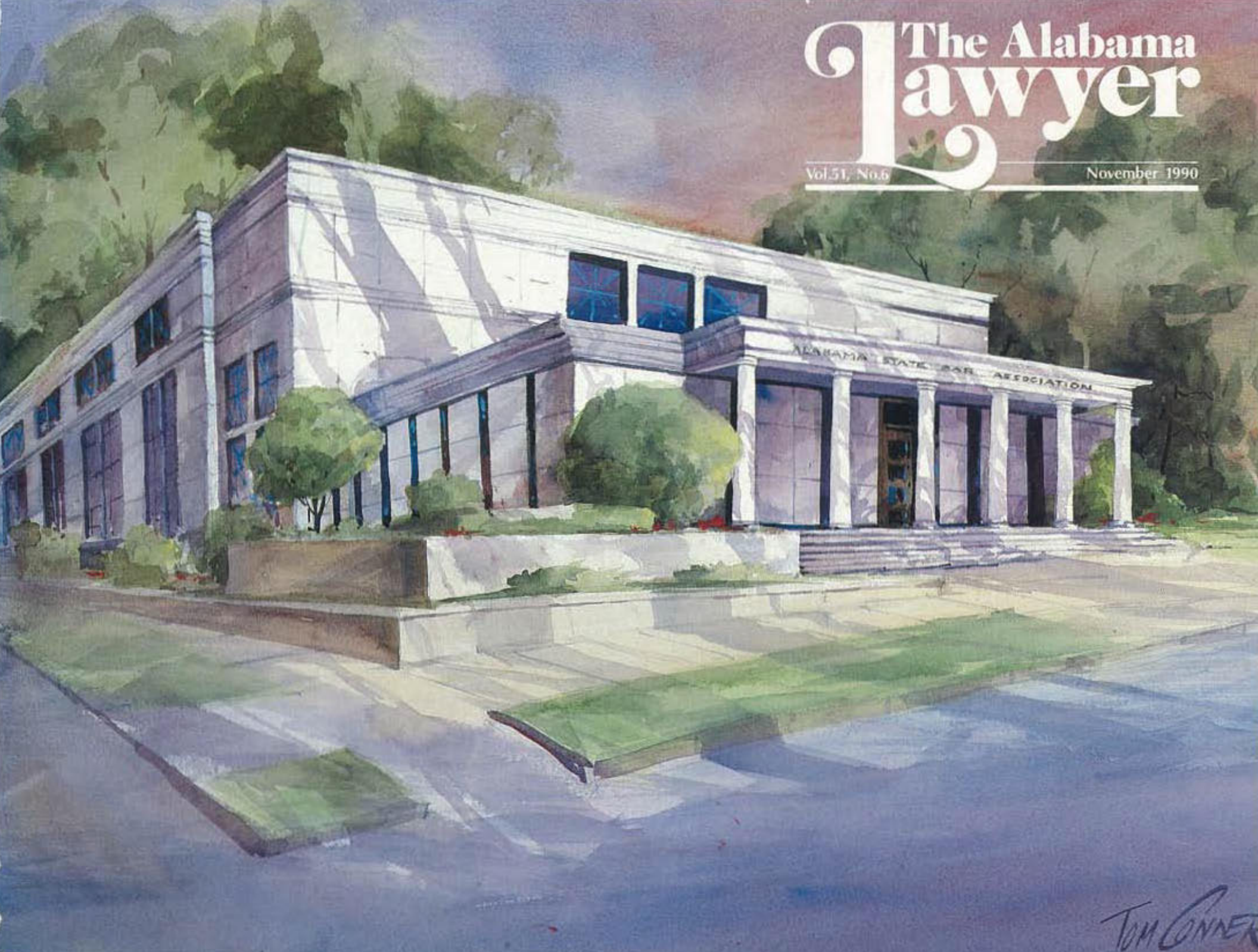

The Alabama Lawyer

Vol. 51, No. 6 November 1990

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The Alabama Lawyer

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In Brief

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

GENERAL INFORMATION The Alabama Lawyer, (ISSN 0002-4287), the official publication of the Alabama State Bar, is published seven times a year in the months of January, March, May, July, August (bar directory edition), September and November. Views and conclusions expressed in articles herein are those of the author, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Subscriptions: Alabama State Bar members receive **The Alabama Lawyer** as part of their annual dues payment; $15 of this goes toward subscriptions for **The Alabama Lawyer.** Advertising rates will be furnished upon request. Advertising copy is carefully reviewed, but publication herein does not necessarily imply endorsement of any product or service offered.

The Alabama Lawyer is published seven times a year for $15 per year in the United States and $20 outside the United States by the Alabama State Bar, 415 Dexter Avenue, Montgomery, AL 36104. Single issues are $3, plus postage for the journal, and $15 for the directory. Second-class postage paid at Montgomery, AL.

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

ON THE COVER — Montgomery artist Tom Connor painted the November cover. Connor is a well-known watercolorist, and the cover painting is his representation of the Alabama State Bar headquarters, following completion of the additional 32,500 square feet of construction currently underway.

Construction on the addition began October 1 and the estimated completion date is September 1991. Once again, all bar association activities will be under one roof. The current building will undergo some renovation when the new addition is finished, with a final project completion date of January 1992.

During construction, every member of the Alabama State Bar will be asked to make a minimum pledge of $300 toward this project. Pledges would be payable over a three-year period.

President Albritton's column in this issue addresses the need for this expansion.

With the construction of the new judicial building underway across the street from the bar headquarters and with our own new facilities, lawyers once again will have a "home away from home" in which to work and meet clients. Our bar commissioners again will have adequate space in which to meet. And, last but not least, once again we will have visitor parking.

INSIDE THIS ISSUE

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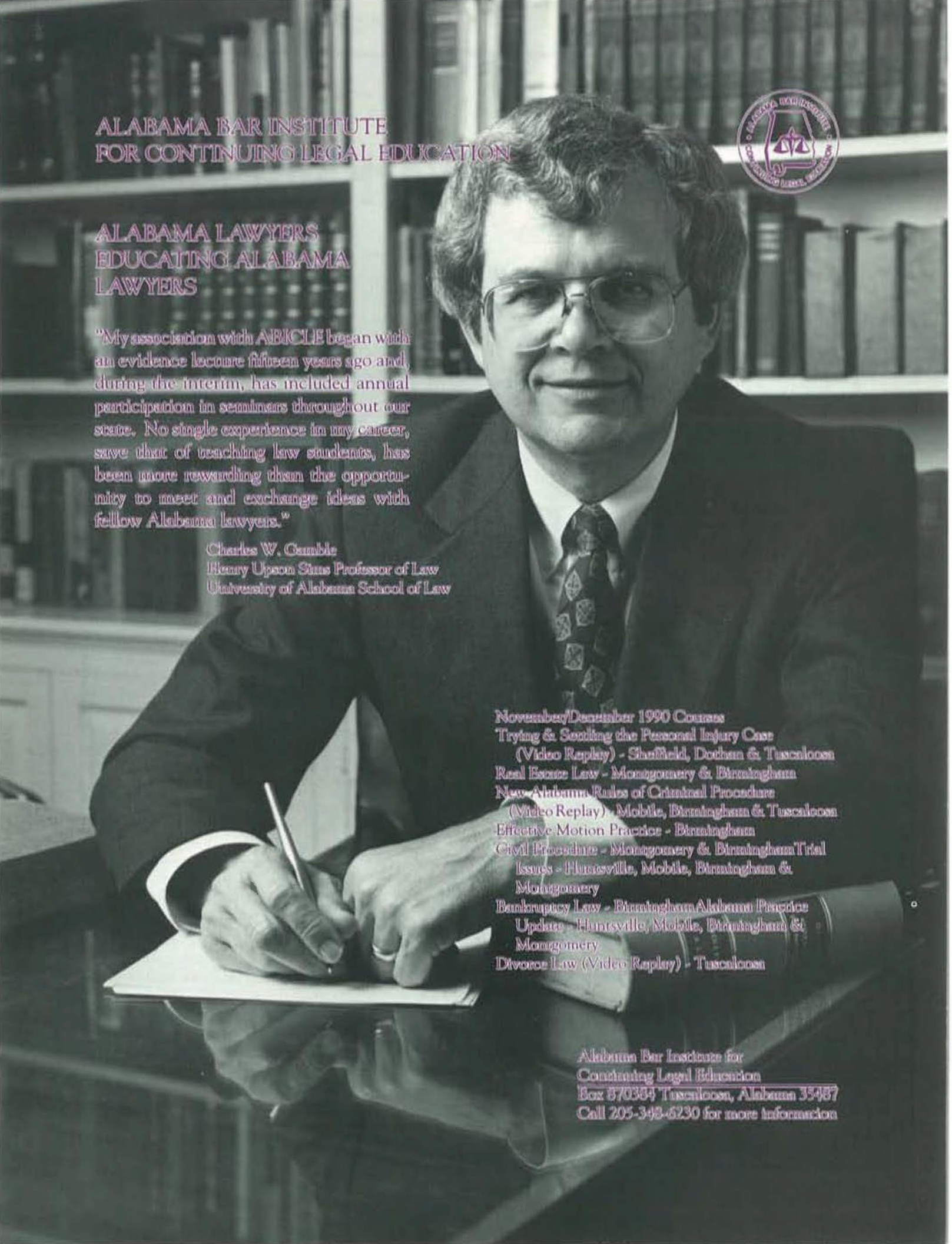

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Charles W. Gamble
Henry Upson Sims Professor of Law
University of Alabama School of Law

November/December 1990 Courses
Trying & Settling the Personal Injury Case (Video Replay) - Sheffield, Dothan & Tuscaloosa
Real Estate Law - Montgomery & Birmingham
New Alabama Rules of Criminal Procedure (Video Replay) - Mobile, Birmingham & Tuscaloosa
Effective Motion Practice - Birmingham
Civil Procedure - Montgomery & Birmingham Trial Issues - Huntsville, Mobile, Birmingham & Montgomery
Bankruptcy Law - Birmingham Alabama Practice Update - Huntsville, Mobile, Birmingham & Montgomery
Divorce Law (Video Replay) - Tuscaloosa

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Call 205-348-6230 for more information

President's Page

ALBRITTON

Alabama State Bar Association

The name is proudly emblazoned across the front of our beautiful headquarters building on Montgomery's Dexter Avenue.

Just as our profession has always been in the center of governmental activity, so, too, is our association's headquarters—a part of the state's governmental complex including the Capitol, the supreme court and the state office buildings.

And, just as governmental functions and responsibilities have grown through the years, the same thing has happened to our state bar.

In 1964 when our building was constructed the number of lawyers belonging to the Alabama State Bar totalled fewer than 2,200. We now number over 9,200, and we continue to grow larger every year.

In 1964 our building was state-of-the-art and justifiably a source of great pride to our members. Not only was it beautiful both outside and within, but it was functional, totally adequate for current needs, and seemed large enough for many years to come. Members and guests entered a large reception room with comfortable sofas and chairs. A visiting lawyer's office was available, as well as a small library and conference room, where out-of-town lawyers could conduct business, and meetings on bar business could be held. Ample storage space existed and our bar association was well-housed.

Many changes caused the association's needs for the physical plant to increase since 1964. With the number of lawyers growing by over 300 percent, the number of staff needed to service their needs and admissions matters has grown. The addition of new programs also has increased the need for staff and facilities. These include the Lawyer Referral Service, which last year processed 11,081 requests and generated an estimated over-$350,000 in fees for participating lawyers; the expanded and modernized *Alabama Lawyer* and *Bar Directory*; the *Alabama Bar Reporter*; the creation of committees and task forces now numbering 46 which involve over 900 volunteer lawyers in bar work; the establishment of 15 sections dedicated to specialized interests of their members; and one of the country's most successful IOLTA programs, which last year processed 51 requests for assistance and dealt with $934,000 received from trust accounts at no cost to participating members.

An area of major unavoidable growth has been the handling of lawyer discipline and other activities of the general counsel's office. In 1964, few complaints were filed against lawyers. Last year the number was 988. If we are to maintain our existing system of self-discipline, rather than having the disciplining of lawyers taken over by some commission outside of the profession, we must be able to thoroughly investigate and dispose of these complaints. And the disposition must be timely, at least as much for the benefit of the lawyers involved as for the complainants. Additionally, the office of general counsel issues binding written and oral non-binding ethics opinions to requesting lawyers. These totalled 117 and 1,100 respectively last year, while such opinion requests were rare 26 years ago. Also, the number of lawsuits in which the bar is made a party continues to increase.

Walk into our headquarters building today and you will receive quite a different impression of our association from a visitor of 1964. If your visit requires you to wait in the reception room, you will stand, because sofas and chairs have given way to additional desks for hard-working staffers who perform their duties over the constant distractions caused by their location. Not only will you have no office available for meeting someone, but if you need to use a telephone the only one available may be sitting on top of the duplicating machine in the print room. If you need the conference room for a meeting, you will have to disrupt the work of the IOLTA funds director, who works at a small

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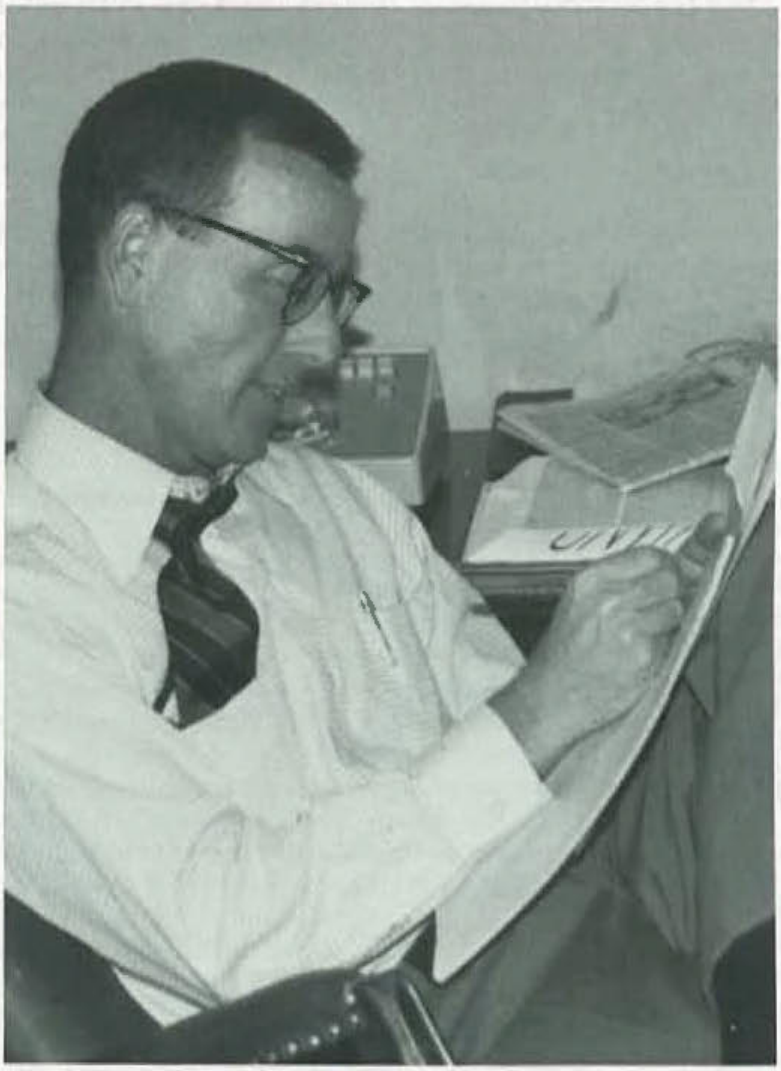
Executive Director's Report

HAMNER



John A. Yung IV

Thanks, J.A.Y. IV

I am using this November space to express my sincere appreciation to a colleague whose dedicated service to the Alabama State Bar has been outstanding. John A. Yung IV has submitted his resignation as assistant general counsel of the Alabama State Bar, effective December 31, 1990. John will have served the bar for ten and one-half years.

John's counsel to the bar has been of inestimable value. He is possessed of a work ethic seldom seen in today's society. He has a keen and creative mind; however, John's sense of right and wrong—and his disdain of the latter to any degree—has made him ideal for the position he has so ably filled.

I recall well John's not infrequent needling about perceived or reported professional wrongdoing in our profession long before he joined our staff. He always wanted to know what we were going to do about it and when. John's comments were never made in a vindic-

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President's Page

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desk in the corner. If records are needed, they may be in one of the file drawers or boxes that have spilled over into the commissioners' meeting room or they may be in a storage room being rented in another part of town. Do not ask for the general counsel or any of his staff, because they are working out of equally crowded facilities in a separate building on Perry Street. And you will not see a desperately needed investigator making it possible to handle complaints involving lawyer discipline and the unauthorized practice of law in a prompt manner, or a statewide coordinator for volunteer programs of legal aid to the poor, because there is nowhere to put them.

It is a great tribute to the abilities of our staff that they are able to perform in an outstanding manner under such adverse conditions, but conditions are getting even worse and we cannot expect such excellence in performance to continue for an indefinite period.

Activity by others to meet their needs for additional facilities are all around us. The Capitol renovation has been underway for four years, work has begun on the new Judicial Building, and across the street from us the Alabama Education Association is well into the over-$4 million expansion of its headquarters. AEA has stated with justifiable pride that its new facilities will be built without borrowing a dime.

For several years we have had a task force at work on our expansion project. Plans now have been completed for a three-story addition which will bring everything under one roof and leave unfinished space for the future. While there are no expensive frills, this enlarged and renovated new headquarters will be a thing of beauty and a source of renewed pride. Its cost, including additional furnishings and equipment, will be approximately $3 1/2 million.

With a leap of faith in the lawyers of our state, your board of commissioners, acting as trustees of the Alabama State Bar Foundation, has approved this important project, awarded a contract and given approval for work to begin.

Suggestions have been made that this project could be financed easily by assessing each member of the bar less than $400. These suggestions have been rejected. This is a labor of love and our headquarters will be paid for because lawyers want to, not because they have to. When we moved into our current building it was completely paid for and furnished by donations. Our building on Perry Street was bought with additional donations. While funds for this project can be borrowed on a long-term basis under a commitment presently in hand, we are confident that lawyers will respond once more to meet this need and make the incurring of substantial debt service unnecessary.

Our present building has a wall bearing the names of the contributors who made it possible. Eighty percent of them are no longer with us, but their names are a continuing statement of their great faith in our generation of lawyers. We can do no less for those who will follow us.

Fundraising will begin soon. Major gifts are already being pledged to memorialize outstanding lawyers, and all members will be given the opportunity to do their part. This is your bar association and your building. Please respond when the call comes. You and future generations of lawyers surely will be proud that you did. ■

1990-91 Bar Directories

LATE!

The latest edition of the Alabama State Bar's directory will be printed and mailed to members in January or February of 1991. The directories were originally scheduled to come out in December of this year, but due to the large number of state telephone numbers being changed, and the many, many attorneys who have moved and **not** sent the state bar a change of address, it was decided by the executive director and the bar directory committee to extend the publication date and "clean up" the book.

On a yearly basis, the state bar will mail to all firms a listing of attorneys in that firm and the address (street and mailing) and telephone number on file for that firm. It is hoped that this effort will ensure a more accurate bar directory, as well as membership records in general.

You can help by making sure, in writing, that the state bar has your current, up-to-date, address, firm name and telephone number. Do not assume that the office manager has taken care of it! Otherwise, the state bar will not be held accountable for any missed mailings (dues notices, CLE compliance forms, *Alabama Lawyers*, etc.).

For more information, please contact **Alice Jo Hendrix**, membership services director, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101, phone (205) 269-1515, WATS (in-state Alabama only) 392-5660.

NOTICE

Newly Revised Third Edition of Sourcebook Describes Medical and Legal Developments

Prentice Hall Law & Business has revised and published the third edition of *Asbestos: Medical and Legal Aspects*, which includes updated information on asbestos disease and worker health.

Written by Barry Castleman, an environmental consultant, *Asbestos: Medical and Legal Aspect* offers attorneys involved in asbestos litigation complete documentation on the evolving knowledge of asbestos hazards, both in open literature and with particular attention to the main defendants in these cases.

The book covers asbestosis and cancer, compensability of asbestosis and cancer as occupational diseases, thresholds and standards used to determine safe or acceptable levels of asbestos hazards gathered from countless depositions, company records, industry consultants and trade associations.

***Asbestos: Medical and Legal Aspects* may be purchased from Prentice Hall Law & Business, 270 Sylvan Avenue, Englewood Cliffs, New Jersey 07633, phone toll-free 1-800-223-0231, or fax (201) 894-8666.**

Report

(continued from page 321)

tive or petty manner. I knew then as now they were expressions of genuine concern about professional conduct which demeaned the profession he honored.

I was listening to the news while driving to Birmingham when I learned John had resigned his former position in the Attorney General's Office. I pulled off the highway in Alabaster, called John from a pay phone and inquired of his interest in joining our staff. He now could have the opportunity to address those concerns that we had previously shared. That call was some of the best money I ever spent.

John's deliberate and thoughtful manner precluded an instant acceptance; however he considered the opportunity only a short time before accepting. We needed a fair-minded, intelligent lawyer committed to the vigorous upholding of the highest of ethical standards.

Not long after John began work, I began receiving comments about John's being too vigorous, too prosecutorial or too inflexible. Even a few suggestions were made that I should reconsider my decision with respect to his employment. I knew John was doing a task which, at times, could be both difficult and unpleasant, not to mention thankless, in a thoroughly professional manner.

I was never more confident in my choice. I had seen a side of John Yung that far too few people know—he likes it that way! He is a very private person, but one of the most generous and caring people I know. John's generosity to those in need and his overall interest in the betterment of the less fortunate are traits I have witnessed firsthand.

John's level of productivity and his work performance, not to mention its quality, are going to make filling his shoes a difficult task. I am going to miss my frequent, though brief, visits with John. John is not one for small talk. I will miss his thoughtful and often prodding memos. I will miss his sense of indignation when the profession is damaged by the actions of a lawyer who violates his or her professional obligations. I will miss his dry and sometimes cynical wit. I will miss his spirit of being free. However, I will miss most his goodness and his genuine caring for our profession and its reputation.

The Alabama State Bar is better today because John Yung chose to dedicate a significant portion of his professional career to making it so. John has not told me of his future plans—you do not ask John these things; however, I am confident that whatever he does and wherever he chooses to do it, society will be the better for his having done it.

Thanks, John, for a job well done. Good luck and God's speed. ■

Bar Briefs

Meyerson speaks at construction contract litigation seminar

Ed Meyerson, a partner in the firm of Najjar, Denaburg, Meyerson, Zarzaur, Max, Wright & Schwartz, P.C., was a featured speaker on the subject of "Claims and Disputes in the '90s" at the XIV Annual Construction Contract Litigation Seminar.

The seminar, sponsored by The Florida Bar Continuing Legal Education Committee and the Trial Lawyers Section, was held in May in Tampa, Florida.

Meyerson is graduate of Cumberland School of Law.

