

The Alabama Lawyer

Vol. 62, No. 7

November 2001

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I thank God for blessing me with the talent of teaching and I am happy to share with the students and the bar my experiences through seminars and the classroom. I appreciate ABICLE giving me the opportunity to teach and therefore to learn.

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On the Cover:

Autauga County Courthouse, Prattville, Alabama—Autauga County was established in 1818 by act of the Alabama Territorial Legislature. The Autauga Indians lived on the creek from which the county takes its name. The Autaugas were members of the Alibamo tribe, and they sent many warriors to resist Andrew Jackson's invasion in the Creek War. The county was part of the territory ceded by the Creek Indians in the Treaty of Fort Jackson, 1814.

—Photography by Paul Crawford, JD

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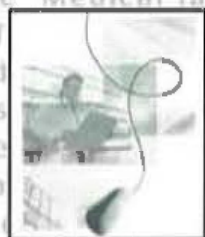
The President Asked Her To Go Shopping

He said it. Sitting there with my wife I heard him. The President of the United States asking us to be patriotic. Help the economy. Then he said it—"If nothing else, go shopping, spend some money." Now we had already purchased flags, ribbons and something that sticks on cars from crafty entrepreneurs. This is what I thought the President meant about spending money, but oh, was I wrong. After a couple of exhaustive trips to the mall, my wife returned with sacks of Saks' merchandise completely convinced that she had carried out the orders of her commander-in-chief. What a patriot! She had performed her mission well. She had bolstered the economy just as the President had requested. When asked about the extent of the shopping, she proudly proclaimed that we had

purchased some items we may not need for two or three years, but we might as well get them now. Door knobs and ceiling tile will eventually wear out.

All of us since that fateful day have felt a compulsion to do something to help our country. I even waddled to the attic to check out my government-issued fatigues in hopes they might strike fear in the despots who were attacking us. To my astonishment, the pants' 33" waistline had shrunk to the point where it would hardly cover one cheek. I muttered something to the effect that I hoped our present soldiers would be issued pants that would not shrink so dramatically when stored in an old box for 30 years. I then thought about attempting to locate that military jeep I was driving on "night maneuvers" one August night between

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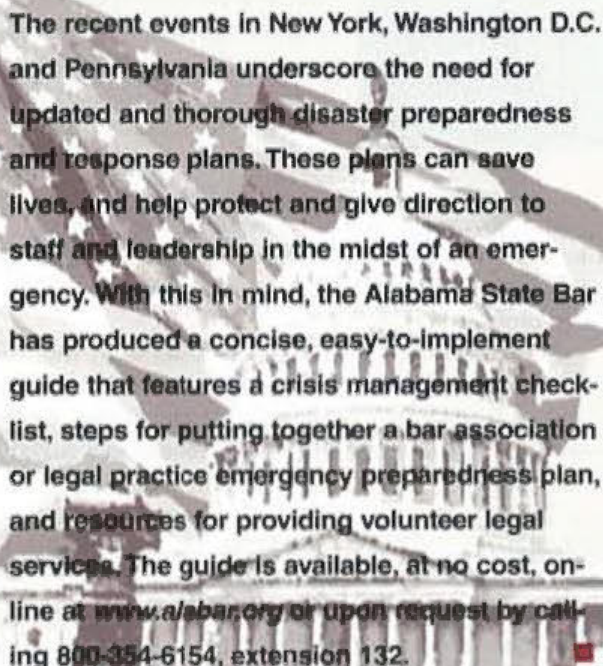
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Hattiesburg and Tuscaloosa that has yet to be found. I ultimately decided that reporting a 28-year-old lost jeep might cause such a monumental investigation by the National Guard that it could interfere with the war effort. Slowly, I realized that I would merely make good cannon fodder for the misled crazies that threaten our very existence.

When all around us there is a hue and cry to restrict our inalienable rights, lawyers have to assume a leadership role. What we as lawyers can do in such a perilous and tense time is do what we do best—stay composed. We need to stay composed because these rights have steered us through a revolt from our mother country, an internal war pitting brother against brother, two world wars and numerous social and political changes. Now is not the time to abandon these precious rights or to allow their power to shrink until for practical purposes they do not exist.

Lawyers are particularly prepared to assume this increased burden of citizenship. We understand that in order to combat the zealots who respect neither law nor religion, we must be ready to sacrifice the possible loss of some liberties. I grudgingly read about the necessity of invasive wiretapping, electronic surveillance and restricted immigration procedures. It is important that we work through our elected officials to let them know it is vitally important that we achieve and maintain a delicate balance between eradicating terrorism and preserving the rights and privileges that have allowed this country to thrive for 200 years. As a leader, and as a lawyer, I know you will take most seriously your responsibility in achieving this balance. At the end of the day, you will be proud you did.

P.S. Your state bar is running smoothly and efficiently. It would seem callous and presumptuous to discuss with you the workings of our bar when we all are trying to help our country and its threatened citizenry. ■



The recent events in New York, Washington D.C. and Pennsylvania underscore the need for updated and thorough disaster preparedness and response plans. These plans can save lives, and help protect and give direction to staff and leadership in the midst of an emergency. With this in mind, the Alabama State Bar has produced a concise, easy-to-implement guide that features a crisis management checklist, steps for putting together a bar association or legal practice emergency preparedness plan, and resources for providing volunteer legal services. The guide is available, at no cost, online at www.alabar.org or upon request by calling 800-354-6154, extension 132. ■

Free Report Shows Lawyers How to Get More Clients

Calif.—Why do some lawyers get rich while others struggle to pay their bills?

The answer, according to attorney, David M. Ward, has nothing to do with talent, education, hard work, or even luck.

"The lawyers who make the big money are not necessarily better lawyers," he says. "They have simply learned how to market their services."

A successful sole practitioner who once struggled to attract clients, Ward credits his turnaround to a referral marketing system he developed six years ago.

"I went from dead broke and drowning in debt to earning \$300,000 a year, practically overnight," he says.

Most lawyers depend on referrals, he notes, but not one in 100 uses a referral system.

"Without a system, referrals

are unpredictable. You may get new clients this month, you may not," he says.

A referral system, Ward says, can bring in a steady stream of new clients, month after month, year after year.

"It feels great to come to the office every day knowing the phone will ring and new business will be on the line."

Ward has taught his referral system to over 2,500 lawyers worldwide, and has written a new report, "How To Get More Clients In A Month Than You Now Get All Year!" which reveals how any lawyer can use this system to get more clients and increase their income.

Alabama lawyers can get a FREE copy of this report by calling 1-800-562-4627, a 24-hour free recorded message, or visiting Ward's web site, <http://www.davidward.com>

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Keith B. Norman

Labor of Love

Here's a riddle. What is 21 feet long, seven inches wide and weighs more than 400 pounds? If you guessed 133 volumes of the *Alabama Reporter* you would be correct. This is the number of volumes of the *Alabama Reporter* containing the published decisions of our appellate courts that have borne the scrutiny of the reporter of decisions, George Earl Smith. George Earl retired as the reporter of decisions on September 30th.

The reporter of decisions is not a headline grabber. Yet, the reporter plays a vital role in our state's jurisprudence by ensuring that the written decisions of our appellate courts are not only grammatically correct, properly punctuated and internally consistent, but also correctly reported. In the last 80 years, we have had only three reporters: Nobel H. Seay (1922-1968), John B. Scott (1968-1978), and George Earl Smith (1979-2001). I am pleased that Bilee Cauley, the assistant reporter, has been appointed to follow George Earl as reporter of decisions.

The first decision of the Alabama Supreme Court reported by George Earl appears in volume 369-370, page 1, of the *Alabama Reporter*. Since that first volume of cases, George Earl has reported Alabama appellate cases filling 133 volumes. He has also reported the Rules of the Alabama Supreme Court that number in the hundreds and now exceed 1,000 pages. Although Bilee joined George Earl in 1989, the number of appellate decisions and court rules that he corrected as reporter is amazing. He has spent 22 years of 80-hour work weeks to keep up with the prodigious workload of our three appellate courts. Yet, this work was neither drudgery nor a chore for him but a labor of love.

I have known George Earl since 1982 when I worked as staff attorney for Justice Hugh Maddox. Law clerks who have worked for one of the appellate courts, and have been called to retrieve the written opinions for their judge's chambers after George Earl read them,

remember those occasions vividly. A perfectionist, George Earl wanted each decision to read clearly and be grammatically correct. His thoroughness in this regard reminded me of my 12th grade English teacher. Once his suggestions were incorporated, however, the final version always read much better.

Although busy, George Earl still took time to improve the ranks of his peers. He was a founding member of the national organization of court reporters, the Association of Reporters of Judicial Decisions (ARJD). He served as its president from 1984 to 1985. This past August, ARJD held its 20th annual meet-

ing in Orange Beach. At that meeting George Earl received the Outstanding Leadership Award recognizing him for his many years of service to the organization and profession.

Retirement will not be a period of inactivity for George Earl. Prior to attending law school, George Earl was an English teacher. He recently told me that he wants to return to the classroom, although in a slightly different context this time. Presently, he is undergoing an intensive study of Spanish at Auburn University Montgomery so that he will be able to teach English to Spanish-speaking students. I am not too surprised at his new endeavor because George Earl has really been an English teacher masquerading as a reporter of decisions these past 22 years. My advice, in poor Spanish, to his future students is: *Prestan atención a los detalles!* ■



George Earl Smith



AALA's Job Bank

The Alabama Association of Legal Assistants is a not-for-profit professional association for legal assistants (also known as paralegals). The AALA not only furthers the legal education of its members and supports community service and charitable projects, it also maintains a job bank to assist members and Alabama law firms with employment needs. Firms can post job openings on the AALA Web site, www.aala.net, and it will be available to members throughout the state. For more information about AALA or specifically about the job bank, contact Michele Steadman, employment chairman, at (205) 250-5024 or msteadman@lawls.com.

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War Stories

The Alabama Lawyer is looking for "war stories" to publish in upcoming issues, humorous tales and anecdotes about Alabama lawyers and judges. Obviously, for such stories to be published, they must be (a) true, (b) amusing and (c) tasteful. Send your reminiscences to: *The Alabama Lawyer*, P.O. Box 4156, Montgomery 36101. **Be sure to include your name, address and a daytime telephone number, in case we need to contact you.**

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For more information about rates and scheduling, contact Laura Calloway or Sandra Clements at the Alabama State Bar, (334) 269-1515.

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- **Rhonda Brownstein** was recently named legal director for the Southern Poverty Law Center, a non-profit organization co-founded in 1971 by lawyers Morris Dees and Joe Levin that combats hate, intolerance and discrimination through litigation and education. As legal director, Brownstein is responsible for overseeing Center litigation, managing a staff of lawyers and support persons, and helping guide the Center's advocacy efforts.
- **Leura Garrett Canary** was sworn in September 4th as the first presidentially nominated woman to serve as a United States Attorney in the state of Alabama.

She serves as the U.S. Attorney for the Middle District of Alabama.

Ms. Canary received her undergraduate degree from Huntingdon College and her law degree from the University of Alabama School of Law. She worked from 1981 until 1990 as an Alabama Assistant Attorney General. For the next four years, she served as a trial attorney in the civil division, constitutional and specialized torts staff of the Department of Justice in Washington, D.C. She then became an Assistant U.S. Attorney for the Middle District of Alabama, where she served as chief of the civil division and also as special attorney for both the Northern and Southern districts of Alabama. ■



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About Members

Christopher A. Thigpen announces the relocation of his practice to 2223 8th Street, Tuscaloosa 35401. Phone (205) 345-4122.

William H. Filmore announces the opening of his office at 31 S. Court Square, Ozark 36361. Phone (334) 774-7274.

Michael D. Mitchell announces the opening of his office at 2820 Columbiana Road, Suite 100, Birmingham 35216. Phone (205) 824-5370.

Among Firms

Boardman, Carr & Weed, P.C. announces a name change to **Boardman, Carr, Weed & Hutcheson, P.C.** and that the offices have relocated to 400 Boardman Drive, Chelsea 35043. Phone (205) 678-8000.

Wolfe, Jones & Boswell announces that **Eric J. Artrip** has become associated with the firm.

