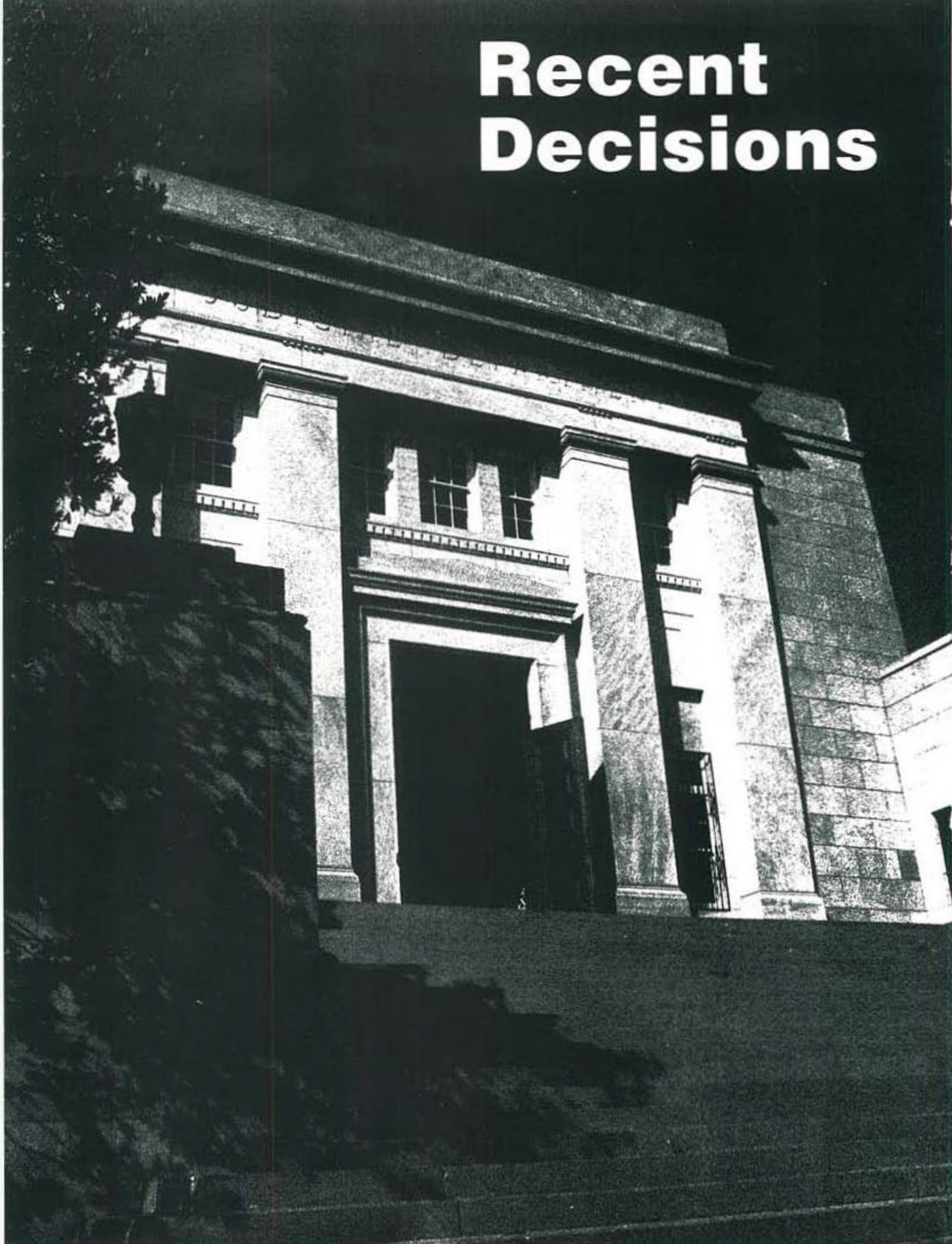
# Recent Decisions



## Recent Decisions of the Alabama Court of Civil Appeals

### Workmen's compensation . . . lump sum attorney fee upheld

*Ashland Chemical Co. v. Watkins,* Civil Appeals No. 3517 (July 20, 1983). After awarding the employee permanent total disability benefits, the employer's attorney was awarded a fee of fifteen percent of the *estimated* compensation benefits to be paid in a lump sum up front, to be deducted by the employer from the back-end of the compensation benefits. In other words, the employer could stop making compensation payments when the remaining balance equaled the amount of the attorney's fees. The Court of Appeals found that the award was permissible, leaving the "manner" of payment of attorney's fees to the sound discretion of the trial judge. The Court of Appeals noted that even though there is a possibility of a change in the compensation award, that possibility has no effect on the award of attorney's fees because the attorney has already earned the fee.

### Workmen's compensation . . . loss of a useless eye compensable

*Goldkist, Inc. v. Barnett,* Civil Appeals No. 3646 (June 1, 1983). In a case of first impression, the Court of Appeals was asked to consider whether an employee's loss of a sightless eye is compensable under Section 25-5-57(a) (3) (a) (17), *Ala. Code* 1975. The Court of Appeals recognized that the several jurisdictions which have confronted this issue are split as to whether workmen's compensation should be granted when the loss involves a *useless* member. Recognizing that while the overall workmen's compensation scheme is based upon the employee's "loss of ability to earn," the Court of Appeals noted that the "scheduled injury provisions" of the Act are not dependent on actual wage loss. The Court concluded that the plain language of the Alabama statute does not limit loss of use recovery to the loss of use of an eye with vision.

## Recent Decisions of the Alabama Court of Criminal Appeals

### Writ of error coram nobis . . . a primer

*Bennett v. State,* Six. Div. 979 (August 30, 1983). Judge Harris sets out the "black letter law" for a meritorious petition for writ of error coram nobis. The Court of Criminal Appeals has recently stated the purpose of the writ of error coram nobis as follows:

> "The office of the writ of error coram nobis, under Alabama Law, is to bring to the attention of the Court for correction an error of fact, one not appearing on the face of the record, unknown to the Court or party affected, and which, if known in time, would have prevented the judgment challenged and serves as a motion for a new trial on the ground of newly discovered evidence . . ."

Judge Harris noted that "in order for a petition for writ of error coram nobis to be *meritorious on its face* it must contain *more* than mere naked allegations that a constitutional right has been violated." The following requirements must be met in order for the trial court to hold an evidentiary hearing: (1) the application or petition should make a full disclosure of the specific facts relied upon and not mere conclusions as to the nature and effect of such facts; and (2) the filing of an affidavit sufficiently refuting a record that appears correct.

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## Recent Decisions of the Supreme Court of Alabama—Civil

### Civil procedure . . . rule 25(a) (1) construed

*Brown v. Wheeler, Admr.,* 17 ABR 3552 (August 26, 1983). In a case of first impression, the Supreme Court declined to follow the Federal Court's construction of Rule 25(a)(1), Federal Rules of Civil Procedure, and held that a suggestion of death filed by the deceased party's attorney need not identify the successor or representative of the deceased to effectively initiate the running of the six-month period for filing a Motion for Substitution under Rule 25(a) (1), ARCP. The Supreme Court agreed with the view expressed by the Georgia courts that litigation still involves an adversary system and that the burden of ascertaining the proper party to be substituted for a deceased litigant is properly placed on the party who would effect the substitution. At the same time, the Court stated that the attorney for the deceased litigant has the duty to suggest the death of his client, notwithstanding the general rule that an attorney's authority to act on behalf of a client ceases on the death of that client.

### Commercial code . . . "after maturity" means "overdue"

*Silk v. Merrill Lynch, Pierce, Fenner and Smith, Inc.,* 17 ABR 3375 (August 19, 1983). In this case, the Supreme Court construed the phrase "after maturity" as used in Section 7-3-501(4), *Ala. Code* 1975, to reasonably mean "overdue." By agreement with the drawer, Silk, the payee, held four checks for over sixty days before endorsing them to Merrill Lynch. Merrill Lynch deposited the checks which were subsequently returned to Merrill Lynch for insufficient funds on April 13, 1982, and Silk was notified two days later. Silk filed suit and both parties filed motions for summary judgment. Silk contended that the liability for endorsement had been discharged because Merrill Lynch failed to give timely notice of dishonor. Merrill Lynch argued that notice of dishonor is not required, citing Section 7-3-501(4) which dispenses with notice of dishonor when the endorser has endorsed the instrument *after maturity.*

The Supreme Court recognized that the term "maturity" is not defined in the Uniform Commercial Code and noted that New Jersey is the only state that has considered this question. The New Jersey court construed the phrase "after

maturity" to mean "overdue" and the Alabama Supreme Court found that construction to be reasonable. An instrument is considered to be "overdue" after more than a "reasonable length of time after its issue," which is presumed to be thirty days, Section 7-3-304(3)(c). However, the thirty-day period is a rebuttable presumption. In this case, Silk endorsed the checks more than sixty days after they were issued.

### Estate proceeding . . . *Hall v. McBride* revisited

*Land v. Bowyer,* 17 ABR 3343 (August 12, 1983). In this case, the Supreme Court amplified *Hall v. McBride,* 416 So.2d 986 (Ala. 1982) holding that *Hall* invalidated Section 43-1-15, *Ala. Code* 1975, in its entirety, and, therefore would cut off *all* claims for dower by a widow where the deceased husband left a will. The widow contended that since the will made no provision for her and since it was unnecessary for her to dissent, *Hall* does not apply. The Supreme Court disagreed stating that the same gender-based classification was involved whether she dissents from the will or not.

To further amplify *Hall,* the Court stated that *Hall* is not to be applied retroactively where dower has already been assigned and become a vested right but is to be applied retroactively where dower has not yet been assigned by a court. In addition, there should be retroactive application where dower has been assigned or denied and there was, at the time of the rendering of *Hall,* a pending appeal of the matter containing a constitutional challenge to Section 43-1-15.

### Income tax . . . intercompany dividends are net income

*Ex parte: State of Alabama Department of Revenue (State of Alabama vs. Chesebrough-Ponds, Inc.),* 17 ABR 3303 (August 12, 1983). Reversing the Court of Appeals, the Supreme Court in a case of first impression held that intercompany dividends received by Chesebrough, a multi-state corporation, are to be considered "net income from business done" and, therefore, to be included in the denominator of the apportionment ratio utilized by Chesebrough to calculate its deduction for Federal income tax liability. Chesebrough excluded intercompany dividends received from its subsidiaries contending that since these dividends are not taxable under Federal Income Tax Law, they should not be considered income from business done as that term is used in Section 40-18-35(3) *Ala. Code* 1975.

The Supreme Court disagreed stating that State law controls the proper calculation of a state income tax deduction. The Court reasoned that since dividends constitute gross income under Alabama law and are not deductible under Section 40-18-35, they constitute net income and must be included in the apportionment ratio.

### Insurance . . . (one occurrence) defined

*United States Fire Insurance Co. v. Safeco Insurance Co.,* 17 ABR 3428 (August 26, 1983). The Supreme Court considered the phrase "one occurrence" as contained in the "limits of liability" section of Safeco's policy. Safeco had the primary insurance with $100,000 limits for *each occurrence* with aggregate limits of $300,000. USF&G had the excess coverage. The insured premises sustained water damage in late 1979 due to the poor condition of the roof. In the spring of 1980, additional water damage occurred when a roofing contractor failed to cover a portion of the roof on which he was working. Safeco maintained that these two incidents of damage constituted "one occurrence" and therefore paid its $100,000 limits and called on USF&G to pay the excess.

On appeal, the Court had to determine whether the additional water damage in the spring was a separate occurrence or whether it constituted "one occurrence" as defined in Safeco's policy. After determining that the policy language was not ambiguous, the Court adopted the "cause analysis" meaning that if there is but one proximate, uninterrupted, and continuing cause which results in the damages, then there is but "one occurrence." However, if there is a separate intervening cause resulting in damage, there are two occurrences. In this case, the negligent act of the roofing contractor was a separate, intervening cause, and Safeco's liability was not limited to $100,000.

### Sales tax . . . section 40-23-1(a)(1) interpreted

*Ex parte: Capitol City Asphalt, Inc. (State of Alabama v. Capitol City Asphalt, Inc.),* 17 ABR 3089 (July 22, 1983). In this case, the Supreme Court affirmed the Court of Appeals which had held that two corporations as a matter of law could not be a "person or company" for sales tax purposes as defined in Section 40-23-1(a) (1), *Ala. Code* 1975. Capitol City Asphalt, Inc. (CCA) appealed an assessment of sales tax on purchases of asphalt mix from its affiliate. Montgomery Asphalt Company, Inc. (MAC), arguing that due to the close relationship of CCA and MAC, the two corporations fit within the statutory definition of a "person or company" and should therefore be taxed as a single entity.

A "person or company" is defined as "any . . . corporation . . . or *any other group or combination acting as a unit* . . ." (emphasis supplied). Despite the fact that CCA and MAC had the same shareholders and that MAC supplied all the asphalt mix used by CCA, the Court reasoned that the Alabama Legislature did not intend that two separate corporations could be treated as "a group or combination acting as a unit," i.e., one entity for sales tax purposes. The Court reasoned that CCA had reaped the benefits of incorporation of MAC and cannot now disclaim the corporate form to reduce the incidents of taxation.

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## Recent Decisions of the Supreme Court of Alabama—Criminal

### Burglary . . . receiving stolen property

*Ex parte: Pete Thomas,* 17 ABR 3746 (September 16, 1983). The defendant, Thomas, was tried under a two count indictment charging him with third-

degree burglary and receiving stolen property. At the close of all the evidence, Thomas moved for a directed verdict on both counts in the indictment. The trial judge granted the motion as to the burglary count, but allowed the second count to go to the jury. Thomas was found guilty of receiving stolen property.