Huckaby and Ogle re-elected to board, American Judicature Society

Gary C. Huckaby, an attorney with the firm of Bradley, Arant, Rose & White in Huntsville, Alabama and Richard F. Ogle, of the Birmingham firm of Schoel, Ogle, Benton, Gentle & Centeno, were recently re-elected to the American Judicature Society Board of Directors at the Society's annual meeting in Chicago. Both Aetna Life and Casualty Vice-President Stephen

Huckaby

Middlebrook and former Nebraska Chief Justice Norman Krivosha were featured speakers at the meeting.

Huckaby, who received both his bachelor's and law degrees from the University of Alabama, is a past president of the Alabama State Bar and a member of the Alabama Law Foundation's Board of Directors and the Alabama Law Institute. He is also the state delegate to the American Bar Association House of Delegates and past chairperson of the Mandatory CLE Commission.

In the past, Huckaby has served as a member of the executive committee of the Alabama State Bar; president of the Huntsville-Madison County Bar Association; member of the Judicial Selection Panel for U.S. Magistrates; and chairperson for the American Bar Association Lawyer Referral and Information Services and Delivery of Legal Service committees. He received the Alabama State Bar Award of Merit in 1986.

Ogle

A graduate of the University of Alabama Law School, Ogle is a member of the Alabama State Bar and the Birmingham Bar Association, the Alabama Law Institute and the American Trial Lawyers Association. He currently is serving as president of the Birmingham Bar Association. Ogle, who serves as an editorial consultant to Matthew Bender and Company and lectures at the Alabama Law Institute for Continuing Legal Education, was a former national president of Pi Kappa Alpha and president of its Memorial Foundation.

Durward elected to board of governors

Gerard J. Durward of Durward & Arnold of Birmingham was elected in June to the Board of Governors of the American Academy of Matrimonial Lawyers at the organization's annual meeting in Chicago.

Durward

Members of the Academy are lawyers who concentrate in the area of family court matters, divorce and matrimonial law.

Durward is a graduate of Birmingham School of Law.

UNA trustees elect Potts president

The University of North Alabama Board of Trustees elected Robert L. Potts as president in a special meeting in August attended by Gov. Guy Hunt.

Potts, the interim president of UNA since January 1, was one of two finalists considered for the permanent position created by the retirement of Robert M. Guillot in late 1989.

Following a vote by secret ballot, the board made a public vocal vote of unanimous support for Potts.

After his appointment, Potts noted there are five areas that will require his immediate attention: reorganizing the administration (largely due to impending

Potts

retirements and temporarily-filled positions); maintaining good relationships on behalf of UNA with the governor's office, the legislature and the Alabama Commission on Higher Education; building partnerships with area community colleges; developing an aggressive marketing and recruiting program; and enhancing the new development effort to build the endowment of UNA.

Potts was the general counsel for the University of Alabama System from 1984 through 1989. Previously, he had been a member of a Florence law firm and, during that time, had served as the UNA attorney. During 1970-71, he was a researcher for a Boston, Massachusetts, law firm while serving as an instructor in law and attaining a master of laws degree from Harvard University. Potts received his juris doctorate degree from the University of Alabama and his bachelor of arts, *cum laude*, from Southern Missionary College. He also studied for a year at Newbold College in England.

Potts also served as Alabama editor and assistant editor of the *Alabama Law Review*. He later served on the editorial advisory board of *The Alabama Lawyer*. He has taught at Boston University Law School, the University of Alabama and UNA.

He was president of the Young Lawyers' Section of the Alabama State Bar in 1979-80. He has served as chairperson of the Alabama Board of Bar Examiners.

Laird appointed to 7th Judicial Circuit

Laird

Governor Guy Hunt appointed R. Joel Laird, Jr., to the Seventh Judicial Circuit to replace Harold Quattlebaum, who resigned the judgeship earlier this year.

Laird, 28, received his law degree from the Cumberland School of Law in Birmingham in 1986 and his undergraduate degree from the University of Alabama in 1983. He has been a partner in the Anniston firm of Caldwell & Laird since July 1989.

Laird's term expires in November 1992.

Cooper elected chairperson of ABA House of Delegates

N. Lee Cooper, a partner in the Birmingham firm of Maynard, Cooper, Frierson & Gale, P.C., has become chairperson of the House of Delegates of the American Bar Association.

Cooper was nominated to the post in February 1990 and took office at the close of the 1990 Annual Meeting in Chicago in August. He will preside over sessions of the House of Delegates between February 1991 and August 1992. The House of Delegates, with 461 members, meets twice yearly to establish association policies. Its members represent various ABA components, as well as state, local, specialty and ethnic bar associations.

Cooper

Cooper received a bachelor of science degree in 1963 and a law degree in 1964 from the University of Alabama at Birmingham, where he was an editor of the *Alabama Law Review*. He is a trustee of the Alabama Law School Foundation and of the Farrah Law Society of the law school. (See the May 1990 *Alabama Lawyer* for more information.)

Black's Law Dictionary updated in new edition from West Publishing

Black's Law Dictionary, one of the nation's most frequently used law books for the past 100 years, has been updated and expanded. West Publishing Company presents the "Centennial" 6th Edition of *Black's Law Dictionary*.

This new "Centennial Edition" contains over 5,000 new or revised entries that reflect recent developments in the law. The last edition of *Black's Law Dictionary* was published by West in 1979. Ten years of changes and new developments in the law have made a new, expanded edition necessary.

Contained within are pronunciation guides, cross-references to related terms, federal court rules, federal statutes, uniform and model laws, agency regulations, and leading cases.

This new edition contains updated and expanded financial terminology, including tax and accounting terms.

Examples of word usage, with citations, have been added throughout to illustrate how various terms are used or applied in various contexts.

This new 6th Edition will be available in both a Standard Edition and a Deluxe Edition.

West Publishing donates professionalism library to ABA

West Publishing Company of St. Paul, Minnesota, has announced its intention to donate a comprehensive ethics and professionalism law library to the American Bar Association Center for Professional Responsibility. This is one of the largest corporate gifts ever received by the ABA through its Fund for Justice and Education. The library will contain West's American Digest System, the Decennial Digest, all of West's Regional Reporters, all of the state statute sets published by West, USCA, CJS, West's Hornbook Series, and other related reference materials.

The "West Professional Responsibility Law Library" will be located in the new offices for the ABA Public and Professional Responsibility Group, at the Time/Life Building in Chicago.

Founded in 1978, the ABA Center for Professional Responsibility develops and interprets rules and guidelines on professional conduct, providing insight and leadership in the areas of legal ethics, professional regulation and discipline, client protection and professionalism.

The ABA Fund for Justice and Education, the Association's charitable arm, supports more than 200 law-related public service and educational programs to improve the legal system and help the public.

American Bar Association announces 1991 Law Day U.S.A. theme

The theme for Law Day U.S.A. 1991 is:

FREEDOM HAS A NAME: THE BILL OF RIGHTS

The 1991 theme encourages Law Day program and event planners to focus their efforts on commemorating the bicentennial of the Bill of Rights.

The purpose of Law Day U.S.A., celebrated annually on May 1, is to reserve a "special day of celebration by the American people in appreciation of their liberties and to provide an occasion for rededication to the ideals of equality and justice under laws." Law Day U.S.A. was established by United States Presidential Proclamation in 1958 and reaffirmed by a Joint Resolution of Congress in 1961.

The American Bar Association, as the national sponsor of Law Day U.S.A., prepares a detailed planning guide to assist individuals and organizations conducting Law Day programs. In addition, the ABA makes available many reasonably priced promotional and educational/informational materials, ranging from buttons and balloons to leaflets, brochures, booklets, speech texts and mock trial scripts.

State and local bar associations, libraries, community organizations, schools, churches, law enforcement agencies, service clubs, legal auxiliaries, and scouting organizations are among the many groups sponsoring Law Day U.S.A. programs and events. The events range from no-cost legal consultations, mock-trials conducted in schools, court ceremonies, poster and essay contests to television and radio call-in programs.

To learn more about Law Day U.S.A., write for a copy of the Law Day Planning

Guide: **Law Day U.S.A., American Bar Association, 8th Floor, 750 North Lake Shore Drive, Chicago, Illinois 60611, or telephone (312)988-6134.** (The 1991 Planning Guide will be available in late January.)

Ford elected representative to National Conference of Special Court Judges

The National Conference of Special Court Judges of the American Bar Association announces that Judge Aubrey Ford, Jr., Macon County district judge, Tuskegee, Alabama, was elected at the annual meeting of the American Bar Association to serve as representative for the fifth district to the executive committee of the National Conference of Special Court Judges, representing judges in the states of Alabama, Tennessee, Kentucky, West Virginia and Mississippi.

The National Conference of Special Court Judges is one of six organizations within the Judicial Administration Division of the American Bar Association, and its members include judges of a variety of limited jurisdiction courts, such as military courts, juvenile and family courts, probate courts, district, county and municipal courts, criminal and civil courts of specialized jurisdiction, and United States magistrates and bankruptcy judges.

Judge Ford has served as chairperson of the Committee on Rural Courts of the National Conference of Special Court Judges, and has been a leader in the planning of a series of national judicial conferences on the problems of rural courts.

Roberts named to SEC

Birmingham native Richard Y. Roberts was recently chosen by President George Bush to fill a vacancy on the Securities and Exchange Commission.

Roberts was a long-time top aide to Senator Richard Shelby. As Shelby's chief of staff and issues director in both the Senate and the House, he developed an expertise in SEC matters.

He is a 1973 graduate of Auburn University and a 1976 graduate of the University of Alabama School of Law. He also received a master of law degree from George Washington University in 1981.

Roberts joined Shelby's Tuscaloosa firm in 1976, and was hired chief of staff when Shelby was first elected to Congress in 1978. He returned to Alabama in 1983 to practice in Montgomery but returned in 1986 to work with Shelby and direct the Senator's staff. Since April, Roberts has been with the Mobile firm of Miller, Hamilton, Snider, Odom & Bridgeman.

Chief Justice announces appellate courts current

Alabama Supreme Court Chief Justice Sonny Hornsby says the supreme court and the state's two appeals courts entered a new court year on October 1 with current dockets.

Supreme Court justices decided 1,304 matters and wrote 703 published opinions during the past year. Twenty years ago in the 1970-71 court year, a total of 176 opinions was released. Hornsby stressed that the work of the court, measured in the number of full written opin-

NOTICE

Judicial Conference of the Eleventh Circuit

Each year, the circuit, district and bankruptcy judges of the Eleventh Judicial Circuit meet in conference with members of the bar to consider the business of the courts of the circuit and to devise means of improving the administration of justice in the circuit. Previously, the members of the bar who have been invited to attend the conference have been restricted to those specified in Addendum No. One of the Local Rules of the Eleventh Circuit Court of Appeals.

The judges of the circuit have concluded that greater lawyer participation than that currently provided for by the local rules is desirable if the conference is to accomplish its purpose of improving the administration of justice. To provide such participation, the judges of the circuit have decided that the 1991 conference will be an open conference: Any attorney admitted to practice before the Court of Appeals of the Eleventh Circuit or before any of the district courts of the circuit may attend the conference.

The 1991 conference will meet in Asheville, North Carolina, May 25-27, 1991. Any lawyer who wishes to attend the meeting must advise the circuit executive, Norman E. Zoller, in writing as soon as possible; hotel accommodations are limited (approximately 1,000 rooms), and they will be allocated on a first-come, first-served basis.

Zoller can be reached at the U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, Atlanta, Georgia 30303. Phone (404) 331-5724.

ions, has increased by 334 percent in 20 years with no increase in the number of justices.

Hornsby also said that the supreme court has adopted national appellate time standards, and that since their adoption earlier this year, the court has met

Hornsby

the standards in 55 percent of its cases. The national standard for appellate courts is that every case should be decided and released within 280 days from the filing of notice of appeal. "The Alabama Supreme Court, in all cases since the standards were adopted, is averaging 293 days," Hornsby said.

During the past court year, the court of criminal appeals released a total of 1,909 cases, 418 with full written opinions. The court of criminal appeals was also current with its docket, having decided and released all cases submitted to the judges prior to July 1. The five judges on that court wrote, on average, 84 opinions each.

The court of civil appeals released a total of 404 opinions and ended the year current with its docket. The court is current with all cases submitted to the judges by the first of September. Active judges on the court averaged writing 109 opinions, each, last court term. The total caseload on the court of civil appeals increased by 18 percent over the previous year.

Jackson appointed MCLE Commission chairperson

Lynn Robertson Jackson of Clayton, Alabama, was recently appointed by Alabama State Bar President Harold Albritton to serve as chairperson of the Mandatory Continuing Legal Education Commission.

Jackson is the first woman to serve as Commission chairperson.

She is a graduate of Jones Law School and was admitted to the state bar in 1981. She has served as president of the Third Judicial Circuit Bar Association, and as a member of the bar's Permanent Code Commission, the board of editors of *The Alabama Lawyer* and the MCLE Commission.

Presently, she serves as a member of the board of bar commissioners (Third Circuit); the board of trustees of the Alabama Law Foundation; the bar commission liaison to the Task Force on Bench and Bar Relations; the Committee on the Unauthorized Practice of Law; the Task Force on Facilities for the Alabama State Bar; and the Disciplinary Board, Panel I, of the state bar.

Jackson

She is a member of the American Bar Association, the American Trial Lawyers Association and the Alabama State Bar.

Jackson is city attorney for the Town of Clayton, and is on the board of directors for the United Way for Barbour County.

Her father, A.B. Robertson, Jr., was a member of the board of bar commissioners from 1964 until his death in 1981. He also served as second vice-president of the state bar and chairperson of the Disciplinary Commission.

Jackson is married to George T. Jackson, a pilot, and they have one daughter, Katherine Robertson Jackson, 17 months. ■

About Members, Among Firms

ABOUT MEMBERS

William C. Daniel announces the relocation of his offices to Suite 502, AmSouth Bank Building, P.O. Box 396, Anniston, Alabama 36202. Phone (205) 236-8099.

■

James R. Berry announces the opening of his office under the name **James R. Berry,** with offices located at 100-A S. Emmett Street, Albertville, Alabama 35950. Phone (205) 878-8500.

■

John McBrayer announces the relocation of his office to Shelby Medical Center Building, 644 2nd Street, N.E., Alabaster, Alabama.

The mailing address is P.O. Box 1949, Alabaster 35007. Phone (205) 664-3838.

■

J. Floyd Minor announces the opening of his office, effective September 1, 1990. The new office address is 458 S. Lawrence Street, Montgomery, Alabama. Phone (205) 265-6200.

■

Frederick T. Enslen announces that he has withdrawn from the firm of Argo, Enslen, Holloway & Sabel, P.C., and has relocated his office to 4145 Wall Street, Montgomery, Alabama 36106. Phone (205) 244-7333.

■

Sheree Martin announces the opening of her offices at 409 N. Court Street, Suite 120, Florence, Alabama 35630. Phone (205) 760-1250.

She is a member of the Alabama State Bar and The Florida Bar, and has an LL.M. in Taxation from the University of Florida.

■

Wallace K. Brown, Jr., announces the opening of the **Law Office of Kin Brown** at 1323 Broad Street, Phenix City, Alabama, effective August 1, 1990. The mailing address is P.O. Box 3556, Phenix City 36868-3556. Phone (205) 298-2222.

■

AMONG FIRMS

Ford & Hunter, P.C. announces that **Richard M. Blythe** has become associated with the firm, effective September 1, 1990. Offices are located at 645 Walnut Street, Suite 5, P.O. Box 388, Gadsden, Alabama 35902. Phone (205) 546-5432.

■

A. Danner Frazer, Jr., Edward C. Greene, William H. Philpot, Jr., and **Michael E. Upchurch** announce the formation of a partnership for the practice of law, in the name of **Frazer, Greene, Philpot & Upchurch,** effective July 1, 1990. Offices are located at Suite 2206, First National Bank Building, 107 St. Francis Street, Mobile, Alabama 36602. The mailing address is P.O. Box 1686, Mobile 36633. Phone (205) 431-6020.

■

Maynard, Cooper, Frierson & Gale, P.C. announces that **C.C. Torbert, Jr.,** former chief justice of the Alabama Supreme Court, has become a member of the firm and will be in the firm's Montgomery office. The firm also announces that **James L. Priester** and **James M. Proctor, II,** have become members of the firm. Offices are located in Birmingham and Montgomery.

■

Paul G. Smith, J. Thomas Burgess, Thomas Spires and **A. Joe Peddy,** formerly of the firm of Smith & Taylor, announce the formation of a partnership under the name of **Smith, Burgess, Spires & Peddy.**

Associates of the firm are **William F. Smith, II, Jim F. Oros, Jr., Michael B. Walls, Todd N. Hamilton** and **Frank M. Cauthen, Jr.** Offices are located at Suite 1212, Brown Marx Tower, 2000 1st Avenue, N., Birmingham, Alabama 35203-4110.

■

The firm of **Dillard & Ferguson** announces that **Stevan K. Goozee'** has been made a partner of the firm. Offices are located at 205 20th Street, N., Suite 331, Frank Nelson Building, Birmingham, Alabama 35203. Phone (205) 251-2823.

■

Griffin, Allison, May & Alvis announce the change of the firm name to **Griffin, Allison, May, Alvis & Fuhrmeister,** and that **James W. Fuhrmeister** has become a partner of the firm, and that **Cindy B. Sirmon** has become associated with the firm. Offices are located at 4518 Valleydale Road, Suite 1, Birmingham, Alabama 35242, and the mailing address is P.O. Box 380275, 35238. Phone (205) 991-6367.

■

The firm of **Sirote & Permutt, P.C.** announces the relocation of its offices to the AmSouth Center, Suite 1000, 200 Clinton Avenue, W., Huntsville, Alabama 35801. Phone (205) 536-1711.

■

The firm of **Turner, Onderdonk & Kimbrough, P.A.** announces that **Gordon K. Howell** has become a partner in the firm, and the name of the firm has been changed to **Turner, Onderdonk, Kimbrough & Howell, P.A.** Offices are located in Mobile and Chatom.

■

Thomas, Means & Gillis, P.C. announces the relocation of their Montgomery office to 3121 Zelda Court, Montgomery, Alabama 36106. The mailing address is P.O. Drawer 5058, Montgomery 36103-5058. Phone (205) 270-1033.

■

The firm of **Miller, Hamilton, Snider & Odom** announces that **Richard A. Wright** and **Richard Y. Roberts** have become members of the firm, and **Robert Bruce Rinehart** and **Robert G. Jackson, Jr.,** have become associated with the firm.

Offices are located in Mobile, Montgomery and Washington, D.C.

■

The firm of **Lyons, Pipes & Cook** announces that **Charles L. Miller, Jr.,** and **W. David Johnson, Jr.,** have become members of the firm effective January 1, 1990, and **William E. Pritchard, III,** has become associated with the firm, effective March 1990.

Offices are located at 2 North Royal Street, Mobile, Alabama 36602. Phone (205) 432-4481.

■

Lewis & Martin, P.C. announces that the name has been changed to **Martin, Drummond & Woosley, P.C.,** and that offices continue to be located at 2020 AmSouth/Harbert Plaza, 1901 6th Avenue, N., Birmingham, Alabama 35203. Phone (205) 322-8000.

■

Lange, Simpson, Robinson & Somerville announces that **Neil R. Clement, David W. Duke, James C. Pennington, Elwyn Berton Spence, Carey W. Spencer,** and **William B. Stewart** have become associated with the firm at its Birmingham office, and that **John R. Barran** has become associated with the firm at its Huntsville office.

■

Legal Services Program for Pasadena and **San Gabriel-Pomona Valley** announces that **Regina B. Edwards** has become associated with **The Handicapped and Elderly Law Project** located at 201 E. Mission Boulevard, Pomona, California 91766. Phone (818) 308-9524. Edwards is a 1987 admittee to the Alabama State Bar.

■

Morring, Schrimsher & Riley of Huntsville announces that **Donald Lee Christian, Jr.,** has joined the firm as an associate. He is a graduate of Cumberland School of Law.

Offices are located at 117 Clinton Avenue, E., Huntsville, Alabama 35801. Phone (205) 534-0671.

■

David A. Ryan has become associated with the firm of **Tingle, Sexton, Murvin, Watson & Bates, P.C.** Ryan is a graduate of the University of Alabama School of Law, where he served as a member of the *Alabama Law Review* and the John A. Campbell Moot Court Board.

■

The firm of **Parnell, Crum & Anderson, P.A.** announces that **Bernard B. Carr,** former staff attorney to **Justice Henry B. Stegall, II,** and **Jonathan H. Cooner** have become associated with the firm.

Offices are located at 641 S. Lawrence Street, P.O. Box 2189, Montgomery, Alabama 36102-2189. Phone (205) 832-4200.

■

The firm of **Harris, Evans & Downs, P.C.** announces the change of the firm name to **Harris, Evans, Berg & Morris, P.C.,** with offices to remain at Historic 2007 Building, 2007 3rd Avenue, N., Birmingham, Alabama 35203.

The firm also announces that **R. Stan Morris** has been named a partner, and that **Linda E. Winkler, Elizabeth Patterson Wallace** and **Matthew J. Dougherty** have become associated with the firm.

■

J. Todd Caldwell announces that **G. Rod Giddens** has become an associate in the firm of **Caldwell & Giddens.**

Offices are located at Suite 407, SouthTrust Bank, 1000 Quintard Avenue, Anniston, Alabama. The mailing address is P.O. Box 2314, Anniston, Alabama 36202. Phone (205) 237-6671.

■

Berry, Ables, Tatum, Little & Baxter, P.C., 315 Franklin Street, S.E., Huntsville, Alabama 35804, announces that **Susan A. McMillan** has joined the firm as an associate. Phone (205) 533-3740.

■

The firm of **Love, Love & Love** announces the opening of a branch office in Gadsden, Alabama. The office is located at 823 Forrest Avenue, Room 101-A. Phone (205) 546-8216.

■

The firm of **Blume & Blume** announces that **R. Shayne Roland** has become associated with the firm.

Offices are located at 2300 E. University Boulevard, Tuscaloosa, Alabama 35404-4136. Phone (205) 556-6712.

■

The firm of **Eyster, Key, Tubb, Weaver & Roth** announces that **M. Bradley Almond** has become associated with the firm. Offices are located at 402 E. Moulton Street, P.O. Box 1607, Decatur, Alabama 35601-1607. Phone (205) 353-6761.

■

The Law Offices of Mary Beth Mantiply announces that **Charlotte Adams Nicholas,** formerly an officer with SouthTrust Bank of Mobile, and **Patrick B. Collins,** formerly of Collins, Galloway & Smith, have become associated with the firm. Offices are located at 209 N. Joachim Street, Mobile, Alabama 36601. Phone (205) 433-3544.

■

Wilson & Pumroy announces that **George D. Robinson** has become an associate with the firm.

The office is located at 1431 Leighton Avenue, P.O. Box 2333, Anniston, Alabama 36202. Phone (205) 236-4222.

■

The firm of **Pradat & Wise** announces that **William B. McGuire, Jr.,** has become a partner in the firm. The firm name has been changed to **Pradat, McGuire & Wise.**

Offices are located at 2902 6th Street, Tuscaloosa, Alabama 35401. Phone (205) 345-2442.