Evans, Jones & Reynolds, P.C. announces that **Samuel D. Payne** has been named a shareholder.

Hornsby, Watson, Hornsby & Blackwell announces that **Jennifer L. McKown** has become associated with the firm.

Bradley Arant Rose & White L.L.P. announces that **George Harris** has relocated to the Montgomery office, and **Philip H. Butler, Wendell Cauley, W. Stanley Gregory, Charles A. Stewart, III, Robert D. Thorington, Thomas F. Monk, and Brian P. Strength** have joined the Montgomery office.

Finkbohner, Lawler & Ray, L.L.C. announces that **John Lawler** has withdrawn from the firm and will continue to practice in Mobile. **Royce A. Ray, III** has also withdrawn from the firm and the practice of law. **George W. Finkbohner** and **Skip Finkbohner** will continue to practice as **The Finkbohner Law Firm, L.L.C.**, with offices located at 1650 Government Street, Mobile 36604. Phone (251) 472-8388.

Cochran, Cherry, Givens & Smith, P.C. announces that **B. Shannon Saunders** and **Lance H. Swanner** have joined the firm.

Brantley & Parker, L.L.C. announces that **Tammy L. Stinson** has become associated with the firm.

Bush Craddock & Reneker L.L.P. announces the opening of an office in Montgomery and that **Michael L. White** and **Winston W. Edwards** have joined the firm. Offices are located at 4142 Carmichael Road, Suite C, Montgomery 36106. Phone (334) 215-3064.

Zarzaur & Schwartz, P.C. announces that **Naomi A. Cohen Ivker** has joined the firm.

The Law Offices of Archie Lamb, L.L.C. announces that **A. David Fawal** has joined the firm and **Barbara F. Olschner** has become *of counsel*.

Ables, Baxter, Parker & Hall, P.C. announces that **Chad W. Ayres** has become associated with the firm.

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Shelly D. Hood and **Patrick O. Sims** announce the opening of **Hood & Sims, L.L.C.**, with offices located at 2516 Paul W. Bryant Drive, Tuscaloosa 35401. Phone (205) 752-9333.

Ogle, Liles & Upshaw, L.L.P. announces that **Robert B. Stewart** has become an associate.

Smith, Spires & Peddy, P.C. announces that **David A. Bright** has joined the firm as an associate.

McKoon, Thomas & Gray announces that **J. Pelham Ferrell** has become of counsel.

The Anderson Law Firm, L.L.C. announces that it has opened a Birmingham office and **Jessica D. Kirk** has become resident counsel of the firm.

John Barnett, III and **Jeff Dyess** announce the formation of **Barnett, Bugg, Lee & Dyess, L.L.C.** Allee F. Lee is also a member. Offices are located at the Monroe County Bank Building, Suite 200, 60 Hines Street, Monroeville 36461. Phone (251) 743-3386.

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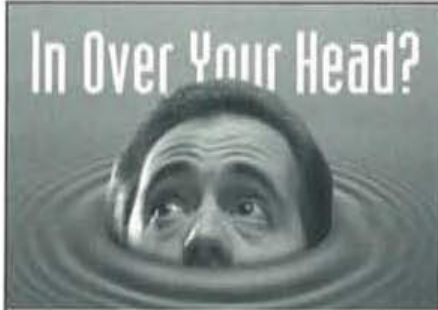
Najjar Denaburg, P.C. announces that **Robin L. Burrell** has become a shareholder and **Scott F. Ford, Kimberly B. Glass** and **Michael A. Anderson** have become associates.

White & Oakes, P.C. announces that **Erick K. Pratt** and **Angela Hames Sahurie** have joined the firm as associates.

T. Eric Ponder announces that he is now associated with the firm of **Berlon, Ponder & Wiklendt, L.L.P.** in Duluth, Georgia.

Brooks & Harmon announces a name change to **Brooks, Harmon & Monk, L.L.C.** and that **George A. Monk** and **A. Donald Scott, Jr.** have joined as a member and an associate, respectively. ■


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Long, Frank M.

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Phenix City
Admitted: 1984
Died: August 3, 2001

Parker, James Allan

Montgomery
Admitted: 1934
Died: July 22, 2001

Culp, Douglass

Birmingham
Admitted: 1968
Died: July 11, 2001

Riley, Ray Gordan, Jr.

Mobile
Admitted: 1968
Died: May 16, 2001

Dollar, Gerald G.

Tuscaloosa
Admitted: 1970
Died: December 26, 2000

Turner, James Arwood

Tuscaloosa
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Harvey, Hubbard Henry, Sr.

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Robert L. McCurley, Jr.

By Robert L. McCurley, Jr.

Third Special Session

The Alabama legislature in September completed its Third Special Session during 2001. This is the most special sessions held since Governor Wallace called the legislature four times into special session in 1983. Only the Governor has the authority to call the legislature into a Special Session.

The First Special Session in 2001, called in the middle of the Regular Session, passed no acts. It had been called for the purpose of dealing with the shortage in the Special Education Trust Fund. The Second Special Session, called for reapportionment of the legislature, yielded three bills. Each house of the legislature was reapportioned and a third bill passed designating the venue for contesting these plans.

In the Third Special Session, the legislature passed 55 bills. Thirty-three were appropriation bills totaling approximately 250 million dollars. Another bill, HB. 6, provided a 110 million dollar bond issue to off-set pro-rata for local school boards of education. It provided the authority to use the bonds for equipment, buildings and capital outlay and to retire debts by amending Act 2001-668. These bonds are exempt from usury and cannot exceed 20 years.

Another bill, H.B. 7, exempted from the Certificate of Need law a hospital of not less than 3,000 beds to allow it to become a "digital hospital."

HB. 61 provides that the Habitual Offender Statute, 13A-5-9, that was amended in 2000 and applied only prospectively will now be applied retroactively by the sentencing judge or presiding judge for consideration of early parole of each non-violent, convicted offender based on evaluations by the Department of Corrections and when approved by the Board of Pardons and Paroles.

HB. 86 amends the Controlled Substance law by adding three new Code sections and amending others which includes the mere possession of precursor sub-

stances with the intent to unlawfully manufacture a controlled substance to be a Class B felony. It further enhances the punishment if the person possesses a firearm or is within 500 feet of a residence, business or school. It further makes the mere possession of anhydrous ammonia to be a crime.

Act No. 90 amends the International Notary Public Article, 36-20-50 *et. seq.* to add definitions and to change the name from "Alabama International Notary" to "Civil Law Notary."

HB. 92 provides that the presiding judge of the circuit has the authority to appoint special judges to sit in circuit, district or probate courts of a judicial circuit as needed. The person so appointed will possess the qualifications of the judgeship to which appointed. The special judge shall qualify by taking the oath of office but shall not receive compensation for his or her services. The appointment cannot be more than 180 consecutive days but may be re-appointed as needed for one additional 180-consecutive-day-period. This is supplemental to Ala. Code Section 12-1-14 which currently requires the supreme court to make appointments.

Senate Bill 28 proposes a constitutional amendment that "any new proposed Constitution of Alabama adopted to replace the existing Constitution of 1901 shall become effective only upon its ratification by a majority of the qualified voters voting on such ratification."

SB. 75, known as Competitive Bid Process for Professional Contracts, provides that attorneys retained to represent the state in litigation shall be appointed by the Attorney General in consultation with the Governor from a list of attorneys maintained by the Attorney General. All attorneys interested in representing the State of Alabama may apply and be included on this listing. The selection of the attorney or law firm shall be based on the level of skill, experience and expertise

required in litigation and the fees charged by the attorney and law firm shall be taken into consideration so that the State of Alabama receives the best representation for the funds paid. Fees shall be negotiated and approved by the Governor in consultation with the Attorney General. The maximum fees paid for legal representation may be established by executive order of the Governor.

Attorneys retained by the state to render non-litigation legal services shall be selected by the purchasing entity needing an attorney from a list of attorneys maintained by the legal advisor to the Governor. All attorneys interested in representing any purchasing state entity may apply and be included on this listing. The selection is under the same criteria as those on the list maintained by the Attorney General and does not apply to attorneys appointed by the court.

Lenders often bundle similar loans such as cars or mortgage loans and sell them to other entities. The purchasers of these loans sell securities back to buy the loans. This is called a securitization transaction. SB. 40. is designed to cor-

rect the problem recently created by the Financial Accounting Standards Board which had ruled a securitization transaction cannot be treated as a final sale of assets until the state clarifies that such a transaction is a sell.

SB. 94 requires anyone who submits a proposal, bid, contract or grant proposal to the State of Alabama to disclose their family relationship with public officials, public employees and family members. This act is very broad. Anyone dealing with the state should consult this act. A violation of this act will subject the person to a civil penalty.

At the writing of this article these bills have been sent to the Governor who must sign them before it will become law. You should consult the legislature's Web site to determine effective dates. The general discussion is that there will be a Fourth Special Session called. If this happens it will be only the third year since 1975 that there have been four special sessions in one year. The previous two years were 1975 and 1983, when George Wallace in his first year of each of his last two terms called the legislature into session four times in addition to

the regular session and organizational session.

The 2002 Regular Session will begin January 8, 2002 and may continue 105 days until April 22, 2002.

Acts Effective January 1, 2002

Act 2001-481 Revised UCC Article 9
Act 2001-458 Alabama Electronic Transactions Act

New Web Site

Our new Web address is www.ali.state.al.us. For information concerning the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013; fax (205) 348-8411; or phone (205) 348-7411. ■

Robert L. McCurley, Jr.

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

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The Alabama State Bar is pleased to make available to individual attorneys, firms and local bar associations, at cost only, a series of brochures on a variety of legal topics of interest to the general public.

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Judicial Award of Merit Nominations Due

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through March 15, 2002. Nominations should be prepared and mailed to:

Keith B. Norman, secretary
Board of Bar Commissioners
Alabama State Bar
P.O. Box 671
Montgomery, AL 36101

The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation.

Nominations are considered by a three-member committee appointed by the president of the state bar, which then makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.

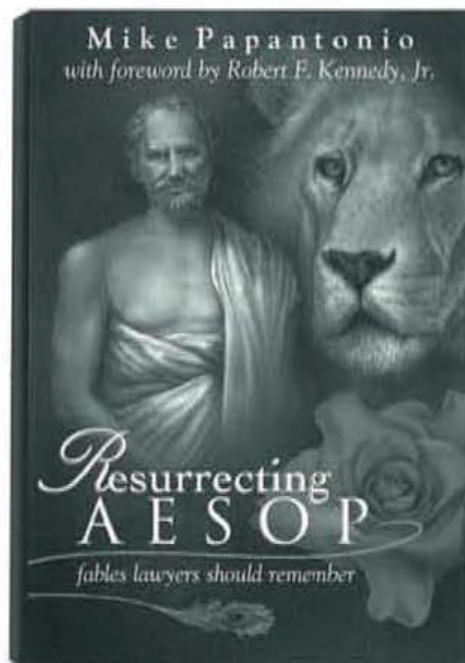
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No More **Closed** Doors

In 1995, the Supreme Court of Alabama adopted a rule governing bar disciplinary procedures which added to each disciplinary board panel a lay member, a non-lawyer, for participation in the Alabama State Bar's disciplinary process. The American Bar Association had previously created The McKay Commission to conduct an overall review of lawyer discipline nationwide.

Three basic criticisms of the self-policing of lawyers were noted by The McKay Commission:

- 1. Too slow;**
- 2. Too soft; and**
- 3. Too secret.**

In response to number three, the Alabama State Bar Board of Bar Commissioners petitioned the Supreme Court of Alabama seeking a rule modification to the Alabama Rules of Disciplinary Procedure which would add a non-lawyer to the disciplinary process, thereby "opening" that portion of lawyer discipline in Alabama. The result was an addition, in 1995, of ten lay members to the bar's disciplinary board panels.

Alabama lawyer Susan Cullen Anderson interviewed certain of these individuals. The following is an excerpt from Ms. Anderson's work.

ON THE ROAD AGAIN...

Since its inception in 1995, the ROADSHOW has covered the state of Alabama visiting local bar associations. The ASB is pleased to now include free CLE components as a benefit to Alabama lawyers. Contact Susan Andres, director of communications, at (334) 269-1515, extension 132, or e-mail to sandres@alabar.org for details. The following free CLE programs* are available:

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- General Counsel Tony McLain keeps bar members informed of the latest in disciplinary issues and major legal developments in Alabama and across the nation.
- Volunteer Lawyers Program Director Linda Lund has developed an ethics and professional component covering significant developments on a local and national level.