The dispositive issue raised by Thomas on appeal was whether the evidence presented by the State which proved Thomas came into possession of the property described in the indictment solely by burglarizing a house precluded a conviction of receiving stolen property. The Supreme Court of Alabama held that it did. The court concluded:

> "The undisputed testimony here is: That a house was burglarized and a television set stolen; that the defendant admitted that he broke into the house, took a television set and transported it to his house; and that the stolen television set was found in his house. On the basis of these facts and the foregoing discussion, we hold that the defendant cannot be convicted of receiving stolen property . . ."

### Other acts of misconduct . . . limitations on the prosecutor's misuse

*Ex parte: Lee Killough,* 17 ABR 2908 (July 8, 1983); *Ex parte: Billy Ray Cofer,* 17 ABR 3618 (September 16, 1983). The Supreme Court in *Killough* held that other acts of misconduct sought to be introduced by the prosecution must be *relevant* and *material* to the indicted offense. Two months later in *Cofer* the Court, speaking through Justice Shores, further defined the limitations of the State's right to use evidence of prior acts of misconduct.

Cofer was convicted of sexually abusing his sixteen-year-old sister-in-law. At the trial the State offered evidence of a prior sexual misconduct by the defendant of an alleged rape which had occurred ten years prior to the date of the present offense. The Court of Criminal Appeals held that the testimony of the prior alleged rape was admissible as tending to prove that Cofer had the requisite intent to commit first-degree sexual abuse.

The Supreme Court in reversing the conviction noted that the requisite intent could be inferred by the jury from the act as described by the prosecutrix. Justice Shores critically focused the issue as follows:

> "The State has no absolute right to use evidence of prior acts to prove the elements of an offense or to buttress inferences created by other evidence. Evidence of prior bad acts of a criminal defendant is *presumptively prejudicial* to the defendant. It interjects a collateral issue into the case which may divert the minds of the jury from the main issue. *Kilpatrick v. State,* 51 Ala. App. 352, 285 So.2d 516 (1973), *cert. denied,* 291 Ala. 628 (1973) . . ."

The Supreme Court further noted that the prior rape occurred ten years before the present offense. Justice Shores held that even if intent were in issue, the prior rape was too remote to be probative of the issue. Citing *Deason v. State,* 363 So.2d 1001, 1005 (Ala. 1978).

### Motion to exclude . . . preserving the issue for appeal

*Ex parte: Earl Wayne Maxwell,* 17 ABR 3175 (August 5, 1983). Maxwell was prosecuted in municipal court for the offense of causing physical harm to another. The defendant appealed his case to the Circuit Court of Mobile County for a trial de novo. In the circuit court, the trial judge found the defendant guilty and sentenced him to imprisonment.

The defendant appealed to the Court of Criminal Appeals based upon the City's failure to plead and prove at trial the ordinance under which it prosecuted Maxwell. The Court of Criminal Appeals held that the defendant's *general motion* to exclude the City's evidence on the grounds that it had failed to prove a prima facie case *did not* preserve for appeal the City's failure to prove the ordinance under which the defendant was prosecuted. The Supreme Court reversed.

The Supreme Court noted that a motion to exclude the evidence which does not state the ground on which the motion is based is properly overruled. Citing *Espey v. State,* 270 Ala. 669, 120 So.2d 904 (1960). However, Justice Faulkner observed that when the defendant's counsel moved to exclude the evidence, he stated the ground that the City had failed to make a prima facie case. The City had failed to establish jurisdiction and to introduce the ordinance, both of which were necessary elements for its prima facie case.

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## Recent Decisions of the Supreme Court of the United States—Criminal

### Luggage search . . . 90-minute detention unreasonable

*U.S. v Place,* 103 S. Ct. 2637 (September, 1983). Based upon a drug profile, the defendant was stopped by drug enforcement officers and questioned in Miami as he prepared to board a flight to New York. The agents were suspicious and called ahead. The defendant was again stopped as he prepared to leave the airport and refused to consent to a

*Continued on page 336*

*John M. Milling, Jr., a member of the Montgomery law firm of Hill, Hill, Carter, Franco, Cole & Black, received his B.S. degree from Spring Hill College and J.D. from the University of Alabama.*

*David B. Byrne, Jr., a member of the Montgomery Law firm of Robison & Belser, P.A., received both his undergraduate degree and J.D. from the University of Alabama.*

*Mr. Byrne and Mr. Milling are co-authors of this section of* ***The Alabama Lawyer*** *concerning significant decisions in the courts. Mr. Byrne will cover the criminal area and Mr. Milling the civil.*

# Young Lawyers' Section

**Edmon McKinley**
***President***

### Executive Committee Recharged and Driving Smoothly Forward

Since the last issue of *The Alabama Lawyer,* the Young Lawyers Section of the Alabama State Bar has been very active. The Executive Committee met on September 17, 1983, at the Sheraton Riverfront in Montgomery. This was the first formal meeting of the Executive Committee since the annual convention in Montgomery. The primary purpose of the meeting was to acquaint the new members of the Executive Committee with the more seasoned "veterans," organize the Executive Committee, receive reports from the various sub-committees, and set the tone and direction of the Executive Committee for this year.

Two of the sub-committees, because of their broad range of responsibilities, have already been very active this year. The Continuing Legal Education Committee chaired by Carol Smith is off to a tremendous start under her leadership. Steve Emens, director of ABICLE, Carol, and I met in Birmingham recently to discuss this year's YLS-CLE activities, topics for the seminars, and possible speakers. This committee organizes and coordinates the Basic Legal Skills Seminar and the Annual Seminar. Carol is very anxious to arrange speakers on those topics for which Alabama young lawyers feel the most need. In that regard, if you have a suggestion as to a topic or speaker for one of these seminars, please contact Carol at Starnes and Atchison, Attorneys at Law, One Daniel Plaza, Daniel Building, Birmingham, Alabama 35233, phone 252-9333.

The Bar Admissions Sub-Committee is the sub-committee which has to get off to the quickest start in our year, and, under the chairpersonship of Linda Flynt, that is exactly what has happened. Linda gave an outstanding report at the Executive Committee meeting detailing the Bar Admissions Ceremony held October 24, 1983, at the Civic Center in Montgomery. The Young Lawyers Section was very honored to have Bill Hairston, president of the Alabama State Bar, consent to be the luncheon speaker. This is the first time in a good number of years that the president of the Bar has spoken to the new admittees, which I think adds a great deal of significance to the ceremony. The January issue of *The Alabama Lawyer* will list the new admittees.

### Who are the Pistons that are Making the Machinery Run?

In addition to the chairpersons already mentioned, the Executive Committee and its sub-committee are composed this year of an outstanding group of Alabama lawyers, many of whom are serving on the Executive Committee for the first time. The energy and intellect of the various Executive Committee members is felt throughout the Young Lawyers Section not only at the Executive Committee meetings, but, also, at the various activities which they carry out each year. These committees do a huge amount of work and, for your information, I would like to take the liberty of recognizing those Executive Committee members and sub-committee chairpersons not previously mentioned. They are: James Anderson, Youth Legislature Judicial Program Committee; Claire Black, Finance Committee; Jane Lecroy Brannan, Administration Committee; Rowena Crocker, Community Law Week; Ronald L. Davis, Public Information Committee and Sub-Committee on Publications; Wanda D. Devereaux, Domestic Abuse Committee; John W. Donald, Jr., Disaster Emergency Legal Assistance Committee; Judge Floyd C. Enfinger, Jr., Executive Committee; Linda Flynt, Bar Admissions Committee; Stephen D. Heninger, Local Bar Coordinating Committee—Jefferson County and North; Robert T. Meadows III, Long Range Planning Committee; Charles R. Mixon, Jr., Annual Seminar Committee (Sandestin—speaker and program arrangements); Caine O'Rear III, Annual Seminar Sub-Committee (all arrangements except speaker and pro-

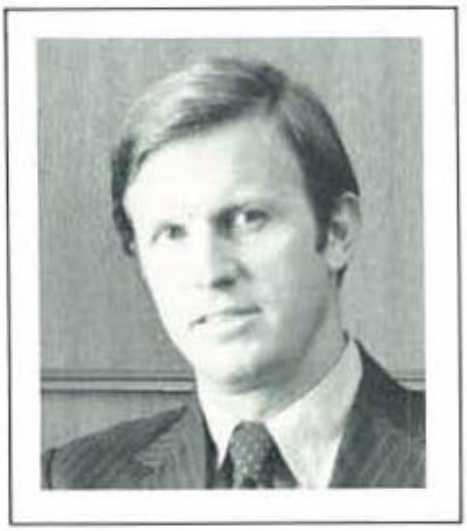
gram); J. Bentley Owens III, Local Bar Coordinating Committee—South of Jefferson County; J. Hobson Presley, Jr., ABA/YLS Liaison Committee; Randolph P. Reaves, Legislative Committee and Conference for the Professions; Schuyler H. Richardson III, Leadership on Issues/Grants Committee; Carleta Roberts, Alabama Bar Information Sub-Committee Newspaper, Television and Radio Sub-Committee; Julie Smeds, By-Laws Committee; Carol A. Smith, Continuing Legal Education Committee; William H. Traeger III, Law Student Liaison Committee; Randall M. Woodrow, Meeting Arrangements Committee.

In addition, this year—for the first time—Alabama young lawyers have been given the opportunity by Bill Hairston to have significant input on all of the committees and task forces of the Bar. These various Alabama young lawyers will act as liaisons this year between the YLS and the various committees and task forces of the State Bar and will report their various activities to the Young Lawyers Section Executive Committee. These young lawyer liaisons are as follows: G. Douglas Jones, Claire Black, Fred McCallum, Jr., Charles L. (Larry) Sparks, John Edmond Mays, J. Bentley Owens III, Rowena Crocker, Carleta Roberts, Ronald L. Davis, Randolph P. Reaves, Carol A. Smith, James A. Philips, Thomas L. Stewart, Robert T. Meadows III, Schuyler H. Richardson III, Raymond E. Ward, J. Thomas King, Jr., Robert E. Patterson, Wanda D. Devereaux, Anne L. Maddox, Robert H. Allen, John W. Donald, Jr., Judge Floyd C. Enfinger, Jr., Eleonora S. Gathany, Terry McElheny, Jane Lecroy Brannan, Larry David Kizziah, Cleophus Thomas, Allen B. Edwards, Jr., Howard M. Belser, Jr., John Wyly Harrison, Celia Collins, James Anderson, John T. Crowder, Jr., Mark A. Stephens, and Carol Sue Nelson.

### New Affiliates are Oiling the Works of YLS

I am very pleased to announce that a new Young Lawyer affiliate has been organized in northwest Alabama. This effort has been spearheaded by Tom Heflin and is in the process of being formalized at the present time. In addition, a group of Decatur young lawyers are considering the possibility of forming a Young Lawyer affiliate in that area. Let me encourage those young lawyers interested in organizing an affiliate where there is not one to contact me. The Young Lawyers Section has two co-chairmen, Stephen D. Heninger and J. Bentley Owens III, who will be more than happy to render assistance to those groups, and, if at all possible, the Executive Committee will have a representative at the organizational meeting of those affiliates and will provide continuing assistance as the group grows.

In this similar vein, I met with the young lawyers in Mobile recently at a very enjoyable dinner meeting and discussed the various aspects of the Young Lawyers Section with them, offering them any assistance that we could provide. This year the Mobile Young Lawyers Section is under the excellent leadership of Jim Newman. Recently this group served as guides to the British Faire at the Magna Charta Exhibit. In addition, this affiliate is very active in various other public service activities. I will be happy to meet with the other affiliates at any time. □



# DIFFERENCES IN FEDERAL AND STATE OF ALABAMA INCOME TAX LAWS

Robert C. Walthall

*Robert C. Walthall is a partner in the Birmingham law firm of Bradley, Arant, Rose and White. He holds an LL.B. from the University of Alabama School of Law and an LL.M. in Taxation from New York University. He is a frequent writer and lecturer on the subject of taxation.*

Although state income tax laws have traditionally been modeled after federal law, the similarities have greatly diminished in recent years because of the increasing number of changes in federal law. Particularly during the last quarter century, hundreds of federal amendments have been introduced by omnibus legislation such as the Internal Revenue Act of 1954, the Tax Reform Act of 1969, the Tax Reform Act of 1976, the Economic Recovery Tax Act of 1981 and the Tax Equity and Fiscal Responsibility Act of 1982. Consequently, many states have incorporated portions of the Internal Revenue Code of 1954, as amended (hereinafter referred to as 1954 Code), into their tax laws. While the manner and extent of incorporation have varied widely among the states, generally three basic approaches have been adopted. Some states assess a fixed percentage of the taxpayer's tax, while other employ the federal adjusted gross income figure as the beginning point for determination of the state tax. A third group of states simply incorporates the federal concept of tax income into their law.

Alabama's income tax is presently imposed under Title 40, Chapter 18 of the Code of Alabama 1975, as amended (hereinafter referred to as Chapter 18). The first income tax law in Alabama became effective on August 2, 1933, and closely resembled the federal law that it was modeled after—the Revenue Act of 1928. The Alabama Legislature has attempted to keep pace over the years with the changing federal law by enacting conforming legislations, but has achieved only limited success. Although the Alabama Legislature has recently considered numerous bills to amend the State income tax law, only two such bills were passed in the 1973 sessions, three in 1975, two in 1977 and two in 1979. However, in 1982 major revisions were enacted to conform the current Alabama law to federal tax law. Despite these continued efforts, the income tax laws of Alabama do not yet adequately conform to federal tax law.

A bill was prepared in 1983 by the Joint Committee to Revise Alabama Income Tax Laws for consideration by the Alabama Legislature in the 1983 Regular Session which would have conformed Alabama law to federal law in most other remaining areas. This bill, which has the support of Alabama's bar and accounting associations plus the Alabama Revenue Department, will be introduced in the 1984 regular session.