■

The firm of **Parker & Brantley** announces that **Mark D. Wilkerson,** formerly a partner with **Haskell, Slaughter & Young,** has joined the firm, and the firm name has been changed to **Parker, Brantley & Wilkerson, P.C.**

The firm has moved its offices to 1200 Bell Building, 207 Montgomery Street, Montgomery, Alabama 36103-4992. Phone (205) 265-1500.

■

Beasley, Wilson, Allen, Mendelsohn & Jemison, P.C. announces that **Blaine C. Stevens,** former law clerk to Alabama Supreme Court Chief Justice Sonny Hornsby, has become associated with the firm, effective August 1, 1990.

Offices are located at 207 Montgomery Street, 10th floor, Bell Building, P.O. Box 4160, Montgomery, Alabama 36103-4160. Phone (205) 269-2343.

■

Jackson & Taylor announces that **Robert J. Hedge** has been associated with the firm as of July 1, 1990. Hedge graduated *cum laude* from Cumberland Law School in 1989.

Offices are located at 61 St. Joseph Street, Suite 1500, Mobile, Alabama. Phone (205) 433-3131.

■

The firm of **Rives & Peterson** announces that **Rhonda K. Pitts** and **Susan Scott Hayes** have become associates of the firm.

Pitts is a graduate of Cumberland School of Law. She is a former law clerk to the Honorable Oscar W. Adams, Jr., of the Alabama Supreme Court.

Hayes is a graduate of Southern Methodist University School of Law. She formerly practiced with the firm of Zelle & Larson in Dallas, Texas.

■

George W. Andrews, III, former district attorney of Jefferson, announces the relocation of his practice to the offices of **White, Dunn & Booker,** 1200 First Alabama Bank Building, Birmingham, Alabama 35203. Phone (205) 323-1888.

■

John Ben Bancroft has become associated with the **Small Business Administration** as an attorney advisor in the District Office at 2121 8th Avenue, N. Suite 200, Birmingham, Alabama 35203. Phone (205) 731-1728. ■

NOTICE

Notice of and Opportunity for Comment on Proposed Amendments to the Rules of the U.S. Court of Appeals for the Eleventh Circuit

Pursuant to the Judicial Improvements and Access to Justice Act, codified at 28 U.S.C. §2071(o), notice is hereby given of proposed amendments to the Rules of the U.S. Court of Appeals for the Eleventh Circuit. A copy of the proposed amendments may be obtained without charge after October 15, 1990, from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., N.W., Atlanta, Georgia 30303. Phone (404) 331-6187. Comments on the proposed amendments may be submitted in writing to the clerk at the above address by November 30, 1990.

NOTICE

ABA publishes new book on agricultural law

The American Bar Association's General Practice Section has published *Agricultural Law: A Lawyer's Guide to Representing Farm Clients.* This new guidebook focuses on laws and regulations that apply specifically to farm concerns, and advises attorneys on procedures for representing clients more effectively.

Agricultural Law devotes a major portion to explaining the laws and regulations governing the farmer's contact with government agencies, particularly the U.S. Department of Agriculture.

Additional chapter topics include organizing the farm, providing specific examples of how each structure (sole proprietorship, partnership, corporation) can meet the needs of a particular kind of farm; marketing the farm product, providing explanations for the array of federal, state and local laws governing the sale and purchase of agricultural products; obtaining credit and dealing with bankruptcy; and using and developing land, reporting on land use issues and the farmer as property owner.

To order, contact ABA Order Fulfillment 515, 750 North Lake Shore Drive, Chicago, Illinois 60611.

Consultant's Corner

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

This is the 18th article in our "Consultant's Corner" series. We would like to hear from you, both in critique of the article written and suggestions of topics for future articles.

Business development, who needs it?

It is sad but true that these days *everyone* needs to be concerned with business development. Great Scott! He is not going to use that "M' word (marketing) is he? No, not if it bothers you a great deal, but with a virtually fixed (some say shrinking) demand for private sector legal services and a continuing oversupply of law school graduates, it behooves all lawyers to think about it, like it or not.

What about no-growth firms?

Even firms with no growth plans need to be concerned with developing new business. The insurance industry, to use a related example, has known for some time that each year they lose about 15 percent of their business book through what they call "leakage." This is the erosion of a fixed insured base through people dying, moving away or simply choosing another provider.

There is no precisely measured leakage figure for the private legal sector, but there must be *some*. Suppose it is only 10 percent lost to death, relocation or change in providers. If your firm is doing a million dollars a year in fee income, this suggests you must scare up at least $100,000 in new business each year just to tread water.

Growth firms

Firms with plans for growth surely see the need to produce new business *in excess of* that required to compensate for leakage. They typically formulate business plans, targeting key prospects, assigning particular partners to particular prospective clients. They often are disappointed when, after a "decent" interval and the expenditure of substantial amounts of time and money, the key partners return home with meager results. Why?

Where the growth potential is

A definitive, though slightly dated, study of some 150 law firms nationwide with defined and implemented business plans, revealed the rather astounding finding that 80 percent of new business came from a firm's *existing* client base. Prospecting for new clients is not to be discouraged, but do not neglect your existing clients. If you want to use the gold mining example, allocate your resources in proportion to the expectation of striking a vein.

Bornstein

There are no General Motors Corporations sitting out in the wilderness waiting for someone to discover them and offer to be their general counsel. They all *have* counsel. Shopping for new clients often involves an ethically delicate act of trying to take away a client from someone else. The someone else will often counterattack. A brawl is on and you have made a professional enemy.

How to get it

So, you have decided to put a substantial share of your business development effort into your existing client base. Now what? You might begin by insuring that your client knows *all* the services your firm provides, not just those you happen to be providing at the moment. Clients are largely lay people and they often see lawyers as they see doctors: a surgical practice here, an internal medicine practice over there, radiologists somewhere else. If you have handled an adoption for them, they might well presume that is *all* you (or your firm) does. If you handled a real estate transaction for them, ditto.

Consider a modest brochure, perhaps two of them, one for personal clients and one for corporate clients. List *all* the services you offer. Some firms include brief biographies of their partners, some even a map showing the location of their office(s). Put some in your reception area. Enclose the personal brochure in some of the instruments you prepare (wills, real estate closings, etc.)

Visit with some of your business clients (a "howdy" call). Ask if they are pleased with the work performed to date and recap the other services your firm offers. Leave a brochure with them. But where are you going to get the *time* to make all these visits? Good question—tune in next issue.

Summary

—Recognize the need for business development;
—Remember where most of the good prospects are (in your own backyard);
—Make sure your clients know *all* you do; and
—Make some calls on your *own* clients. ■

Request For Consulting Services Office Automation Consulting Program

SCHEDULE OF FEES, TERMS AND CONDITIONS

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

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

REQUEST FOR CONSULTING SERVICES
OFFICE AUTOMATION CONSULTING PROGRAM
Sponsored by Alabama State Bar

THE FIRM

Firm name _____
Address _____
City _____ Zip _____ telephone # _____
Contact person _____ title _____
Number of lawyers _____ paralegals _____ secretaries _____ others _____
Offices in other cities? _____

ITS PRACTICE

Practice Areas (%)

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

Number of clients handled annually _____
Number of matters handled annually _____
Number of matters presently open _____
How often do you bill? _____

EQUIPMENT

Word processing equipment (if any) _____
Data processing equipment (if any) _____
Dictation equipment (if any) _____
Copy equipment (if any) _____
Telephone equipment _____

PROGRAM

% of emphasis desired

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

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

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

Building Alabama's Courthouses

by Samuel A. Rumore, Jr.

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

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

Cherokee County

The Cherokees were one of the largest southern Indian tribes, and they had a long history of contact with Europeans. Their lands covered sections of North and South Carolina, Tennessee, Georgia and Alabama. The area of present-day Cherokee County, Alabama, was occupied by Cherokee Indians from approximately 1330 to May 1838, when the Indians were forcibly moved to the west.

The Cherokees encountered the white man as early as 1540 when Hernando de Soto explored the Indian country in what is now Alabama. Later, the Cherokees came into contact with English and French traders. As they met more Europeans they took on more of the white man's ways, even developing their own written language. In the American Revolutionary War, the Cherokees sided with the English. Much Cherokee land was laid waste during the war as crops and cabins were destroyed.

After the war, the Cherokees were the first tribe to pledge allegiance to the new United States. However, by 1791 they had lost much of their land in the Carolinas and Tennessee by treaty with the American Government.

The Cherokees remained friendly with the Americans and continued to imitate the white man's way of life. When war broke out between frontiersmen and the Creek Indians in Alabama, the Cherokees assisted the Americans. Cherokees fought against the Creeks at the Battle of Horseshoe Bend in 1814. However, when the returning white Indian fighters saw the beauty and richness of the Cherokee lands, the seeds were sown for the ultimate "Trail of Tears".

Alabama became a state in 1819. As early as 1829 the state began exercising civil jurisdiction over Indian territory. In January of that year a legislative act extended civil jurisdiction of the state over the Creek nation. The Creeks were removed from Alabama to the west in 1832. Likewise, an act of the Alabama Legislature in 1832 added the lands that technically belonged to the Cherokees to the jurisdiction of St. Clair County.

Finally, on December 29, 1835, the Treaty of New Echota was signed between the United States Government and certain representatives of the Cherokee Indians. Eight million acres were transferred by this document, and the signers agreed to move west of the Mississippi River. The United States Senate eagerly approved this treaty which was of questionable legality. Chief John Ross, who did not sign the treaty, attempted to nullify it, taking his case to the United States Supreme Court.

The Cherokees ultimately lost their fight and were forced to move from Alabama in 1838. More than 4,000 died on the long march to Oklahoma. It is an understatement to say that this incident was one of the darkest chapters in the history of Alabama, and of the United States.

After the Treaty of New Echota was signed, it did not take long for the Legislature to organize the Cherokee territory. On January 9, 1836, only 11 days after the treaty signing, the counties of Marshall, DeKalb and Cherokee were created from

the newly-acquired Indian lands. The house of a Colonel Hendricks was designated by the Legislature as the temporary county seat of Cherokee County.

According to local tradition, though, the first court in Cherokee County was actually held at the home or storehouse of Singleton Hughes, on Cowan's Creek, approximately eight miles from Centre. The defendants were a gang of ruffians not unlike today's youth gangs, known as

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

the "Slicks." They were accused of the savage beating of an old man. The pioneer justice system of Cherokee County put the "Slick Brigade" out of business.

On December 22, 1836, the Legislature authorized an election to determine the permanent seat of justice for Cherokee County. Four locations were placed in nomination: the homes of John Garrett, Joseph Hampton and John C. Rhea, and an area on the Coosa River known as Cedar Bluff. Cedar Bluff won the election. On June 24, 1837, the Legislature officially designated Cedar Bluff, below William Woodley's ferry, as the county seat.

In the same act designating Cedar Bluff the county seat, commissioners were appointed to lay out a town into lots and provide for public buildings for the county. A temporary courthouse was built where the present-day city park of Cedar Bluff is located. This building was a log structure.

The new county seat was called Cedar Bluff because of the cedar trees that grew on the town site overlooking the Coosa River. Sometime between June 24, 1837, when the site of the county seat was selected, and December 23, 1837, when the county seat was incorporated, the town was renamed Jefferson, probably to honor Thomas Jefferson. Five years later on December 23, 1842, the Legislature renamed the town Cedar Bluff.

In 1843, a section of southern Cherokee County, which had been removed from the county, was restored. This boundary change increased the population of southern Cherokee County, and resulted in dissatisfaction over the location of the county seat. More people in the county now lived south of the Coosa River, while Cedar Bluff was north of the river.

On January 15, 1844, the Legislature appointed a commission to locate the exact geographic center of Cherokee County. It also called for an election on the first Monday in April 1844 for the voters to choose between Cedar Bluff and the geographic center of the county for the county seat location. The commission selected a hill where Centre is located today. Needless to say, Cedar Bluff lost the election to Centre, which is the Old English spelling of the word "center."

Cherokee County Courthouse

Cherokee County Courthouse Annex

(continued from previous page)

The promoters of the new county seat hastily erected a frame building for the new courthouse. However, the agitation concerning the location of the county seat did not stop. There was continuing opposition to the complete transfer of the affairs of the county to Centre. On January 27, 1846, the sale of lots in Centre was authorized, but the county seat issue still remained unsettled.

On February 22, 1848, the Legislature provided for the construction of a courthouse at Centre and named the building committee. In 1849 a brick building was constructed. However, the controversy continued and on February 11, 1850, a new election was called for the first Monday in August 1850 to once again determine the county seat location. Centre and Cedar Bluff were the only nominees. Centre won again, and the issue was finally resolved.

The brick courthouse at Centre burned May 24, 1882. Arson was suspected. Most records of the probate and circuit courts were lost. All indictments, bonds and complaints were destroyed. Only the walls of the 33-year-old building still stood. An interesting observation from investigators supporting the arson theory was that no fire had been used in the building during the previous day.

On September 14, 1882, a cornerstone was laid for a new courthouse. The first brick was placed by the contractor, J.B. Patton. This courthouse also burned 13 years later in 1895.

The courthouse was rebuilt in 1896, and a large bell was placed in the building. The 1896 courthouse was a two-story brick structure with a clock tower. It served Cherokee County for 40 years.

By 1936, the people of Cherokee County voted for a new courthouse by a count of 520 to 35. The county received assistance with the project from the federal government which paid 45 percent of the cost of the building. Also, the county issued courthouse bonds for the balance. The total cost of the Cherokee County Courthouse was $80,000. The contractor for the project was the Duke-Stickney Company, and the architect was Paul W. Hofferbert, who also designed the Etowah Courthouse. In 1952, a courthouse annex for Cherokee County was completed. The architect again was Paul W. Hofferbert. ■

Issues in the Sale of a Small Business Under the Alabama Business Corporation Act

by
Michael D. Waters and Daniel B. Graves

Michael D. Waters is a graduate of Duke University, Oxford University and the University of Alabama School of Law. He practices in the Montgomery office of Miller, Hamilton, Snider & Odom, and is a member of the Alabama State Bar and the District of Columbia Bar.

Daniel B. Graves is a graduate of the University of Alabama and the University's School of Law. He practices in the Mobile office of the firm of Miller, Hamilton, Snider & Odom, and is a member of the Alabama State Bar and The Florida Bar.

Business enterprises are bought and sold every day. Although in many cases these enterprises are managed through partnerships or sole proprietorships, they are typically operated through a corporation. When an enterprise that is to be sold is owned by a corporation, the sale of the business raises a number of issues under the Alabama Business Corporation Act.[1]

The purpose of this article is to set forth certain basic corporate issues that often arise in sales of Alabama corporations. This article does not discuss other problems that are sometimes present in the sale of a business such as tax or antitrust matters or registration issues under state and federal securities statutes.[2] Also, the scope of the discussion below does not include issues peculiar to the sale of a public company (*i.e.*, a corporation which is subject to reporting requirements with the Securities and Exchange Commission [the "SEC"] under either Section 12 or Section 15(d) of the Securities Exchange Act of 1934[3]), although many issues considered here are equally applicable to the public company. Instead, this article focuses upon the sale of corporations that are relatively closely held—*i.e.*, corporations with 25 or 30 shareholders, or less.

This article is directed primarily at the lawyer who represents the corporation that is to be sold (the "selling corporation"). It is also assumed that the selling corporation is to be acquired by another Alabama corporation (the "acquiring corporation") rather than by an individual, a group of individuals, or other form of business, and that the acquiring corporation is also not a public company.

The discussion below is divided into three parts. Part I summarizes various forms that the sale of the corporate enterprise may take. Part II highlights some procedural requirements of the Alabama Business Corporation Act in the context of the sale of a corporate enterprise. The

third part addresses certain problems that are typically found in this context which, if not addressed properly, can present major obstacles to the accomplishment of an effective sale.

I. Form of the transaction

1. **Merger**—The sale of a business enterprise can take a variety of forms if the enterprise is operated through a corporation. This is especially true if the entity acquiring the enterprise is also a corporation. The first option is a merger.[4] In that situation, the selling corporation may merge into the acquiring corporation. As part of that transaction, the selling corporation becomes a part of the acquiring corporation, and the selling corporation ceases to exist. All of the assets and liabilities of the selling corporation become part of the assets and liabilities of the acquiring corporation.[5] The acquiring corporation could also merge into the selling corporation, with the result that the selling corporation becomes the surviving corporation in the merger.

Sometimes an acquisition is undertaken through an interim merger. The acquiring corporation creates a wholly owned, new corporation, and the selling corporation is then merged into the new or "interim" corporation. As a consequence, the corporation resulting from the merger is owned by the acquiring corporation. There may be reasons why the acquiring corporation wants to operate the selling corporation as a subsidiary, such as a desire to insulate the parent corporation from the liabilities of the subsidiary or to maintain for public relations purposes the separate identity of the selling corporation. The interim merger provides a way to accomplish those goals.

2. **Consolidation**—The second form that the acquisition could take, the consolidation,[6] is similar to the merger. In a consolidation, each of the two constituent corporations, the selling and the acquiring corporations, combine to form a new corporation altogether. The legal effect of the consolidation, however, is essentially the same as the merger, in that the corporation that results from the consolidation has all of the assets and liabilities previously owned by the two corporations.[7]

3. **Sale of assets**—A sale of assets is another method by which a business enterprise can be sold.[8] Under this method, the selling corporation sells specifically designated assets to the acquiring corporation. Also, the acquiring corporation may, but need not, agree to assume all or certain designated liabilities of the selling corporation. In a sale of assets, the acquiring corporation chooses only those assets and liabilities it desires to purchase and assume from the selling corporation. For example, if the selling corporation owns two auto parts stores and wishes to sell only one to the acquiring corporation, a sale of assets transaction would be a logical method by which the sale could be accomplished. While a sale of assets transaction has the possible advantage of enabling the acquiring corporation to acquire only those liabilities of the seller which it wishes to acquire, in Alabama a sale of assets which involves the sale of substantially all of the assets of the selling corporation will probably be treated as a *de facto* merger, and the acquiring corporation is likely to be burdened with all liabilities of the selling corporation regardless of any agreement to the contrary.[9]

4. **Exchange of stock**—Another acquisition method, but one that seems to have been used little in Alabama, is the exchange of stock transaction.[10] Under this method, a corporation can enter into an agreement with another corporation pursuant to which the stock of the selling corporation will be exchanged for stock, other securities, cash or other property of the acquiring corporation. The procedures for approving an exchange of stock transaction are basically identical to the procedures for a merger or consolidation, which will be discussed further in part II. The exchange of stock procedure can be followed to require *all* stockholders of the selling corporation to exchange their shares in the selling corporation for the consideration offered. The effect of this transaction, like the interim merger discussed above, would be to make the selling corporation a wholly owned subsidiary of the acquiring corporation.

5. **Sale of stock**—The final form that a sale of a business might take is a sale of stock of the selling corporation in a private transaction by the selling corporation's stockholders. In other words, the stockholders of the selling corporation, or at least a majority of them, could agree with the acquiring corporation to sell their shares of the selling corporation to the acquiring corporation for cash or to exchange such shares for securities or other property of the acquiring corporation. The terms of the sale would be negotiated between the shareholders of the selling corporation and the acquiring corporation. One reason for using this alternative is simplicity in that a sale of a majority of shares of a selling corporation might be negotiated and consummated quickly, and this generally can be undertaken without corporate action by the selling corporation or approval of the other shareholders who are not participating in the sale. Thus, certain procedural requirements which must be followed in the other forms noted above need not be satisfied in a privately negotiated sale of stock.

Another advantage to this method rests in the ability of the majority holders of the selling corporation's shares to sell the shares at a premium price. Often, this means that the price paid for the majority (or control) shares exceeds what would be paid for the minority shares either in a privately negotiated sale or a subsequent merger of the selling corporation with the acquiring corporation. Courts have made it clear that, as a general rule, a premium price may be paid for control and that the majority stockholder (or majority group) owes no duty to distribute the premium to the minority.[11] As mentioned in part II, however, there are certain disadvantages to the acquiring corporation if this method is followed.

II. Procedure

Except for the sale of stock in a privately negotiated transaction, all of the forms presented above are subject to certain specified statutory procedures before they may be utilized. For example, in a merger the board of directors of each constituent corporation is required to adopt a plan of merger, and the plan must contain provisions specified in the statute such as the consideration to be received for the shares of the selling corporation.[12] The board of directors must then direct that the plan of merger be submitted to a vote at a meeting of shareholders (which may be either an annual or a special meeting), and written notice of the meeting has to be given not less than 20 days before the meeting. A copy or a summary of the plan of merger or plan of consolidation must be included in or enclosed with the notice of the special meeting.[13]

At the meeting of shareholders, the plan of merger is required to be approved by the affirmative vote of the holders of two-thirds of all shares of each constituent corporation entitled to vote on the plan.[14] Following shareholder approval, articles of merger must be executed by the appropriate corporate officers and be filed with the Secretary of State.[15]

These procedures are the same for consolidations and are substantially the same for exchange of stock transactions and sales of assets other than in the regular course of business, except that no filing with the Secretary of State is required following approval by the stockholders in an exchange of stock or sale of assets transaction.

In all of the transactions discussed in part I, except the privately negotiated sale of stock, stockholders have the right to dissent[16] and, upon following the procedures set forth in Section 10-2A-163, have the right to have their shares purchased for cash at the fair value of such shares as of the date prior to the date on which the shareholder vote was taken approving the proposed corporate action.

Note several points regarding the above procedures. First, in each transaction form, except the sale of stock, the board of directors must approve a plan that relates to the form, *i.e.*, a merger, consolidation, sale of assets, or exchange of stock. Typically, that plan is set forth in a written agreement which contains the terms that are required by statute to be included in the plan and which often sets forth additional terms agreed to by the parties.

Second, the statute requires that the plan, or a summary of the plan, be in-

cluded in or enclosed with the notice of special meeting of the stockholders.[17] This raises disclosure issues to stockholders which are outlined further in part III. It is sometimes thought that a company which is not a public company, and therefore not subject to the disclosure obligations of the SEC's proxy regulations,[18] with regard to matters to be voted upon, need provide a little or no disclosure to stockholders. In the case of a transaction such as a merger, a sale of assets, or an exchange of stock, however, inadequate disclosure can provide a basis for attack by shareholders who may be unhappy about the transaction, especially the consideration paid for shares of the selling corporation.[19] These actions are generally founded upon state law or the antifraud provisions of the federal securities laws.

Many of the foregoing problems can be avoided if the sale is undertaken pursuant to a privately negotiated sale of a majority of the shares of the corporation by individual stockholders. In that case, no stockholder meeting or other statutory steps are required to be followed. At the same time, however, if the acquiring corporation is unable to negotiate the purchase of 100 percent of the stock of the selling corporation, the acquiring corporation, once it acquires a majority of the stock, will be left with minority stockholders in the selling corporation, and, thus, the acquiring corporation and its management will owe fiduciary obligations to those stockholders. That may be a result which is unpalatable to the acquiring corporation and its board of directors.