*Each CLE component is available in one- to three-hour format.

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ALABAMA STATE BAR
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Thomaston Mayor Patsy Sumrall joined the Alabama State Bar's disciplinary board in 1995 without preconceptions and with some empathy. "My brother is a lawyer," she says. "You always hear that all lawyers are crooked and all politicians are crooked. But I know there are great lawyers and great politicians. In any profession, you'll find bad eggs."

Ms. Sumrall was one of ten lay people added to the state bar's disciplinary board after the task force recommended, and the Alabama Supreme Court approved, citizen participation in lawyer discipline. At present, there are six lay members and two alternates. The disciplinary board is divided into six panels consisting of one lay member, four bar commissioners, and a disciplinary hearing officer. Each panel hears charges against lawyers accused of violating the bar's Rules of Professional Conduct. The lay members are appointed for one-year terms and may serve unlimited successive terms.

Mobile lawyer Billy Bedsole, a bar commissioner for several years, and presently serving as a disciplinary hearing officer, admits he was apprehensive before the lay members were selected. "I didn't think the lay members would understand the legal niceties of ethical violations," he says. And Bedsole was a little nervous about the punishment those lay folk would want to dish out to the wayward attorneys. "Before they were added, I thought they'd say, 'I have the chance to punish a lawyer, let's hang him by the heels,'" Bedsole says.

Thankfully, Bedsole found he was wrong on both counts. "I think the lay people understand the problems just as well as we do," he says. And as for the punishment, it's been his experience that the lay members are more lenient than the bar commissioners. They have to see that a lawyer intended to do harm before they're willing to punish him, he says. Recently added lay member Paul Hufham, a retired orthodontist from Dothan, agrees. The lawyers on his panel "were a little tougher than I was. I don't think they let up on their own."

Not that the lay members cut the accused lawyers any slack. Leon Garrett, a retired assistant superintendent of the Anniston City Schools, has high expectations for the attorneys who appear before his panel. Many of them have been accused of neglecting clients. "I expect attorneys to be a little more honest and professional," he says. Some of the lawyers on his panel are more sympathetic to their peers getting bogged down in their caseloads, Garrett says, but to him, it's no excuse. "If I had performed that way as a superintendent, I'd be fired," he says.

Bedsole says that the lay members have no trouble recognizing a "snow job." He remembers a case in which the accused lawyer claimed his sexual proposition to a client—a proposition memorialized on tape—was a joke. Before any of the lawyers voiced their opinions, the lay member of his panel dismissed the lawyer's claim as preposterous. "They see through the stuff as quickly as we do," Bedsole says. "We listen to them and we give them respect. They are equal to anybody on the panel."

Garrett affirms that he has been treated as an equal by the lawyers on his panel. "The attorneys do respect my opinion. It seems that they enjoy my input," he says. "We have not always agreed, but we've always been able to reach a conclusion."

Alternate Jim Hayes, Jr., a Birmingham financial consultant and vocal proponent of lay involvement in bar discipline, has sat on a panel once so far and found it fascinating, but "intimidating from a layman's standpoint." Hayes states that the bar's decision to add lay people to its disciplinary board panels is "commendable."

Hayes believes that lay members are an important addition to the bar's disciplinary board. "Lawyers are just that—lawyers," he says. "I have always said that until lay members are involved, there is no credibility in the system." Mark White, a bar commissioner and a Birmingham trial lawyer, agrees. "It's very, very healthy," he says. "It gives the general public a sense that this is not a proceeding by lawyers, for lawyers."

Mayor Sumrall says she was surprised to find that the lawyer members of her panel have been truly upset at the messes their fellow lawyers get themselves into. "They seem to be really fair and understanding," she says. "It bothers them to sit there and judge their peers. It's not all black and white."

It's been difficult for her to sit in judgment, too, Sumrall adds. When the disciplinary board disbars an attorney, it takes away his livelihood, and "that's not easy," she says. "It has given me insight into how anyone can get into trouble."

That insight is an important effect of lay involvement in the disciplinary process, Bedsole says. "Lay members go home and tell their friends about their experience and that the lawyers are trying to do the right thing. It's better than any advertisement," he says.

(The following portion of this article was written by the ASB General Counsel Tony McLain.)

Addition of lay members to the disciplinary board panels has brought openness and accountability to the disciplinary process. It is important that the public perceives lawyers as willing to allow lay people to hear cases against their own. And, lay members bring a different perspective to the hearings. Their terms of accountability are different from that of lawyers. They review the process and the lawyer's conduct more from a consumer's standpoint.

This increased participation by non-lawyers in the disciplinary process has provided an enhanced degree of accountability to our state bar disciplinary process. Retired Colonel Hollis Boston, who recently resigned his position as a lay member, commented on his experience:

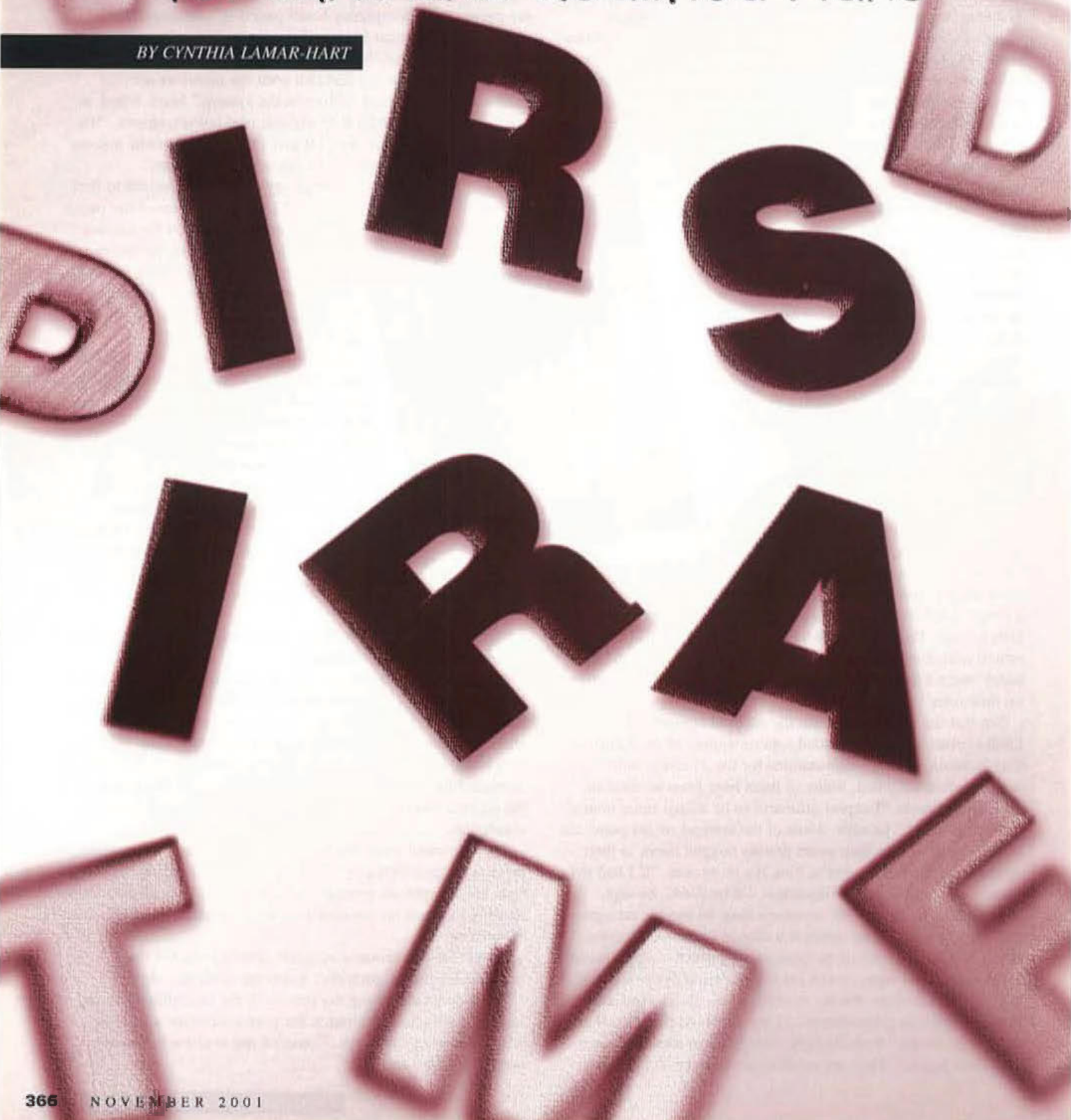
"...the bar has immunized itself against criticism that lawyers, like foxes, shouldn't guard the henhouse alone."

"I learned a lot during my time with the Disciplinary Board, and left with great admiration for your profession and those who labor in its vineyards. Count on me to share this opinion with everyone I know."



New IRS Regulations Greatly Simplify Minimum Distribution Rules for IRAs and Qualified Plans

BY CYNTHIA LAMAR-HART



On January 17, 2001, the IRS issued new proposed regulations that greatly simplify the rules governing minimum distributions from IRAs and qualified retirement plans. Prop. Treas. Reg. §§1.401(a)(9)-0 through 1.401(a)(9)-8; 1.408-8; and 54.4974-2 (January 17, 2001).¹ Not only do the new proposed regulations demystify the timing and selection of a beneficiary for such a plan or account, but they also provide for the use of a new uniform table for calculating minimum distributions that will allow account holders and plan participants to benefit from generous income tax deferral formerly available to only a select few participants who managed (primarily through the kindness of fate) to qualify under the old "MDIB" rule (no longer a factor). This article will summarize the new rules as they apply to defined contribution plans (such as profit-sharing plans, money purchase pension plans and 401(k) plans) and IRAs, focusing on the "required beginning date," distributions during the participant's lifetime, distributions after the participant's death, designated beneficiaries, trusts as beneficiaries, and the special rules applying to spouses as beneficiaries.

The "Required Beginning Date"

The required beginning date (RBD) is the date on which a participant in a qualified retirement plan or an owner of an IRA (both of whom may sometimes be referred to as a "participant") is required to begin taking at least the required minimum distribution from the account or plan. The determination of this date is not changed under the new regulations. For IRA owners and participants in qualified plans who own more than 5 percent of the sponsoring employer, the RBD is April 1 of the year following the year in which the individual reaches the age of 70 1/2. For a participant in a qualified plan (but not an IRA owner) who does not own more than 5 percent of the sponsoring employer, the RBD is the April 1 following the later of the calendar year in which the participant retires or reaches the age of 70 1/2.

Distributions During the Participant's Lifetime

The so-called "minimum distribution rules" of I.R.C. § 401(a)(9)(A) provide that, no later than the participant's RBD, the participant's plan benefits and IRA balances must be paid in a lump sum or must begin to be paid in substantially equal periodic payments over:

- a. The life of the participant;
- b. The joint lives of the participant and a designated beneficiary;
- c. A period not extending beyond the life expectancy of the participant; or
- d. A period not extending beyond the joint and last survivor expectancy of the participant and a designated beneficiary.

Under the old proposed regulations, in addition to choosing one of these periods, a participant had to choose whether to have his life expectancy recalculated each year and, if the participant's designated beneficiary was the participant's spouse, whether to have the spouse's life expectancy recalculated each year. Thus, the old rules produced a byzantine structure whereby the calculation method to be used by any particular participant varied according to the identity and age of his designated beneficiary on his RBD, what method he had elected to use to determine his own life expectancy and that of his spouse (if applicable), and whether the participant had changed his designated beneficiary after the RBD. These choices resulted in four possible computation methods for a participant whose beneficiary was his spouse, three possible methods for participants with non-spouse beneficiaries and two methods if the participant had no designated beneficiary. These myriad choices and their various implications were well beyond the understanding of all but the most sophisticated participants, not to mention their advisors.