The task of ascertaining the Alabama rule on a particular point is often made difficult by the form and sequence of Chapter 18. In many instances the phraseology employed in Chapter 18 varies from that of the 1954 Code. These variations necessarily raise troublesome questions of whether substantive differences were intended.

The differences in federal and Alabama tax laws affecting most Alabama taxpayers primarily involve provisions governing the inclusion and exclusion of income and the deduction of expense items in the computation of taxable income. This section will attempt to identify the major differences.

A series of tables have been used at the end of this section to illustrate the differences between federal and Alabama tax laws in inclusion and exclusion of income and the deduction of expense items in the computation of taxable income.

The provisions relating to gross income and exclusions from it are generally the first to capture the taxpayer's attention. Although both federal and State statutes define gross income in basically similar terms, a number of unexplainable inconsistencies exist. For example, historically, federal law has afforded more favorable treatment than Alabama law for sick pay and employee death benefits, while Alabama law provided more favorable treatment on items such as proceeds from health and accident insurance policies paid for by an employer.

Under current federal and Alabama provisions, deductions are allowed for certain business and personal expenses and losses. Likewise, both federal and Alabama law permit deductions for "ordinary and necessary" business expenses and for nonbusiness expenses arising from the production of income. While the Alabama statute dealing with deductions is generally modeled after the federal provisions, there have been some significant differences. Changes adopted in 1982 conforming Alabama provisions to federal law generally benefit Alabama taxpayers with respect to itemized, personal deductions. Permissible deduc-

tions for charitable contributions have been increased, and alimony payment deductions have become available.

Alabama's statutes dealing with the determination and recognition of gain or loss and those governing determination of cost basis generally resemble the corresponding federal provisions. Nevertheless, there are noteworthy inconsistencies. One particularly important difference is the absence of any special provision under Alabama law for the treatment of capital gains. Consequently, all gains are taxed in full. This result is offset in part, however, by the lack of any limit on the deduction of capital losses.

The taxation of estate and trust income raises problems that require special provisions under both federal and Alabama income tax laws. The tax burden must be allocated between the settlor or decedent, the fiduciary of the trust or estate, and the beneficiaries. Subchapter J of the Internal Revenue Code includes a comprehensive scheme to govern this complex situation. Unfortunately, Alabama does not presently have a similar provision. Additionally, the State statute does not differentiate between simple and complex trusts, nor has it adopted the concept of "distributable net income" which the federal law employs to measure and allocate taxable and exempt income between the trust or estate and the beneficiaries. Conforming Alabama law to federal law in this area of taxation would eliminate questions concerning the allocation of trust income among the trustee, grantor and beneficiaries. Moreover, there seems little reason for retaining Alabama's present provisions since most trusts are set up to comply with the more comprehensive, yet beneficial, federal provisions.

An area of inconsistency that has a large impact on the lower income taxpayer involves personal exemptions and standard deductions. Presently, the Alabama personal exemption is more favorable. However, the federal standard deduction or low income allowance provides a greater deduction from gross income and therefore a greater tax saving to the taxpayer.

The differences between federal and Alabama law noted in this section create difficulties for taxpayers and the State in preparing and policing tax returns—difficulties that could be eliminated by conforming existing provisions of the Alabama taxing statutes to those of the Internal Revenue Code of 1954. Although some of the distinctions in the two laws may have been dictated by varied social and economic objectives, the majority cannot be justified on policy grounds. Rather, most of the differences must be attributed to the Alabama Legislature's failure to stay abreast of the rapid changes in federal tax law.

## TABLE I

### DIFFERENCES IN INCLUSIONS AND EXCLUSIONS FROM GROSS INCOME

| Subject | Federal Treatment & Provisions | Alabama Treatment & Provisions |
|---|---|---|
| 1. Disability pay to permanently disabled under age 65 | Excluded under specific conditions I.R.C. §§ 104-105 | Included prior to 1982 unless proceeds from Insurance. Reg. 14.2(e). Effective January 1, 1982, follows §§ I.R.C. 104 & 105. |
| 2. Employee death benefits | Excluded up to $5,000. I.R.C. § 101(b). | Included § 40-18-14 |
| 3. Dividends-Interest | First $100 of certain dividends excluded I.R.C. § 116. ($200 if joint return) (maximum $900 interest—1985) | Fully included § 40-18-14(1) |
| 4. Installment payments of life insurance proceeds to spouse | Up to $1,000 interest per year excluded. I.R.C. § 101(d)(1)(b) | Interest fully included Reg. 14.2(a) |
| 5. Premiums on group term life insurance policies paid by employer | Premiums for policies up to $50,000 excluded though paid by an employer for the benefit of an employee I.R.C. § 79. (inclusion for discriminatory plans—1983) | Apparently excluded under Reg. 810-3-15-.02(b)6 |
| 6. Premiums on group health or hospital insurance paid by employer | Excluded when paid by employer for the benefit of an employee I.R.C. § 106 | Apparently included § 40-18-14 Reg. 810-3-15-.02(b)6. |

| | | |
|---|---|---|
| (f) Contribution to non-qualified employee benefit plan | Excluded under certain conditions | Considered taxable income if nonforfeitable at time made § 40-18-25(i) |
| (g) Employee stock options | Difference between the option price and the stock's fair market value is includable as income. I.R.C. §§ 421-425 | No tax until the stock is sold for a profit |
| 10. Dependent care assistance to employees | Amounts excluded under § 129 beginning 1982 | No comparable provision |
| 11. Military Retirement Benefits | Includable | For 1982 $4,750 excludable<br>For 1983 & 1984 $8,000 excludable<br>For 1985 & thereafter $10,000 excludable |
| 7. Health and accident insurance proceeds | Sometimes included when premiums paid by employer for benefit of employee. I.R.C. §§ 104, 105 | Excluded § 40-18-14(2)e as provided under §§ 104 and 105 |
| 8. Interest received from U.S. obligations | Generally included. Treas. Reg. § 1.61-7(b)(3) | Excluded § 40-18-14(2)d |
| 9. Deferred compensation | | |
| (a) Employee trust plans | Qualified trusts are exempt from income tax. I.R.C. §§ 401(a), 501(a). | No formal application is required under § 40-18-25 for the trust to be exempted. IRA—Koegh Plans exempt under 1982 Act |
| (b) Employee contributions to Trust Plan | Excluded § 401 (k) | Included—Position of Alabama Department of Revenue. No provision for excluding or deducting from gross income. |
| (c) Alabama and federal employees retirement income [Including Alabama's Teachers' Retirement Systems, State Employees' Retirement System, Judicial Retirement System & Federal Civil Service Retirement System] | Included Treas. Reg. § 1.61-11 | Excluded Reg. 19.2 |
| (d) Annuities or pension income | Applies an exclusion ratio formula. I.R.C. § 72. (However, under some exceptions can use cost recovery) | No tax until the total purchase price of the annuity or the total contribution of an employee to a pension fund is fully recovered. Regs. 14.2, 19.2 |
| (e) Amounts received from IRA, Koegh or other qualified plan rolled over into another qualified plan | Not includable in gross income | Effective January 1, 1982, rules and limitations of Federal tax law will govern. Amounts distributed from any qualified pension plans which were not deductible will be excludable from gross income. § 40-18-25(e) |

## TABLE II

### DIFFERENCES IN DEDUCTIONS FROM GROSS INCOME

| Subject | Federal Treatment & Provisions | Alabama Treatment & Provisions |
|---|---|---|
| 1. Business deductions | | |
| (a) Organization and financing expenses | Corporations and partnerships may deduct costs of organizing a partnership and corporation over sixty months. I.R.C. §§ 248, 709. (Note: Must also deal with IRS' position that pre-opening expenses constitute capitalizable costs) | Not deductible until business abandoned or dissolved. Reg. 17.1(d)—Consider deducting these costs under Alabama version of I.R.C. § 212 [§ 40-18-15(a)(14)]. The IRS' position regarding preopening expenses—capitalizable cost is also applicable for Alabama purposes. |
| (b) Start-Up Expenditures | (60 month amortization, § 195) | No comparable provision—these costs may be deductible under Alabama version of I.R.C. § 212 [§ 40-18-15(a)(14)] dealing with expenses for production of income. |
| (c) Partnership losses—At Risk Rules—Hobby Losses | Losses limited to amount at risk | No comparable provision. The Alabama Department of Revenue has used federal rules to question so-called hobby losses involving automobile racing, cattle raising, riding stables, kennels and horse breeding. |
| (d) Moving expense—Job Hunting Expenses | Allows deduction for moving expenses paid or incurred by taxpayer involving expenses of selling, buying or leasing a residence, taxes, expenses and pre-move house hunting trips, expenses for meals and lodging while in temporary quarters at new job location § 217. Job hunting expenses deductible. | Effective January 1, 1982, deduction allowed for items listed under I.R.C. § 217. Thus, Alabama now allows deduction for expenses of buying and selling house. Job hunting expenses not deductible. |
| (e) Mine development expenditures | Allowed as business expense deduction. I.R.C. § 616 | All expenses in excess of net receipts from sales must be capitalized, recoverable through depletion only. Reg. 16.2. |
| (f) Depreciation | Accelerated Cost Recovery Allowance—I.R.C. § 168. | Allows "reasonable allowance" only. § 40-18-15(a)(8) § 40-18-16(a). Department of Revenue will adopt regulations adopting ACRS. |
| (g) Expensing of new business property | $5,000 per year, $10,000 beginning in 1986 | Department will not allow expensing. |
| (h) Depletion | Allows from 5% to 22% of gross income from the property as a percentage depletion deduction depending on the natural resource involved. I.R.C. § 613. | Allows a uniform 27-1/2% depletion deduction for oil and gas wells, computed on the taxpayer's gross income from the property § 40-18-16. No percentage depletion for coal and other minerals. |
| (i) Bad Debt Reserve | Allows deduction for reasonable addition to reserve for bad debts. | No comparable provision. |

| | | |
|---|---|---|
| (j) Corporation charitable deduction | 10% of taxable income—increased deduction for gifts of research property (basis plus 1/2 appreciation) § 170(e) | 5% limitation—no comparable provision |
| 2. Personal deductions | | |
| (a) Contributions—self employed retirement plan—corporate deductions to corporate retirement plan | Prior to 1983 allows deduction for amounts contributed to plan equal to lesser of $15,000 or 15% of earned income. I.R.C. § 404(e) (limitations change in 1983 for corporate plan to maximum of $30,000 for defined contribution and $90,000 for defined benefit plans. For Koegh Plan defined contribution—$20,000 1983, $25,000 1984 and $30,000 1985) | Prior to 1982 no comparable provision. Reg. 15.19 provides that Alabama law contains no similar provision. Effective January 1, 1982, contributions as allowed by federal law *from time to time*. |
| (b) Contribution—individual retirement account | Allows deduction for amounts contributed by or on behalf of an individual to an individual retirement account equal to less of $2,000 or 100% of compensation or earned income. I.R.C. §§ 219,408. | Prior to 1982 no comparable provision. Effective January 1, 1982, contributions as allowed by federal law. |
| (c) Charitable contributions | Limitations are 20%, 30% or 50% of adjusted gross income with a five-year carryover for excess contributions. I.R.C. § 170. | Prior to 1/1/80 limited to 15% of taxpayer's net income. No carryover of excess contribution § 40-18-15(a); effective 1/1/80 limited to 15% of limited taxpayer's adjusted gross income, no carryover. Effective January 1, 1982, charitable contributions are limited to the more favorable federal restrictions. The new law allows contributions limited to 20%, 30% or 50% of adjusted gross income depending on the type of property contributed and the organization that receives the contribution. Contributions in excess of the limitations may now be carried over to other tax years in the manner provided by federal tax law. |
| (d) Child care expenses | Allows credit for child care expenses. I.R.C. § 44A. Maximum $1,440 | No comparable credit, not deductible under Reg. 17.1(a)(4). |
| (e) Alimony | Payments made prior to or pursuant to a decree may be deductible. I.R.C. §§ 71,215. | Prior to 1982 nondeductible. Reg. 17.1(a)(8). Effective January 1, 1982, deduction will be allowed for alimony and separate maintenance payments. § 40-18-15(a)(18). Payments are taxable to recipient. |
| (f) Medical expenses | Subject to 3% and 1% of adjusted gross income limitations. (Changed to 5% in 1983) | Effective January 1, 1982, medical expenses will be deductible according to federal law on January 1, 1982. No difference in limitations for taxpayers over age 65. |
| (g) Adoption expenses | Up to $1,500 of qualified adoption expenses § 222 | No comparable provision. |

| | | |
|---|---|---|
| (h) State and local taxes | | Effective 1982, following taxes are no longer deductible: driver's license, auto tag, transportation tax, alcohol tax, tobacco tax, gasoline tax, utility tax, telephone tax. |
| 3. Losses | | |
| (a) Current losses of sub-chapter S corporation | Allows shareholders to report current losses in their personal income tax return. I.R.C. § 1374. | No comparable provision. |
| (b) Net operating loss | Allows carryover and carryback of losses as net operating loss deduction. I.R.C. § 172(b). | Special carryback and carryforward provisions for *individuals* for tax years after 1974; corporations can deduct loss in year of loss *only* § 40-18-15(a)(16). Effective January 1, 1984, corporations can deduct up to $600,000 in losses occurring in years after 1983 against current year income provided that the deduction cannot exceed previous year loss. Only losses through 1988 may be deducted. |
| (c) Section 1244 stock | Preferential treatment of losses from small business stock. I.R.C. § 1244 | All losses on stock are deductible. |
| (d) Casualty loss | Requires exclusion of first $100, unless incurred in trade or transaction entered into for profit. I.R.C. § 165(c). (10% exclusion beginning in 1983) | Allows deduction for full amount of casualty loss. § 40-18-15. Effective January 1, 1982, casualty loss deduction not connected with a trade or business have a $100 deductible for individuals. § 40-18-15(a)(6). |
| (e) Nonbusiness bad debts | Short term capital loss | Not deductible |