A final point relates to the consideration to be paid in the transaction. In most cases, a business will be sold for cash or stock of the acquiring corporation. A cash sale is generally less complex than a sale for stock or other securities of the acquiring corporation. Sometimes the consideration may be mixed, *i.e.*, part cash or part stock (or other property).[20] If the sale involves the issuance of stock or securities of the acquiring corporation, the issuance of stock or other securities may subject the acquiring corporation to the registration requirements of both the Securities Act of Alabama and the federal securities laws unless exemptions from registration are available.

III. Certain problem areas

1. **Conflicts of interest**—Several problems arise in the transactions discussed above when approval by the board of directors is required. For example, under Section 10-2A-63, if a director of the selling corporation is a director or officer of, or is financially interested in, the acquiring corporation, the transaction contains an inherent conflict of interest. As a result, the conflict must be disclosed to the full board of directors which is required to authorize the transaction without the vote of any interested director, or the conflict of interest must be disclosed to the shareholders who must approve or ratify the transaction. Obviously, a conflict of interest exists if a director of the selling corporation is also a director or a major stockholder of the acquiring corporation. Such conflicts of interest are not unusual in sales of small businesses. They need not necessarily create problems, but if there are minority shareholders in either the selling corporation or the acquiring corporation, the proce-

dure set forth in Section 10-2A-63 should be followed carefully in order to ensure that the transaction is free from attack by any disgruntled stockholders.

Note, too, that Section 10-2A-63 requires that the transaction be fair and reasonable to the corporation regardless of the manner in which the transaction is approved.[21] Thus, even though the transaction receives the approval of the disinterested directors, or receives the approval of stockholders, if it is not fair and reasonable to the corporation, it is voidable because of the relationship giving rise to the conflict of interest.

Additional problems arise under this section if a majority of the directors have the prohibited conflict of interest. The statute, for example, provides that common or interested directors may not be counted in determining the presence of a quorum at a meeting of the board of directors which authorizes the transaction. What if the board of directors consists of five members, four of whom have a conflict, but a majority of which is required for a quorum? In this case, the inability of the board to establish a quorum for a meeting would prevent director action and would mean that the transaction would be required to be approved by the stockholders of the corporation. Stockholder approval would protect the transaction from attack on the basis of the conflict of interest, but the requisite board approval of the transaction would be absent. This dilemma, the result of which would be failure to comply with the statutory procedures, is not addressed by the statutes.[22]

Another issue arises in the case of stockholder approval under Section 10-2A-63. If a conflict of interest transaction is presented to the stockholders in order for the section to be satisfied, can interested stockholders vote, or must the transaction be approved only by those stockholders who have no interest in the matter to be voted upon? While Section 10-2A-63 specifically excludes interested directors from voting in any director action on the matter, it contains no similar prohibition for interested stockholders in the stockholder vote. Thus, there may be a legislative implication that interested stockholders may vote. There is no case law on point in Alabama, however, and there is some authority in other jurisdictions suggesting that interested stockholders should abstain from voting.[23]

2. **Disclosure to stockholders**—Except for the sale of stock in a privately negotiated transaction, each of the transactions discussed above must be approved by stockholders. The statute specifically requires that the plan of merger or consolidation be distributed to (or be described for) the stockholders.[24] In addition, as noted above, the conflict of interest statute may require disclosure to shareholders of the particular conflict of interest in question when the shareholders are required to vote on the transaction. The obvious question here is how much disclosure should be presented to stockholders in these types of transactions. While a nonpublic company is not subject to the disclosure requirements of the SEC's proxy regulations, the Alabama Business Corporation Act nonetheless requires at least some disclosure to the stockholders with respect to certain types of transactions. Implicit in that requirement is that the disclosure be fair and complete, *i.e.*, that it not be misleading. While there are no cases in Alabama that speak to the disclosure which must be made to stockholders of a nonpublic company, cases in other jurisdictions confirm that stockholders must be informed fairly about the matters to be voted upon at a stockholder meeting and that any disclosure given must contain all material information necessary to enable stockholders to make an informed decision.[25] Some cases have suggested that in order to ensure complete disclosure to the stockholders the disclosure provisions of the SEC's proxy rules should be followed.[26] While cases from other states indicate that the disclosure obligations imposed upon a nonpublic company are probably not as great as the obligations imposed on a public company under the SEC's proxy rules,[27] disclosing in accordance with the proxy rules, at least in substantial part, should help ensure that the information given to stockholders is adequate and that the risks of having the transaction overturned, or enjoined, for lack of adequate disclosure are minimized.

3. **Disclosure of pending negotiations**—A particularly troubling issue arises during negotiations regarding the sale of a business when there are stockholders of the selling corporation who are not privy to the negotiations. Sometimes these stockholders even sell shares to the corporate insiders who are aware of the negotiations but who fail to disclose the negotiations to the selling stockholders. If a definitive agreement regarding the sale of the corporation is in existence, then any purchase of stock by corporate insiders aware of the agree-

ment from stockholders who are unaware of the agreement would violate Rule 10b-5[28] of the SEC on the basis that the definitive agreement is a material fact which should be disclosed in the sale or purchase of the stock.[29] Sometimes, however, negotiations are merely in process, and no definitive agreement has been reached. Before the U.S. Supreme Court's ruling in *Basic v. Levinson*[30] several circuits stated that unless an agreement in principle had been reached regarding the purchase price to be paid for the corporation and the structure of the transaction, no disclosure obligation existed to other stockholders.[31] In *Basic*, however, the Supreme Court ruled that the mere existence of negotiations can be a material fact which must be disclosed to all stockholders if there is any trading in the stock. According to the Court, whether the existence of merger negotiations is material depends upon assessing the probability that the merger will occur and the anticipated magnitude of the transaction to the selling corporation if it in fact occurs.[32]

The *Basic* decision establishes the rule that even in the sale of a nonpublic company, corporate insiders (and their counsel) must be sensitive to whether any trading in the stock of the selling corporation is taking place. This is especially true if any persons who have access to the inside information regarding the negotiations are purchasing stock from unsuspecting stockholders. If that is the case, such persons, and possibly the corporation itself, may be in violation of the federal securities laws on the theory that the purchases have taken place in violation of the ban on trading on the basis of material, nonpublic information under Rule 10b-5.[33]

4. **Business judgment of the board**—Except for privately negotiated sales of stock, all of the transactions discussed above must be initially approved by the board of directors of the selling corporation. As a result, it is the board of directors of the corporation, in the first instance, that must make a decision as to whether the transaction is in the best interest of the corporation and, thereafter, to recommend the transaction for stockholder approval. Anytime a board of directors of a corporation is required to make a decision regarding what is in the best interest of the corporation, the directors must satisfy certain fiduciary duties. These duties encompass the duty of loyalty and the duty of care.[34] Accordingly, when directors decide whether a transaction is good for a company, if any challenge to the decision is ever presented, they must be able to demonstrate that these duties were satisfied.

Another way of stating this proposition is that the board of directors of the corporation must act in accordance with good business judgment. While there are a few Alabama cases which address the business judgment rule in Alabama,[35] there are a host of cases in Delaware (as well as in other jurisdictions) which discuss the duty of the board of directors in a sale of business context. Those cases state what is commonly known as the "business judgment rule." This rule provides that when a board of directors acts its decisions will be presumed to be in the best interests of the corporation and will not be disturbed by a court provided that the directors acted with due care, in good faith, and without self-interest.[36] These principles apply equally to public and nonpublic corporations.

Accordingly, in the sale of a nonpublic corporation, the board of directors must be prepared to demonstrate to minority shareholders that its decision satisfied the business judgment rule. Business judgment rule issues can arise in a variety of situations, but two examples will suffice here. First, assume that members of the board of directors of the selling corporation wish to merge their corporation into the acquiring corporation. Assume further that some of the directors of the selling corporation own stock or are otherwise financially interested in the acquiring corporation, and, therefore, have a conflict of interest in the transaction. Finally, assume that there are a number of other stockholders in the selling corporation, so that the directors of the selling corporation owe fiduciary duties to protect the interest of the minority stockholders. In that situation, the business judgment rule requires that any decision made by the board of directors regarding the sale of the corporation be free of the conflict of interest.

Accordingly, it would be typical for the members of the board of directors of the selling corporation who are not financially interested in the transaction to serve as a committee of directors to review all relevant facts regarding the merger and to approve the transaction. Note that this process is consistent with Section 10-2A-63 which sets forth the procedure that must be followed for the approval of transactions in which directors have a conflict of interest.[37] Even if the terms of the transaction are entirely fair to the selling corporation, if the decision of the board of directors to recommend the transaction is tainted by a conflict of interest, then, under the business judgment rule, a court is free to second-guess the decision of the directors. If the court finds that the transaction is not inherently fair, it can enjoin the consummation of the transaction or allow damages to minority stockholders who claim that they have been damaged as a result of the transaction.

The second example involves a situation in which there is no conflict of interest and the directors act entirely in good faith. It merely offers the issue of whether, in approving the transaction, the directors exercised their duty of due care. In other words, were the directors fully informed about the value of their corporation (and other transaction terms) when they authorized the transaction? The Delaware case of *Smith v. Van Gorkum*[38] although it involved a public company, presented a situation where the directors of the selling company approved the sale at a price that included a substantial premium over the prevailing market value. Accordingly, on its face,

FOOTNOTES

1. *Ala. Code* §§ 10-2A-1 to -339 (1990). Further Alabama statutory references are to the *Code of Alabama*, 1975.
2. The Securities Act of Alabama is codified at §§ 8-6-1 to -60. Federal securities law is embodied primarily in two acts, the Securities Act of 1933, 15 U.S.C.A. §§ 77a-77aa (West 1981), and the Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78a-78j (West 1981).
3. 15 U.S.C.A. §§ 781 & 78o(d) (West 1981).
4. See §10-2A-140.
5. See §10-2A-145(b).
6. See § 10-2A-141.
7. See §10-2A-145(b).
8. See §10-2A-161.
9. See *Matrix-Churchill v. Springsteen*, 461 So.2d 782 (Ala. 1984); *Rivers v. Stihl, Inc.*, 434 So.2d 766 (Ala. 1983); *Morris Ave. Corp. v. Daniel Realty Corp.*, 429 So.2d 268 (Ala. 1983); Andrews v. John E. Smith's Sons Co., 369 So.2d 781 (Ala. 1979). *In Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1456 (11th Cir. 1985), the court said that the general rule that the acquisition by one corporation of the assets of another corporation does not necessarily burden the acquiring corporation with the debts and liabilities of the other corporation is not followed in the case of a *de facto* merger. In addition, other issues may be involved in a sale of assets transaction, such as whether the bulk sales provisions of §§ 7-6-101 to -111 apply.
10. See § 10-2A-170.
11. See, e.g., *Delano v. Kech*, 663 F.2d 990 (10th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982); *Clagett v. Hutchinson*, 583 F.2d 1259 (4th Cir. 1978); *Stromfeld v. Great Atl. & Pac. Tea Co.*, 484 F.Supp 1264 (S.D.N.Y. 1980). This rule is not without exception. Among other things, if the seller of control has reason to believe that the purchasers will loot the corporation, if the sale involves a usurpation of corporate opportunity, or if a sale of corporate office is involved, liability may be imposed upon the seller of control. See e.g., *Shell v. Hensly*, 430 F.2d 819 (5th Cir. 1970); *Perlman v. Feldman*, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955); *Gerdes v. Reynolds*, 28 N.Y.S. 2d 622 (N.Y. Sup. Ct. 1941).
12. § 10-2A-140(b).
13. § 10-2A-142(a).
14. § 10-2A-142(b).
15. § 10-2A-143. One procedural requirement that can be easily overlooked is the requirement in Section 10-2A-146(a)(2) that the surviving corporation in a merger of an Alabama corporation into a foreign corporation make appropriate filings with the Secretary of State of Alabama.
16. See §§10-2A-162 and 10-2A-171.
17. See §§ 10-2A-142, -161(2), and -171.
18. 17 C.F.R. §§ 240.14a-1 to .14(g)(4) (1988).
19. See e.g., *Brown v. Ward*, 593 P.2d 247 (Alaska 1979); *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. 1977); *Brown v. Halbert*, 76 Cal. Rptr. 781 (Cal. Ct. App. 1969).
20. See §10-2A-140(b)(3).
21. See § 10-2A-63, Commentary.
22. Sections 10-2A-140, -141, -161 and -170 require board approval of a merger, consolidation, sale of assets, and exchange of stock, respectively, as part of the statutory procedure for such transactions. These statutes do not address the situation where a majority of the board has a conflict of interest. One possible resolution to this problem may be to amend the corporation's bylaws to reduce the number of directors required for a quorum to one, if there is at least one director without a conflict of interest. Otherwise, a disgruntled stockholder might challenge the transaction for failure to follow the statutory procedure for approval of the transaction.
23. See generally, E. Brodsky & M. Adamski, *Corporate Officers & Directors* § 3:06 (1984) (hereinafter cited as "Brodsky") (disinterested shareholder approval removes any "taint" or presumption of wrongdoing because it provides an independent layer of scrutiny).
24. See §§10-2A-140(b), -142(a). See *supra* notes 17-19 and accompanying text.
25. See, e.g., *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977) (Delaware law requires complete, not just "adequate," disclosure of material facts); *Knauff v. Utah Contr. & Mining Co.*, 408 F.2d 958, 961, 963-65 (10th Cir. 1969)(judging adequacy of disclosure under federal Rule 10b-5 when company not subject to federal proxy regulations); *In re Scheuer*, 59 N.Y.S.2d 500, 501 (N.Y. Sup. Ct. 1942)(applying "exacting standards of fairness" in proxy solicitation not subject to federal proxy regulations).
26. See *Brown v. Ward*, 593 P.2d 247, 250 (Alaska 1979); *O'Conner v. Fergang*, 182 N.Y.S. 2d 942, 944 (Sup. Ct. 1958). *But see Bresnick v. Home Title Guar. Co.*, 175 F.Supp. 723, 725 (S.D.N.Y. 1959) (expressly rejecting application of federal proxy rules to solicitations not subject to such rules due to technical nature of proxy rules).
27. See generally *Brown v. Ward*, 593 P.2d 247, 249 (Alaska 1979); *Empire So. Gas Co. v. Gray*, 46 A.2d 741, 746 (1946). Common law requires, generally, that proxy solicitations must be free from materially false or misleading statements, but there is no clear structure under common law to lend guidance to the draftsman as to the requisite content of disclosure to stockholders. See also Comment, *Standards of Disclosure in Proxy Solicitations of Unlisted Securities*, 1960 Duke L.J. 623, 635-36.
28. 17 C.F.R. § 240.10b-5 (1988) 'Rule 10b-5'). In general, Rule 10b-5 prohibits fraud in the sale of securities, including the making of untrue statements of material facts or omissions of material facts required to make statements made not misleading.
29. See *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988); *Greenfield v. Heublein, Inc.*, 742 F.2d 751 (3d Cir. 1984). *Reiss v. Pan Am. World Airways, Inc.*, 711 F.2d 11 (2d Cir. 1983);
30. 485 U.S. 224 (1988);
31. *See Flamm v. Eberstadt*, 814 F.2d 1169 (7th Cir. 1987); *Greenfield v. Heublein, Inc.*, 742 F.2d 751 (3rd Cir. 1984); *Staffin v. Greenberg*, 672 F.2d 1196 (3d Cir. 1982).
32. See *Basic, Inc. v. Levinson*, 485 U.S. 224, 238-239 (1988).
33. See e.g., *McLaury v. Duff and Phelps, Inc.*, [1987-1988 Transfer Binder], Fed. Sec. L. Rep. (CCH) Para. 93,767, at 98,597 (N.D. Ill. May 13, 1988) (relying on *Basic*, court noted that, because of signif cance of buyout to privately held corporations, negotiations regarding buyout become material at an earlier stage than negotiations concerning other transactions).
34. See *generally* Brodsky, § 2:01 and 3:01 (upon accepting office of director or officer of a corporation, a person assumes a duty of loyalty to company and its shareholders and a duty to act with care in fulfilling responsibilities); *See also Banks v. Bryant* Slip.Op. 88-98 (Ala. March 2, 1990); *Burt v. Burt Boiler Works, Inc.*, 350 So.2d 327 (Ala. 1978).
35. See, e.g., *Deal v. Johnson*, 362 So.2d 214 (Ala. 1978); *Cadden v. Ladd*, 358 So.2d 437 (Ala. 1978); *Burke v. Gulf, M. & O.R. Co.*, 324 F.Supp. 1125 (S.D. Ala. 1971), *aff'd*, 465 F.2d 1206 (5th Cir. 1972); *Cherry Inv. Corp. v. Folsom*, 142 So.2d 181 (Ala. 1962); *King v. Livingston Mfg. Co.*, 68 So. 897 (Ala. 1915).
36. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Smith v. Van Gorkum*, 488 A.2d 858 (Del. 1985); *Aronson v. Lewis*, 473 A.2d 805 (Del. Supr. 1984). Essentially, the business judgment rule provides that directors are not insurers and that if they act in good faith, without self-interest and with due care, they will not be held liable for mistakes or errors of judgment. Brodsky §2:07.
37. See § 10-2A-63. According to the official commentary, Section 10-2A-63 is not intended to provide a basis for validating for all purposes a fair and reasonable contract or transaction between an interested director and the corporation, but seeks to establish "that such transaction is not automatically void or voidable solely by reason of the director's interest." Thus, Section 10-2A-63 is not, according to the commentary, the exclusive test of validity of a conflict of interest transaction. This means that even if Section 10-2A-63 is satisfied, the decision made by a board of directors in a conflict of interest transaction will nevertheless be governed by the business judgment rule.
38. 488 A.2d 858 (Del. 1985).
39. The valuation issue is particularly noteworthy. The court was not persuaded that the directors had acted properly even though the company was sold at a premium over market price. "A substantial premium may provide one reason to recommend a merger, but in the absence of *other sound valuation information*, the fact of a premium alone does not provide an adequate basis upon which to assess the fairness of an offering price." *Id.* at 875 (emphasis added).
40. 471 U.S. 681 (1985).
41. See, e.g., *King v. Winkler*, 673 F.2d 342 (11th Cir. 1982); *Sutter v. Groen*, 687 F.2d 197 (7th Cir. 1982); *Chandler v. Kew, Inc.*, 691 F.2d 443 (10th Cir. 1977).
42. See *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 697 (1985).
43. *Banton v. Hackney*, 557 So.2d 807, 825 (Ala. 1990).
44. The Alabama Securities Act contains a liability provision which is similar to federal Rule 10b-5. See § 8-6-17.

the transaction appeared to be "fair." At the same time, however, minority stockholders brought an action for damages against the directors of the company on the basis that the directors could have obtained a higher price. The court, in reviewing the procedures followed by the board of directors in approving the transaction, held that the directors did not exercise their duty of due care. The court noted that the proper standard to judge director actions in this context is a gross negligence standard. It found that the board of directors, in relying almost exclusively on the chairman of the board of the corporation to determine what the company was worth, in failing to obtain an appraisal of the company by an independent expert, and in failing to make their own judgment as to the inherent worth of the company, were grossly negligent. The directors were held liable to the stockholders for damages.[39]

Smith v. Van Gorkum illustrates that the business judgment rule can be harsh. It is vital that, when a board of directors approves a sale of a company, the directors keep in mind that they may be required to demonstrate to a court that they acted with due care in arriving at a value of the company or in approving other terms. Even in the nonpublic company context, the board of directors must be prudent about the procedures that it follows.

5. **Sale of Business Doctrine–fraud in the sale of a security**—The sale of a business corporation almost always generates considerations under federal and state securities laws. In the sale of a closely held corporation, the form of the transaction (i.e., a merger, sale of assets, sale of stock, etc.) often is important only as the means of transferring the business. Prior to the Supreme Court's decision in *Landreth Timber Co. v. Landreth*,[40] several circuits, including the Eleventh Circuit, had held that in the sale of a business, in which control of the business shifted to the purchaser who intended to operate the business, no sale of a security occurred within the meaning of the federal securities laws even though the transaction was structured as a stock sale.[41] This rationale, known as the sale of business doctrine, held that what was primarily involved was a sale of a business, and the purchaser, who intended to operate the business, really did not need the protection of the federal securities laws.

Landreth rejected this doctrine.[42] Now, a sale of a security is deemed to be involved even in the simplest of transactions, such as where a sole stockholder transfers 100 percent of the stock of the selling corporation to the acquiring corporation which, of course, will operate and have sole control over the business.

Recently, the Alabama Supreme Court followed the rationale of *Landreth* and held that the Alabama securities laws apply to a sale of a business and the transfer of all of the stock.[43] *Hackney* has broad implications in the sale of a nonpublic company. The antifraud provisions of the Alabama Securities Act[44] clearly apply and will provide remedies to either the defrauded seller or purchaser in the sale of business context. The impact may be greater for the acquiring corporation, which may have a cause of action against the selling corporation (or its stockholders) if the selling party fraudulently misrepresents to the acquiring corporation information about the business being acquired.

Conclusion

The sale of a business is sometimes considered to be a relatively simple undertaking, especially if the business is operated through a nonpublic corporation. As can be seen, however, the sale can take a variety of forms, and usually a number of corporate and securities issues must be addressed before any effective sale can be accomplished. ■

CLE
Calendar of Events

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NOVEMBER

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15-16 University of Alabama, "Federal Tax Clinic", Tuscaloosa, AL, 12.0 CLE credits. Contact (205) 348-6222.

16 Alabama Bar Institute for CLE, "Civil Procedure", Birmingham, AL, 6.0 CLE credits. Contact (205) 348-6230.

16 Alabama Trial Lawyers Association, "The Nuts & Bolts of Product Liability Law", Lanett, AL, Ramada Inn. Contact (205) 262-4974.

16 Cumberland Institute for CLE, "Soft Tissue Injury Case", Birmingham, AL, Pickwick Center, 6.0 CLE credits, Cost $125. Contact (205) 870-2865.

16-17 Louisiana State University School of Law, "Jury Practice", Baton Rouge, LA, LSU Law Center, 8.3 CLE credits. Contact (504) 388-5837.

28 National Business Institute, "Administration of the Estate", Birmingham, AL, 6.0 CLE credits, Cost $108. Contact (715) 835-8525.

28 National Business Institute, "The Legal Issues of Problem Collections in Alabama", Montgomery, AL, 6.0 CLE credits, Cost $108. Contact (715) 835-8525.

29 Alabama Bar Institute for CLE, "Trial Issues", Huntsville, AL, 6.0 CLE credits. Contact (205) 348-6230.

29 Alabama Bar Institute for CLE, "Trial Issues", Mobile, AL, 6.0 CLE credits. Contact (205) 348-6230.

29 National Business Institute, "Administration of the Estate", Huntsville, AL, 6.0 CLE credits, Cost $108. Contact (715) 835-8525.

29 National Business Institute, "The Legal Issues of Problem Collections in Alabama", Mobile, AL, 6.0 CLE credits, Cost $108. Contact (715) 835-8525.

29-30 Wake Forest University School of Law, "Personnel Law", Atlanta, GA, Terrace Garden Inn, 12.0 CLE credits, Cost $440. Contact (919) 761-5560.