The new rules change significantly the determination of minimum required distributions once a participant reaches his RBD. As has always been the case, these

minimum required distributions will be determined by dividing the participant's account balance (revalued annually) by a life expectancy factor (the "divisor"). Fortunately, the new proposed regulations yield but two ways of determining the appropriate divisor, one that applies to any participant whose sole beneficiary is his spouse who is more than ten years younger than he is, and the other (referred to herein as the "Uniform Table") to be used by everyone else. Prop. Treas. Reg. §§ 1.401(a)(9)-2, A-1(c); 1.401(a)(9)-5, A-4.

A. The Uniform Table

The divisors in the Uniform Table represent the joint life expectancy of a participant age 70 or older and a hypothetical beneficiary who is ten years younger than the participant (a table formerly known as the Minimum Distribution Incidental Benefit [or "MDIB"] rule table and available only to participants who managed to name a younger-generation beneficiary prior to their required beginning dates). For a 70-year-old participant, the initial divisor under the Uniform Table is 26 (the joint life expectancy of a 70-year-old and a 60-year-old). Under the old rules, if this same 70-year-old participant had named his same-age spouse as his beneficiary, he would have had to use their actual joint life expectancy of 19.6, resulting in larger required distributions, less income tax deferral and, inevitably, less money for the participant's old age, or his heirs. Under the new, simplified rule, all participants qualify for this favorable treatment, resulting in longer mandatory payouts and greater income tax deferral.

Thus, the application of the Uniform Table represents one of the most practical and beneficial changes brought by the new proposed regulations: A participant will be able to select his beneficiary based solely on the person whom he would like to receive post-death distributions, such as a life-long spouse or elderly relative, without the concern that such a choice will accelerate the required distributions to the participant during life. By the same token, a participant wishing to name a charity as his sole beneficiary may do so and still take advantage of the Uniform Table for longer-lasting lifetime distributions.

B. Much Younger Spouse as Sole Beneficiary

If the only designated beneficiary is a spouse who is more than ten years younger than the participant, then the participant will be able to use the actual joint life expectancy of himself and his spouse (Table VI). The new proposed regulations state that if the participant's sole designated beneficiary is the participant's spouse, for lifetime distributions the participant may use the longer of the distribution period determined under the Uniform Table or the "joint life expectancy of the [participant] and spouse using the [participant's] and spouse's attained ages as of the [participant's] and the spouse's birthdays in the distribution calendar year." Prop. Treas. Reg. § 1.401(a)(9)-5, A-4(b). The determination whether the spouse is the sole beneficiary will be made on a year-by-year basis, and the spouse must be the sole beneficiary for the entire distribution calendar year. Prop. Treas. Reg. § 1.401(a)(9)-5, A-4(b). The fact that the determination is made yearly typically will be a favorable change, in that it allows a

participant to switch to the more advantageous joint life expectancy table if he marries a younger spouse after lifetime distributions have begun (rather than his designated beneficiary's having been carved in stone at the RBD, as under the old rules). Of course, if that much younger spouse dies during the participant's lifetime, the participant will have to switch back to the Uniform Table, a switch that would not have been required under the old rules. Also, the new rule could be improved by allowing a change in status due to the death of a spouse or a divorce to take effect in the following year, rather than the partial year in which it occurred.

Because the divisor is recalculated annually under either table, regardless of how long the participant lives, the required minimum distributions will never cause the account to be reduced to zero (assuming positive investment results). Recalculation was available under the old rules if elected, but once death occurred, the life expectancy of the deceased person (whether the participant or the spouse) went to zero. Consequently, the remaining plan benefit or account balance at the survivor's death had to be distributed before the end of the year following the year of the survivor's death. This could be costly for a beneficiary who had to report all the income in one year. Under the new rules, if the participant dies after his RBD, the benefits are distributed over the life expectancy of the designated beneficiary or, if there is no designated beneficiary, over the remaining fixed-term life expectancy of the participant. If the spouse/beneficiary dies subsequent to the participant, the applicable distribution period becomes the life expectancy of the spouse, determined in the calendar year of the surviving spouse's death, reduced by one each calendar year.

C. Summary Comparison, New Requirements and Penalties for Noncompliance

The new rules thus eliminate two choices that a participant had to make at his RBD under the old rules: (1) the selection of a designated beneficiary whose life expectancy would be used for all purposes; and (2) the decision whether to recalculate the life expectancy of the participant and/or the participant's spouse. Both choices were

irrevocable unless, after the selection was made, the participant chose an older person as his beneficiary. In such a case, the new beneficiary's life expectancy was used to shorten further the available distribution period. Under the new rules, the participant must choose a beneficiary at his RBD only if he has a spouse more than ten years younger and he wants to use his actual life expectancy to achieve a longer distribution period than that made available by the Uniform Table.

The new regulations impose a new burden on IRA sponsors, that of requiring an IRA sponsor to inform the participant or beneficiary of the amount of the required distribution from the IRA. However, even though each IRA sponsor is required to provide this information, the participant may take the required minimum distribution from any one or more IRAs for which he is a participant. In addition, a beneficiary is allowed to take the required minimum distribution from any of the IRAs created by from the same decedent.

It is hoped that the simplifications accomplished by the new proposed regulations will have the effect of increasing participants' ability to comply with the minimum distribution rules with certainty, especially in light of the stiff penalties for failure to comply. A 50-percent excise tax is imposed on the amount of any required distribution that is not actually distributed. I.R.C. § 4974(a). However, if the participant dies before the RBD and there is a designated beneficiary, but the designated beneficiary fails to take the required minimum distribution in any year following the year of the participant's death, the 50-percent penalty will be waived if the beneficiary receives the entire remaining plan benefit or account balance before the end of the fifth year following the year in which the participant died.

Distributions after the Death of the Participant

One major difficulty of the old proposed regulations was that, while post-death distributions were supposedly based on the life expectancy of the bene-



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fiary, many times the actual beneficiaries who eventually inherited retirement plan benefits or IRAs could not use their life expectancies to measure required distributions because the determination of who was the participant's "beneficiary" was made at the RBD. Under the new scheme, required distributions will be based on the actual life expectancies of the actual beneficiaries who inherit the plan benefit or IRA. Furthermore, the new proposed regulations contain an additional innovation, in that, for purposes of calculating minimum distributions, the identity of the actual beneficiary need not be determined until December 31 of the year following the year in which the participant dies, allowing some post-death "cleanup" of the decedent's estate plan. The implications of this "clean-up" option are discussed further in the sections regarding designated beneficiaries and trusts as beneficiaries, below.

A. Death of the Participant before the RBD

With respect to the plan benefits and IRAs of a participant who dies before his RBD, the new rules vary from the old proposed regulations in several ways. First, as noted above, the designated beneficiary need not be identified until December 31 of the year following the calendar year of the participant's death (sometimes referred

to herein as the "Designation Date").³ Second, as discussed below, the default rule for a non-spouse beneficiary is reversed from the old five-year distribution rule to the beneficiary's life expectancy (if there is a designated beneficiary by the Designation Date). The new rules operate basically as follows:

1. Single, Non-Spouse Beneficiary

If a participant dies before reaching his RBD and he has a non-spouse designated beneficiary as of December 31 of the year following the calendar year of his death (the Designation Date), his plan benefits and IRAs must be distributed over the designated beneficiary's life expectancy, determined in the year following the year of the participant's death and reduced by one year for each year thereafter. Distributions must commence no later than the end of the calendar year after the year of the participant's death. Prop. Treas. Reg. §§ 1.401(a)(9)-3; 1.401(a)(9)-5, A-5(b). Under the old rules, the default rule for distributions was the "five-year distribution rule," which the designated beneficiary (who must have been determined at the RBD) could elect out of and choose instead his life expectancy. The new proposed regulations reverse the default rule to be the designated beneficiary's life expectancy, which will apply unless the designated beneficiary chooses instead the five-year rule or unless there is no designated beneficiary.

2. Spouse as Sole Beneficiary

If the sole designated beneficiary is the participant's spouse, the distributions do not have to commence until the participant would have reached age 70 1/2. Prop. Treas. Reg. §1.401(a)(9)-3, A-3(b). Once distributions commence to a surviving spouse, they can be made over the spouse's life expectancy, re-determined each year. Once the spouse dies, the applicable distribution period is the spouse's life expectancy in the calendar year of his death, reduced by one each year. Prop. Treas. Reg. (1.401(a)(9)-5, A-5(c)(2), unless the spouse chooses the five-year distribution rule.

3. Multiple Individual Beneficiaries and the Separate Account Rule

If there are multiple individual beneficiaries, as long as their respective shares have been divided into "separate accounts" as of the Designation Date, the distribution rules will apply to each account separately. If their shares are not divided by the Designation Date, as long as they are all individuals, then they may either take distributions under the five-year distribution rule or they may use the life expectancy of the oldest of them, beginning no later than the year following the calendar year in which the participant died. This rule applies even if one of the individuals is the participant's surviving spouse. Prop. Treas. Reg. §§ 1.401(a)(9)-3, A-3(a); 1.401(a)(9)-4, A-4(c); 1.401(a)(9)-5, A-7.

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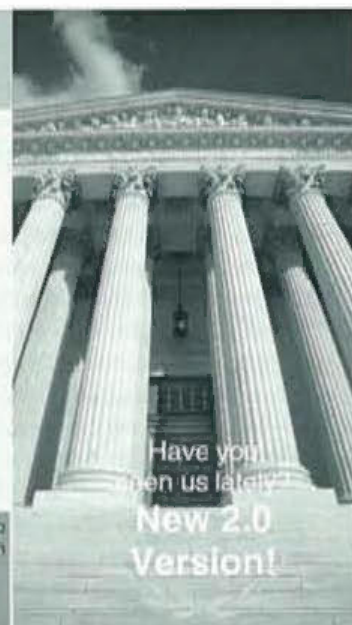
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No Beneficiary: The Five-Year Rule

If there is a single beneficiary and it is not an individual, or if there are multiple beneficiaries who do not establish separate accounts by the Designation Date and one of them is not an individual, then the participant is treated as having no designated beneficiary. If the participant does not have a designated beneficiary by the Designation Date, or is treated as if there were none, then the five-year rule applies, which means that all benefits must be distributed no later than the fifth anniversary of the participant's date of death. This is the case even if one of the beneficiaries is the participant's surviving spouse. Prop. Treas. Reg. §§ 1.401(a)(9)-3, A-1(b) & A-2; 1.401(a)(9)-4, A-3(b), A-4(c); 1.401(a)(9)-5, A-5(c)(3) & A-7.

B. Participant Dies After the Required Beginning Date

If the participant dies on or after his RBD, the minimum distribution for the year of death will be the same as the deceased participant would have been required to take (if he had not already done so). Prop. Treas. Reg. § 1.401(a)(9)-5, A-4(a)(1). For subsequent years, the rules applicable when the participant dies after the RBD are substantially similar to the rules that apply when the participant dies before the RBD, except when the participant dies without a designated beneficiary. In such a case, the distribution period is the participant's remaining life expectancy, determined in the year of

his death, reduced by one for each year thereafter. Under the old rules, this same calculation would apply only if the participant's life expectancy were not being recalculated each year. If the participant's life expectancy were being recalculated, the old rules required that the life expectancy of the participant be reduced to zero, and all benefits were required to be paid out by the end of the year following the year of the participant's death.

Designated Beneficiaries

A "designated beneficiary" must be an individual. Prop. Treas. Reg. § 1.401(a)(9)-4, A-1. An individual beneficiary of a trust may be treated as a designated beneficiary if the trust meets certain requirements, Prop. Treas. Reg. § 1.401(a)(9)-4, A-5, which will be discussed further below. As noted above, if there are two or more individual beneficiaries, only the oldest beneficiary will be treated as a designated beneficiary unless each beneficiary is entitled to a separate share or account. Prop. Treas. Reg. § 1.401(a)(9)-5, A-7(a)(1). If there are multiple beneficiaries, any one of which is not an individual, then the participant will be treated as not having a designated beneficiary unless the non-individual beneficiary is entitled to a separate share or a separate account. Prop. Treas. Reg. § 1.401(a)(9)-5, A-7(a)(1). To be treated as a designated beneficiary, an individual must be designated under the terms of the plan, including an affirmative election by the participant pursuant to the terms of the plan. Prop. Treas. Reg. § 1.401(a)(9)-4, A-1. Thus, an individual who becomes entitled to the account pursuant to applicable state law will not be treated as a designated beneficiary. Prop. Treas. Reg. § 1.401(a)(9)-4, A-1. Further, an estate may not be a designated beneficiary. As a result, it appears that, if the participant names his estate as the beneficiary, even if an individual becomes entitled to receive the benefit by the Designation Date (such as by the estate's closing prior to the Designation Date), that individual will not be treated as a designated beneficiary. Prop. Treas. Reg. § 1.401(a)(9)-4, A-3(a).