## TABLE III

### DIFFERENCES IN RECOGNITION AND DETERMINATION OF GAIN OR LOSS BY THE INDIVIDUAL

| Subject | Federal Treatment & Provisions | Alabama Treatment & Provisions |
|---|---|---|
| 1. Non-recognition of gain or loss in involuntary conversions of property | Taxpayer may choose whether to recognize gain from an involuntary conversion or to decrease basis of new property to reflect non-recognized gain. I.R.C. § 1033. | Allows no such election. If disposition of property qualifies for nonrecognition of gain, then the gain may not be recognized § 40-18-8(f). |
| 2. Sale of personal residence | Preferential treatment of sale of personal residence by persons 55 or over up to $125,000. I.R.C. § 121. Taxpayer may defer gain on sale of residence by reinvestment in another residence within two year periods. I.R.C. § 1034. | Effective January 1, 1976, § 40-18-14(2)(h) provides for nonrecognition of gain on sale of residence as provided by federal law. Effective January 1, 1982, there is an 18 month rollover period for sale of a principal residence and a $100,000 one time exclusion of gain on sale of a principal residence by individual who has attained age 55. |
| 3. Basis | | |
| (a) Property acquired from decedent | Basis of property is fair market value at time of decedent's death, I.R.C. § 1023. | Basis of property is fair market value at time of decedent's death. § 40-18-6(a)(3). |

| | | |
|---|---|---|
| (b) Gift tax adjustment | Taxpayer may increase basis of property acquired by gift to represent amount of gift tax paid. I.R.C. § 1015(d)(1)(A). | No comparable provision, however, get step up in basis to fair market value at date of acquisition. |
| (c) Gift or transfer in trust | Basis of property is adjusted basis in hands of transferor. I.R.C. § 1015 | Basis of property is fair market value of the property at date of acquisition. § 40-18-6(a)(2) |
| 4. Capital gains and losses | Allows special deduction for capital gains and losses. I.R.C. §§ 1201, 1202. Capital loss deductions are limited by I.R.C. § 1211. | All recognized gain taxed in full. Reg. 15.15. |
| 5. Installment sales | Sales may be reported on the new installment basis. I.R.C. § 453. | Installment sale reporting permitted so long as initial downpayments in the year of sale do not exceed 40%. § 40-18-44. *40% limitation has been problem in several recent Alabama tax audits.* |
| | *Problem areas for Alabama taxpayers:* | |
| | —Permissible one payment rule applies under Federal law but may not apply under Alabama law | |
| | —Section 337 liquidation with installment obligations—will not accelerate installment obligations under Federal law—no comparable provisions under Alabama law | |
| | —Related party sales—now restricted under Federal law—no comparable provision under Alabama law | |

## TABLE IV

## DIFFERENCES IN THE TAXATION OF ESTATE AND TRUST INCOME

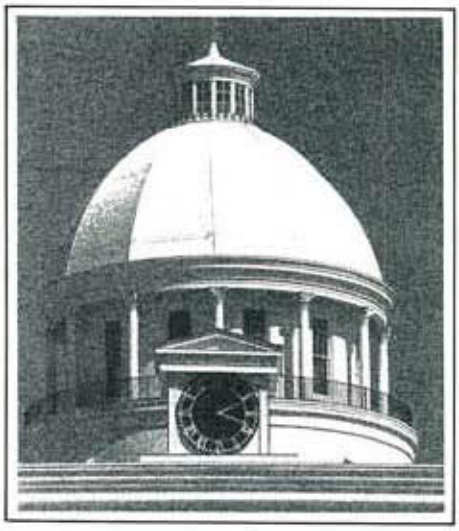
| Subject | Federal Treatment & Provisions | Alabama Treatment & Provisions |
|---|---|---|
| 1. Simple and complex trusts | A trust is classified as simple or complex depending on its dispositive provisions. | All trusts are treated the same under § 40-18-25. |
| 2. Exemptions | An exemption of $300 is provided for simple trusts, $100 for complex trusts, and $600 for estates. I.R.C. § 642(b). | Trusts and estates are allowed a personal exemption of $1500. Reg. 25.1 1982 Act changes tax rate schedule for estates and trusts. |
| 3. Short term trusts | The grantor is taxed on the income of a short term trust unless the trust is set up for at least 10 years or for the life of the beneficiary. I.R.C. § 673 | Section 40-18-25 addresses only the tax liability of the trustee and the beneficiary for trust income. From this failure to include the grantor it is assumed that the grantor is subject to no tax liability if he has relinquished all control over the trust for the tax year. |

| | | |
|---|---|---|
| 4. Accumulated income distributions | Under the federal "throwback" rule the beneficiaries are taxed under distribution of accumulated income as if the income had been distributed each year. I.R.C. §§ 665-668. | Accumulated income is treated as part of the corpus that is not taxable to the beneficiaries. § 40-18-25. |
| 5. Distribution | If current income is used to pay a specific pecuniary gift or bequest in not more than three installments, it may be treated as a nontaxable distribution out of corpus and be excluded from the gross income of the beneficiary. I.R.C. § 663(a)(1). | No comparable provision. |
| 6. Unused loss carryovers | Beneficiaries may deduct unused loss carryovers and deductions in excess of gross income for the last tax year of a terminated trust or estate. I.R.C. § 642(h). | Does not allow loss carryovers §§ 40-18-25, 40-18-15 |
| 7. Income in respect of a decedent | Allows a deduction for the inheritance tax paid on income "in respect of a decedent." I.R.C. § 691(c). | No comparable deduction is allowed. |

## TABLE V

## DIFFERENCES IN PERSONAL EXEMPTIONS AND STANDARD DEDUCTIONS

| Subject | Federal Treatment & Provisions | Alabama Treatment & Provisions |
|---|---|---|
| 1. Personal exemptions | Allows an individual exemption and dependents exemptions of $1,000. I.R.C. § 151. | Allows an individual exemption of $1,500. § 40-18-19. Effective January 1, 1982, requires each spouse to claim their respective $1,500 exemption when computing the tax on their separate income. No proration of exemption upon death. |
| 2. Standard deduction | The zero bracket amount replaces the standard deduction used in earlier years to simplify tax computations. Each taxpayer now gets a zero bracket amount in figuring his or her tax. The size of the zero bracket amount depends on the particular tax status of taxpayer. | Allows a standard deduction of 10% of taxpayer's adjusted gross income up to a maximum of $1,000. § 40-18-15. Effective January 1, 1982, increased to 20% of adjusted gross income up to a maximum of $2,000 for taxpayers using the single tax rate schedule and $4,000 for married taxpayers filing joint returns. |
| 3. Deduction for two-earner married couples | 10% of lesser of $30,000 or qualified earned income (maximum $1,500 in 1982, $3,000 later years) | No comparable provision. |
| 4. Inflation adjustment in individual rate brackets, personal exemptions and zero bracket amount | Starts in 1985 §§ 1(f) & 151(f) | No comparable provision. |



# LEGISLATIVE WRAP-UP

*by Randy Reaves*

This is the final report from the Legislative Counsel to the members of the Alabama State Bar concerning legislation introduced in the 1983 regular session. During the session some 1488 bills were introduced in the House and Senate. Of these bills, both general and local, only 299 achieved final passage. Of the hundreds of bills related to attorneys or the practice of law which were reported earlier, only eighteen have become law.

## Alabama State Bar Bills

Two bills endorsed by the Board of Bar Commissioners did not fare well this session. Both H.B. 81 to remove the exemption from license taxes for first and second year lawyers and S.B. 204 to reduce the statute of limitations in legal malpractice actions, were reported from committees late and swallowed by long regular calendars in both chambers. Efforts to bring them up on Special Order calendars failed and both died.

One bill of importance to the organized Bar passed both the House and Senate. H. B. 366, now Act. No. 83-373, by Rep. Noopie Cosby of Selma continues the Board of Bar Examiners without change. Representative Cosby did an excellent job for the Bar and was ably assisted in the Senate by lawyer/legislators Jim Smith of Huntsville and Wendell Mitchell of Luverne.

## Alabama Law Institute Bills

Two bills were drafted for the regular session by the Law Institute. The Alabama Limited Partnership Act was co-sponsored by Senators Smith (J), Harrison, Kirkland and Hilliard. The bill, now Act No. 83-513, resembles the new Uniform Limited Partnership Act, but with certain adjustments to conform to Alabama practice.

It updates the present Alabama statute as to the limited partnership form of business organization. This act simplifies the process of filing or amending a certificate of limited partnership; allows for the granting to limited partners of rights necessary to qualify Alabama limited partnerships under the securities laws of many states without subjecting such limited partners to unlimited liability; and, also, contains provisions as to financial contributions and distributions, assignment of partnership interests, dissolution of limited partnerships, and actions by a limited partner on behalf of the limited partnership. This act becomes effective January 1, 1984.

The second bill, the Revised Alabama Professional Corporation Act, also becomes effective January 1, 1984. This revision of the professional corporation and professional association laws, now Act No. 83-514, brings these laws into conformity with the Business Corporation Act while combining them into one statute. For an excellent review of this new law (by Bob McCurley), see the Legislative Wrap-up in the July edition of *The Alabama Lawyer*. It was sponsored in the Senate by Ryan deGraffenried and handled in the House by Representatives Manley, Langford and Casey.

## New State Constitution Proposed

S. B. 58 by Sen. Ryan deGraffenried proposed that the citizens of the state have a chance to vote on a new Constitution to replace the 1901 version that has been amended hundreds of times. The bill passed the Senate on the 14th legislative day and was assigned to the House Constitution & Election Committee. A substitute bill, drafted by the Governor's office, was reported from committee rather than the Senate version. This version ultimately passed and bears Act No. 83-683. An election upon the proposed amendment is ordered to be held at the next special or general election held not less than three months after the final adjournment of the 1983 regular session of the legislature.

## DUI Law Changes

One of the more controversial issues to come before the legislature in 1983 involved proposed changes to the penalties for driving under the influence. A number of measures were introduced, but only H. B. 264, now Act No. 83-620, passed. This bill amends §§ 32-5-192, 32-5A-191, 32-5A-192, 32-6-19 and 11-45-9. The penalty for refusing to submit to a chemical test the first time is now a license suspension of 90 days, and the second such refusal will result in license suspension for a year.

The penalties for convictions of driving under the influence under §32-5A-191 have been increased as follows:

### First Conviction

| House Bill 264 | Summary of Changes |
|---|---|
| Imprisonment in county or municipal jail for not more than 1 year | Same |
| and/or | |
| fine not less than $250 nor more than $1,000 | Increased minimum fine from $100 to $250 |
| and | |
| 90 day suspension of driving privilege or license by director of Public Safety | Mandatory 90 day suspension |
| and | |
| mandatory completion of approved DUI Court Referral Program | Same |

### Second Conviction

| | |
|---|---|
| Minimum 48 consecutive hours imprisonment; maximum 1 year | Mandatory 48 hours imprisonment or 20 hours community service. Mandatory sentence not subject to probation or suspension |
| or | |
| 20 days community service | |
| and | |
| fine of not less than $500 nor more than $2,500 | Fine must be imposed in addition to imprisonment or community service |
| and | |
| 1 year driver's license revocation by the Department of Public Safety | Increases minimum fine from $200 to $500 and increases maximum from $1,500 to $2,500<br>Revocation of license increased from 6 months to 1 year |

### Third and Subsequent Convictions

| | |
|---|---|
| Imprisonment 60 days to 1 year. Mandatory 60 days imprisonment which cannot be probated or suspended | Mandatory 60 days imprisonment |
| and | |
| fine of not less than $1,000 nor more than $5,000 | Mandatory fine of not less than $1,000. Minimum fine increased from $200 to $1,000; maximum increased from $1,500 to $5,000 |
| and | |
| Director of Public Safety shall revoke license for 3 years | Mandatory revocation by DPS increased from 6 months to 3 years. |

This bill also provides that any person arrested for violating the provisions of this act shall not be released from jail under bond or otherwise, until there is less than the same percent by weight of alcohol in his blood as specified in §32-5A-191(a)(1).

It clarifies penalty for violation of §32-5A-192 (Homicide by Vehicle). Fine not less than $500 nor more than $2,000 or imprisonment for a term not less than one year nor more than five years, *or both.*

It also increases penalty for violation of §32-6-19 (Driving While Revoked)—minimum fine increased to *$100,* maximum fine remains at $500; maximum term of imprisonment increased to *180* days.

Last, but not least, it amends §11-45-9 to allow municipal courts to enforce increased penalties under §32-5A-191 (DUI).

## OTHER BILLS OF INTEREST

### Banking, Commercial and Corporate

S-97
83-605 To amend §7-9-204 of the *Code of Alabama,* 1975, relating to security agreements in connection with after-acquired property and future advances so as to provide that as relates to agriculture, a security agreement may provide that any and all obligations covered by the security agreement are to be secured by after-acquired collateral including without limitation all seed and all crops and the seed and agricultural products from any such crops growing or crops to be grown, whether they become such more or less than one year after the security agreement is executed and whether the security agreement is given in conjunction with a lease, a land purchase or improvement transaction or not. Effective date 7-28-83.

S-120
83-495 To amend the Alabama Business Corporation Act so as to provide the procedure for acquisition of stock in any corporation through exchange of stock by another corporation; to provide for the

right of a shareholder to dissent from such exchange; to prescribe a dissenting shareholder's rights. Effective date 7-14-83.