30 Alabama Bar Institute for CLE, "Bankruptcy Law", Birmingham, AL, 6.0 CLE credits. Contact (205) 348-6230.

30 Alabama Trial Lawyers Association, "Trial Practice Update", Sheffield, AL. Contact (205) 262-4974.

30 Cumberland Institute for CLE, "Evidence for Advocates", Birmingham, AL, Pickwick Center, 6.0 CLE credits, Cost $140. Contact (205) 870-2865.

30 Professional Education Systems, Inc., "Orthopedics for Lawyers", Birmingham, AL. 6.0 CLE credits, Cost $165. Contact (800) 647-8079.

DECEMBER

5 Attorneys Insurance Mutual of Alabama, Inc., "Legal Malpractice '90: Its Causes and Cures", Birmingham, AL, Civic Center, 6.0 CLE credits. Contact (800) 526-1246.

6 Alabama Bar Institute for CLE, "Trial Issues", Montgomery, AL, 6.0 CLE credits. Contact (205) 348-6230.

6-7 Southwestern Legal Foundation, "Institute on Patent Law", Dallas, TX, Westin Hotel. Contact (214) 690-2377.

7 Alabama Bar Institute for CLE, "Trial Issues", Birmingham, AL, 6.0 CLE credits. Contact (205) 348-6230.

7 Alabama Bar Institute for CLE, "Estate Planning", Birmingham, AL, 6.0 CLE credits. Contact (205) 348-6230.

7 Alabama Trial Lawyers Association, "Annual Trial Practice Update", Montgomery, AL, Riverfront Inn. Contact (205) 242-4974.

7 Cumberland Institute for CLE, "Representing The Distributor and Manufacturer", Birmingham, AL, Pickwick Center, 6.0 CLE credits, Cost $125. Contact (205) 870-2865.

7 Cumberland Institute for CLE, "Admiralty", Mobile, AL, Admiral Semmes Hotel, 6.0 CLE credits, Cost $125. Contact (205) 870-2865.

10-13 Southwestern Legal Foundation, "Securities Regulation", Dallas, TX, Westin Hotel. Contact (214) 690-2377.

11 Alabama Bar Institute for CLE, "Alabama Practice Update", Mobile, AL, 6.0 CLE credits. Contact (205) 348-6230.

12 Alabama Bar Institute for CLE, "Alabama Practice Update", Montgomery, AL, 6.0 CLE credits. Contact (205) 348-6230.

13 Alabama Bar Institute for CLE, "Alabama Practice Update", Huntsville, AL, 6.0 CLE credits. Contact (205) 348-6230.

13 Cumberland Institute for CLE, "Recent Developments", Birmingham, AL, 6.0 CLE Credits, Cost $125. Contact (205) 870-2865.

14 Alabama Bar Institute for CLE, "Alabama Practice Update", Birmingham, AL, 6.0 CLE credits. Contact (205) 348-6230.

14 Alabama Trial Lawyers Association, "Trial Practice Update", Dothan, AL. Contact (205) 242-4974.

14 Birmingham Bar Association, "Year-End Update", Birmingham, AL, Harbert Center, 5.0 CLE credits, Cost $50. Contact (205) 251-8006.

14 Cumberland Institute for CLE, "Civil Procedure", Birmingham, AL, 6.0 CLE credits, Cost $125. Contact (205) 870-2865.

14 Institute of Continuing Legal Education in Georgia, "Labor Law Institute", Atlanta, GA, Sheraton Century Center Hotel, 6.0 CLE credits, Cost $105. Contact (404) 542-1121.

15 Tulane Law School, "New Techniques for Winning Jury Trials", New Orleans, LA, Hyatt Regency, 6.0 CLE credits, Cost $225. Contact (504) 865-5900.

18 Alabama Bar Institute for CLE, "Divorce Law", (video replay), Tuscaloosa, AL, 6.0 CLE credits. Contact (205) 348-6230.

19 Alabama Bar Institute for CLE, "Trying & Settling Personal Injury Cases", (video replay), Tuscaloosa, AL, 6.0 CLE credits. Contact (205) 348-6230.

19 Alabama Bar Institute for CLE, "New Alabama Rules of Criminal Procedure", (video replay), Birmingham, AL, 6.0 CLE credits. Contact (205) 348-6230.

20 Alabama Bar Institute for CLE, "New Alabama Rules of Criminal Procedure", (video replay), Tuscaloosa, AL, 6.0 CLE credits. Contact (205) 348-6230.

21 Birmingham Bar Association, "Punitive Damages", Birmingham, AL, Harbert Center, 1.0 CLE credit. Contact (205) 251-8006.

21 Mobile Bar Association, "Environmental Law", Mobile, AL, Admiral Semmes Hotel, 3.3 CLE credits. Contact (205) 433-9790.

it. Speculation "is a highly subjective concept which means different things to different investors." Wade, *supra*, at 7. It arguably resulted in courts substituting their own judgment for that of the trustee. This, along with the common law rule's focus upon capital preservation, has "encouraged trustees to invest conservatively to avoid losses, even though...so-called 'safe' investments actually may increase overall portfolio risk." *Id.*

Section 19-3-120.2(a), like ERISA and the various other state statutes, again omits any reference to speculation or safety of capital. Wade, *supra*, at 15. A trustee, instead, is to manage investments to "attain the purposes of the account." This objective standard contrasts with the inherently subjective speculation/preservation of investment dichotomy underlying the common law "prudent person" rule. Wade, *supra*, at 12.

Under the new standard, a trustee, subject to the trust's objectives and other relevant factors, may select an investment in order to increase capital rather than merely preserve it. While the Restatement prohibits an investment with a high degree of risk, even where the opportunity for gain outweighs any risk, §19-3-120.2(a) "does not require the conclusion that any investment is per se imprudent based solely on the risk associated with it." Wade, *supra*, at 15.

The account's overall portfolio of assets

Subsection (a) represents another significant departure from the common law. Its second sentence permits investment strategies consistent with modern portfolio theory and other investment techniques that account for the composition of the portfolio as a whole in terms of its overall risk and return. Section 19-3-120.2(a) provides, in part, that a trustee "*shall* consider the role that the investment plays within *the account's overall portfolio of assets.*" (emphasis added). This mandatory direction is similar to that of the Washington statute.[9] The trustee also "may consider the general economic conditions, the anticipated tax consequences of the investment, the anticipated duration of the account and the needs of the beneficiaries of the account."[10]

At common law, while some courts at least acknowledged the role that a particular investment played within a trust portfolio as a whole, see, e.g., *Chase v. Pevear*, 383 Mass. 350, 419 N.E.2d 1358 (1981); *In re Bank of New York*, 35 N.Y.2d 512, 323 N.E.2d 700 (1970), these same courts emphasized that a trustee must focus upon the merits of each individual investment. For example, as the New York Court of Appeals has stated, "[t]he fact that this portfolio showed substantial overall increase in total value during the accounting period does not insulate the trustee from responsibility from imprudence with respect to individual investments for which it would otherwise be surcharged...." 35 N.Y.2d at 517.

The new statute, moreover, addresses a major criticism of the common law "prudent person" rule, that is, the particular concept of risk implicit in this rule. Three elements summarize this concept: (1) a focus upon the risk of loss; (2) a focus upon the risk of a particular investment, rather than a focus upon the overall portfolio; and (3) an isolation of the risk of loss of a particular investment from its potential for gain. Note, *The Regulation of Risky Investments*, to at least one commentator, implicitly incorporates this concept of "risk." Wade, *supra*, at 7.

The common law rule's focus upon risk avoidance assumes that a trust beneficiary's only concern is the possibility that future trust investment values will be less than cost. *Id.* at 8. A beneficiary's concern, more than likely, is with all possible future values, including the possibility that such values will exceed cost. This suggests that, in evaluating an investment, a trustee should consider the opportunity for gain, as well as the possibility of loss. In short, the common law isolates risk from potential return even though a beneficiary, more than likely, does not.

The traditional focus upon the risk of loss resulting from a particular investment also assumes that the risk of an entire trust portfolio is merely the arithmetical sum of the risks of its component investments. *Id.* But "to examine the prudence of any single investment in such a portfolio out of the context of the portfolio would be akin to examining the prudence of the placement of any stone in a gothic arch without examining its relationship to the arch." Klevan, *Fiduciary Responsibility Under ERISA's Prudent Man Rule*, 44 J. Tax'n 152, 155 (1976). A particular investment, which at common law would be "speculative" if considered alone, may be "prudent" within the context of the portfolio as a whole, i.e., in light of its potential for gain and the overall risk of the portfolio as a whole.[11]

Under §19-3-120.2(a), a trustee may design a portfolio "in such a way as to contain securities that will react in different manners to events which influence the market, so that movement downward in one part of the portfolio will be offset by a corresponding upward movement in another part of the portfolio." Klevan, *supra*. This type of portfolio "is theoretically less vulnerable to risk than any of its individual components, as each investment is made considering its effect on the overall riskiness of the entire portfolio." *Id.*

Still, neither the language of §19-3-120.2(a) nor ERISA suggests that a trustee may wholly ignore the merits of an individual investment. For example,

the Department of Labor regulations interpreting ERISA still require a determination that "a particular investment...is reasonably designed...to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain...." 29 C.F.R. §2550404(a)-1(b)(2). Court decisions interpreting ERISA are consistent.[12]

Nor should one necessarily view the statute's failure to mention diversification as eliminating this common law requirement.[13] A trustee should arguably diversify his investments, unless the various factors enumerated in §19-3-120.2, e.g., general economic conditions, the beneficiaries' needs, etc., dictate otherwise.

Section 19-3-120.2, like ERISA, contemplates a two-step process. First, a trustee must investigate the merits of a particular investment. Second, the trustee must assess how this particular investment affects the portfolio as a whole. Unlike the common law rule, this section legitimizes this second step as part of the decision making process. Wade, *supra*, at 16.

As they exist at the time of the investment decision

Subsection (b) of the statute also sanctions the application of modern portfolio theory: "The propriety of an investment decision is to be determined by what a fiduciary knew or should have known at the time of the decision about the inherent nature and expected performance of the investment, the attributes of the account portfolio, the general economy, and the needs and objectives of the beneficiaries of the account as they existed at the time of the investment decision." This subsection closely parallels the language of the Delaware and Georgia statutes, and is consistent with ERISA.[14]

Section 19-3-120.2(b) also retains a key aspect of the common law standard: that a court will judge a trustee on the basis of his conduct in carrying out his investment responsibilities, rather than on the basis of his performance or results. Courts do not demand infallibility of a trustee; instead, they measure the prudence of his actions by his conduct at the time an investment is made. *In re Morgan Guaranty Trust Co.*, 89 Misc. 2d 1088, 1091, 396 N.Y.S.2d 781, 784 (1977).

Under the common law rule, at least in theory, a loss of an investment did not automatically result in liability. The common law rule, however, provided little, if any, guidance as to the scope of a permitted or prohibited investment. In theory, if a trustee proved that he had diligently researched and monitored each investment in his portfolio, that he had a rational basis for each decision to purchase, sell or retain a particular investment, he should not have been held liable for a loss merely because hindsight revealed that his decision was a mistake. Restatement (Second) of *Trusts* §227 comment o (1959). *See also Starke v. United States Trust Co.*, 445 F.Supp. 670 (S.D.N.Y. 1978) (trustee acted prudently even though a decline in the market value of retained stock exceeded 90 percent over a three-year period).

The inclusion of this language in the statute hopefully will result in a renewed emphasis by the courts upon the ex-

tent to which a trustee takes these factors into account. In the past, some courts have given in to the temptation of second-guessing a trustee's investment decisions, particularly in times of economic uncertainty. *See, e.g., In re Chamberlain's Estate*, 9 N.J. Misc. 809, 156 A. 42 (1931) (holding the trustee liable for not foreseeing the 1929 market crash). Section 19-3-120.2(b) eliminates the common law focus upon losses resulting, by implication, from "speculation," and clearly shifts the focus to the process by which a trustee makes an investment.

Reliance on the express provisions of the trust instrument.

Subsection (c) of section 19-3-120.2 merely emphasizes that the trust instrument itself remains the primary source for determining investment objectives and responsibilities. Under subsection (c), "[a]ny fiduciary acting under a governing instrument shall not be liable to anyone whose interests arise from such instrument for the fiduciary's good faith reliance on the express provisions of such instrument." This language is identical to the language of the Delaware statute, and is consistent with the common law, but differs significantly from ERISA.[15]

Under the common law, a testator may permit an investment in speculative securities. Restatement (Second) of *Trusts* §227 comments s, n (1959). As always,

FOOTNOTES

1. *See, e.g.*, Cal. Prob. Code §16040(b) (1987); Del. Code Ann. tit. 12, §3302 (1987); Ga. Code Ann. §53-8-1 *et seq.* (1988); Wash. Rev. Code §11.100.010 *et seq.* (1987); Minn. Stat. Ann. §501.125 (1987).
2. *See* ERISA §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B); Cal. Prob. Code §16040(b) (West 1987); Del. Code Ann. tit. 12, §3302(a) (1986).
3. Wade, *The New California Prudent Investor Rule: A Statutory Interpretive Analysis*, 20 Real Prop., Prob. & Trust J. 1, 10 (1985) (hereinafter "Wade").
4. *See* notes 1 and 2, *supra*.
5. *See* note 3, *supra*. "This does not mean that the standard will necessarily be a higher or lower standard than imposed under the traditional formulation.... It will be a fairer standard." Hearings on H.R. 1045, H.R. 1046 and H.R. 16462, 91st Cong., 1st Sess. 477 (1969-70). This represents a shift in focus from the common law where a trustee who has greater skill, or represented as such, was held to that higher standard. *See, e.g., First Alabama Bank v. Spragins*, 475 So.2d 512, 516 (Ala. 1985). Under §19-3-120.2, the question now is what level of skill is appropriate given the trust in question.
6. *See* notes 1 and 2, *supra*.
7. "The Department is of the opinion that...the relative riskiness of a specific investment or investment course of action does not render such investment or...course of action either per se prudent or per se imprudent...." 44 Fed. Reg. 37221, 37222 (1979).
8. Alabama law prior to the enactment of §19-3-120.2 was in accord with this view. *See First Alabama Bank of Montgomery v. Martin*, 425 So.2d 415, 427 (Ala. 1982) ("One who is making a prudent investment examines the stocks' intrinsic values and purchases them for *long-term investment*").
9. *See* note 1, *supra*. The California, Delaware and Georgia statutes employ a similar formulation, referring to the "overall investment strategy." While ERISA itself includes no such references, the regulations interpreting ERISA expressly sanction the application of modern portfolio theory: "[T]he prudence of an investment decision should not be judged without regard to the role that the proposed investment or investment course of action plays within the overall plan portfolio." 44 Fed. Reg. 37221, 37222 (1979). *See also* [1975-79 Transfer Binder] Pension Plan Guide (CCH) ¶¶25,177; 25,186.
10. Significantly, while trustees investing the assets of ERISA plans might consider the same factors, the circumstances of such plans differ from those of most personal trusts. For example, ERISA plans are tax exempt and enjoy a regular cash flow from employer contributions. An ERISA fiduciary, moreover, does not have to consider the potentially competing interests of income beneficiaries and remaindermen. These factors may lead to different investment considerations. Cheris, *Making Responsible Investment Decisions in Light of the Evolving Prudent Person Rule*, 14 Est. Planning 338, 340-41 (Nov./Dec. 1987) (hereinafter "Cheris"); Wade, *supra*, at 14.
11. There are several other criticisms of the traditional rule. First, it fails to account for the risk of inflation. Loss of purchasing power through inflation is a serious threat to every investment portfolio, yet statutory codifications of the rule fail to establish as a goal preservation of the real value of the corpus. Sheris, *supra*, at 339. Second, the traditional rule "may cause a trustee to adopt an intransigent posture because it requires a poor investment vehicle to be maintained in the hope that its performance will improve, as opposed to selling at a loss and investing in an instrument that offers a better recovery prospect." *Id.* at 340. Third, it "induces a trustee to hold under-diversified portfolios. The requirement that a trustee investigate and monitor each individual investment necessarily limits the number of investments held." *Id.* Finally, the common law standard "imposes a duty of active portfolio management on the trustee, even though actively managed portfolios rarely outperform comparable passive portfolios." *Id.*
12. A court must inquire "whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).
13. ERISA expressly requires diversification "unless under the circumstances it is clearly prudent not to do so." ERISA §404(a)(1)(C), 29 U.S.C. §1104(a)(1)(C).
14. *See* notes 1 and 2, *supra*. *See also Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) (a court should evaluate investments "from the perspective of the 'time of the investment decision' rather than from, the vantage point of hindsight"); *Marshall v. Glass/Metal Ass'n Pension Plan*, 507 F.Supp. 378, 384 (D. Haw. 1980) ("The application of ERISA's prudence standard does not depend upon the ultimate outcome of an investment, but upon the prudence of the fiduciaries under the circumstances prevailing when they make their decision and in light of the alternatives available to them").
15. *See* note 1, *supra*. ERISA does not permit a governing instrument to modify the basic fiduciary responsibilities mandated by the statute. ERISA §404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D).

a testator is free to vary the otherwise applicable investment standard in the drafting of his own instrument. The new statute merely reemphasizes this point: "The standards set forth in this section may be expanded, restricted, or eliminated by express provisions in a governing instrument." *Ala. Code* §19-3-120.2(c) (Supp. 1989).

Section 19-3-120.2's elimination of the common law focus upon avoiding speculation and preserving capital arguably elevates the importance of the terms of the trust instrument. Wade, *supra*, at 6. Under the common law rule, even the express terms of a trust could be overridden by the prohibition on speculation, where, "owing to circumstances not known to the settlor and not anticipated by him," the making of such investment defeated the trust's purpose. Restatement (Second) of *Trusts* §227 comment w (1959).

The retention of assets

Subsection (d) of §19-3-120.2, which is similar to the California statute, also represents a shift from the common law "prudent person" rule. At common law, a trustee must sell an improper investment regardless of whether he received it at the creation of the trust or whether it was prudent when initially made. Wade, *supra*, at 4. He must continue to monitor its performance and dispose of it if subsequent circumstances render the investment unsuitable in light of the trust's objectives, as well as the investment strategy employed by the trustee. There was, of course, an exception to this rule: where the trust instrument commanded the trustee to retain an existing investment. Wade, *supra*, at 13.

Under 19-3-120.2(c), a trustee "may without liability continue to hold property received into an account at its inception...if and as long as the fiduciary, in the exercise of good faith and of reasonable prudence, may consider that retention to be in the best interest of the account or in furtherance of the goals of the governing instrument." This property, significantly, "may include...stock in the fiduciary if [it is] a corporation...." This tempers the common law rule that a trustee must dispose of an "improper" asset unless the trust instrument specifies otherwise; now, a trustee may make a good faith determination that retention serves the account's interests or furthers the trust's goals.

This section of the statute is also consistent with the ERISA. As one court has stated, "[w]e have no doubt that under the 'prudent man' rule, which is codified in ERISA, the trustees here have a duty within a reasonable time after ERISA took effect to dispose of any part of the trust estate which would be improper to keep." *Morrissey v. Curran*, 567 F.2d 546, 548-49 (2d Cir. 1977).

Retroactive application

Finally, subsection (f) of 19-3-120.2 provides that "this section shall apply to all fiduciary relations now existing or hereafter created, but only to the fiduciary actions or inactions occurring after the effective date hereof." This is significant because one of the other major trust statutes in Alabama, the Alabama Principal and Income Act, as codified at *Ala. Code* §19-3-270 *et seq.* (1984), is inapplicable to trusts created prior to its effective date. *See Englund v. First Nat'l Bank of Birmingham*, 381 So.2d 8, 10 n.1 (Ala. 1980). Thus, fiduciary actions or inactions are subject to section 19-3-120.2 even if the trust was created prior to May 16, 1989, the effective date of that section.

Conclusion

Section 19-3-120.2 represents a significant departure from the common law "prudent person" rule. First, it allows a trustee to make a particular investment in the context of other investments, and allows a trustee to account for both potential gains and losses. Second, the statute eliminates the common law's focus on avoiding speculation and preserving the trust corpus. Third, the statute, it is hoped, will result in a renewed focus by the courts on the process by which fiduciaries actually make investment decisions. Finally, it reaffirms that the key to divining a testator's intent is the trust instrument itself. While the statute establishes the standard by which a court should judge a trustee's conduct, a testator is free, as always, to provide directions to the contrary. ■

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

by Kenneth W. Battles, Sr.

Kenneth W. Battles, Sr., received his undergraduate degree from the University of Alabama in Birmingham and his law degree from Cumberland School of Law. He is currently a sole practitioner in Birmingham, and is chairperson of the Alabama State Bar Committee on Access to Legal Services.

This is the third and final article in the three-part series of articles by members of the Alabama State Bar Committee on Access to Legal Services. The first article dealt with the legal needs survey for Alabama conducted by Davis, Penfield & Associates and the results of that survey of the poor. The second article dealt with the aspect of the survey with regards to members of the bar, judiciary and legal services employees and their perception of the legal needs of the poor within this state and how those needs are being met. This article will discuss the proposal of this committee to the bar and board of bar commissioners—the Volunteer Lawyer Program.

The bottom line of the legal needs survey was what many lawyers have been acutely aware of for many years—the majority of the legal needs of the poor are *not* being met. It is evident that the current system does not and cannot meet and handle the growing number of legal problems faced by the poor segment of the population. There are a number of lawyers in private practice who contribute substantial time and resources each year through various means, including organized programs sponsored by local bar associations or Legal Services programs, and assist the poor with legal representation. These lawyers should be recognized and applauded for their work in this area but many times they go unnoticed by the majority of us. On the other hand, there are a number of lawyers who have the desire to assist the poor with their legal problems but feel lacking in knowledge in this area, those who do not realize the enormous need of legal assistance to the poor segment of the population, and finally those who do not care. In recent years, however, a sense of professionalism has been rekindled and lawyers have a desire to devote a portion of their efforts in providing legal assistance to the poor without expectation of financial payment.

This committee was charged by the bar to "review, evaluate and foster the development of *pro bono publico* programs designed to assure access to legal services by those citizens of Alabama who cannot afford them." The first step was the survey to assess the legal needs of the target group—those citizens who cannot afford legal services. The second step was to investigate, evaluate, assess and critically review other programs which have been implemented in other states to the needs and limitations faced by

practitioners in this state. The third step was to develop a program that would meet the legal needs of the poor and be a functional and viable program throughout the entire state. The fourth and final step was to implement the program.

The committee has accomplished three of the four steps outlined. The result of this work is a program entitled the Volunteer Lawyer Program. The basics of this program were discussed with leaders of the bar and judiciary in May and met with approval and encouragement.

The fourth and final step, the implementation of the program, is now in progress. The board of bar commissioners in July adopted a resolution ratifying the Volunteer Lawyer Program. The search is now being conducted to select a state coordinator for the program. The coordinator will work through the office of the Alabama State Bar. The job description and requirements of the state coordinator are described elsewhere in this issue of the *Lawyer*.