Because the new rules allow a "clean-

up" period up to and including December 31 of the year following the calendar year of the participant's death, there appear to be at least three ways to ensure that an individual, or a particular individual, will be treated as the designated beneficiary. First, if there are multiple beneficiaries and one is not an individual, such as a charitable organization, then if the non-qualifying beneficiary is paid its portion of the plan benefit or IRA before the Designation Date, that beneficiary will be disregarded for purposes of determining whether there is a designated beneficiary.

Second, the clean-up period allows an individual beneficiary to disclaim benefits prior to the Designation Date, thereby causing himself to be disregarded for purposes of determining the designated beneficiary (or beneficiaries) and the associated calculations of life expectancies.

Third, the new proposed regulations allow the establishment of separate accounts for each beneficiary or group of beneficiaries by the Designation Date. As a result, the fact that the beneficiary of one separate account is not an individual will not affect the other separate accounts; the individual beneficiaries of the remaining separate accounts will be treated as designated beneficiaries. The definition of separate accounts is unchanged from the earlier proposed regulations. Prop. Treas. Reg. § 1.401(a)(9)-8, A-2 & A-3. However, the date by which such separate accounts must be established has changed. Under the old rules, the applicable date was the date of death or the RBD, whichever first occurred. The new rules provide that the applicable date, at least in the case of death before the RBD, is the Designation Date.

Several expert commentators¹ have noted a possible anomaly in the new proposed regulations if the participant's death occurs on or after the required beginning date, however. The Preamble to the new proposed regulations states that the new regulations provide "the same rules for distributions after the employee's death, regardless of whether such death occurs before or after" the RBD. The Preamble further states that "[i]f, as of the end of the year following the year of the employee's death, the employee has more than one designated beneficiary and the account or benefit

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(until the participant would have reached age 70 1/2) for required distributions when the participant dies before his required beginning date leaving benefits to his surviving spouse, §401(a)(9)(b)(iv)(I); Prop. Treas. Reg. §1.401(a)(9)-3, A-3(b); and

(d) The surviving spouse's right to roll over to his own IRA benefits received as a beneficiary of a deceased spouse or to treat the decedent's IRA as his own, §402(c)(9); § 408(d)(3)(A) & (B); Prop. Treas. Reg. §1.408-8, A-5.

Of course, as noted above, the application of any of these special rules requires that the spouse be the sole beneficiary of the participant's benefits. The applicability of the first three rules has been discussed, at least to some extent, above. The opportunity for the spouse to roll over plan benefits or an IRA to his own IRA, which was also available under the old rules, merits discussion here.

A surviving spouse may have the decedent's plan benefit transferred to his own IRA, if permitted under the plan, or may have the decedent's IRA transferred to his own IRA. Also, the surviving spouse may elect to have the decedent's IRA treated as his own. If the participant died after his RBD, the surviving spouse would be required to take the required minimum distribution that the deceased participant would have received had the decedent survived until the end of the calendar year in which he died. It appears that if the rollover or election to treat the decedent's IRA as the surviving spouse's IRA takes place after the surviving spouse has reached age 70 1/2, the surviving spouse would be required to take a required minimum distribution in the year in which the rollover or the election was made if it occurred in a year after the year of the decedent's death. The required minimum distribution would be based on the distribution that would have been required if the rollover or the election had occurred as of the beginning of the calendar year. Thus, the distribution would be based on the Uniform Table, rather than the surviving spouse's life expectancy, determined in the year in which the rollover election was made.

Effective Date

The new proposed regulations are stated to be effective for distributions in calendar years beginning in 2002, except that IRA participants may apply the new rules for calendar years beginning in 2001. In addition, a qualified retirement plan may adopt an amendment to apply the new regulations to distributions in calendar years beginning in 2001. However, Announcement 2001-18 made clear that a required minimum distribution due before April 1, 2001, because it was the participant's RBD, was a required minimum distribution for the calendar year 2000, such that it was subject to the old rules. ■

Endnotes

1. The old rules governing required minimum distributions were also proposed regulations, issued July 27, 1987, and amended on December 30, 1997. References in this article to "proposed regulations" are intended to indicate the 2001 proposed regulations.
2. This term was coined by Natalie B. Choate, esq., in her unpublished article "Understanding the New Minimum Distributions Rules: The January 2001 Amendments to the Proposed Regulations," March 18, 2001. Ms. Choate's materials on this topic are, as of this writing, available on www.ataxplan.com.
3. *Id.*; Louis A. Mozzullo, esq., *IRA and Plan Distributions: What's Now*, ABA Section of Real Property, Probate and Trust Law 12th Annual Real Property and Estate Planning Symposium, Probate & Trust Programs, Friday, April 27, 2001.
4. See Choate, *supra* note 2.
5. In addition to the four statutory requirements, it is clear that because the trust rules are "look-through" rules, the identified beneficiary must qualify as a designated beneficiary. Also, the determination of who the beneficiary is may not be apparent unless the trust is required to pass through minimum distributions to the trust beneficiary or beneficiaries.

Cynthia Lamar-Hart

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has not been divided into separate accounts or shares for each beneficiary, the beneficiary with the shortest life expectancy is the designated beneficiary," suggesting that the separate accounts determination is made on the Designation Date, without any reference to when the participant's death occurred. However, the actual language of Prop. Treas. Reg. §1.401(a)(9)-8, A-2(a) states that separate accounts are aggregated "except as otherwise provided in" subparagraph (b), although the cited subparagraph does not provide any specific contrary rule for post-death distributions where death occurs after the RBD. Subparagraph (b) only provides a specific contrary rule for lifetime required distributions where death occurs before the RBD. It is hoped that, in view of the conflict with the stated intent in the Preamble, the omission of post-death distributions where death occurs after the RBD was an oversight, and the Service will correct the mistake in or prior to the final regulations.

An additional problem raised by the new proposed regulations⁴ is this: What is the effect of the designated beneficiary's death if he survives the participant but dies before the Designation Date? Under the new rules as written, it would appear that the beneficiary's death prior to the Designation Date would cause him to lose his status as the designated beneficiary. In the unlikely event that the plan allows the beneficiary to name his successor beneficiary and he has done so, then the successor beneficiary will be the designated beneficiary on the Designation Date. In most cases, however, without proper planning with the participant to address this situation, the beneficiary's estate will be the recipient, such that the participant has no designated beneficiary and the five-year rule will apply. Again, it is hoped that the Service will consider comments requesting that the beneficiary's survival until the Designation Date not be required as a condition of designated beneficiary status. Of course, it would appear that the participant can avoid this problem entirely by providing in his beneficiary designation that if his primary beneficiary does not survive until the Designation Date, then an alternate beneficiary is named. It is imperative that advisors recognize this important planning opportunity and take the initiative to help their

clients implement a beneficiary designation that closes this gap created by the new proposed regulations.

Benefits Payable to a Trust

Under the new proposed regulations, as under the old, a trust must satisfy four requirements in order for an individual beneficiary of the trust to be treated as a designated beneficiary: (1) The trust must be a valid trust or would be a valid trust under state law if it had a corpus; (2) the beneficiaries of the trust entitled to the plan benefit or IRA must be identifiable; (3) the trust must be irrevocable or, by its terms, will become irrevocable at the participant's death; and (4) certain documentation requirements must be satisfied. Prop. Treas. Reg. §1.401(a)(9)-4, A-5 & A-6.⁵ These documentation requirements generally require that the participant or trustee must furnish to the plan administrator or IRA trustee, custodian or issuer by the Designation Date either a copy of the trust instrument or a list of beneficiaries, including contingent and remainder beneficiaries, and the conditions of their entitlement. Prop. Treas. Reg. §1.401(a)(9)-4, A-6(b); Prop. Treas. Reg. §1.408-8, A-1(b). Also, the participant or trustee must certify that the list is complete and agree to furnish a copy of the trust instrument if requested.

Because, under the new regulations, the identity of the designated beneficiary is relevant for purposes of determining the required minimum distribution at the participant's RBD only when the designated beneficiary is a spouse who is ten years younger than the participant, typically these four requirements and the documentation requirements need not be met until the Designation Date. However, if the participant wants to take advantage of a much-younger spouse's actual life expectancy under Table VI to calculate his required minimum distributions during life, these documentation requirements must be satisfied at the RBD. If the trust agreement is amended after the RBD, a copy of the amendment or a corrected certification must be furnished to the plan administrator within a reasonable time. A surviving spouse who is a beneficiary of a trust will be treated as the participant's sole beneficiary only if

the entire required minimum distribution that is made during each calendar year during the surviving spouse's lifetime is required to be redistributed to the surviving spouse.

With respect to benefits payable to trusts, the new regulations contain several improvements over the old rules. For example, the new regulations contain modest clarifications of the definition of "trust beneficiary" and improve the guidance regarding which contingent beneficiaries may be disregarded. Prop. Treas. Reg. §1.401(a)(9)-5, A-7(b) & (c)(1). They also confirm that testamentary trusts can meet the requirements of the trust rules. Prop. Treas. Reg. §1.401(a)(9)-5, A-7(c)(3), Examples 2 & 3; Preamble, "Trust as Beneficiary."

The opportunity under the new proposed regulations to "clean up" beneficiaries of plan benefits or IRAs prior to the Designation Date also allows the curing of deficient trusts. For example, non-individual beneficiaries can be "removed" from consideration if their shares are capable of being distributed prior to the Designation Date.

Special Rules for the Surviving Spouse, Including Spousal Rollovers

Although an exhaustive discussion of the special rules affecting the surviving spouse of an participant is beyond the scope of this article, in general, there are four unique provisions that may apply when the participant's surviving spouse is named as the beneficiary:

- (a) The calculation of lifetime required distributions using the actual joint life expectancy of the participant and a spouse more than ten years younger than the participant, Prop. Treas. Reg. §1.401(a)(9)-5, A-4(b);
- (b) The calculation of the surviving spouse's life expectancy by annual recalculation during the surviving spouse's remaining life and fixed term life expectancy thereafter;
- (c) The postponed commencement date

The Rules **Do** Apply to Me

This time of year is an extremely vulnerable time for individuals with a drug, alcohol or depression illness. It is also a difficult time for the people who love them. I received this story in the mail the other day. I was reminded again of the incredible impact these illnesses have on all family members.

Loved ones are often overwhelmed by the increased alcohol use and the extra celebrations that coincide with this time of year. Their loved one's wellbeing is literally held in suspense as they ponder: Are they driving? Is she safe? I hope no one sees him that way. How much has he had to drink? Will he or she ruin the day again? Is there any money left? I'll be really quiet so we do not have a fight. And so on. If one of these illnesses is present in your family, then you know what I am talking about. You are all too aware of the increased anxiety and panic that accompany the holiday season. I encourage you to remember that there is help, and there is a solution. It can be a joyous time. Call ALAP for you and your loved one. — Jeanne Marie Leslie, director, Alabama Lawyer Assistance Program

This holiday season, I'll spend time with my family, the people whom I love and love me in return. I have so much to be grateful for today. I have a good relationship with my wife and my children. I know I'm making a difference in their lives. I didn't always have that. Above all, I am grateful to be sober, for without that, none of the rest could be possible. It wasn't always that way for me.

In January 1981, I knew I had a drinking problem. I had just received a DUI, and spent the night in the executive suite of the city jail. There was additional evidence of my problem, in fact, a mountain of evidence that I had previously ignored, which crushed me with the understanding that I had to quit drinking. I swore I would never drink again. Of course, marijuana had never caused me any problems and I saw no reason to quit that.

I took the bar exam for the second time in February 1981, and passed. I failed the first time because I was hung over and high all three days. For the second bar exam, I quit smoking marijuana for a week and got plenty of rest, and I passed with flying colors.