S-127
83-513
To be known as "The Alabama Limited Partnership Act of 1983" revising the laws of Alabama in Title 10 of the *Code of Alabama,* 1975. Effective date 1-1-84.

H-244
83-741
To further amend §§40-18-42, 40-18-80, 40-18-82, and 40-18-83, *Code of Alabama,* 1975, so as to provide for elimination of installment payments of income tax by corporations and fiduciaries and to require the filing and payment of declarations of estimated income tax by corporations. Effective date 1-1-84.

### Civil Litigation

S-192
83-607
To amend §31-2-90, *Code of Alabama,* 1975, which provides for appointment of defense counsel in actions against members of the national guard, so as to make such counsel available at state expense, etc. Effective date 7-28-83.

H-300
83-774
To amend *Code of Alabama,* 1975, §9-16-93(f) which places jurisdiction in the district courts of the state by placing jurisdiction in the circuit courts of the state; to amend §9-16-94(a) which provides for mandatory assessment of civil penalties upon the issuance of cessation orders under §9-16-96(a) to correctly read §9-16-93(a); to amend §9-16-95(f) by providing for reasonable attorney and expert witness fees; to amend §9-16-99(2) which provides for waiver of certain requirements of this Article on surface mining areas affecting two acres or less; and to amend §9-16-75 relating to rule making procedures by providing that provisions in this Act shall take precedence over the provisions of the Alabama Administrative Procedure Act; etc. Effective date 8-5-83.

S-191
83-606
To amend §31-2-89, *Code of Alabama,* 1975, which bars actions or proceedings against members of the national guard for acts done in the discharge of military duty, so as to provide for conditions under which indemnification by the state shall be available to such persons. Effective date 7-28-83.

### Criminal Law and Procedure

H-297
83-622
To further provide for criminal procedure; to provide that the victim in any criminal case is entitled to be present throughout the trial proceedings; etc. Effective date 7-29-83.

H-214
83-571
To amend §13A-6-45 of the *Code of Alabama,* 1975, relating to interference with custody, so as to change the penalty for such offense from a misdemeanor to a felony. Effective date 7-18-83.

H-246
83-508
To provide that a Restitution Order in a criminal case is a Final Judgment and has the same force and effect as a Final Judgment in civil actions under the laws of the State of Alabama; etc. Effective date 7-18-83.

H-264
83-620
To amend §§32-5A-191 and 32-5A-194, *Code of Alabama,* 1975, which relate to offenses and penalties and matters of evidence related to driving under the influence of alcohol or controlled substances (DUI), so as to lower the minimum weight of alcohol in the blood required to convict a person under said §32-5A-191, to provide that such minimum alcohol limits create a conclusive presumption of guilt or fault, and to generally increase the penalties and other sanctions for various degrees of violations of §32-5A-191. Effective date 7-29-83.

H-299
83-742
To amend §13A-7-1, *Code of Alabama,* 1975, which provides for the definitions relating to the crimes of burglary and criminal trespass, so as to provide further for said definitions. Effective date 8-5-83.

H-536
83-750
To amend §15-22-23 and §15-22-36, of the *Code of Alabama,* 1975, which relates to the authority of the board of pardons and paroles to grant pardons and paroles so as to provide further for notification procedures. Effective date 8-8-83.

S-489
83-569
Relating to the 37th Judicial Circuit of Alabama; to provide that if a defendant in a criminal case enters a written plea of not guilty prior to his arraignment such pleas shall constitute waiver of his right to have an arraignment at which he is present in person or represented by an attorney. Effective date 7-18-83.

H-798
83-563
To provide for the criminal offense of theft of trade secrets and to prescribe penalty for conviction of such offense. Effective date 7-18-83.

### Judiciary

H-340
83-744
To amend §§12-19-71 through 12-19-75 and §§12-19-171 through 12-19-179, *Code of Alabama,* 1975, to further provide for the assessment, collection and distribution of fees and costs in circuit and district courts so as to enhance that portion of the fee schedule distributed to the state general fund and to provide for the judicial training and education fund which is created hereby, etc. Effective date 9-5-83.

### Miscellaneous

H-366
83-373
Relating to the Alabama Sunset Law to continue the existence and functioning of the Board of Bar Examiners as provided in §§34-3-1 through §34-3-44, *Code of Alabama,* 1975, and the legislature's concurrence thereof. Effective date 6-17-83.

**Wills, Estates and Tax**

H-243
83-740

To amend §§4, 7, 10, 11 and 15 of Title 40, Chapter 15, *Code of Alabama*, 1975, that imposes an estate and inheritance tax by changing due dates under this Chapter from 15 months after the decedent's death to 9 months after the decedent's death and by changing the interest rate charged for the delinquent payments from six percent per annum to the rate established in §40-1-44, *Code of Alabama*, 1975. Effective date 8-5-83.

*Robert L. McCurley, Jr., director of the Alabama Law Institute, received both his undergraduate and law degrees from the University of Alabama. In this regular column, Mr. McCurley will keep us updated on legislation of interest and importance to Alabama attorneys.*

*Randolph P. Reaves, a graduate of the University of Alabama and University of Alabama School of Law, practices with the Montgomery firm of Wood, Minor & Parnell, P.A. He presently serves as legislative counsel for the Alabama State Bar.*

*by Bob McCurley*

An Alabama Law Institute drafting committee has completed its study on the Alabama Non-Profit Corporation Law. This committee, chaired by Yetta Samford of Opelika, has completed its revision with commentary and will present this revision to the Institute Council this fall in time for it to be presented to the 1984 Legislature.

The Institute committee revising the eminent domain laws is redrafting certain sections of its original recommendation in response to public comments and lawyers' suggestions.

The probate revision committee has undertaken to revise Alabama's guardianship laws. Alabama now has statutes dealing with guardians of minors and mental incompetents; guardians for handling welfare funds; guardians for veterans; limited guardians and curators. We also provide for guardians of the person and guardian of property. This committee, chaired by E. T. Brown of Birmingham, welcomes your comments and recommendations to make our guardianship laws more simplified.

Alabama enacted its present Condominium law in 1971, six years before the Model Condominium Act was approved by the National Commissioners of State Laws. After ten years' experience of dealing with condominiums in Alabama, the Institute has undertaken to update, revise and complete Alabama's Condominium law. The committee, chaired by Albert Tully of Mobile, became acutely aware of the need for revision with the rapid development of condominiums in Gulf Shores after the devastation of Hurricane Frederic. After several years of slow real estate development, interest rates and prices are dropping causing developers to convert apartments in several of the major cities into condominiums. The legislature recently adopted Act 83-670 which deals with "Condominium time sharing." Sellers of "time sharing" plans must be licensed by the Alabama Real Estate Commission and their sales plans approved. □

## Short Story Contest

Through the grapevine it has been learned that there are several Alabama lawyers who are very talented creative writers. *The Alabama Lawyer* is therefore sponsoring a short-story contest for those authors. We invite any member to participate by sending two copies of their story to us no later than January 31, 1984.

The subject-matter is to your own choosing. Keep stories to 3,000 words or less—twelve typed, doublespaced pages on 8 1/2'' x 11'' paper. The winning short story, and possibly others, will appear in the May 1984 issue of *The Alabama Lawyer*.

If you are not a writer but know of an associate who is, please encourage them to participate—sometimes it takes a little push.

Send stories to *The Alabama Lawyer*, P.O. Box 4156, Montgomery, Alabama 36101.

# CLE News & Seminars

**Mary Lyn Pike**
*Staff Director, MCLE Commission*


## MCLE NEWS

### *1983 Compliance Reports Due on December 31*

Every member of the Alabama State Bar, resident and nonresident alike, must submit the form entitled "Annual Report of Compliance" by December 31, 1983. However, only those persons who held a 1983 Alabama occupational license, 1981 and 1982 Bar admittees, assistant and deputy attorneys general, district attorneys, and assistant or deputy district attorneys must report attendance of CLE activities. Others should claim the appropriate exemption and report credits earned, if any.

Carryover credits from 1981-82 were posted on the reporting forms mailed to members of the Bar in September. As provided in Regulation 3.7 of the Rules and Regulations for Mandatory Continuing Legal Education in Alabama, courses attended in 1981-82 but not reported in 1982 may not be reported in 1983. Extra credits earned in 1983 must be reported on the 1983 form in order to be used to meet the 1984 requirement. The MCLE Commission will permit amendment of 1983 reports until February 29, 1984. Request an amendment by sending a letter stating the title, sponsor, date and location of the addition as well as the credits earned. As specified in Rule 4.B., credits carried forward from 1981-82

## CONTINUING LEGAL EDUCATION OPPORTUNITIES

November, 1983—January, 1984

### SPONSORS

| Sponsor Code | Sponsor Name | Telephone Number |
|---|---|---|
| ABA | American Bar Association | (312) 947-4000 |
| ABANI | American Bar Association National Institutes | (312) 567-4675 |
| AICLE | Alabama Institute for Continuing Legal Education | (205) 348-6230 |
| ALI-ABA | American Law Institute-American Bar Association | (215) 243-1600 |
| BBA | Birmingham Bar Association | (205) 251-8006 |
| CICLE | Cumberland Institute for Continuing Legal Education | (205) 870-2865 |
| CLRA | Center for Litigation Risk Analysis | (415) 854-1104 |
| CLS | Center for Legal Studies | (215) 567-4800 |
| FP | Federal Publications | (202) 337-7000 |
| MBA | Mobile Bar Association | (205) 433-9790 |
| MLC | Miami Law Center | (305) 284-4762 |
| MSL | McGeorge School of Law | (205) 871-6665 |
| NCDA | National College of District Attorneys | (713) 749-1571 |
| NHLA | National Health Lawyers Association | (202) 393-3050 |
| PLI | Practising Law Institute | (212) 765-5700 |
| TTLA | Tuscaloosa Trial Lawyers Association | (205) 758-8332 |
| UA | University of Alabama | (205) 348-6371 |

### SCHEDULE OF SEMINARS

Because the following list of approved CLE activities was compiled in September 1983, it is not necessarily inclusive of all activities approved for November 1983 through January 1984. An attorney planning to attend an activity that is not listed should contact the sponsoring organization to determine whether it is approved for CLE credit in Alabama. If it has not been approved, the sponsor should submit an application for approval at least 30 days in advance of the program. Applications are available upon request from the MCLE Commission office: P. O. Box 671, Montgomery, Alabama 36101.

| Dates | Names and Places |
|---|---|
| November 4, 1983 | Birmingham. ***Collections.*** AICLE. Credits: 6.3. Cost: $65. |
| November 4-5, 1983 | New Orleans. ***Employee Dishonesty.*** ABANI. Credits: 13.4. Cost: $350 / members; $375 / non-members. |
| November 10-11, 1983 | Washington. ***Hazardous Wastes.*** ALI-ABA. Credits: 15.6. Cost: $335. |
| | New Orleans. ***Federal Appellate Practice.*** ALI-ABA. Credits: 9.6. Cost: $295. |
| November 11, 1983 | Birmingham. ***TEFRA Changes and Pension and Profit Sharing Plans.*** CICLE. Cost: $75. |
| November 14-15, 1983 | Atlanta. ***Computer Literacy for Lawyers.*** CLS. Credits: 13.5. Cost: $550. |
| November 17, 1983 | Montgomery. ***Appellate Practice.*** AICLE. Credits: 7.4. Cost: $65. |
| | Tuscaloosa. ***Summation and Argument*** (Part I). TTLA. Credits: 1.0. |
| November 17-18, 1983 | Chicago. ***Estate Planning.*** PLI. Credits: 12.0. Cost: $325. |
| | Tuscaloosa. ***Federal Tax Clinic.*** UA. Credits: 14.4. |
| November 17-19, 1983 | Houston. ***Commercial Real Estate Leasing.*** ALI-ABA. Credits: 23.0. Cost: $395. |