The need for a Volunteer Lawyer Program has been recognized in this state and across this country for some time. Many states have adopted and implemented programs of similar nature to meet the needs of those persons unable to afford a lawyer. Some states have reviewed and discussed the possibility of a mandatory requirement that each lawyer devote a portion of his or her time to provide legal assistance to the poor. However, no state has adopted a mandatory requirement at this time. Two of our neighboring states, Mississippi and Georgia, have a volunteer program presently operating.

The Volunteer Lawyer Program developed and designed for Alabama will build upon the local programs now in place in the urban areas and utilize this groundwork to expand to those areas of the state not covered under the current programs. The Volunteer Lawyer Program will utilize a state coordinator to oversee this program throughout the state. The coordinator will assist the local bar associations with the development of new volunteer programs, volunteer recruitment and training for the volunteers, and provide technical assistance and support.

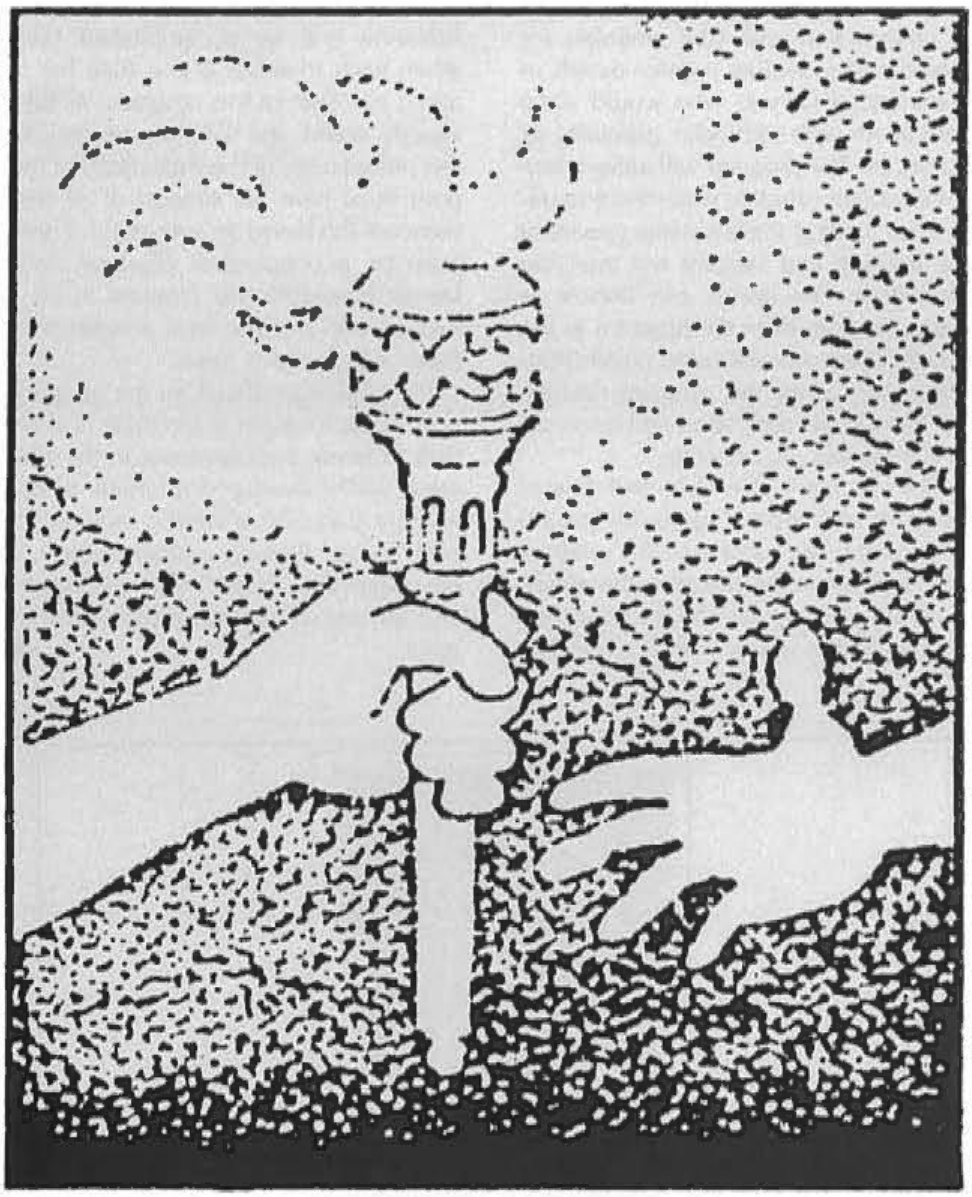
The program will entail a number of different avenues to create an area of interest for the lawyer while providing much needed legal assistance to the poor. Some possibilities include areas of special need or special client issues, specialty panels of particular interests of the lawyers, providing specialized training to lawyers outside their normal scope of practice, providing training seminars in conjunction with CLE programs for credit, and providing mentor panels of experienced lawyers who would assist volunteers with particular problems or questions. The program will allow a lawyer to obtain valuable experience in unfamiliar areas of the law while providing the training and support not available elsewhere. The lawyer can benefit as much or more from the program as the client. There are unlimited possibilities and potential for this program through the knowledge, dedication and resources of the lawyers in this state.

The success of the Volunteer Lawyer Program will depend upon the lawyers of the state. The success of this program will depend on the attitudes, the professionalism, the desires and the concerted efforts of each lawyer who is a member of the Alabama State Bar. The efforts in other states have met with varied success. The success has been due to a large degree to the percentage of participation of the volunteering members of those state bar associations. The complete success of the Volunteer Lawyer Program in Alabama will be accomplished only when each member of the state bar is also a member of this program. As previously stated, the solution we seek to this unmet need of the legal needs of the poor must have the support of all segments of the bar to be successful. There must be a cooperative effort by each lawyer to enable this program to be a success and provide legal assistance to those who need it most.

The challenge ahead for the program and for each lawyer in this state is to return to being a professional in the true sense of the word and volunteer to become a part of this worthy program. If each lawyer devotes a small portion of his or her time to this effort, the results will be overwhelming and the rewards great. ■

Pass the Torch

by Margaret L. Lathum and Jan Loomis



The Constitution of the United States of America was drafted between May 14 and September 17, 1787, and became operative in 1789. It is the oldest written constitution now in effect.

The drafters of the Constitution were seeking to create a government to protect us from foreign enemies, to foster our general welfare and commercial development and to preserve peace internally.

A lot of children feel they are on the outside when it comes to our system of law and government. If we are able to educate young students in law and government at an early age and they become active, law-abiding citizens, then we have positively affected 12 percent of our present population, who will be 100 percent of our population tomorrow. Furthermore, studies indicate law-related education has been a strong factor in juvenile delinquency reduction. As an attorney, you have the opportunity to pass the torch by educating young people within your community.

A law-related education association is a formalized network of educational, legal, law enforcement and community leaders promoting public knowledge and understanding of the law and civic responsibilities through the schools and communities. The ABA, Alabama State Bar, Alabama's Administrative Office of Courts, Cumberland School of Law, and Jan Loomis (former teacher in the Jefferson County school system) have been instrumental in getting the project off the ground and moving forward in Alabama.

A nonprofit corporation, the Alabama Center for Law and Civic Education, Inc. has been created with an office located in Cumberland School of Law for purposes of promoting law-related education. The executive director, Jan Loomis, with the help of the state bar and members, has received funding of $40,000 from IOLTA and $50,000 from the state Legislature, through the Alabama Department of Education 1990-91 budget. In addition, because our state now has a LRE Center, which will be part of the National Training and Dissemination Program as a development state, it will receive $39,000 in Office of Juvenile Justice & Delinquency Prevention funding from the U.S. Department of Justice over the next five years to set up programs in juvenile delinquency prevention.

The following are the objectives of law-related education to which the Task Force Committee and the Center are committed:

(1) Ways to build understanding of our legal system and the foundations and principles of our democratic form of government:

(2) Ways to develop legal survival skills and provide practical, updated law-related information to the public:

(3) Ways to enhance commitments to justice and civic responsibilities, by deterring criminal and antisocial behavior:

(4) Ways to develop skills in logical and analytical thinking, mediation and decision-making; and

(5) Ways to help people function more effectively in their community. Law-related education projects presently being sponsored are:

I. Bar-School Partnership Program

The Task Force Committee on Citizenship Education of the Alabama State Bar in 1989-90 implemented a Bar-School Partnership Program in pilot areas-Birmingham, Mobile and Opelika. The bar leaders in these areas for 1990-91 are: Michael Edwards, Birmingham; David

Peeler, Mobile; and James Cox, Opelika. The Honorable Walter Bridges, chairperson of the Task Force Committee on Citizenship Education, and members are closely working with the director to further expand the program.

In the fall of 1989, workshops were held in Opelika, Mobile and Birmingham. Approximately 50 lawyers and 50 teachers volunteered to become part of this effort to explore ways in which teachers and lawyers could work together to improve youth education in the law.

Last year consisted of classroom visits by attorneys; field trips to the courthouse, prisons and law firms; legal research; enactment of mock trials in the classrooms; debates on legal issues; and schoolwide assemblies. Over 2,000 elementary, middle and high school students were reached by the program.

II. LRE survey of the state bar

In order to compile information on law-related activities within the state, avoid needless duplication of efforts in this area, and have a centralized center with resource materials on topics, volunteers, organizations and societies contributing to these objectives, a survey is needed to identify *all* law-related education activities. The information received from the survey will be compiled by the Center and issued in directory form as the Alabama Law-Related Education Review. In addition, the information will become part of a data base for ongoing activities, programs, referrals, references, and statistical analyses of objectives and goals accomplished or to be accomplished within the communities.

III. Bicentennial Competition on the Constitution and Bill of Rights

During the past three years, at least 50 attorneys have either served as judges, advisors or coaches to teams competing at the district, state and national levels on their knowledge of the U.S. Constitution and Bill of Rights.

The competition continues for at least two more years. It is directed by Dr. David Sink of the University of Alabama in Birmingham and coordinated by an individual in each U.S. Congressional District. Workshops were held in August to instruct teachers how to use the *We the People* text and to recruit teachers for the competitions.

IV. OJJDP Project

The Center's grant of $39,000 from the U.S. Department of Justice will activate this program within the communities. During the first year, we will select communities throughout the state in which to establish advisory councils. Their job will be to define problems and explore strategies and policy changes which could have an impact upon the problems of juvenile delinquency in their respective communities. The Center will assist by providing training and resources for this project.

V. Drug education programs

The Center will be administering four different national LRE drug education programs. They are:

(1) Lawyer/Doctor Education Team (sponsored by the ABA and AMA):

(2) The Drug Question (sponsored by the Constitutional Rights Foundation);

(3) Street Law Substance Abuse Prevention Supplements (sponsored by NICEL); and

(4) Drugs in the School (sponsored by the Center for Civic Education).

VI. Educational videos on law and civic education

The Center for Communication and Educational Technology has offered to produce videos for the state bar and the Center at one-tenth of the usual cost. This makes more affordable the creation of videos. The video will be "What does a lawyer do?" This education tool will assist teachers and lawyers in the presentation of material to the students in a more advanced form.

Please take a few minutes to complete the survey (pages 358-359) and drop it in the mail. This survey will greatly assist your state bar and the Center in establishing and implementing projects to make Alabama a better place to live.

LRE awareness and training workshops are available to anyone. To hold a workshop in your area, contact Jan Loomis, Executive Director, Alabama Center for Law and Civic Education, Inc., Cumberland School of Law, 800 Lakeshore Drive, Birmingham, Alabama 35229, or call (205) 870-2433. ■

ALABAMA STATE BAR LAW-RELATED EDUCATION SURVEY

Name: _____

Company/Firm: _____

Address: _____

City _____ Zip _____

Telephone: _____

Areas of legal expertise: _____

_____

LRE activities or programs in which you have participated: _____

_____

_____

_____

In which LRE, activities or programs would you be interested in participating? (Check your areas of interest.)

Program

_____ Bar-School Partnership

_____ Bicentennial Competition on the U.S. Constitution and Bill of Rights (high school level)

_____ OJJDP Project on Juvenile Delinquency Prevention (U.S. Dept. of Justice)

_____ Drug Education

_____ Educational Videos on Law and Civic Education

Description

_____ Serve as legal resource person to a teacher

_____ Judge a local, state or national competition and/or coach a competing team

_____ Serve as a community advisor to assess needs and offer strategies regarding juvenile delinquency

_____ Serve as a resource person to explain drug laws

_____ Serve as an advisor

_____ Write scripts

_____ Personally appear on videos

(Sample topic: "What does a lawyer do?")

_____ Teaching Law to the Public

If asked to speak to a group of young people or adults, on which law-related topics would you be willing to speak? (Check the areas.)

_____ Constitutional Law
_____ School Law
_____ State Criminal Code
_____ Juvenile Justice System
_____ Mock Trial
_____ Legal Research (basic)
_____ Mediation/Dispute Resolution
_____ Domestic Law
_____ Consumer Law
_____ Others (Specify):

_____

_____

(continued on next page)

(survey continued from previous page)

Check the grade level(s) to whom you would prefer to speak:

_____ Elementary (K-5)
_____ Middle (6-8)
_____ High School (9-12)
_____ Adult

What does the general public need to know about the law and/or government?

_____

_____

_____

_____

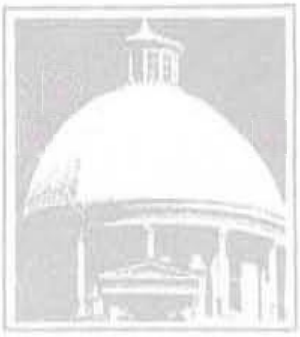
Other Comments:

_____

_____

_____

Complete and mail to: The Alabama Center for Law & Civic Education
Cumberland School of Law
800 Lakeshore Drive
Birmingham, Alabama 35229



Legislative Wrap-up

by Robert L. McCurley, Jr.

Alabama Uniform Condominium Act of 1991

In 1964 Alabama enacted our first Condominium Act with revisions in 1974. The Legislature enacted a new Condominium statute, Act No. 90-551, which is patterned after the draft of the Uniform Condominium Act proposed by the National Conference of Commissioners on Uniform State Laws. This bill was sponsored by Representative Jim Campbell and Senator Ryan deGraffenried. It is the result of work begun in 1982 by a drafting committee of the Institute chaired first by Albert Tully and then E.B. Peebles, both of Mobile. Professor Gerald Gibbons of the University of Alabama School of Law served as chief draftsman.

This new Act governs condominiums created after January 1, 1991. This new law is prospective and its application is limited to those condominiums with more than four units. As to existing condominiums, the "old" law remains applicable. However, amendments to existing condominiums must conform to the "new" law.

The following important new provisions concern the "creation of condominiums", "plats and plans", "management" and "condominium purchasers".

Creation of condominiums

When all the units are substantially completed as evidenced by an independent registered engineer or registered architect, the declaration may be filed with the judge of probate. The probate office will keep on file in a "Condominium Book" a copy of the declaration of condominium, all drawings, amendments, certificate of completion or termination or other like amendments.

The declaration must contain: the name of the condominum which must include the word "condominium"; legal description of the real estate; number of units; description of the boundaries of each unit and limited common areas; and a description of development rights reserved to be exercised at different times or under certain conditions. Any restrictions on the use, occupancy or leasing and the sales price must be indicated, as well as any easements. If the declarant reserves any units this reservation must be made known. Other matters, such as the voting rights, sales office, association officers and board, also must be shown.

Plats and plans

Plats and plans are a part of the declaration. Each plan must show: (1) the name and a survey or a general schematic map of the entire condominium; (2) the location and dimensions of all real estate not subject to development rights; (3) a legal description of any property subject to development rights; (4) encroachments; (5) easements; (6) location and dimensions of vertical and horizontal unit boundaries; (7) distance between non-contiguous parcels; (8) location and dimension of limited common elements; and (9) improvements: any contemplated improvements must be labeled "MUST BE BUILT" or "NEED NOT BE BUILT".

Management

The unit owners association must be incorporated and may have the following powers: (1) adopt bylaws and regulations; (2) adopt budgets and collect assessments; (3) hire agents and employees; (4) institute and defend litigation; (5) make contracts; (6) regulate and maintain the common areas; (7) make improvements; (8) convey real and personal property; (9) make leases; (10) impose fees and charges; and (11) levy fines.

The developer must terminate control after 75 percent of the units are sold, or two years after the units are ceased to be sold. There are then provisions for unit owners to be on the board.

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

The association is responsible for setting a budget and keeping up the common areas, and must hold a meeting at least once a year. To enforce the association's assessment the association has a lien on the units from the time the assessment becomes due.

Condominium purchasers

Purchasers of new units must be given an offering statement to apprise them of the condominium. This offering statement must describe the condominium and number of units, and include a copy of the declaration, plats and plans, as well as other recorded convenants and restrictions. Furthermore, the offering statement must include a copy of the bylaws and any association rules, a current balance sheet, a statement of the projected common expenses, expense assessment for the particular unit, any services which the owner must separately pay, closing costs, liens and mortgages, financing available, warranties, any restrictions on sale or lease, insurance coverage, zoning, and any special provisions such as units being used as "time shares".

The purchaser has seven days to rescind after signing a contract and receiving an offering statement when the condominium is for residential purposes.

On the resale of a condominium, the unit owner and association must furnish the prospective buyer certain information upon request of the purchaser. An offering statement is not generally required.

The entire Condominium Act can now be found in the 1990 Cumulative Supplement, §§ 35-8A-1 through 35-8A-417. Any further information concerning any Law Institute project may be obtained by writing:

Alabama Law Institute
P. O. Box 1425
Tuscaloosa, Alabama 35486

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NOTICE

The Supreme Court Conference on Constitutional Law

The Duke University Canadian Studies Center announces a conference on United States/Canadian Constitutional Law to be held April 4-6, 1991. This event will bring together practitioners and senior scholars from Canada and the United States, and will feature Supreme Court Chief Justice Antonio Lamar of Canada and Supreme Court Chief Justice William Rehnquist of the United States, as well as eight other justices from the two countries, and retired Canadian Chief Justice Brian Dickson. The focus of the conference will be the comparative examination of Constitutional issues in both countries. Panel topics will include: federalism, amending the Constitution, freedom of expression and dimensions of equality.

The conference is being organized by a joint Canadian/U.S. committee representing Duke University, the faculty of law of Ottawa University, the faculty of law of the University of British Columbia, and the Supreme Courts of both Canada and the United States.

For more information, contact the Duke University Canadian Studies Center (919) 684-4260.

Opinions of the General Counsel

by Alex W. Jackson, assistant general counsel

QUESTION:

"A difficult situation has developed with our client for which we sought guidance from the Office of General Counsel.

"Our client was involved in an automobile accident (not his fault) in Jefferson County. He was driving a vehicle insured by State Farm and owned by his sister. He was hit by an Allstate insured and sought representation during the first week of June 1988. We were in constant contact with our client and helped him to secure important rehabilitation treatment.

"On April 12, 1989, we submitted a pre-litigation demand to Allstate, together with complete documentation of our client's injuries and damages up to that point. About the same time, our client visited me in the office in the presence of several other employees. He complained of constant pain and was constantly wondering 'if it was all worth it.' I was concerned that he was suicidal and that his action would fail if not filed so we filed a lawsuit around the middle of April 1989.

"We negotiated back and forth with Allstate and, finally, around the first or second week in December 1989, Allstate agreed to pay the policy limits of $20,000. We had our client execute a *pro tanto* release of the Allstate defendant, reserving rights against any other coverage or defendant.

"After the case was settled and the release executed, we received a letter from the physician treating our client indicating that, in his opinion, our client was unable to manage his own affairs and finances. When we had settled the case and discussed the disbursement with him, he had requested that we pay all of his medical expenses. We represented him on a 40 percent contingency contract. Out of his $12,000 share, we were reimbursed case expenses in the amount of $247.25, paid medical liens in the amount of $3,930.15, and had $7,822.60 remaining to pay to our client.

"During this time we were trying to make arrangements for him to be admitted to a trauma unit for treatment of his chronic pain syndrome. We were having some difficulty getting him admitted to the program, so there was no disbursement of the money. I had several conversations with the people at the hospital about him. When I discussed the money that we were holding for him, I told him on several occasions that it 'looked like it would only be a few thousand dollars, if that much.' I had felt that the hospital would charge him whatever money he had, so we did not reveal the amount of the proceeds for fear that the trauma unit's charges would dissipate the entire amount.

"As talks progressed with them, because of his fragile situation and his poor financial situation, it looked as though Vocational Rehabilitation would pay for his program and that all of his funds would be preserved. In fact, I believe that he has received considerable treatment at the Trauma Program without having to pay anything.

"When it became apparent that he was going to be able to receive the treatment without spending his own money, I became very uncomfortable with our holding his money in trust. I called him on several occasions to tell him the exact amount we were holding and that the money was available, but we were concerned about his ability to manage his finances. I contacted an attorney friend of mine and explained the situation and asked if he would meet with the client and me to discuss the possibility of handling the client's funds as his court-appointed conservator. The client cancelled several appointments we had made for him to meet with the attorney. Finally, two or three months ago, he did meet with the attorney and me and agreed that it was a good idea for the attorney to petition the court, with the client's approval, to be appointed by the court to conserve his funds. That has not happened to date and the attorney has since indicated that he does not want to be involved in the case in any way.

"We called you because the attorney had been contacted by the client and told that he was mad at us because we would not give him his money. He had never requested his money from us but had specifically requested that we keep it so it would be available for admission to Lakeshore. You suggested that we write a letter to you detailing the case and that we contact the client about having a member of his family petition the court to assist him with his affairs.

"The client called two or three days ago and I explained to him everything that we had done and what our concerns are. He, as always, was very frustrated about his medical condition, and resisted making a decision of any kind. At one point in the conversation, he said that he did not trust anyone, but later in the conversation said that he trusted me. At one point in the conversation, he asked if we could just keep his money until he needed it. I explained that we did not feel comfortable with that and felt that someone in his family should be appointed to help him with his finances. I suggested that the most responsible person in his family was probably his sister and requested that she would be a good choice. He said that he did not trust his sister and would not trust anyone in his family to be in control of his money.

"During the last several weeks an uninsured motorist claim has been settled (with the client's knowledge and consent)

against State Farm Insurance Company for policy limits of $20,000 and a consent judgment was entered in Federal District Court. Obviously, there are additional monies (close to $12,000) payable immediately to the client.

"So, we have a client who is due to be paid almost $20,000 from our trust account, but who is unable, according to physicians, to handle his own affairs and who is unwilling for any family member to manage his affairs. We are uncomfortable with this situation. Knowing what we know about his condition, we feel it would be wrong to disburse the money to him, but we also do not feel comfortable talking to his family behind his back, since he is our client.

"Please consider this as a request for formal guidance in this matter. If you have any questions or would like to see any documents, please contact me immediately. Thank you for your cooperation."