I opened my law practice as a sole practitioner in June 1981, and I pictured myself as an outlaw at law, a rebel with something to prove in criminal court, taking criminal appointments. I did well in court, but the constant marijuana smoking sapped me of my energy, and so I didn't get many appointments because I was too lazy to show up for arraignments. I started drinking again, for no apparent reason except that I needed the action.

I remained lazy, and the lack of business caught up to me in February 1984. I



closed my practice, and started going to AA meetings to get sober. This time I stopped marijuana as well. It worked. I followed the rules. I got a sponsor, talked in meetings and worked the steps. In six months I got a job with a judge in a different city as his law clerk, and a year later got a job with the state. I kept going to meetings, and I got married. I got bored with the job, and took another where I would be practicing law. At this time, I had three years' sobriety, but I kept going to meetings. My wife and I had a son, and three years later a daughter. At some point I lost interest in AA and quit going to meetings, but had no problem staying sober. Then I began to get bored with my job, and I felt trapped. In 1993, with over nine years of sobriety, I decided that I could smoke marijuana and control it. I smoked one joint, and within the hour I

had purchased a whole bag, and within a week I was smoking every day. I started drinking again, quit my job and opened a practice again as a sole practitioner. I was on the road to complete destruction and didn't even know it.

I managed to hide my drinking and drugging from my wife for many months, but within the year, I had managed to completely destroy my relationship with her and my parents. I was well on the way to destroying my relationship with my children. On Valentine's Day 1995, my wife gave me an ultimatum to quit drinking and get treatment or move out of the house. I made the only choice an addict could make. I moved out, into a trailer park on the outskirts of town.

I didn't last though. I wound up in a treatment center directed by an amazing woman. It was honest and confrontational. My wife and I got back together and worked through our many problems. Today, with six years' sobriety, I am a happy and well balanced individual. Professionally, I'm more successful than ever before, and I'm a good husband and father. These blessings come directly from God, whom I found in the rooms of AA, and from the realization of three fundamental facts about my life. I can never drink successfully; one drink or drug will lead to certain disaster. All of the rules apply to me; rules are guideposts to a centered life, not chains of authority. Finally, I know that when I need some action, I can always choose to go to a meeting or talk about it with another alcoholic; as soon as I've talked about it, the desire for action is gone, replaced by gratitude for my life and the people in it. ■



Understanding Title Insurance in Alabama

BY ROBERT R. MADDOX and ELLEN GRAY OWEN

Title insurance, for most Alabamians, is one of the numerous documents that swirls around the table during a residential closing. At the time it only appears to be part of the litany of fees paid and signatures required at a closing, which just serves to knot up the emotions of both the seller and purchaser. Once the closing is completed, the parties part ways and likely part with the fleeting thought of title insurance, until it is needed and/or disputed, and then title insurance is invaluable not only financially but for peace of mind. The purpose of this article is twofold: first an overview of the components and mechanics involved with title insurance, followed by an analysis of Alabama's newly enacted "Alabama Title Insurance Act."

Why Buy Title Insurance? Introduction to Title Insurance

Title insurance seems to be one of those little understood, but always required, items shown on the HUD-1 for the purchase or refinance of real property. For a one-time premium, lenders and owners can purchase a title insurance policy which will protect

against a number of problems. Most lenders require a lender's title policy, which does not necessarily protect an owner. An owner can purchase his own policy for an additional premium, which will offer protection for his benefit usually based on the owner's equity in the land.

Title insurance is a contract between the insurer and the insured, and is ordinarily purchased in the context of a transfer of an interest in real property. In the typical real estate transaction, whether purchase or refinance, a search of the land records is conducted to determine ownership of the land to be insured, as well as recorded encumbrances such as liens, judgments, restrictions, easements, etc. After the search has been completed, typically a commitment is issued. The commitment tells the lender and owner, if owner's title insurance is being purchased, that the title insurer will agree to insure the land under the circumstances outlined in the commitment. There are a number of policy types issued by title insurers, such as leasehold, mineral, oil & gas, and the most widely known, owner's and lender's.

The title policy is made up of three parts: the pre-printed policy jacket, which contains insuring provisions, the Exclusions from

Coverage and the Conditions and Stipulations; Schedule A, which contains the name of the insured, the limit of liability, the date of the policy, the description of the land, and the nature of interest held by the insured (it is similar to a casualty insurance declarations page); and Schedule B, which contains exceptions from coverage which are peculiar to the particular land insured.

The contract of title insurance is a contract of indemnity against actual monetary loss sustained (See Condition and Stipulation 7), which means that if the title of the land is not as insured and the insured suffers a loss, then the insurer pays that loss. Title insurance insures against past risks which are known and knowable, unlike casualty insurance which insures against future risk. A title policy incurs a one-time premium, rather than an annual premium like a casualty policy.

The Commitment

The commitment is the insurer's agreement to insure the title so long as certain conditions are met. The commitment has a number of parts: the cover sheet, Schedule A, and Schedules B1 and B2. The conditions under which the insurer will issue a title policy are contained in the Schedules and typically include requirements of warranty deed; payment and release of prior mortgages; satisfaction and release of judgments; etc. The schedules in the commitment also contain information about those recorded matter which affect the land and were discovered during the title search, such as utility easements, restrictive covenants, etc. These are usually considered exceptions and thus not covered by the policy.

Once a closing has occurred, all conditions contained in the commitment have been met, and the premium paid, the title policy is issued.

The Policy

A. Schedules A and B

The title policy, like the commitment, has a number of parts: the pre-printed jacket, which contains a policy number, the insuring provisions, the Exclusions from Coverage, and the Conditions and Stipulations. The pre-printed jacket is an American Land Title Association form and is identical for each title insurer. Schedule A, which is what would be called the declarations page in a casualty context, names the insured, date of policy, limit of liability amount, and describes the land insured. Schedule B contains the individual exclusions which apply specifically to the land described in Schedule A. Schedules A and B are customized for a particular piece of land.

B. Insuring Provisions

The owner's policy jacket contains four insuring provisions: The insured owns the described land (Provision 1); there are no defects, liens or encumbrances that the insurer has not told the insured about (Provision 2); title is marketable (Provision 3); and the insured has a legal right of access (Provision 4). The lender's policy adds four more insuring provisions dealing with priority (Provision 6) and enforceability (Provision 5) of the insured lien; assignment of the insured lien (Provision 8); and mechanic's lien issues (Provision 7).

C. Exclusions from Coverage

Following the insuring provisions are the exclusions which are contained in four numbered paragraphs. These exclusions state that the insurer will not pay for loss or damage, costs, attorneys' fees, or expenses arising from enumerated items such



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as zoning [Excl. 1(a)] and local law enforcement [Excl. 1(b)] or eminent domain (Excl. 2). Other paragraphs exclude liability for defects, liens, encumbrances or other matters which have been created, suffered, assumed or agreed to by the insured claimant or those matters known to the insured, not known to the company, not of record and not disclosed to the company prior to the issuance of the policy. Exclusion 4 deals with bankruptcy issues which affect title such as preferential transfers [Excl. 4(b)].

D. Conditions and Stipulations

The last part of the policy jacket contains the Conditions and Stipulations. These describe the obligations on both the insurer and the insured. The Conditions and Stipulations also define important terms and control the conduct of a claim.

One of the most important sections of the C&S is the definitions section. This section defines "insured," "knowledge," or "known," "land," "public records," and "unmarketability" among others. Usually "insured" means the named insured in Schedule A. However, an insured also includes those entities to which an assignment has been made and those who take title by operation of law such as an heir or devisee [C&S 1(a); but see *Lawyers Title Insurance Corporation v. Cae-Link*, 45 F.3d 426 (1995)]. "Knowledge" means actual knowledge, rather than constructive knowledge [C&S 1(c)].

"Land" [C&S 1(d)] means the land described in Schedule A and does not include any land outside of that description. "Unmarketability" of title [C&S 1(g)] essentially means that there is some defect in title, not previously known or disclosed, which would allow a contract purchaser to rescind or revoke the contract. It does not mean that the policy guarantees that an insured can sell land at the insured's asking price.

Another important part of the Conditions and Stipulations involves notice to the insurer of a claim [C&S 3]. The requirements set forth state specifically that notice must be prompt and in writing when an insured claimant learns of a defect in title or there is litigation filed. This allows the Company to make a coverage determination in a timely manner. In case of litigation involving the insured land [see 4(a)], if notice is not prompt, there is a real danger that coverage will be jeopardized if there has been prejudice to the Company by the insured's failure to notify timely. An insured cannot sit on his rights under the policy, lose his case in court, and then expect the title insurer to come to his rescue.

Paragraph 4 describes the defense of claims and the duty of the insured claimant to cooperate with the Company. In the event an insured is sued, the Company will provide a defense for the insured for only those claims which are covered under the policy. For example, while a title insurer may provide a defense against a claim of easement rights asserted by an adjacent landowner, it may not necessarily defend the insured against claims of harassment, intention infliction of emotional distress, stalking, misdemeanor threats of bodily harm, slander, and the like. Torts are not covered items under a title policy. If the title issue can be separated in the context of the litigation, a title insurer will ordinarily elect to do so.

The policy allows an insurer an option of bringing suit to establish title as insured as in the case of access [C&S 4(b)]. Typical cases include access matters, lack of priority, boundary disputes and easements. The insured has a duty to cooperate with the insurer and assist the Company in the prosecution or defense of the case [C&S 4(d)]. This duty can mean that the insured may have to provide a deposition to another party or to the title insurer; provide copies of all documents relating to the dispute in his possession; or do any other act which the insurer deems in the best interest of the handling of the claim.

Another provision of which an insured should be aware is contained in Paragraph 9(c). This paragraph eliminates liability to the insured for loss or damage voluntarily assumed by the insured claimant without the prior written consent of the Company.

Another significant section involves the option of the insurer to pay or settle in a variety of ways [C&S 6]. For example, the Company can tender policy limits [C&S 6(a)]; or it can settle with the competing claimant in order to establish title as insured [C&S 6(b)]; or it can concede the loss to the insured [C&S 6(b)(iii)] and pay the diminution in value [as described in 7(a)(iii)], usually after an appraisal is made.

Claims

The vast majority of claims made are against residential property, rather than commercial, and typically involve unpaid/unreleased prior mortgages, boundary line disputes, encroachment/easement issues, and, increasingly, bankruptcy problems. A typical claim investigation includes a title exam, review of the loan documents, review of the closing file, and discussion with the agent, approved attorney and/or insured claimant. Once the coverage decision has been made, most insurers communicate the decisions to the insured in writing, citing the applicable policy provisions if liability is denied.

The policy provides a number of ways to settle claims [C&S 7 and 8]. The insurer can pay policy limits to the insured at any time. This is limited by the existence of litigation in which a company has already accepted tender of defense. Under most circumstances, payment of policy limits and termination of involvement in litigation is not an option. The insurer can also pay any third party in order to establish title as insured. A title insurer can also concede the defect and pay the insured the diminution in value as described in C&S 7(a)(ii) or reach some compromise with a third party. There are occasions in which an insurer will litigate an issue to its conclusion on behalf of the insured, as permitted by 4(c).

Administratively, costs and expenses incurred do not affect the limit of liability as shown on Schedule A [C&S 7(b)(ii)]. Once a loss has been paid, the policy is usually endorsed to show the reduction in the limit of liability [C&S 10 and 12(a)]. If policy limits are paid, the policy is canceled, and future claims will not be covered [C&S 6(a)].

It is important to note that when there are both owner's and lender's policies, most losses are paid to the lender on behalf of the owner, unless the lender waives the payment in writing.

A. Recovery of Loss

Once an insurer is involved, the possible sources of recovery are analyzed and evaluated. Recovery sources typically include the policy issuing agent, the approved attorney, the contractor and the grantor under warranty theories. An insurer can pursue recovery under its subrogation rights conferred by C&S 13. The recovery process is sometimes protracted and can take years to recover losses which have been paid.

There are many instances in which the coverage afforded by the title policy can save the day. For example, the policy typically protects against forgeries or unknown heirs in the chain of title. Title insurers handle hundreds of claims annually, at a cost of hundreds of thousands of dollars, for losses which are covered under the policy.