| | |
|---|---|
| November 18, 1983 | Birmingham. ***Appellate Practice.*** AICLE. Credits: 7.4. Cost: $65. |
| | Birmingham. ***Alabama Probate Code.*** BBA. Credits: 3.4. Cost: $15/members; $25/non-members. |
| | Birmingham. ***Real Estate.*** CICLE. Cost: $75. |
| November 29-December 2, 1983 | Washington. ***Litigating Asbestos Claims.*** FP. Cost: $725. |
| December 1-2, 1983 | New York. ***Advanced Antitrust Seminar.*** PLI. Credits: 12.6. Cost: $450. |
| | New York. ***Chapter 11 Business Reorganizations.*** PLI. Credits: 13.2. Cost: $350. |
| | Birmingham. ***Focus on the Jury: Strategic Considerations in Persuasion.*** CICLE. Credits: 11.9. Cost: $150. |
| December 2, 1983 | Birmingham. ***Estate Planning.*** AICLE. Credits: 7.3. Cost: $65. |
| December 2-3, 1983 | Miami. ***Historic Preservation Law.*** ALI-ABA. Credits: 12.5. Cost: $295. |
| | San Francisco. ***Occupational Disease Litigation.*** PLI. Credits: 13.2. Cost: $375. |
| December 6-7, 1983 | Washington. ***Health Planning and the Law.*** NHLA. Credits: 12.3. |
| December 8-9, 1983 | Arlington. ***Advanced Evidence and Trial Techniques.*** ALI-ABA. Credits: 15.5. Cost: $335. |
| | New York. ***The Jury: Techniques for the Trial Lawyer.*** PLI. Credits: 13.2. Cost: $350. |
| December 9, 1983 | Birmingham. ***Social Security Disability.*** CICLE. Cost: $75. |
| December 12-13, 1983 | New Orleans. ***Equipment Leasing.*** PLI. Credits: 14.4. Cost: $350. |
| | New York. ***Realty Joint Ventures.*** PLI. Credits: 13.2. Cost: $425. |
| December 15, 1983 | Tuscaloosa. ***Summation and Argument*** (Part 2). TTLA. Credits: 1.0. |
| | Atlanta. ***Litigation Risk Analysis.***™ CLRA. Credits: 7.9. Cost: $575. |
| December 16, 1983 | Birmingham. ***Real Estate Law.*** BBA. Credits: 3.4. Cost: $15/members; $25/non-members. |
| | Birmingham. ***Business Torts and Antitrust Law.*** CICLE. Credits: 6.0. Cost: $75. |
| | Mobile. ***Irving Younger on Hearsay.*** MBA. Credits: 3.5. Cost: $10. |
| January 9-13, 1984 | Miami. ***Estate Planning.*** MLC. Credits: 14.4. |
| January 12-13, 1984 | San Francisco. ***Corporate and Outside Counsel.*** ABANI. Credits: 11.4. Cost: $320/members; $350/non-members. |
| January 12-13, 1984 | San Francisco. ***Advanced Antitrust Seminar.*** PLI. Credits: 12.6. Cost: $375. |
| January 20, 1984 | Birmingham. ***Checklist for Incorporating a New Business.*** BBA. Credits: 1.0. Cost: $10. |
| January 22-26, 1984 | Denver. ***Trial Advocacy for Prosecutors.*** NCDA. |
| January 26, 1984 | Montgomery. ***Sales Law in Alabama.*** AICLE. Cost: $65. |
| January 27, 1984 | Birmingham. ***Sales Law in Alabama.*** AICLE. Cost: $65. |
| | Birmingham. ***Effective Trial Techniques.*** BBA. Credits: 3.4. |
| January 30-February 3, 1984 | Vail. ***Recent Developments in the Law.*** AICLE. Cost: $75. |
| January 28-February 4, 1984 | Park City. ***Alumni CLE Ski Trip.*** CICLE. |
| January 30-February 4, 1984 | Salzburg. ***Commercial Agency.*** MSL. Credits: 12.0. Cost: $325. |

cannot be used after 1983. Only credits earned but not needed in 1983 may be designated as carryover credits for 1984.

Only approved CLE courses attended in 1983 may be reported on the form. Approved courses are those offered by sponsors listed at Regulation 4.2 and 44 *Alabama Lawyer* 81, 197, 253 (1983), or courses that have been accredited by the MCLE Commission upon application by the sponsoring organizations. Courses not yet approved cannot be accepted. You may ascertain the status of a course by contacting the sponsoring organization or by calling the MCLE Commission office (269-1515). Applications for approval may be obtained by writing to:

MCLE Commission
Alabama State Bar
P. O. Box 671
Montgomery, Alabama 36101.

Teaching credit is available for attorneys who contribute to the Bar by serving as speakers in approved CLE courses, guest lecturers in accredited law schools, and full-time or part-time faculty in accredited law schools. Teaching in other settings does not earn CLE credit. Six CLE credits are awarded to CLE speakers and guest lecturers for each hour of presentation accompanied by a thorough handout. Three CLE credits are awarded for presentations not so accompanied. Repeat presentations qualify for one half of the credits available for the original presentation. Six CLE credits are awarded to law school teachers for each hour of academic credit awarded by the schools for the courses.

### *Alabama State Bar Annual Meeting: CLE Credit*

The following portions of the 1983 annual meeting qualified for CLE credit: "Recent Developments in the Law", 6.6; "Policing the Bar", 1.5; Administrative Law, 1.5; Criminal Law, 1.5; Practice and Procedure, 2.0; Corporation, Banking and Business Law, 1.0; Oil, Gas and Mineral Law, 1.0; Taxation, 1.0; Environmental Law, 1.0; Labor Law, 1.0; Business Meeting, 2.0. The business meeting was designated an approved CLE activity by the Supreme Court of Alabama on June 14, 1983. □

# Opinions of the General Counsel

William H. Morrow, Jr.

## QUESTION:

"When the Attorney General or an Assistant Attorney General ceases to be a public employee and enters into private practice may he accept appointment as a Special Assistant Attorney General to complete matters in which he had substantial responsibility while he was a public employee?"

## ANSWER:

Acceptance of appointment as a Special Assistant Attorney General by a former Attorney General as Assistant Attorney General engaged in private practice to complete matters in which he had substantial responsibility while he was a public employee would not be unethical or a violation of Disciplinary Rule 9-101(B).

## DISCUSSION:

On at least three occasions requests for opinions have been directed to the Office of the General Counsel and the Disciplinary Commission involving the question posed herein.

Disciplinary Rule 9-101 (B) provides:

> "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

We arrive at the foregoing conclusion for at least two reasons. First, it is our opinion that the evil which DR 9-101 (B) was designed to prevent is inapplicable to the specific facts in this situation. DR 9-101 (B) was designed to prevent a former public employee from becoming intimately acquainted with a matter which he handled as a public employee and exercised substantial responsibility and then accepting employment from a person, individual or corporate, and using this knowledge for the benefit of his new client and adversely to the public entity by which he was previously employed. This reason for the rule does not apply in this case since as a Special Assistant Attorney General the attorney, although engaging in private practice, would continue to pursue the same goals and objectives in the matters as to which he heretofore had substantial responsibility as a public employee.

Secondly, an answer to the question requires some consideration of the precise meaning of the words "private employment" as used in DR 9-101 (B). We are of the opinion that the "private employment" contemplated by DR 9-101 (B) would not include acceptance of employment as a Special Assistant Attorney General. It can be argued that a Special Assistant Attorney General is still a "public employee" within the contemplation of the rule since he would merely be continuing to perform the identical duties with regard to the specific matters in which he had substantial responsibility as a public employee.

We do not believe that a strictly literal interpretation of DR 9-101 (B) should be applied and that it is in the best interest of office of the Attorney General, the courts and the public that the rule should be applied as described herein. □

## Rounding up Renovations

A very special issue of *The Alabama Lawyer* is upcoming and we want to invite you to be a part of it!

Our May 1984 issue will feature "old buildings for modern uses"—namely, the restoration of old buildings or homes for law offices. We have already started getting this feature together so don't be left out.

Please send historical (if any) or background information about your law office to: *The Alabama Lawyer,* P.O. Box 4156, Montgomery, AL 36101. We also will publish several photos of offices selected statewide—please include a snapshot of your office. Formal pictures can be made at a later date.

# Disciplinary Report

## Disbarments

**John Bennett Samford,** of Montgomery and Opelika, was disbarred, effective September 26, 1983, for having violated DR 1-102(A)(4), 1-102(A)(6), 9-102(B)(1), and 9-102(B)(4), by having obtained money from an insurance company on behalf of a client, and having failed to deliver the money to the client or notify the client of the receipt of the money.

**Fred J. Sandefer,** of Birmingham, was disbarred effective October 25, 1983, for having violated DR 1-102(A)(4) in having falsely represented to a creditor that an indebtedness had been paid and presenting false evidence of payment to the creditor, namely, a spurious cancelled check which did not, in fact, represent payment of the indebtedness.

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## Public Censure

On July 20, 1983, Huntsville attorney **Clement J. Cartron** was publicly censured before the Board of Bar Commissioners of the Alabama State Bar for violation of Disciplinary Rules 9-102(A)(2), 9-102(B)(1), 1-102(A)(5), and 1-102(A)(6) of the Code of Professional Responsibility of the Alabama State Bar. It was found that Mr. Cartron had filed a garnishment on behalf of one of his clients to collect past due child support payments and that he continued to collect funds through the garnishment after satisfaction of the judgment. It was further found that Mr. Cartron had failed to advise his client of the receipt of the funds paid after satisfaction of the judgment. The Disciplinary Commission of the Alabama State Bar determined that Mr. Cartron's conduct was prejudicial to the administration of justice and adversely reflected on his fitness to practice law. They also found that Mr. Cartron had violated association rules by failing to notify his client of the receipt of funds obtained on her behalf.

## Private Reprimands

On July 20, 1983 a private reprimand was administered to an Alabama attorney for violation of Disciplinary Rule 7-107(F)(2) which is concerned with extrajudicial statements made during the pendency of a civil lawsuit. It was the finding of the Disciplinary Commission that the respondent attorney had made a written report to his client, a county commission, regarding the character and credibility of a party, witness, or perspective witness to a civil lawsuit then pending against the client. It was the further finding of the Disciplinary Commission that the report to the county commission on the lawsuit was made a part of the minutes of the county commission meeting, and subsequently read aloud for the press and reported thereafter both in print and electronic media. The Commission found that extrajudicial statements of this type are in violation of the Disciplinary Rule above cited and that the respondent should receive a private reprimand for the violation.

On October 7, 1983, private reprimands were given for the following violations:

- A lawyer was privately reprimanded for having violated DR 5-101(C), by having filed a petition to modify a divorce decree on behalf of an individual, after having previously represented that individual's former spouse in the original divorce proceeding.
- A lawyer received a private reprimand for violation of Disciplinary Rule 1-102(A)(6), engaging in conduct that adversely reflects on his fitness to practice law, for failing to correct errors in real estate documents prepared by him, which were brought to his attention by his client, and for falsely promising the client that he would do so.
- A lawyer was privately reprimanded for having violated DR 1-102(A)(3), (4) and (6) by knowingly issuing two worthless checks to an associate counsel in payment of his share of the fee in a criminal case, and by then failing to make the checks good, even after demand by the associate counsel.
- A lawyer was privately reprimanded for having willfully neglected a legal matter entrusted to him, in violation of DR 6-101(A), by having failed to pursue the probate of a will, from the filing of the petition for probate on February 6, 1981, until after having been notified that a complaint had been filed against him in the matter in August 1982.

# About Members Among Firms

## About Members

Mobile County Circuit Judge **Robert E. Hodnette, Jr.,** was elected president of the Alabama Association of Circuit Court Judges in July.

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**Irving Silver,** a Mobile lawyer, has recently been installed as president of the Estate Planning Council of Mobile, Inc. Mobile attorneys **Kenneth E. Niemeyer** and **Charles B. Bailey** were elected second vice president and secretary, respectively.

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Alabama Gas Corporation has announced the election of **William Michael Warren, Jr.,** as vice president and general counsel. Previous to joining Alabama Gas, Warren was with the law firm of Bradley, Arant, Rose and White in Birmingham.

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Effective September 21, 1983, **Brian Dowling** became employed as city attorney for Dothan, Alabama. Previously, he was in private practice in Dothan.

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**Daniel J. Meador,** former dean at the University of Alabama and a member of the Alabama State Bar, was presented the 1983 American Judicature Society Justice Award at the society's annual meeting in July. Presently, Meador is a professor of law at the University of Virginia Law School.

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**John D. Saxon,** counsel to the U.S. Senate Select Committee on Ethics, has been appointed by President Reagan to the Presidents' Commission on White House Fellowships. Saxon, appointed by President Carter as a 1978-79 White House Fellow, is currently president of both the White House Fellows Association and the White House Fellows Foundation.

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**Leonard Wertheimer III,** recently elected as a Fellow of the American College of Probate Counsel, practices law in Birmingham rather than in Mobile, as was incorrectly noted in the September issue of *The Alabama Lawyer.*

Tuskegee attorney **Jock M. Smith** was named president of the Alabama Lawyers Association at the organization's 11th Annual Meeting held in August.

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Talladega County District Attorney **Robert L. Rumsey III** was elected president of the Alabama District Attorneys' Association at their summer conference held in August.

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**James D. Harris, Jr.,** has become a member of the law firm of Harlin, Parker & Rudloff located at 519 East Tenth Street, Bowling Green, Kentucky.

## Among Firms

**Gary D. Porter, Thomas M. Taul III, C. MacLeod Fuller** and **Joseph T. Brunson** are pleased to announce the relocation of their offices to Suite 3002—The LaClede, 150 Government Street, Mobile, Alabama.

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**Irvin Grodsky** is pleased to announce that **Tamara Olen Mitchell** has joined him in the formation of a partnership for the practice of law under the firm name of **Grodsky & Mitchell.** Offices are located at Suite 2010, First National Bank Building, Mobile, Alabama. Phone 433-3657.

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**Ronald A. Davidson** wishes to announce that he is now engaged in the general practice of law with offices at 301 Title Building, 2030 Third Avenue North, Birmingham, Alabama 35203. Phone 252-1146.

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**Thad Yancey, Jr.,** wishes to announce the relocation of his office to 519-C South Brundidge Street, Troy, Alabama. Phone 566-3400.

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**Quinton R. Bowers** announces the relocation of his law office to 308 Frank Nelson Building, 205 North Twentieth Street, Birmingham, Alabama 35203. Phone 323-2445.

**Lionel C. Williams** wishes to announce the relocation of his office to Suite 2109, First National Bank Building, Mobile, Alabama 36602. Phone 433-5703.

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**E. Dwight Fay, Jr.,** announces the opening of his office for the general practice of law at Suite B, 223 East Side Square, Huntsville, Alabama 35801. Phone 539-0058.

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**Marcus Wendell Reid,** formerly associated with the law office of J. Mason Davis, and **Cleophus Thomas, Jr.,** formerly law clerk to U.S. District Judge J. Foy Guin, announce the formation of a partnership for the general practice of law. The firm, **Reid & Thomas,** is located at 514 SouthTrust Bank Building, P.O. Box 2303, Anniston, Alabama 36202. Phone 236-1240.

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**J. Michael Conaway, R. Bruce Hall, Cada M. Carter** and **Barry Bledsoe** are pleased to announce their association for the general practice of law. The firm of **Conaway, Hall, Carter & Bledsoe** is located at 1303 West Main Street, Dothan, Alabama. Phone 793-3610.

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**John Burdette Bates** announces the removal of his office to #10 Office Park Circle, Suite 122, Birmingham, Alabama 35223.