ANSWER:

You and your firm have complied with the various provisions of Canon 9 concerning the deposit of client funds in insured depository trust accounts. You have also complied with the provisions thereof governing notification to the client of the receipt of the funds. You now have on deposit, or expect soon to receive, nearly $20,000 in funds belonging to that client, and you now believe that client, based upon an opinion expressed by one of the client's treating physicians, to be unable to manage his own affairs and finances. Your personal observation of the client has also led you to have concerns regarding the competence of the client and his ability to deal effectively with such a sum of money. Under the present *Code of Professional Responsibility* it is conceivable that this information regarding the competence of your client might be considered as a confidence or secret of the client, the disclosure of which would be embarrassing or detrimental to the client. By this definition, disclosure of such confidential or secret information is prohibited absent consent of the client or the existence of other conditions as delineated in Disciplinary Rule 4-101(C).

On the other hand disbursment of such a large sum of money to an incompetent client, or one reasonably believed to be incompetent, could result in waste or misapplication of the corpus and deny the client the benefit of the money. Under the Alabama Rules of Professional Conduct proposed to the Supreme Court of Alabama and to be promulgated in January 1991, the supreme court recognizes that a lawyer may, on occasion, best serve a client by taking action that, on first blush, might appear to be adverse to the client. Specifically, Proposed Rule 1.14, "Client Under a Disability," provides as follows:

"(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

"(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

The Comment to Rule 1.14 provides in pertinent part that:

"If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part."

The Comment goes on to provide as follows:

"Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician."

Accordingly, and in recognition of the impending changes in the ethical rules that would have substantial impact upon this particular fact situation, it is our opinion that if you are reasonably convinced that the client is operating under a disability, and that the disability is of such a nature and to such an extent as to materially impede and or endanger his ability to make decisions in reference to the sum of money involved, then you may seek to have a guardian or curator appointed to protect the interests of the client. In effect, we adopt the view expressed in Rule 1.14 that a lawyer may seek the appointment of a guardian or take other protective action with respect to a client when the lawyer reasonably believes that the client cannot adequately act in his own interests. [RO-90-67] ■

Young Lawyers' Section

Walker Percy Badham, III
YLS President

Even though I know that each of you eagerly awaits my articles in *The Alabama Lawyer* and the words of wisdom that I impart, I want to change the format for this article and expand the contents. I think we need more statewide communication about what each of the local bar associations is doing. I am not sure that the Birmingham Young Lawyers know what the Montgomery or Mobile Young Lawyers are doing, and vice versa. I think one of my responsibilities is to open the communication and information lines to let everyone know on a statewide level what is happening at the local levels.

My goal is to use this space in the *Lawyer* for communication of local news, as well as statewide events. I welcome any thoughts or comments you may have as to the best way to achieve this.

The bar admissions ceremony was held Tuesday, October 23, 1990, and was a great success. I especially thank Rebecca Bryan for her hard work in planning that ceremony. As always, she did a great job and things went really smoothly. I welcome all the new admittees and wish them the best of luck in their practice.

In closing, I leave you with portions of an article written by Judy Perry Martinez, president of the American Bar Association Young Lawyers, which I think captures the spirit of the Young Lawyers and challenges us to act upon that spirit:

"Ralph Waldo Emerson once wrote: 'The high prize of life, the crowning fortune of a man, is to be born with a bias to some pursuit which finds him in employment and happiness.'

"Making the most of our professional life is a goal that all lawyers share. But competence and excellence in our chosen field will not bring the happiness and personal satisfaction that Emerson described. That happiness can be achieved by getting involved, whether by running for public office, using your trial skills to represent an indigent person, contributing your legal skills to a non-profit organization or participating in bar association governments.

"Getting involved means returning something to society. It means contributing what for each of us is a scarce commodity—time—in return for the privilege that society has afforded us to participate in its system of justice.

"There are 8,760 hours in a year, and I know of no time sheet in existence on which one could log all of those hours as billable. Each of us must use some of those hours, whether it be 50, 100 or more, toward utilizing our talents to help others.

"Each of us can find a niche, a way to contribute without draining needed energy from our professional and personal life. Many community and bar association projects require only a few hours a month for successful completion. Indeed, the organized bar is especially sensitive to professional demands placed on young lawyers, and fashions many projects to require minimal time commitment . . . .

"By taking pride in our profession, by trying to make it just a little better for those many who will follow, we will gain a great personal satisfaction. Everyone's contribution, no matter how small, will make a difference. And, most important, that difference will be felt not only by the organization or person you serve, but also by you."

—Judy Perry Martinez

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Recent Decisions

by John M. Milling, Jr.,
and Wilbur G. Silberman

Recent Decisions of the Supreme Court of Alabama

Administrative law . . . Administrative remedies do not have to be exhausted prior to filing declaratory judgment in circuit court

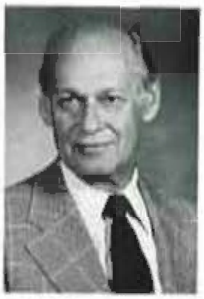
Alabama Cellular Service, Inc., et al. v. Sizemore, 24 ABR 2876 (June 22, 1990). Alabama Cellular Services filed a complaint for a declaratory judgment and injunctive relief in the circuit court under the Declaratory Judgments Act. It sought a declaration as to whether it was a "public utility" and, therefore, subject to certain taxes and the Alabama Public Service Commission. ACS's circuit court action was dismissed, the trial court holding that §41-22-11, *Ala. Code* (1975) require ACS to exhaust its administrative remedies under the Administrative Procedure Act (APA), §41-22-1, *et seq.*, *Ala. Code* (1975). ACS appealed and the supreme court reversed.

The APA was adopted in 1981 as "a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public". Thus, the APA seeks to make the process of review of state agency actions fairer and more efficient, *not to alter substantive rights* of a person affected by a rule. The supreme court noted that although the genesis of §42-1-10 is from the *Tennessee Code*, the *Alabama Code*, unlike the *Tennessee Code*, does not expressly require that a complaint be filed with the agency before a declaratory judgment may be filed. The supreme court reasoned that the absence of that provision indicates that the Alabama Legislature did not intend to make an agency declaratory ruling a prerequisite to seeking a declaratory judgment in the circuit court. The supreme court also noted that the Revised Model State Administrative Procedures Act (1961) included no requirement that the administrative remedies be exhausted before an affected party could pursue a declaratory judgment action.

Civil procedure . . . doctrine of inconsistent positions explained

Porter v. Jolly, 24 ABR 2354 (May 18, 1990). Porter and Jolly lived together for over two years and had a dispute about money. Porter sued for divorce alleging a common law marriage and attached an affidavit to her complaint which stated that Jolly had misappropriated her money. Service was never perfected and Porter dismissed the complaint. Subsequently Porter executed another document stating that the financial problems

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



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

were resolved and that the parties intended to marry. A month later Jolly filed a declaratory judgment action seeking a court determination that no common law marriage existed and Porter counterclaimed contending that Jolly had taken over $100,000 from her.

The trial court determined that there was no common law marriage and that Porter's counterclaim was improper because their prior divorce action was dismissed based on her statement that Jolly owed her nothing. The court ruled Porter could not take such inconsistent positions. Porter appealed and the supreme court reversed.

The supreme court stated that while Alabama recognizes the "doctrine of inconsistent position", that doctrine has a number of limitations:

> A number of limitations upon, or qualifications of, the rule against assuming inconsistent positions in judicial proceedings, have been laid down. Thus, the following have been enumerated as essentials to the establishment of an estoppel under the rule that a position taken in an earlier action estops the one taking such position from assuming an inconsistent position in a later action: (1) the inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; and (6) it must appear unjust to one party to permit the other to change.

Thus, a party may not assert the defense of judicial estoppel or a prior inconsistent position unless it is demonstrated that the party against whom the estoppel is sought to be imposed actually *procured judgment* in his favor as a result of the inconsistent position taken by him in the prior proceeding. In this case, the prior divorce action did not go to judgment.

Executors and administrators . . . relation back as it relates to §43-2-22(a)

Holyfield v. Moates, 24 ABR 1729 (June 15, 1990). Downs, a resident of Chilton County, was fatally injured in November 1985 in Chilton County by Moates. Crenshaw, an Illinois resident, was appointed administratrix of the deceased's estate. In September 1987, Crenshaw filed a wrongful death action in the circuit court against Moates. Moates moved for summary judgment contending that Crenshaw was disqualified under §43-2-22(a), *Alabama Code* (1975), to serve as administratrix because she was not an Alabama resident. Moates also challenged Crenshaw's letters of administration in the probate court and the probate court revoked the letters and appointed Holyfield. The circuit court entered summary judgment in favor of Moates finding that Crenshaw's appointment was null and void because she was a non-resident and further finding that since the appointment was null and void, Holyfield's recent appointment and amended action could not relate back because there was nothing to relate back to. Holyfield appealed and the supreme court reversed.

In a case of first impression in Alabama, the supreme court was asked to determine whether the acts of an administratrix who is "duly appointed" are void or voidable where the administratrix is a non-resident and disqualified by §43-2-22(a). The supreme court noted that the probate court of Chilton County clearly had subject matter jurisdiction to issue the letters. It is also clear that when the fact of residence does not exist, the grant of letters is not void, but merely voidable. As a general rule when a court that has jurisdiction over a case renders an erroneous judgment, that judgment is not void, but voidable upon a direct attack or on appeal. There is nothing jurisdictional about §43-2-22. Violation of that statute is simply incorrect application of the law, subject only to a direct attack and/or appeal.

Insurance . . . an *L&S Roofing* applied

Shelby Steel Fabricators, Inc. v. United States Fidelity and Guaranty Ins. Co., 24 ABR 2362 (May 18, 1990). Shelby Steel, a steel fabricator, was sued in 1984 because the steel support structure it fabricated collapsed. USF&G insured Shelby Steel under a comprehensive general liability policy. Shelby Steel notified USF& G of the suit and USF& G hired a law firm to defend. In March 1984 USF& G sent Shelby Steel a form non-waiver agreement. Shelby Steel's attorney also received a copy of USF&G's letter to the defense firm stating that the defense was under a non-waiver agreement. From March 1985 to June 1987, USF& G had exclusive control of the defense and never consulted in anyway with Shelby Steel. Twenty-nine months after undertaking the defense, USF& G sent Shelby Steel a reservation of rights letter that denied coverage based on policy exclusions. The denial of coverage was based on facts alleged in the complaint. Shelby Steel filed a declaratory judgment action and the trial court ruled in favor of USF& G. The supreme court reversed.

Applying the *L&S Roofing* case, the supreme court stated that USF& G must meet its "enhanced obligation of good faith" in order to deny coverage pursuant to a reservation of rights. This obligation includes keeping the insured apprised of the status of the case. Since USF& G failed to meet the obligation, it must indemnify Shelby Steel from any liability in the underlying action. If an insurer intends to defend a case pursuant to a non-waiver agreement or a reservation of rights, then that insurer not only must provide notice to its insured of that fact, but also must keep its insured informed of the status of the case. Since Shelby Steel's personal attorney was also notified of the no-waiver, the supreme court determined that the form non-waiver was effective.

Torts . . . psychiatrist generally not liable for patient's attack on third party

Morton v. Dr. Prescott, 24 ABR 2613 (June 1, 1990). Prescott, a psychiatrist in private practice, admitted Hunter to Jackson Hospital following an altercation with another patient at a medical health treatment facility. Hunter received treatment and was released by Dr. Prescott. The following day, Hunter assaulted Morton. Morton filed suit against Dr. Prescott alleging that he had negligently discharged a patient who assaulted him. Morton's claim was dismissed and he appeals. The supreme court affirmed.

In *Donahoo v. State*, 479 So.2d 1188 (Ala. 1985), the court held that in order to establish liability on the part of state officials, a plaintiff must plead and prove that the officials knew or should have

known that an agressor might be a danger to a specific person. The supreme court reasoned that although *Donohoo* concerned an action against state officials, its rationale is equally applicable to this case. Hunter made no specific threat of harm to the victim or to any identifiable group of which the victim might have been a member. Unless a patient makes specific threats, the possibility that he may in fact injure another is vague, speculative and a matter of conjecture. Once specific threats are verbalized, then the possibility of harm to third persons become foreseeable and the psychiatrist's duty arises.

Torts . . .

Dram Shop Act discussed

The Booth, Inc. v. Miles, 24 ABR 2790 (June 22, 1990). Miles was injured when the car he was driving collided with Gilmer. Gilmer had been to The Booth, a bar. Several witnesses testified that Gilmer appeared intoxicated while in The Booth. Miles sued Gilmer and The Booth under §6-5-71, *Ala. Code* (1975). Miles testified he incurred approximately $1,800 in medical expenses, that his car was damaged, and that he was not able to work. Prior to trial, Miles entered into a *pro tanto* settlement with Gilmer for $15,000. The case was tried as to The Booth and the jury returned a verdict for zero compensatory damages and $65,000 punitive damages. Booth appeals, and the supreme court affirmed.

Booth argued that the verdict is inconsistent because punitive damages cannot stand when the jury found no compensatory damages. The supreme court noted that §6-5-71 states that the defendant is liable "for all damages actually sustained, as well as exemplary damages." Therefore, that statute states that a plaintiff may collect for all damages *sustained*, not all damages necessarily *awarded* by a jury. The evidence in this case would support an award of compensatory damages. Therefore, in a dram shop action, when there is sufficient evidence of actual damage or injury to support an award of compensatory damages, the supreme court does not require a specific *award* of actual damages in order to support an award of punitive damages.

Recent Bankruptcy Cases

Secured creditors as liable under CERCLA

Although not a bankruptcy case as such, the following is important to secured creditors in bankruptcy cases. In *U.S. v. Fleet Factors*, 901 F.2d 1550 (11th Cir. 1990), the 11th C.C.A. stated that a secured creditor could become liable under CERCLA (pollution control legislation) if it participated in financial management. However, the court stated that there was no definition under the statute which defined "participated in the management." The court held that the secured lender may be liable should there be an inference that such lender had the control if it desired to affect decisions regarding disposal of hazardous wastes. Thus, according to the holding, the mere ability or potential to become involved in pollution control could make the secured lender liable the same as an owner.

State exemption laws in conflict with ERISA

In re Starkey, BKY D. Colo 20 B.C.D. 1118, 7/13/90. This Chapter 13 case should be of interest to lawyers representing debtors who under the recent Alabama legislation will claim ERISA, 401K, qualified pension plans as exempt from the bankruptcy estate. The *Starkey* court stated that the exemption was valid, as *Bankruptcy Code* §522(b)(2) permits a state to opt out from the federal law and successfully claim the exemption even in the face of ERISA [29 USC 1056(d)(2)] providing that the benefit is not exempt in bankruptcy.

Similarly, *In re Vickers, W.D. Mo.* 7/5/90 20 B.C.D. 1168, held that the exemption of benefits of a pension plan superseded the ERISA provision as it was legislation which came about by reason of a specific section of the *Bankruptcy Code*. Likewise in *Viraf v. Bharucha*, 20 B.C.D. 947, an Arizona bankruptcy judge held that ERISA does not supersede the state exemption statute on a retirement plan provided that the plan is established and maintained by the debtor with the debtor's own resources and into those of the debtor's employer or by an employee organization.

Trust fund taxes—possible preferential payment

Beglier, Trustee v. IRS, 52 U.S.L.W. 4764 110 S. Ct. 2258, U.S. Supreme Court (June 21, 1990). In this case, the trustee claimed a preference existed in payment to the U.S. of a trust fund tax obligation from the general account of the debtor. The debtor had not segregated the tax money as required under the law, and, therefore, the funds had not been in any trust account. Nevertheless, Justice Marshall determined that segregation was not essential—that the payment itself was tantamount to establishment of a trust fund, and that as the funds did not belong to the estate but to the IRS, there was no preference. Justice Scalia, in concurring but not agreeing with the reasoning, said that when a check was made to the IRS, this, of itself, identifies the portion of the asset which became the trust fund. He held there to be no preference as the identification caused a relation back to the time of withholding, which time was longer than the preference period.

Discharge of criminal restitution obligations

Pennsylvania Department of Public Welfare v. Davenport, 110 S. Ct. 2126, 1990. The U.S. Supreme Court held that criminal restitution obligations are defined in §101(1) of the *Bankruptcy Code* as debts and that in a Chapter 13 bankruptcy case, such obligations are dischargeable. In this case the debtor was found guilty of welfare fraud and ordered to repay the amount to the welfare department. However, before completing payments, debtor filed a Chapter 13 proceeding. The bankruptcy court said this was a debt which was dischargeable. The district court reversed, but the Third Circuit said it was dischargeable. The U.S. Supreme Court then affirmed the Third Circuit, two judges dissenting.

The district court had held that there was no right to payment but that this was a restitution obligation required for punishment and rehabilitation. The Supreme Court, in construing *Bankruptcy Code* §101(4)(A), said that this came within that section. The Supreme Court did make a point in stating that in Chapter 7, as previously set forth in *Kelly v. Robinson*, 479 U.S. 36,50, restitution obligations as con-

ditions of probation are nondischargeable. The Court said it was not reversing itself as there was a distinct difference between what was dischargeable in a Chapter 7 case and in a Chapter 13 case.

Application of federal taxes

United States v. Energy Resources Company, Inc., 110 S.Ct. 2139, May 29, 1990. The U.S. Supreme Court held that in a Chapter 11 case, the plan may provide for direction of payments to the IRS in order that the portion of the debtor's tax which emanates from a trust fund be paid first. As is generally known, if principals of a corporation fail to see that trust fund taxes, i.e., withholding taxes, are not paid, the IRS is allowed to assess against the principals a penalty equal to the amount of the tax.

Therefore, it is beneficial to such principals, if under a plan, first payments of taxes be made to apply to such trust fund. In an eight-to-one decision, the Court held that if it is necessary for a successful reorganization to do so, the Bankruptcy Court has the authority to make the IRS accept the plan tax payments as trust fund payments; this is so even if it means that after the debtor pays the trust fund payments it is unable to pay the remainder of taxes, thus leaving the United States at risk. ■

Riding the Circuits

Tuscaloosa County Bar Association

The following are the officers for the 1990-91 term of the Tuscaloosa County Bar Association:

President: J. Douglas McElvy, Tuscaloosa

Vice-president/President-elect: Wilbor J. Hust, Jr., Tuscaloosa

Secretary/Treasurer: Dan Gibson, Tuscaloosa

The 28 members of the Dale County Bar Association elected their officers for 1990-91: David Robinson, treasurer, Daleville; George Trawick, secretary, Ariton; Neville Reese, vice-president, Daleville; and Bill Filmore, president, Ozark.

Malpractice Prevention 17-Point Checklist

by Victor B. Levit

Victor B. Levit is resident partner of the San Francisco office of the Barger & Wolen law firm with offices also in Los Angeles, San Diego and Newport Beach. He is coauthor of Legal Malpractice, 2nd *(West Publishing 1981).*

1. Do not promise or predict any specific outcome or dollar recovery.
2. Before performing any services explain to your client the amount of fees or the basis for computing them. Any fee contract between attorney and client arranged after representation has begun may be challenged by the client.
3. Maintain detailed and complete time records for all services rendered, including hours and descriptions of services. When appropriate, bill your client periodically and explain the basis for your charges.
4. Do not ignore your client. Inform the client by periodic status reports. If there are long periods of delay explain the reason for inactivity. Send copies of pleadings and self-explanatory letters and return telephone calls.
5. Keep your client advised of any serious problems that have developed. Do not minimize risks that may be involved in the legal proceedings. Where there are alternative strategies or options that involve risks, inform your client to give you recommendations and let the client choose which of the strategies should be allowed.
6. Take no material action that may prejudice your client without express consent. Do not settle the case. Do not agree to judgment and do not release or dismiss the party without your client's consent in any of these situations.
7. Avoid representing parties with conflicting interests, including both parties to a divorce. Disclose any prior representation that may appear to affect the quality or extent of representation. Disclose any personal or adverse interest you may have in the matter being represented.
8. Preserve the client's confidence.
9. Develop a system that will require compliance with all deadlines, statutory limitations, law and motion matters, trial setting dates and other dates that must be remembered.
10. Confirm all oral instructions or important conversations with your client by letter.
11. Do not talk down to your client. Your general attitude and rapport with your client are vital.
12. Do not overstate the strength of your case.
13. Do not associate other counsel or refer to a specialist without your client's consent.
14. Do not undertake representation in matters beyond your experience or ability without securing assistance or associating other counsel.
15. Do not criticize your client's former lawyer without being fully apprised of all material facts.
16. Do not reveal that you carry malpractice insurance. Retain all your policies, primary and excess, especially those written on an occurrence basis.
17. Do not attempt to defend your own malpractice claims.

—Senate Judiciary Committee—
NOTICE

The Senate Judiciary Committee adopted a committee resolution in August regarding membership in clubs that engage in discrimination. The resolution states that it is inappropriate for persons who may be nominated in the future to the federal judiciary or to posts in the Department of Justice to belong to discriminatory clubs where business is conducted, unless such persons are actively engaged in bona fide efforts to eliminate the discriminatory practices. The resolution takes effect on January 1, 1991.

The committee unanimously adopted this resolution because of its concern that membership in such clubs conflicts with the appearance of impartiality required of those who serve on the federal bench or in the Justice Department. The resolution indicates that membership in discriminatory clubs will be an important factor for Senators to consider in evaluating nominees.

Committee Resolution

Expressing the sense of the Committee on the Judiciary concerning membership in clubs that engage in discrimination.

Resolved by the Committee on the Judiciary, That it is the sense of the Committee on the Judiciary of the Senate that—

(1) clubs where business is conducted that by policy or practice intentionally discriminate on the basis of race, color, religion, sex, disability or national origin operate to exclude persons, including women and minorities, from business and professional opportunities;

(2) in recent years, awareness has grown that such discrimination is invidious and that membership in such discriminatory clubs may be viewed as a tacit endorsement of the discriminatory practices;

(3) membership in such discriminatory clubs conflicts with the appearance of impartiality required of persons who may serve in positions in the Federal judiciary or the Department of Justice;

(4) it is inappropriate for persons who may be nominated in the future to serve in the Federal judiciary or the Department of Justice to belong to such discriminatory clubs, unless such persons are actively engaged in bona fide efforts to eliminate the discriminatory practices;

(5) such membership is an important factor which Senators should consider in evaluating such persons, in conjunction with other factors which may reflect upon their fitness and ability;

(6) so as to promote a consistent policy on this issue in the legislative branch as well, any Senator belonging to such a club should resign his or her membership in light of this resolution;

(7) to be considered a club where business is conducted, a club must have one of the following characteristics—

(A) club members bring business clients or professional associates to the club for conferences, meetings, meals, or use of the facilities;

(B) club members or their employers deduct dues, fees or payments as business expenses on tax returns;

(C) the club is one where contacts valuable for business purposes, employment and professional advancement are formed; or

(D) the club receives payments from non-members for meals or services provided by the club; except that country clubs and clubs where meals are served shall be presumed to be clubs where business is conducted;

(8) paragraphs (1) through (7) do not apply to fraternal, sororal, religious or ethnic heritage organizations;

(9) this resolution shall take effect January 1, 1991; and

(10) the Chairman of the Committee on the Judiciary of the Senate is requested to transmit a copy of this resolution to the President and the Attorney General of the United States and all members of the Senate, for such use as they deem appropriate in considering future nominations to the Federal bench and the Department of Justice.