This article is a brief guide to the title insurance policy and is not a complete discussion of all policy provisions and is not to be used a substitute for a reading of the issued policy, or applicable case law.

Analysis of the 2001 Alabama Title Insurance Act Introduction

The first title insurance company was formed in Pennsylvania in 1853, and since that time it has evolved and developed into a nationwide industry. *D. Barlow Burke, Jr., Law of Title Insurance*, 1:2 (2 ed., Little Brown & Company 1993). Over the past decade and a half state governments have sought to regulate this essential industry in order to provide stability and organization and to protect their citizenry. On October 1, 2001 Alabama joined 41 other states in regulating its title insurance industry with the Alabama Title Insurance Act (hereinafter "Title Act"). S.B. 246, 2001 Leg., (Ala. 2001). The State of Alabama had long recognized title insurance as a form of insurance, as indicated by defining it in prior insurance sections of the Alabama Code. "'Title insurance' is insurance of owners of property, or others having an interest therein or liens or encumbrances therein against loss by encumbrance, or defective titles, or invalidity or adverse claim to title." *Ala. Code* § 27-5-10 (1975). However, the intent of Alabama's new Title Act is to clearly define and regulate this foundational industry:

The purpose of this act is to set forth certain definitions applicable to title insurance in this state and to provide further for the supervision of the business of title insurance transacted in this state.

S.B. 246, 2001 Leg., (Ala. 2001).

Who is Affected? Title Insurers and Agents

The Title Act addresses the regulation of both title insurers and title agents who are engaged in the business of providing title insurance. The Title Act defines a title insurer as "[a] company organized under the laws of this state or licensed in this state for the purpose of transacting as insurer the business of title insurance, as defined in § 27-5-10, *Code of Alabama* 1975, and any foreign or alien title insurer licensed to be engaged in this state in the business of title insurance." S.B. 246, 2001 Leg., (Ala. 2001). Furthermore, the Title Act defines a title agent as "[a]ny person who is authorized in writing by a title insurer to perform the following: (a) solicit title insurance business; (b) collect premiums; (c) determine insurability in accordance with underwriting rules, standards, and guidelines prescribed by the title insurer; and (d) issue title insurance commitments, policies or endorsements of the title insurer. The term 'title agent' does not include the officers or employees of a title insurer." S.B. 246, 2001 Leg., (Ala. 2001).

Furthermore, the Title Act narrows the scope of title agents by requiring that the agent either be a domiciliary or a resident of

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Alabama. The Title Act provides that a title insurance policy in Alabama "shall not be issued by any person or agent unless the person or agent issuing a title insurance policy is domiciled in or is otherwise a bona fide resident of and resides within this state or is a partnership, association, corporation, or other legal entity properly organized or existing under the laws of this state." S.B. 246, 2001 Leg., (Ala. 2001). The apparent reason for requiring a title agent to be a domiciliary or bona fide resident of Alabama is so the State of Alabama may regulate the profession, clearly have jurisdiction over any violators and enforce the applicable sections of this Title Act.

Duties for Title Insurers and Agents

A. Certificate of Authority

Alabama's new Title Insurance Act places duties and responsibilities both upon the title insurers and the title agents. For Alabama title insurers the new act provides two prerequisites before the title insurer may allow one of its agents to issue a title insurance policy. Section 4(b) of the Title Act requires title insurers to obtain "a certificate of authority from the [insurance] commissioner." S.B. 246, 2001 Leg., (Ala. 2001). This Certificate of Authority is for each individual title agent. However, it is the duty of the title insurer agency to acquire a Certificate of Authority for each member of that agency who is authorized by the title insurer to sign commitments, policies and endorsements. The Certificate of Authority must be reissued annually at a cost of \$50 to the title insurer.

B. Filing Rates with Commissioner

As a condition precedent, § 6 of the Title Act requires a title insurer to file with the insurance commissioner a schedule of premium rates prior to engaging in the business of title insurance. Section 3(6) defines premium as "[f]ees charged for assuming liability and risk under a title insurance policy. For the purpose of this act, 'premium' shall include any amount retained by or paid to an agent under an agreement between the agent and the title insurance company." S.B. 246, 2001 Leg., (Ala. 2001). However, the Title Act further defines premiums as not including:

- expenses for the performance of services such as abstracting, searching and examining titles or obtaining a title opinion;
- fees for document preparation;
- fees for handling escrows, settlements or closings;
- fees incurred to cure defects in the title; and
- fees incident to the issuance of a commitment to insure title or title insurance policy, including, but not limited to, the cost of reinsurance.

S.B. 246, 2001 Leg., (Ala. 2001).

Furthermore, the Title Act prohibits negotiation or bidding of the premium rate to be charged for a policy insuring an interest in property in Alabama. Finally, the insurance commissioner, within 60 days of receipt of the premium rate filed by the title

insurer, must either approve or disapprove of the rates. If the insurance commissioner disapproves the file rates, the commissioner shall provide written notification to the title insurer and provide a hearing within 30 days upon written request by the title insurer. The Title Act grants the insurance commissioner the power to examine witnesses and require the production of documents relevant to the rate inquiry either upon request of the commissioner or the title insurer. S.B. 246, 2001 Leg., (Ala. 2001). Thus, the thrust of the premium filing rate is to prohibit charging a rate that is more, or less, than the rate filed by the title insurer with the insurance commissioner.

C. The Notice of Availability of Owner's Coverage

Pursuant to § 7 of the Title Act, either during or before the closing of settlement and disbursement of any funds, a title insurance agent must obtain a statement in writing from the purchaser "acknowledging that the purchaser has received a notice that owner's title insurance may be available to the purchaser in accordance with the underwriting guidelines of the title insurer and that the purchaser does or does not desire to purchase owner's insurance coverage." S.B. 246, 2001 Leg., (Ala. 2001). This written notice of availability of the owner's title insurance must include:

- (1) the address or legal description of the property;
- (2) a disclosure that owner's title insurance may be available in accordance with the underwriting guidelines of the title insurer and the premium therefore;
- (3) a space to indicate the desire of the purchaser to either acquire or decline owner's title insurance;
- (4) the date the notice is executed by the purchaser; and
- (5) the signature of the purchaser or purchasers.

S.B. 246, 2001 Leg., (Ala. 2001).

If the title insurance agent fails to secure the Notice of Availability of the owner's coverage, signed by the purchaser at the closing, the title insurance agent may cure this omission at any time after the closing of the settlement; however, this curative remedy *must* be done "prior to actual or constructive notice of a claim or possible claim against the title of the real estate." S.B. 246, 2001 Leg., (Ala. 2001).

D. Title Search

In addition, Alabama's new Title Act requires that a title examination/search of the real property records be done prior to a title insurer/agent issuing a "preliminary report, commitment, binder, policy or contract of title insurance." S.B. 246, 2001 Leg., (Ala. 2001). Specifically, the title insurance act requires that the title insurer/agent perform any of the following:

- (1) conduct a search or examination of title;
- (2) obtain an abstract of title; and
- (3) obtain an opinion of title.

S.B. 246, 2001 Leg., (Ala. 2001). The Act further defines each one of these individual prerequisites to issuing a title policy. Title search/title examination is defined as "[a] search of the records in the office of the judge of probate in the county where the real property is situated through such period of time as is acceptable to the title insurer. Though often litigated, the Title Act's definition of 'records' as only title records in the office of the judge of probate, and not the Circuit Court records, is consistent with current Alabama case law." See *Upton v. Mississippi Valley Title Ins. Co.*, 469 So. 2d 548, 557 (Ala. 1985); *Parker v. Ward*, 614 So. 2d 975, 976 (Ala. 1993). Abstracts are defined by the Title Act as, "[a] compilation or summary of all instruments of public record of whatever kind or nature which in any manner affect title to a specified parcel of real property." S.B. 246, 2001 Leg., (Ala. 2001). The Title Act defines opinion of title as, "[a] written expression of the status of title based upon an examination by an attorney at law, who is licensed to practice law in this state to ascertain the history and present condition of title." S.B. 246, 2001 Leg., (Ala. 2001). Thus, the Title Act definitively sets forth that the title insurer/agent must complete one of the above-mentioned prerequisite acts prior to issuing any type of preliminary documentation on the real property in question.

E. Time Requirement for Issuance of Policies

In an attempt to provide a backstop from forgotten or omitted title insurance commitments, in which premiums were collected for the title insurance policy, § 4(c) of the Title Act provides that within 60 days from the effective date of the policy a title policy shall be issued. Or in the case of a title insurance commitment having already been issued, within 60 days after the satisfaction of all requirements and conditions set out in the commitment." S.B. 246, 2001 Leg., (Ala. 2001). The effective date of the policy, under the Title Act 60-day requirement, is the "date and time the instrument conveying the interest to be insured is recorded." An exception to the Title Act's 60-day requirement, which ultimately moots the requirement, is when the proposed title insured subsequently requests a policy after the instrument has been recorded in the Probate title records.

Enforceability of the Act

The Title Act grants to the insurance commissioner the ability to enforce the duties and/or requirements of the Act. Furthermore, the Title Act provides the insurance commissioner, upon the cause shown, the authority to penalize title insurers or agents for failure to follow the Act. These penalties include revocation of Certificate of Authority of a title agent, revocation of the license issued to the title insurer, and fines ranging from \$500, for each violation, up to but not exceeding \$5,000 for willful and intentional deviation from the premium filed rates. Included within these monetary penalties is a statement that no title insurer shall pay directly or indirectly any portion of the fine imposed on any agent of the title insurer. S.B. 246, 2001

Leg., (Ala. 2001). The apparent intention of this requirement is to prevent a title agent from negligently or willfully disregarding the requirements of the Title Act at the direction or order of its employer, the title insurer. Finally, the Title Act expressly states that "[t]his act . . . does not create any private cause of action or other private legal recourse." S.B. 246, 2001 Leg., (Ala. 2001).

Conclusion

Alabama's first enacted regulation of the title insurance industry should be commended as an affirmative step by the State to provide guidelines and requirements of this foundational and necessary industry. Though the Act places restrictive requirements on those directly involved with title insurance in this state, residential requirements for title agents and an Alabama State Bar admissions for attorneys issuing title opinions, the beneficiaries of the requirements of the Title Act will be the commercial corporations and citizens of Alabama. The residential requirement for title agents in Alabama should have the intended effect of guaranteeing to Alabama purchasers that their agent is singularly familiar with Alabama title insurance laws. Furthermore, state regulation of the title insurance industry will reassure multi-state commercial real estate ventures of some stability in a previously unregulated practice, thus, it is hoped, providing a more fertile ground for commercial development. Finally, the requirement of notice of availability of the prior owner's title insurance coverage may educate and notify Alabama purchasers of this type of fundamental property insurance. Truly, if effectively implemented, the Alabama Title Insurance Act will serve to benefit Alabama attorneys and their clients. ■

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How to Recognize and Protect Intellectual Property

BY KENNETH M. BUSH

Over the years, I have met with many prospective clients regarding their intellectual property and how best to protect it. From large companies, to individual inventors and artists, to the attorneys who advise them, I have frequently encountered mistaken beliefs as to what is protectable as intellectual property, how it should be protected, and how to avoid infringing on another's intellectual property.

We live in a competitive world and most new businesses fail. To succeed, a business must have a competitive advantage. To obtain a competitive advantage, a business must evaluate its products and services and take steps to protect any valuable intellectual property. As attorneys, we must assist our clients in protecting their intellectual property to give them this competitive advantage.

So what is intellectual property, or "IP"? Simply stated, it is the fruit of the mind. It is the creative ideas, the know-how, the sweat of the brow that gives your client a competitive edge. IP begins with an idea, an idea for a business, a better product, a book, a song, a solution to a problem. But an idea, without more, is not protectable. A business must take steps to implement its idea and then take steps to protect it. As the idea takes form, the business will develop IP suitable for protection.

But how best to protect IP? Should a company publicly disclose its novel manufacturing process in exchange for a patent monopoly having limited duration, or keep the process a trade secret and thereby have an indefinite monopoly? If the company does not have the resources to protect all of its IP, what should it protect? What takes priority? Where should it start? These are all good questions. The answers begin with an introduction to the principal forms of IP.

While IP can be owned by all types of entities, I will frequently refer to the intellectual property owner in this article as a "company" for convenience.