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**George W. Andrews III** and **Lynn Robertson Jackson** are pleased to announce the formation of a partnership for the general practice of law under the firm name of **Andrews & Jackson** with offices at the A.B. Robertson Building, Clayton, Alabama 36016. Phone 755-3508.

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**Reneau, Enslen and Reneau** announce the dissolution of their law partnership which became effective September 1, 1983. **W.B. Reneau** and **Robert B. Reneau** have established a partnership under the name of **Reneau and Reneau** at the same location, 114 South Main Street, Wetumpka, Alabama 36092. Phone 567-8488. **John E. Enslen** has established a sole proprietorship at 499 South Main Street, Wetumpka, Alabama 36092. Phone 567-2545.

**Capell, Howard, Knabe & Cobbs, P.A.,** is pleased to announce that **Henry H. Hutchinson** became a member of the firm on June 27, 1983. Offices are located at 57 Adams Avenue, Montgomery, Alabama 36104.

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**John Martin Galese** announces the relocation of his law office to 3058 Independence Drive, Homewood, Alabama 35209. Phone 870-0663.

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**William D. Nichols** announces the opening of his law office at One Riverchase Office Plaza, Suite 214, Birmingham, Alabama 35244. Phone 988-4570.

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**Hardin and Hollis** is pleased to announce that **James C. Gray III** and **Theresa Berg Johanson** have become associated with the firm. Offices are at 1825 Morris Avenue, Birmingham, Alabama 35203.

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**Wm. Gregory Waldrep,** Attorney at Law, announces the opening of his office for the general practice of law at 836 Second Avenue, Columbus, Georgia 31902. P.O. Box 468. Phone (404) 324-7115.

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**Bill Thompson** takes pleasure in announcing that **Richard Shoemaker** has joined the firm in the practice of law. Offices are located at 217 North Court Street, Talladega, Alabama.

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**Horace Moon, Jr.,** and **William G. Jones III** are pleased to announce that **William A. Donaldson** has joined them in the practice of law at 2151 Government Street, Mobile, Alabama 36606. Phone 479-1457.

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**James M. Campbell** and **Vaughn M. Stewart II** are pleased to announce their association in the practice of law. Offices are located at 401 AmSouth Bank Building, P.O. Box 2003, Anniston, Alabama 36202. Phone 238-8543.

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To have an announcement listed in this column, send it to *The Alabama Lawyer,* P.O. Box 4156, Montgomery, Alabama 36101. Announcements must be received no later than a month prior to publication date.

# The Lighter Side of Law

## Humorous excerpts from court proceedings:

**Q.** Getting to the problem of his diagnosis and syndromes, does Mr. Doe fit a known psychiatric syndrome?

**A.** Yes.

**Q.** What is it?

**A.** A neurotic, undifferentiated schizophrenic reaction of moderate to severe quantity, with prominent sociopathic depressive and socially deviant features.

**Q.** So there is nothing unusual about him?

---

**Q.** After you made your appraisal of the property, why did you consult with three other appraisers?

**A.** Just to confirm my own judgment as to the value.

**Q.** Didn't you trust your own judgment?

**A.** Yes, sir.

**Q.** Then why did you consult with three others?

**A.** I don't know, unless it's for the same reason that you have three other lawyers at the table with you.

---

**Q.** Did you see the accident?

**A.** No, sir. I was asleep.

**Q.** You were what?

**A.** I was asleep.

**Q.** Why were you asleep?

**A.** I guess it's just a habit or a disease. It runs in the family. Always have done it, all my life.

**Q.** Did you ever stay all night with this man in Birmingham?

**A.** I refuse to answer that question.

**Q.** Did you ever stay all night with this man in Montgomery?

**A.** I refuse to answer that question.

**Q.** Did you ever stay all night with this man in Mobile?

**A.** No.

---

**Q.** Did he ever get out of your sight?

**A.** No, I don't believe so.

**Q.** He remained constantly in your sight?

**A.** I wasn't watching him constantly, but there wasn't any time that I looked at him that I didn't see him.

**THE COURT:** Do you have anything to say before I sentence you?

**THE DEFENDANT:** No, Judge. You're the cleaver and I'm the meat, so just cut away.

---

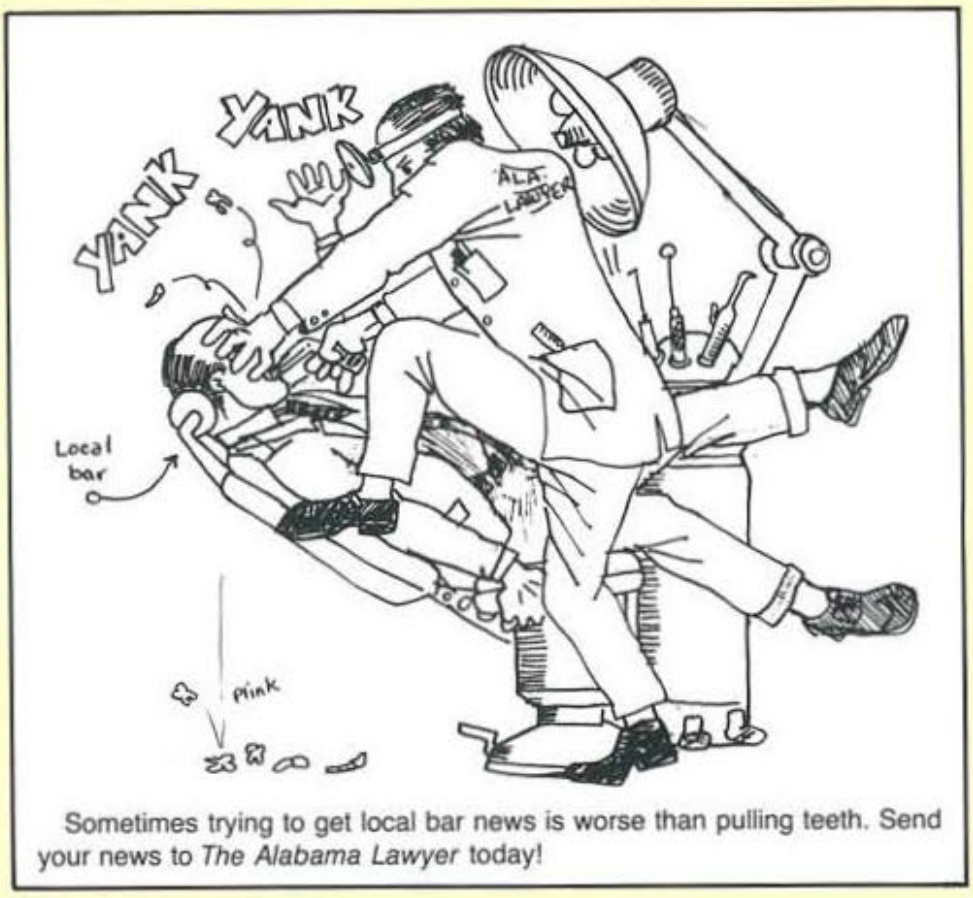
**THE COURT:** Homer Crane, you have been charged with habitual drunkenness. How do you plead?

**THE DEFENDANT:** Habitual thirst, your Honor.

---

**Q.** Are you sure this is the man who stole your car last Thursday?

**A.** I was. Now, after cross-examination, I'm not sure I ever owned a car.




Sometimes trying to get local bar news is worse than pulling teeth. Send your news to *The Alabama Lawyer* today!

# SECTIONS REPORT

## Antitrust Section

The Antitrust Section of the Alabama State Bar, under the chairmanship of Mr. Lewis Page, has set out four major goals of the section for the coming year: to sponsor its annual CLE seminar, to jointly sponsor a regional antitrust conference, to publish two newsletters, and to consider a change of the section name.

On December 16, 1983, the Antitrust Section and the Cumberland School of Law will sponsor our annual seminar on business torts and antitrust law. The morning session will focus on the development in Alabama law of remedies for commercial injury, including the law related to trade secrets, trade names and trademarks, unfair competition, interference with contract, business conspiracies, and the making of contracts without the intent to perform them. The afternoon session will move to a broader scope of topics, including an overview of securities fraud actions, a report on computer litigation, a review of antitrust principles governing territorial restriction and exclusive dealing arrangements, the use of the federal RICO statute in civil cases, and the use of the motion to disqualify opposing counsel.

The section is attempting to arrange a joint conference with the Antitrust Sections of the Alabama, Florida, and Georgia Bar Associations. We hope the seminar will be in the spring of 1984 at a resort location.

The Antitrust Section newsletter will be published twice—in early December and in the spring. In this way, we hope to further acquaint our membership with our programs and recent developments of interest. Mike Edwards is our newsletter editor.

The section is also studying the possibility of seeking a change in their name, to reflect the reality that antitrust claims are often only one of a number of related claims in cases seeking relief for commercial injuries.

## Environmental Law Section

Mr. Neil C. Johnston, chairman of the Alabama State Bar Environmental Law Section, has announced a Program Planning Committee has been established consisting of the following persons:

Neil C. Johnston
Katheryn A. Eckerlein
Mark E. Brandon
Richard Craig Kneisel
Dayton F. Hale, Jr.
Fournier J. Gale III
Earle Boyd Self
William L. Andreen

The Planning Committee will be working on a program of the application of environmental laws to present day practice and hopes to present such a program during the second quarter of 1984.

Membership in the Environmental Law Section is open to the Alabama State Bar members. Anyone interested in becoming a member should submit their request to Neil Johnston at the following address:

Neil C. Johnston
Hand, Arendall, Bedsole,
Greaves & Johnston
P.O. Box 123
Mobile, Alabama 36601

## Oil, Gas and Mineral Law Section

The Oil, Gas and Mineral Law Section of the Alabama State Bar plans to work with Continuing Legal Education at the University of Alabama School of Law and Cumberland School of Law to present one or more Oil, Gas and Mineral Law Seminars in 1984. The section also has plans to compile and make available to section members and other members of the Bar summaries of all significant oil, gas and mineral decisions in the state of Alabama for the past several years.

Additionally, the section has plans to undertake a membership drive during the 1983-84 year and to present an informative program on oil, gas and mineral law at the 1984 State Bar Annual Meeting to be held in Mobile. □

# The Final Judgment

## W. H. Morton

On June 9, 1983, it being God's will, Wade Hampton Morton died at the age of eighty.

Wade was born in Cartersville, Georgia, but at an early age his family moved to Albertville, Alabama, where he was graduated from high school. He attended Howard College and was president of the Alumni Association at the time funds were being raised for the new campus of his school, now Samford University. Upon his graduation with highest honors from the Birmingham School of Law in 1939, he commenced the practice of law and taught at the school at night. After over twenty-five years as a partner in the firm of Whitmire, Morton and Coleman, Wade finished his practice with his retirement in 1979.

His activity in the affairs of the Bar was evidenced by his membership in the Birmingham, Alabama and American Bar Associations. The esteem in which he was held in his profession was highlighted by his election as the Birmingham Bar Association Secretary in 1957, as a member of the Bar Association Executive Committee from 1961-1963, and as one of the two lawyers on the prestigious Jefferson County Judicial Commission from 1964 to 1970. He was one of the Trustees of Legal Aid from 1966-1968. Although he was involved in a general practice, he was a true specialist in the chancery court and in estate matters. He was renowned for his knowledge of pleading before the new Rules of Civil Procedure were adopted.

Wade's church came next to his love for and pride in his family. He was a founder and member of St. Luke's Episcopal Church in Mountain Brook. He served on the vestry of the church for many years and was a senior warden and the church chancellor. From 1955 to 1959 he was treasurer of the Episcopal Foundation of Jefferson County.

He earned the respect of each member of the Bar through the hallmark of integrity, ability, hard work, and love of the law, which was evidenced in every act of his career. His ideals, principles, sense of value, love of the truth could well be the finest foundation of the fledgling lawyer. Although he was truly a gentle person and known for his courtly manner and kindness to all, there was a bit of steel to be found when principle, right or wrong were involved. The two renowned Wade Hamptons of South Carolina must view with pride the achievements of this man whose given name was theirs.

The Bar loved him, his church loved him, his family loved him, and he will be sorely missed by all who crossed his path, particularly the individual honored by the opportunity to set down these words.

He is survived by his wife, Mary McIntosh Miller; his daughter, Mrs. George Morris III; and two sons, Wade Hampton, Jr., and Bruce Edward, who followed their illustrious father in his chosen career.

## G.W. Nichols, Jr.

George W. Nichols, Jr., a popular and widely-known Tuscaloosa attorney, died on September 12, 1983. He was fifty-two.

Born in Mobile on January 14, 1931, Judge Nichols graduated from Mobile's Murphy High School in 1948, then entered the University of Alabama. With a major in history, he earned his B.A. degree in 1953. He served in the U.S. Air Force from 1954-56, then he entered the University of Alabama School of Law and received his LL.B. degree in 1958. Soon afterwards, he became the law partner of A.K. Callahan. In 1971, Judge Nichols was appointed by President Richard Nixon as U.S. Magistrate in Tuscaloosa, a post he held for three years. That same year he served as president of the Tuscaloosa County Bar Association.

In 1966 Judge Nichols became active in Republican Party politics and served on the executive committees of the party at the state and local levels. In 1976 he was a delegate to the Republican National Convention in Kansas City. For many years, Judge Nichols also served as an election official for Tuscaloosa County during the general elections.

Judge Nichols was a member of the Tuscaloosa, Alabama, and American Bar Associations. He was also a member of the Alabama Trial Lawyers Association, and from 1967-80 he was active in the Farrah Law Society of the University of Alabama School of Law.

Long interested in Alabama history, Judge Nichols was a member of the Tuscaloosa County Preservation Society. He was a proponent of restoration of the older neighborhoods in downtown Tuscaloosa, and had renovated an old house which he used as his office building. He was a member of the Calvary Baptist Church.