Adopted by the Committee on the Judiciary of the Senate on August 2, 1990.

Alabama State Bar
Proposed Workers' Compensation
Law Section Survey

A task force has been commissioned to survey the membership of the Alabama State Bar to determine whether there is sufficient interest to form a Workers' Compensation Law Section.

This section's focus would be four-fold:

(a) Development of a network of experienced attorneys for the sharing of information and identification of knowledgeable attorneys throughout the state;

(b) Presentation of a periodic newsletter dealing with workers' compensation law topics of special interest to Alabama attorneys;

(c) Presentation of an annual seminar, possibly in conjunction with the state bar convention; and

(d) Legislative efforts and oversight as the need arises.

Attorneys who might be interested in joining the Alabama State Bar Workers' Compensation Law Section would be those who have an interest in workers' compensation cases and who represent either the injured employee or the employer/insurance company.

The annual dues for membership in this section would probably range from $10 to $20, depending on the number of members and the level of activity of the section.

If you are interested in becoming a charter member of this section, please indicate on the survey form below and return it to Keith B. Norman at the state bar headquarters in Montgomery by November 30, 1990.

I would be interested in joining the proposed Workers' Compensation Law Section of the Alabama State Bar.

_____

(Name)

_____

(Firm)

_____

(Mailing address, City, State, ZIP)

Areas of special interest (mark with an "X")

_____ Employee/Injured Party

_____ Employer/Insurance Company

_____ Other (please describe)

Please return by **December 7, 1990,** to Keith B. Norman, Director of Programs, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101. ■

Law Clerk Update

The following is a list of the staff attorneys and law clerks who will be working for the federal and state judges in the Montgomery area during 1990-91 followed by a list of the judges' law clerks in the Fifteenth Judicial Circuit and the district courts.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Judge Johnson: *David Vann
*Ruth Todd Chattin
*Michael Schecter
Judge Godbold: *David Lyle

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

Judge Hobbs: *William Brooks
*Bill King
Judge Thompson: *Barry Fisher
*Chris Herren
Judge Dubina: *Ruth Williamson
*Linda Smith
*Peter Fruin
Judge Varner: *Rhon E. Jones
*Dalton Smith
Magistrate Carroll: *Beatrice Oliver
*Michele Reed
Magistrate Coody: *Ame Anderson
*Mark Chattin

SUPREME COURT OF ALABAMA

Judge Hornsby: +Wayne Bills
*Steve Burford
*Pam Mable
Justice Maddox: +Ray Vaughan
*Susan Gunnells
*David Sawyer
Justice Jones: +Ann Wilson
+John Jones
*Michelle Denton
Justice Almon: +George Dent
+Charles Pullen
*Perryn Gazaway
Justice Shores: +Belle Stoddard
*Stan Glasscox
#Belinda Barnett
Justice Adams: +Teresa Norman
*Monte Hortin
*Will Chambers
Justice Houston: +Bari Miller
*Jay Hinton
Justice Steagall: +Alice Kracke
+Bernard Carr
*Wendy Runyan
Justice Kennedy: +Landis Sexton
+Evans Crow
*Courtney Loftin
Clerk's Office: +Kerry Gaston
+Celeste Sabel
+John Dobbs

ALABAMA COURT OF CIVIL APPEALS

Judge Ingram: +Lindy Julian Beale
*Susan Harris
Judge Robertson: +Leah Snell
+Deborah Sanders
Judge Russell: +Charlotte Mussafer
+Michael Silberman
Judge Wright & *Julie Wilson
Judge Bradley: *Jeff Parmer

ALABAMA COURT OF CRIMINAL APPEALS

Judge Taylor: +Beth Kellum
*Mary Stuart Troup
*Carol Surratt
Judge Tyson: +Susan Copeland
*Sandra Guin
*Lilla Cousins
Judge Bowen: +Mary Lil Owens
*Kelly Watson
*Robert Ward
Judge Patterson: +Jennifer Garrett
*Greg Hopkins
*Dee Miles
Judge McMillan: +Anne Bownes
*Amy Jones
*Chris Acker

FIFTEENTH JUDICIAL CIRCUIT

Judge Thomas: *Eric Ponder
Judge Gordon: *Donna Knotts
Judge Phelps: *Cole Portis
Judge Price: *Brenda Clark
Judge Montiel: *Karen Chambliss

DOMESTIC

Judge Bailey, referee
Judge Davis: -O.M. Strickland
Judge Dorrough: *Kathy Brown

DISTRICT COURT

Judge Bright,
Judge Greenhaw &
Judge Miller: *Phyllis Brantley

\+ Staff Attorney
* Law Clerk
\# Administrative Assistant
\- Baliff

—MCBA Docket, September 1990

Memorials

FRANCIS DAVID HOLLIFIELD, SR.

I have known Frank D. Hollifield, Sr., since the 1950s. He was born December 13, 1906, and died July 31, 1990.

After attending Howard College, Frank graduated from the Birmingham School of Law in 1933. Frank was admitted to the bar in 1935, and was a member of the bar for over 50 years.

He practiced law in the Birmingham area before serving as an attorney for the Veterans Administration. He worked in this capacity for many years. He practiced law in Montgomery in his own law firm (Hollifield & Hollifield) until 1988.

Frank had many other interests, including attaining Competent Toastmaster in the Montgomery Toastmaster Club #1334. He made many interesting speeches dealing with law and social justice, and also did some excellent readings from *Poor Richard's Almanac* and the works of Elbert Hubbard.

He enjoyed his association with the Montgomery Civitan Club, and looked forward to his meetings each Friday.

He was a family man, and enjoyed his children and grandchildren. He had been married over 50 years.

Frank will be missed by his family, his church, his many, many friends, and his associates. Frank went to church each Sunday and attended his Sunday Bible School class. He was a student of the law and on the side of the little man or downtrodden one.

Frank was very good at investigations. He would find the facts, truth or person. At one time, he called himself "Bird Dog" Hollifield. His manner made one trust his honesty and integrity.

It was a joy to be around Frank as he was a jolly man and easy to talk to. He was good company and always interesting. The world is a better place for Frank Hollifield's having lived in it. ■

—Joe B. Cain, Jr.
Admitted to the bar in 1935

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

Murray Allen Battles—Cullman
Admitted: 1945
Died: May 7, 1990

Herbert Carey Walker, Jr.—Huntsville
Admitted: 1956
Died: August 28, 1990

Ewell Ney Clark—Destin, Florida
Admitted: 1948
Died: June 12, 1990

Frank David Hollifield—Montgomery
Admitted: 1933
Died: July 31, 1990

Thomas Burks Huie—Birmingham
Admitted: 1938
Died: August 25, 1990

John Bascomb Parker, Jr.—Huntsville
Admitted: 1948
Died: February 4, 1990

Walter C. Phillips—Atlanta, Georgia
Admitted: 1942
Died: August 30, 1990

Wayland Henry Riggins—Huntsville
Admitted: 1962
Died: April 28, 1990

Robert Clarence Williams—Alexander City
Admitted: 1927
Died: May 12, 1990

Please Help Us . . .

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

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

Disciplinary Report

Suspensions

● Effective June 1, 1990, Birmingham lawyer **Vernon Wade LeMay** has been suspended from the practice of law for noncompliance with the Mandatory Continuing Legal Education Rules. [CLE No. 90-241]

● Effective August 1, 1990, Sylacauga lawyer **Michael Wayne Landers** has been suspended from the practice of law for noncompliance with the Mandatory Continuing Legal Education Rules. [CLE No. 90-52]

● On August 16, 1990, the Supreme Court ordered that Mobile attorney **Major E. Madison, Jr.**, be suspended from the practice of law for a period of two years, effective retroactively to December 28, 1988. Madison was found guilty of willfully neglecting legal matters entrusted to him; of failing to seek the lawful objectives of his clients; of failing to carry out a contract of employment entered into for his professional services; of prejudicing and damaging his clients during the course of the professional relationship; and of engaging in conduct that adversely reflected on his fitness to practice law. [ASB Nos. 88-592, 88-798, & 88-689]

● Effective September 1, 1990, Tuscaloosa lawyer **Hugh Don Waldrop** was suspended from the practice of law for noncompliance with the Mandatory Continuing Legal Education Rules. [CLE No. 90-46]

● In an order dated August 2, 1990, the Supreme Court of Alabama suspended **Richard L. Taylor** from the practice of law in the State of Alabama for a period of ten days, said suspension to become effective September 13, 1990. This suspension was based on the Disciplinary Board of the Alabama State Bar finding Taylor guilty of certain violations of the *Code of Professional Responsibility*. [ASB No. 88-587]

● Effective September 7, 1990, Mobile lawyer **Sidney Moxey Harrell** has been suspended from the practice of law for noncompliance with the Client Security Fund Rule. [CLE No. 90-46]

Public Censure

● On September 21, 1990, attorney **Thomas McAllister Semmes** of Anniston was publicly censured for violating Disciplinary Rules 6-101(A), 7-101(A)(1) and 7-101(A)(2). Semmes was hired by an individual to file for a hearing and/or reconsideration on a social security/disability claim. The client was informed by Semmes' office that the hearing request had been filed, when, in fact, it was later discovered that no such request had been processed properly by Semmes' office. Semmes therefore was found to have willfully neglected a legal matter entrusted to him, to have failed to seek the lawful objectives of his client, and to have failed to carry out a contract of employment entered into for his professional services. [ASB No. 89-306]

Private Reprimands

● On July 18, 1990, an Alabama lawyer received a private reprimand for violations of Disciplinary Rules 7-101(A)(1) and (2). The Disciplinary Commission determined that the lawyer had failed to seek the lawful objectives of his client and failed to carry out a contract of employment by not pursuing appellate relief in a worker's compensation case and by assuring the client that all available remedies had been sought. [ASB No. 86-477]

● On September 21, 1990, a lawyer was privately reprimanded for willfully neglecting a legal matter entrusted to him, failing to seek the lawful objectives of his client, and failing to carry out a contract of employment entered into for his services. The lawyer accepted a retainer to represent the client in pursuing a mortgage foreclosure. Due to the dilatory manner in which the lawyer handled the foreclosure, the property in question was vandalized and the client lost rental income on the property. [ASB No. 88-674]

● On September 21, 1990, an Alabama lawyer received a private reprimand for violation of Disciplinary Rule 7-101(A)(3). The Disciplinary Commission determined that the lawyer had engaged in representing differing interests to the detriment of a client in a criminal case when he refused to call a former client as a witness to provide testimony to attack a search warrant. The Commission found that the former client had acted as a confidential informant against the present client and that the attorney, knowing of that, did not inform the present client of the possible exculpatory testimony available from the former client and did not seek to call the former client as a witness. The Disciplinary Commission deemed this to be a breach of the Code and determined that a private reprimand should be given. [ASB No. 89-625(A)] ■

Classified Notices

RATES: Members: 2 free listings per bar member per calendar year EXCEPT for "position wanted" or "position offered" listings—$35 per insertion of 50 words or less, $50 per additional word; Nonmembers: $35 per insertion of 50 words or less, $50 per additional word.
Classified copy and payment must be received according to the following publishing schedule:
January '91 Issue—Deadline November 30
March '91 Issue—Deadline January 31
No deadline extensions will be made. Send classified copy and payment, made out to *The Alabama Lawyer*, to: Alabama Lawyer Classifieds, c/o Margaret Murphy, P.O. Box 4156, Montgomery, AL 36101.

FOR SALE

FOR SALE: U.S. Supreme Court Reports (Publisher: Lawyer's Cooperative) $1,000; Alabama Law Reports 3d & 4th (Publisher: Lawyer's Cooperative) $1,800; Proof of Facts 1st, 2d, 3d (Publisher: Lawyer's Cooperative) $1,300; Handling Federal Estate & Gift Taxes (Publisher: Lawyer's Cooperative) $100; Defense of Drunk Driving (Publisher: Matthew-Bender) $250. All sets are complete and up-to-date. **Contact Brogden & Quattlebaum, P.O. Drawer 908, Ozark, Alabama 36361, or phone (205) 774-5171.**

FOR SALE OR TRADE: Condo on the beach at Fort Walton Beach, Florida-one bedroom, one bath—completely furnished. Current mortgage is $56,000 with payment of $668 per month plus maintenance fee of $91 per month. Third floor with balcony looking down on beach. No equity required and closing costs are negotiable. Unit is very desirable rental and must be seen to fully appreciate. **Call (904) 863-2784 or (904) 243-9303 or write Bob Ayers, 184 Eglin Parkway, NE, Suite 7, Fort Walton Beach, Florida 32548.**

FOR SALE: Law office and equipment. 2,300-square foot law office with computers, printer, copier, phones, books & FAX. Sole practitioner elected judge effective January 1991. **Phone (205) 593-2222 or write P.O. Box 752, Boaz, Alabama 35957.**

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FOR SALE: TC Memo Decisions, Vols. 1-56; US Board of Tax Appeals, Vols. 1-47; Tax Court, Vols. 1-91; American Federal Tax Reports, Vols. 1-52; AFTR 2d, Vols 1-61. **Contact Amy Hamm at (205) 322-0534.**

FOR SALE: Southern Reporter, Vols. 1-200; Southern Reporter Second, Vols. 1-201; complete Corpus Juris; and Corpus Juris Secundum through 1975. All books in excellent condition. **Contact Karl Tyree, 115 Hickory Hills Court, Florence, Alabama 35630. Phone (205) 764-9682 or 764-3030.**

FOR SALE: Alabama Reporter, Vols. 439-557 Southern Reporter 2nd Series (39 books). **Contact L. Shattuck at 1212 Rumson Drive, Birmingham, Alabama 35226 or call (205) 877-7792.**

FOR SALE: Alabama Digest with 1990 pocket parts; Alabama Practice and Forms Vols. 1-6. **Contact Bill White, P.O. Drawer 9, Scottsboro, Alabama 35768. Phone (205) 259-1711.**

POSITIONS OFFERED

ATTORNEY JOBS: National and Federal Legal Employment Report: highly regarded monthly detailed listing of hundreds of attorney and law-related jobs with U.S. government, other public/private employers in Washington, D.C., throughout U.S. and abroad. $32—3 months; $55—6 months. **Federal Reports, 1010 Vermont Avenue, NW, #408-AB, Washington, D.C. 20005. Phone (202) 393-3311.** Visa/MC.

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WRONGFUL DEATH/PERSONAL INJURY: Expert actuaries will testify to value of lost future earnings in wrongful death and personal injury cases. Fellows of Society of Actuaries. Experience in court. Can assist in design of structured settlement. **Call David Godofsky—C&B Consulting Group, a Corroon & Black company, 1927 1st Avenue, N., Birmingham, Alabama 35203. Phone (205) 323-7000.**

LEGAL RESEARCH HELP: Experienced attorney, member of Alabama State Bar since 1977. Access to state law library. Westlaw available. Prompt deadline searches. We do UCC-1 searches. $35/hour. **Sarah Kathryn Farnell, 112 Moore Building, Montgomery, Alabama 36104. Call (205) 277-7937.** *No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services.*

MEDICAL/DENTAL MALPRACTICE EXPERTS: Our experts successfully testify in Alabama. Gratis preview of your medical records. **Health Care Auditors, Inc., P.O. Box 22007, St. Petersburg, Florida 33742. Phone (813) 579-8054. For Stat Svs: FAX: 573-1333.**

CERTIFIED FORENSIC DOCUMENT EXAMINER: B.S., M.S., graduate of university-based resident school in document examination. Published nat/internat. Seventeen years' trial experience in state and federal courts of Alabama. Forgery, alterations and document authenticity examinations in non-criminal matters. American Academy of Forensic Sciences, American Board of Forensic Document Examiners, American Society of Questioned Examiners. **Lamar Miller, P.O. Box 55405, Birmingham, Alabama 35255. Phone (205) 988-4158.**

Classified Notices

DIVORCE CASES-PENSION EXPERT: Pension actuary will determine present value of accrued pension rights. Standard fee for written valuation. In-court testimony for hourly fee. **Call David Godofsky—C & B Consulting Group, a Corroon & Black company, 1972 1st Avenue, N., Birmingham, Alabama 35203. Phone (205) 323-7000.**

TRAFFIC ENGINEER: Consultant/Expert Witness. Graduate, registered, professional engineer. Forty years' experience. Highway and city design, traffic control devices, city zoning. Write or call for resume, fees. **Jack W. Chambliss, 421 Bellehurst Drive, Montgomery, Alabama 36109. Phone (205) 272-2353.**

MACHINERY & EQUIPMENT APPRAISER: Twenty-five years' experience. Liquidation, fair market value and replacement cost for capital, refinancing, bankruptcy, insurance, etc. Write for free brochure. **Phillip D. Bryant, P.O. Drawer 966, Oxford, Mississippi 38655-0966. Phone (601) 234-6204.** ■

NOTICE

Form 8300, Report of Cash Payments over $10,000 Received in a Trade or Business

As a result of the Tax Reform Act of 1984, a person receiving more than $10,000 cash (to include foreign currency) in a trade or business is required to file Form 8300, "Report of Cash Payments over $10,000 Received in a Trade or Business," with the Internal Revenue Service.

Multiple transactions between a payer and a recipient involving cash transactions within a 24-hour period must be reported. For example, if an individual attends an auction and purchases an item for $9,000 cash and later purchases another item for $1,300, a Form 8300 must be filed reporting $10,300 received in the "trade or business." Also, if cash in excess of $10,000 is received in a series of connected transactions beyond a 24-hour period, a Form 8300 is required. If a person pays $5,000 cash for an automobile and subsequently makes cash payments, the amounts must be aggregated, and once the payments exceed $10,000 in cash within one year, Form 8300 must be filed. Forms 8300 are due within 15 days after the date of the transaction. Additionally, by January 31, the recipient of the cash must furnish to each payer a statement totalling the amounts received from the payer during the preceding calendar year. The Forms 8300 must be filed with the Internal Revenue Service at the following address:

Internal Revenue Service Data Center
P.O. Box 32621
Attn: RCP
Detroit, Michigan 48232

For returns due after 1986, and before 1990, there is a $50 failure-to-file penalty not to exceed $100,000 for willful neglect. Intentional disregard was $100 per failure to file with no limitation. Effective January 1, 1990, the intentional disregard penalty was increased to 10 percent of the aggregate amount of items required to be reported. Willful failure to file may subject a taxpayer to a criminal fine of $25,000 ($100,000 for corporations) and five years' imprisonment. Willful falsification of Form 8300 is a felony with a fine of $100,000 ($500,000 for corporations) and three years' imprisonment.

The Birmingham District recently completed 131 Form 8300 compliance checks and found a 60 percent noncompliance rate. Cash transactions of about $2 million were identified which had not been reported on Forms 8300, as required. The Internal Revenue Service will step up enforcement of the IRC Section 6050 I provisions.

Suspicious transactions may be reported to the Internal Revenue Service, Criminal Investigation Division at (205) 731-0976.

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

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

ASSETS

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

LIABILITIES AND SHAREHOLDERS' EQUITY

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

OFFICERS

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Chairman & CEO

John T. Cossar
President

J. Morton Matrick
Executive Vice President and Secretary

J.M. Sellari
Executive Vice President and Treasurer

William T. Blakely
Vice President

Patricia Bailey Brown
Vice President

Richard A. Cecchettini
Vice President
Minneapolis, MN

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Vice President
Canton, MS

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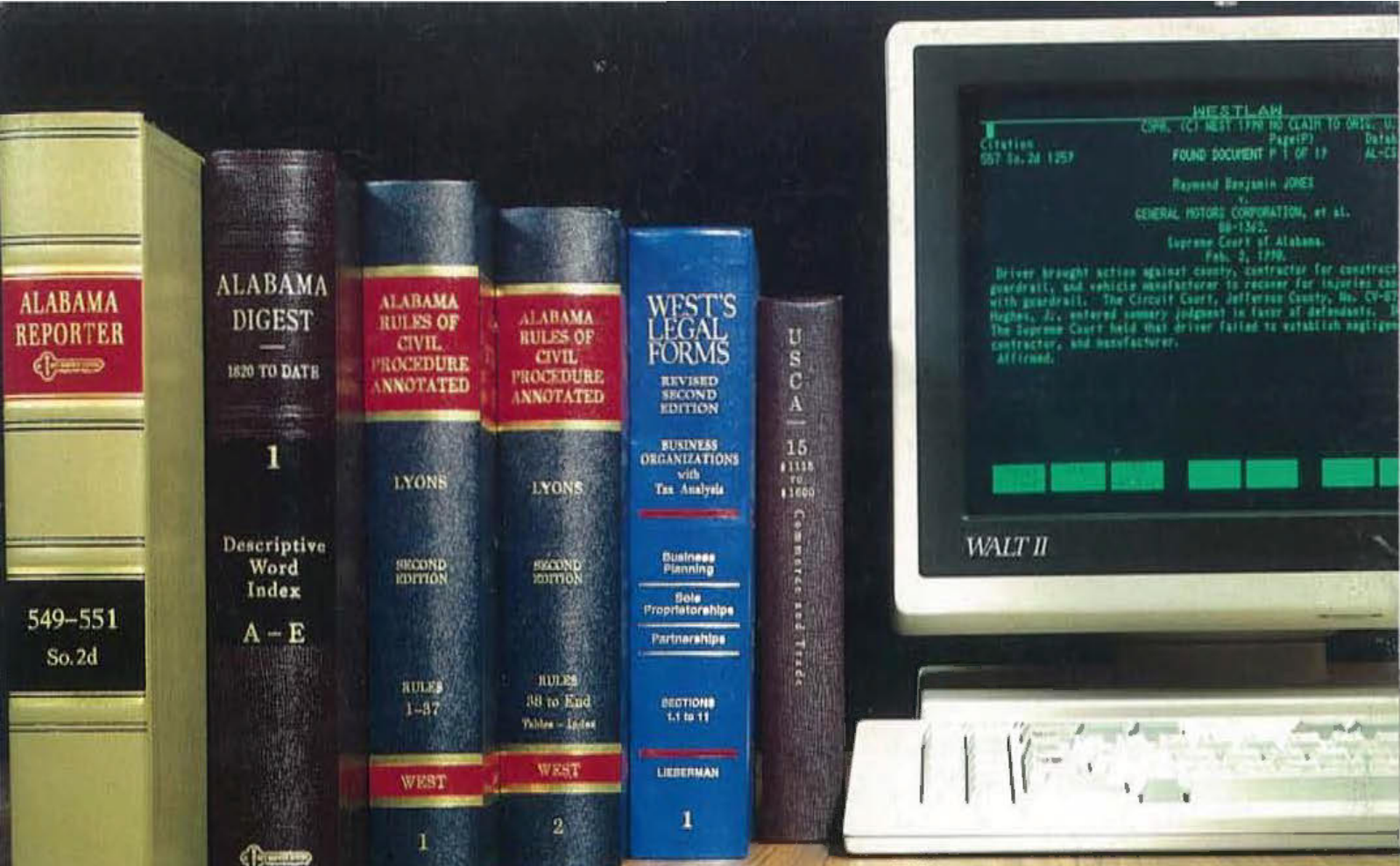

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