He is fondly remembered by his professional colleagues for his friendly, outgoing nature, and as a master of courtroom procedure whose general practice of law earned him considerable respect in the arenas of criminal cases and damage suits. His clients recall him as one who wore their problems as his very own and one who exhibited the highest caliber of compassion to those who engaged his services as an attorney.

Judge Nichols' survivors include his children, Dana Rudolph Nichols, Lisa Susan Nichols and George W. Nichols III, all of Tuscaloosa; his mother, Mrs. Lucille McKnight Nichols of Mobile; three sisters and four brothers.

### IN MEMORIAM

**Cleveland, Grady Garland, Jr.**—Eufaula
Admitted: 1941 Died: July 7, 1983

**Foster, Harold Thomas, Sr.**—Scottsboro
Admitted: 1931 Died: August 30, 1983

**Nichols, George Webb, Jr.**—Tuscaloosa
Admitted: 1958 Died: September 14, 1983

**Stapp, Jerry Lee**—Huntsville
Admitted: 1954 Died: September 10, 1983

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

## J. B. Noel, Jr.

James Barney Noel, Jr., of Birmingham died July 11, 1983. He was fifty-six.

Mr. Noel was born in Birmingham on June 4, 1927. He attended the University of Alabama where he received a B.S. in Commerce and Business Administration, then entered the University of Alabama School of Law and earned his LL.B. in 1951. He was admitted to the Alabama Bar that same year.

Mr. Noel was employed by West Publishing Company for thirty-one years. Eighteen of those years he represented the company in Alabama. He also worked in Virginia and California, but in 1975 requested that West allow him to return to his native Alabama. His death occurred just two weeks before he had planned to retire.

Mr. Noel was active in the Alabama Republican Party. In 1980 he represented Alabama in the Electoral College which elected Ronald Reagan as president. He also supported many charitable and civic causes in both Alabama and California.

The James B. Noel Research Fund has been established in Mr. Noel's memory as a permanent endowment to the library at the University of Alabama School of Law. The fund is a fitting tribute to a lawyer whose career was devoted to the furtherance of legal research. Contributions to the research fund may be sent to the University of Alabama School of Law, P. O. Box 1435, University, Alabama 35486.

Mr. Noel is survived by his wife, Shirley S. Noel, and his son, Jim, who is a member of the Alabama Bar.

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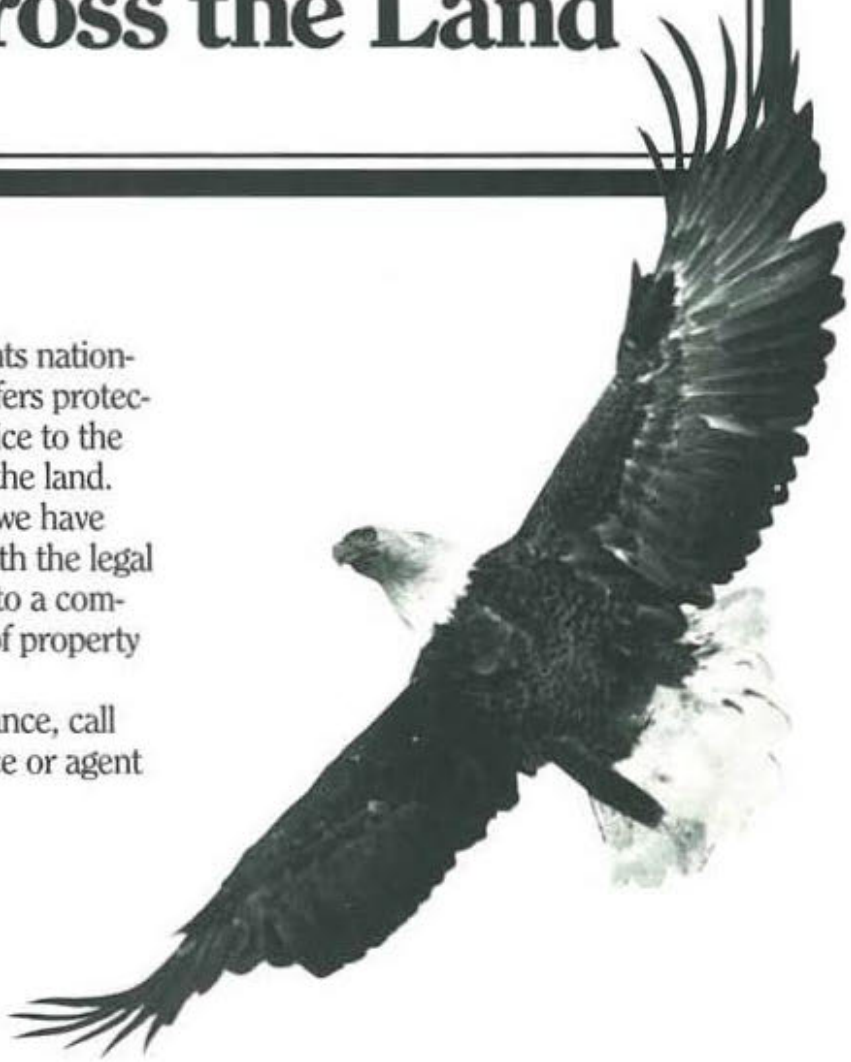

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**AM JUR PLEADING PRACTICE FORMS,** Am Jur Proof of Facts 2d, Am Jur 2d. Need up-to-date supplements. Contact: Mitchell, Green, Pino & Medaris, P.O. Box 766, Alabaster, AL 35007. Phone 663-1581.

**FOR SALE:** Southern Reporter; First Series, Vol. 1 to 60; 71 to 150; 169 to 175 and 190—mostly leather; Second Series, Vol. 1 to 100, new condition. Write your best offer to: Raymond P. Mims, Sr., 2537 Ridgewood Terr. N.W., Atlanta, GA 30318.

**FOR SALE:** Southern Digest with 1983 pocket parts and supplements. Good condition. Call (205) 533-3500 or write Charles E. Richardson, P.O. Box 287, Huntsville, AL 35804.

**WEST US CODE** Annotated. Purchased new in 1982. Includes 1983 update. Contact Floyd Likins, P.O. Box 2142, Opelika, AL 36801. Phone 749-5606.

**FOR SALE:** Am Jur 2d; ALR 2d, later case service; ALR 3d and ALR 4th. Contact David C. Howland, Suite 1425, Bank for Savings Building, Birmingham, AL 35203. Phone 323-1551.

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**EXPERT WITNESS/TOXICOLOGY.** Board Certified Ph.D. Toxicologist with over 20 years pertinent experience and over 50 peer-reviewed publications and abstracts, available as expert witness and consultant on matters relating to occupational/environmental health and product liability. R.A. Parent, Ph.D., D.A.B.T., P.O. Box 14787, Baton Rouge, LA 70898. Phone 504/766-3300.

## positions offered

**SEEKING EXPERIENCED** applicants for 2-year clerkships, summer, 1984. Upper 15% of law school class and/or law review; excellent writing, research skills. $20,256-29,374. Resume, transcript, and writing sample: Director, Staff Attorney's Office, 11th Circuit Court of Appeals, 56 Forsyth Street, N.W., Atlanta, GA 30303, by December 30, 1983.

**LEGAL SERVICES** Corp. of Alabama seeks licensed attorney for Dothan regional office. Send resume and writing sample to 161 South Oates Street, Dothan, AL 36301. Attention: Elizabeth Herbert, Managing Attorney.

## wanted

**USED BOOKS:** Alabama Code, ALR 2d (and later editions), Alabama Digest, Alabama or Southern Reporters, and an especially inexpensive set of Am Jur 2d. Call Reggie Hamner at the Alabama State Bar if you would like to sell any of the listed books. In Montgomery, 269-1515. Or toll-free in Alabama, 1-800-392-5660.

## miscellaneous

**AUSTRIAN ALPS SKI AND CLE.** $998. January 27-Feb. 5. Includes Air from Atlanta/Auto/First Class Hotel/2 nt. Salzburg/4 nt. Slopes/2 nt. Munich/Meals. SEMINAR COST $242. FOR INFORMATION: BACKROADS/JEAN, P.O. Box 7313, Birmingham, AL 35253. (205) 871-6665. 12 hrs. approved CLE credit.

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November 15 (January Issue)
January 15 (March Issue)
March 15 (May Issue)
May 15 (July Issue)
July 15 (September Issue)
September 15 (November Issue)

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## Recent Decisions *Continued from page 329*

search. The officers took two pieces of luggage after finding some discrepancies in the address information he gave. The officers detained the bags for ninety minutes in order to allow a drug detection dog to sniff the bags for narcotics. On the following Monday, a warrant was obtained and a search ensued. Cocaine was found and the defendant was subsequently convicted of possession with intent to distribute controlled substances.

The Supreme Court held that the defendant's motion to suppress should have been granted and that the seizure of the respondent's luggage was unreasonable within the meaning of the Fourth Amendment. Justice O'Connor highlighted the dispositive issue on appeal as follows:

> "There is no doubt that the agents made a 'seizure' of Place's luggage for purposes of the Fourth Amendment when, following his refusal to consent to a search, the agent told Place that he was going to take the luggage to a Federal Judge to secure issuance of a warrant.
>
> The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was unreasonable in the absence of probable cause. Although the 90-minute detention of respondent's luggage is sufficient to render the seizure unreasonable, the violation was exacerbated by the failure of the agents to accurately inform the respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and what arrangements would be made for the return of the luggage if the investigation dispelled the suspicion."

Ultimately the Supreme Court held that the detention of the defendant's luggage went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics. □

**New Admittees** to the Bar who are interested in purchasing the group picture or family pictures taken on the steps of the Supreme Court Building following the October admissions ceremony may do so by contacting Scott Photographic Services, P. O. Box 1361, Montgomery, AL 36102. Phone 262-8761.

**With this issue** of **The Alabama Lawyer** those who have purchased binders for Volume 44 will notice there are no metal rods left for their next issue. It's time to reorder! These attractive Alabama Lawyer binders may be purchased by sending a check for $6.50 to The Alabama Lawyer, P. O. Box 4156, Montgomery, AL 36101. If you are missing an issue, there are a limited number left which you may buy for $3.00 per copy, including postage.

**The Lawyer Referral Service** does work! At the end of a statewide, toll-free phone line to the state bar, your name will be given to potential clients specifically requesting a lawyer in your area of practice. The cost is only $25 for the entire year, so become a member of the Lawyer Referral Service in 1984. For an application or information contact the Alabama State Bar. The cities of Birmingham, Mobile, Huntsville and Tuscaloosa have their own Lawyer Referral Services locally.

**Have you moved recently?** If the answer to that question is yes, double-check that you have submitted a change of address to the Alabama State Bar. If your address is not changed, you will not receive your **Alabama Lawyer** or other important mailings from the bar association. Send your change of address to The Alabama State Bar, P. O. Box 671, Montgomery, AL 36101.

**News flash! The Alabama Lawyer** needs you to keep us informed of news in "your neck of the woods." Please send interesting news to The Alabama Lawyer, P. O. Box 4156, Montgomery, AL 36101. Phone (toll-free) 1-800-392-5660, or 269-1515 in Montgomery.

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# UPCOMING

**1983**

**December 2**
Board of Bar Commissioners Meeting, Montgomery

**1984**

**January 18-20**
ADAA Mid-Winter Conference, Birmingham

**January 27-28**
ATLA Mid-Winter Conference, Birmingham

**February 8-15**
ABA Midyear Meeting, Las Vegas, NV

**March 9-10**
Alabama State Bar Midyear Meeting, Montgomery

**May 18-19**
YLS Annual Seminar, Sandestin, FL

**July 12-14**
Alabama State Bar Convention, Mobile

The Alabama Lawyer



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# Got It Covered

## NOVEMBER

| | | |
|---|---|---|
| **FRI 4**<br>Collections, Birmingham (AICLE) | **FRI 11**<br>TEFRA Changes and Pension and Profit Sharing Plans, Birmingham (CICLE) | **THURS 17**<br>Appellate Practice, Montgomery (AICLE)<br>Summation and Argument, Tuscaloosa (TTLA) Part 1<br>Federal Tax Clinic, Tuscaloosa (UA) |
| **FRI 18**<br>Federal Tax Clinic, Tuscaloosa (UA)<br>Appellate Practice, Birmingham (AICLE)<br>Alabama Probate Code, Birmingham (BBA)<br>Real Estate, Birmingham (CICLE) | **THURS 24**<br>Thanksgiving Day | |

## DECEMBER

| | | |
|---|---|---|
| **THURS 1**<br>Focus on the Jury, Birmingham (CICLE) | **FRI 2**<br>Focus on the Jury, Birmingham (CICLE)<br>Estate Planning, Birmingham (AICLE)<br>Board of Commissioners Meeting, Montgomery | **FRI 9**<br>Social Security Disability, Birmingham (CICLE) |
| **THURS 15**<br>Summation and Argument, Tuscaloosa (TTLA) Part 2 | **FRI 16**<br>Real Estate Law, Birmingham (BBA)<br>Irving Younger on Hearsay, Mobile (MBA)<br>Business Torts and Antitrust Law, Birmingham (CICLE) | **SUN 25**<br>Christmas Day |

## JANUARY

| | | | | | |
|---|---|---|---|---|---|
| | **SUN 1**<br>New Year's Day | **FRI 20**<br>Checklist for Incorporating a New Business, Birmingham (BBA) | **THURS 26**<br>Sales Law in Alabama, Montgomery (AICLE) | **FRI 27**<br>Sales Law in Alabama, Birmingham (AICLE)<br>Effective Trial Techniques, Birmingham (BBA) | |