Trademarks, Service Marks and Trade Names

A trademark or service mark is any word, name, symbol, logo, or other device used to indicate a company as the source of its goods or services and to identify and distinguish its goods or services from those of others. A trade name is the name used to identify the company. A trade name may also serve as a trademark or service mark. Trademarks, service marks and trade names used as trademarks or service marks are collectively referred to as "marks."

A company's marks are typically the primary means by which its customers associate its goods and services with the company. For a new company, a name, logo or slogan can be essential to the growth necessary to survive and flourish. Successful companies typically have accumulated substantial customer goodwill, which ensures repeat business. Usually, that goodwill is reflected in the value of the companies' identifying marks. Examples

of successful marks are PEPSI™, FORD™ and IBM™.

Whether your client is beginning a new business or expanding its current business, their marks need to be carefully selected and protected because these marks are the most important link to their customers. Contrary to popular belief, registering a corporate name with the Secretary of State does not give a company the right to use the registered name as a mark. Precious capital resources can be wasted if money is spent advertising a mark, only to find later the same mark is already the property of another. Trademark availability searches are the best way to minimize this risk. Armed with the results of a trademark availability search and an opinion from IP counsel, a company can make an informed decision whether to adopt a mark.

Once a company has adopted a mark, protection of the mark through state and federal registrations can give its business the freedom to grow. In order to maintain a competitive advantage, the company must protect and enforce its rights in these valuable intangible assets. If properly protected and maintained, these marks can be owned indefinitely. However, if the company does not actively protect its marks, it may lose the exclusive right to those marks. A trademark owner should seriously consider a trademark watch service, as well as a program of contacting potential infringers, to ensure the value of its marks is protected.

Patents

U.S. patent law recognizes three types of patents: utility, design and plant patents. A utility patent may be obtained by anyone who invents or discovers any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof. A design patent may be obtained by anyone who invents any new, original and ornamental design for an article of manufacture. Basically, a utility patent protects the functional features of an invention, and a design patent protects the ornamental (i.e. nonfunctional) features of an invention. A plant patent may be obtained by anyone who invents or discovers and asexually reproduces any distinct and new variety of plant.

Once an invention is realized or begins to take form, the company's agent and/or inventor(s) should meet with a registered patent attorney (i.e. an attorney who is registered to practice before the U.S. Patent & Trademark Office) so that the attorney can evaluate the invention and advise the client whether the invention may be patentable and educate the client about the patenting process. U.S. patent law includes strict time periods in which certain actions must be taken to avoid losing the right to obtain a patent.

Prior to filing a patent application, it is typically advisable to perform a novelty search in which the Patent Office's records are searched for "prior art" that is related to the invention. The results of the novelty search should be evaluated by a patent attorney to determine whether the invention has important fea-

tures that can be distinguished from the prior art. Based on the patent attorney's opinion, the company can make an informed decision whether the scope of patent protection potentially available is worth the costs associated with preparing, filing and prosecuting a patent application.

To obtain a patent on an invention, a patent application must be submitted to the U.S. Patent & Trademark Office. The application must meet strict requirements and should properly capture the idea embodied in the invention. The form and skill with which the application is drafted and prosecuted in the Patent Office can dramatically affect the scope of patent protection that may be obtained. By hiring a skilled patent attorney, inventors and their organizations can obtain the broadest possible protection available for their inventions.

Through the patenting process, a limited monopoly for a fixed time period may be granted in exchange for publicly disclosing the details of the invention. Upon grant of a patent, the patent owner has the right to exclude others from making, using, selling, offering for sale, or importing the patented invention. These rights can be critical to the success of a company, particularly if the company is engaged in a very competitive industry.

Copyrights

U.S. copyright law recognizes protection for original works of authorship fixed in any tangible medium of expression from which the works can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. Examples of works of authorship are computer software, books, songs, poems, photographs, video recordings, advertisements, and company brochures.

Under current law, copyright protection automatically attaches to the work whether or not the copyright owner registers the work with the U.S. Copyright Office. However, registration provides certain benefits and is a prerequisite for filing suit and recovering statutory damages or attorney fees for copyright infringement. Because copyright registration is relatively inexpensive, it is advisable to register any work that may be of value.

Subject to certain limitations, the owner of a copyrighted work has the exclusive rights to reproduce the work, prepare derivative works based upon the work, distribute copies of the work to the public, display the work publicly, and perform the work publicly.

Trade Secrets

A trade secret includes proprietary information that has economic value to a company and is not generally known or readily ascertainable by others who could obtain economic value from the information. Trade secrets can be preserved indefinitely so long as reasonable efforts are taken to protect their secrecy. Examples of information that may be protectable as trade secrets are client lists, soft drink formulas and manufacturing processes. A famous example of a successfully maintained trade secret is the formula for the COCA-COLA™ soft drink.

All companies should consult their IP counsel regarding the safeguards that are appropriate for the companies to protect their trade secrets.

Trade Dress

Trade dress is a form of trademark protection which protects the appearance or "look" of a product. A product's trade dress is the overall image presented to consumers, and may include features such as size, shape, color, texture, graphics, and various combinations thereof. Trade dress protection is typically associated with product configuration or product packaging, but trade dress protection has also been extended to protect such things as advertising strategies and restaurant layouts.

Computer-Related IP

IP abounds today in computer software and hardware. For example, computer software can be protected under copyright, patent and trade secret laws. Since today's technologies have made duplicating software and hardware designs easy and inexpensive, taking steps to protect rights in computer-related IP is paramount to protecting a company's assets.

Internet-Related IP

The Internet poses increased complexity for protection issues for all types of IP. A virtual potpourri of IP rights are embodied in Internet sites. Misappropriation of trademarks, copyrighted images and patented processes is almost commonplace today. Whether the misappropriation is innocent or willful, legal steps should be taken to protect IP accessible through the Internet.

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THE HOMEFRONT

BY BEN BOWDEN

On September 17, 2001, just a few short days after the terrorist attack on America, I found myself pulling a few days of reserve duty at the base legal office at Skyline Air Force Base.* Captain Smith, Chief of Operational Law, stuck her head in my office. "Can you work the line this afternoon?" she inquired. "It is supposed to be up and running at 1400 hours." "No problem, I can handle it," I answered. I had been preparing "last will and testaments" for Air Force service members the last two days and welcomed the opportunity to get out of the office for a little while.

"The line" or "mobility line" is the term the Air Force uses to refer to the process by which we get troops ready to deploy to other locations. It consists of "stations" manned by a number of agencies—military pay, medical, legal (JAG)—to name a few. Military members scheduled to deploy are processed through each station in order to take care of any last minute details before deploying. Eliminating distractions on the home front helps the troops focus on the mission at hand. At least that is what I have been told, and like a lot of things in the military, you really don't bother to question the logic.

Having been assigned to air bases in Europe when I was on active duty, I had worked a number of mobility lines. Most of the time it was for training. Most recently I had worked the line at Skyline AFB to deploy troops in support of a "peacekeeping" mission. This was different. We were responding to an attack on our Country. This was the real thing.

Captain Smith seemed to have a few misgivings about sending me to work the line. Quite naturally she was concerned about a reservist's ability even to find the facility where the line was located, much less actually knowing what to do when I got there. I assured her I had done this many times before. She sent along Captain Thomas for good measure—a new Captain who was probably in the eighth grade when I worked my first mobility line. We also took along a paralegal, Technical Sergeant Jones, to help out.

We arrived early so that we could set up. Our primary function was to provide powers-of-attorney for service members so that others could handle things for them while they were away. The Air Force has pre-printed forms for everything imaginable, from paying taxes to looking after dependents. At our station, we had a computer tied into the office computer across the base in order to access the "last will and testament" computer program. We also had a little room that we could go in to counsel someone in private. Ironically, we share this room with the Chaplain. Funny how work for Chaplains and JAGs seems to spike during a crisis.

Someone called out that the line was open. The low rumble of voices grew nearer. A crowd soon gathered at our station: "I need to sell my boat"; "I need a will"; "What happens if my military pay gets messed up?" We were quickly overwhelmed and I was thankful that Captain Smith had the foresight to send additional help. I prepared powers-of-attorney. Technical Sergeant Jones notarized everything. I heard Captain Thomas in the background,

"If you die, who do you want your personal property to go to?" Normally a jovial group, there was little laughter among the troops. I didn't sense nervousness—just determination. Like something automatic had taken over and they were focused on the task at hand before moving on to the next task.

It was over pretty quick. There were less than 100 people to process. Near the end, a young enlisted troop came through. He needed to ask me a question or two. When he started with "my wife and I are separated..." I knew we needed to go to the little "confessional" room for a private conversation. He was young—maybe 20. His wife had left him two days ago. They could not and would not reconcile. They were divorcing. Only he was about to go away for a while. What should he do?

This scenario makes all lawyers uncomfortable. There is no time for the standard, "I'll research that and get back with you." He needed immediate advice. I started with the Soldier's and Sailor's Civil Relief Act. If she filed a divorce complaint, he could delay things until he got back. He was more worried about practical things. "What about my stuff? She has a key to the house. Who's going to pay the bills?" We decided to give his mother a general power-of-attorney so she could secure his personal belongings in a storage facility and pay bills. We prepared a special power-of-attorney for his mother to hire a civilian lawyer and at least initiate divorce proceedings. Finally, I sent him back to the military pay station to change the banking account where his pay was deposited so that only he would have access. A wave of relief seemed to wash over him. I felt disappointment that his marriage had failed, but felt good that maybe I had taken some of the pressure off of him. As he straggled into the auditorium for a mission brief, I hoped that I had given the right advice.

We closed down our station and headed back to the office. I was pensive, if not down-right worried. Would there be a massive deployment? Schooled on the mistakes of Vietnam, I worried about the mission. In the end, though, my concern was self-centered. Would I be called up? It was certainly possible. I was part of a group commonly known as the "National Guard and Reserve." Most people are familiar with the National Guard. They are military units located in towns across America, have specific missions, and are normally under State control. In an emergency, the Guard can be activated and then they come under Federal control. Reserve units are similar to Guard units, except they are always under Federal control. I am a "Category B" reservist. Category B reservists augment, or supplement, the active-duty troops in times of crisis and normally train with the active-duty forces. All of us are part-time in that we only serve a few days a month unless ordered to active duty. Over the years, many critical missions have been transferred to the Guard and Reserve such that a operation of any size requires the activation of many "citizen soldiers."

After getting back to the base legal office, I immediately prepared a power-of-attorney for my wife. I went down to the uniform store and ordered name tags (name tags are the hardest

thing to get in a hurry). I updated my personnel information so that the Reserve Command could get in touch with me. A day or two later, I went back to my civilian practice. The thoughts of uniforms and military law quickly gave way to the pressures of private practice. From time to time, I stop and ponder what will happen if I am called up. I go from worrying about what will happen to my practice if I have to go, to worrying that I won't get to participate in what may be my generation's war. I keep telling concerned family and friends that it will have to get pretty bad before they will need me.

Some of our family, neighbors, and friends have already gotten the call. As citizens and lawyers, we need to find ways to help keep things "quiet on the home front" so that our troops can focus on their missions. It is quite possible that lawyers throughout Alabama will get calls from people in a situation much like the young enlisted troop I mentioned above. It is possible that reserve JAGs may be called up and will need help maintaining their practices. Please consider donating a little of your time to answer questions, prepare simple documents, or cover a court appearance for a colleague. If you face a unique military issue, any of the legal offices located on military installations are always willing to help. Our Nation is engaged in a tremendous struggle and we all need to do what we can to see it through. Finally, if you have not already joined the Volunteer Lawyers Program,¹ please do so right away. You won't ever regret getting the opportunity to help.

**The events depicted in this article are based on a true story. The names and places have been changed to protect identities and military operations.*

***The Volunteer Lawyers Program (VLP) began statewide in Alabama in 1991. Modeled after the highly successful Mobile Bar Association Volunteer Lawyers Program, it provides a way for lawyers in Alabama to help their communities. Attorneys enroll in the program by agreeing to provide up to 20 hours, per year, of free legal service to poor citizens of Alabama. Cases are referred to the VLP from Legal Services offices around the state. Before referral, the cases are screened for merit and complexity (each case should be resolvable in 20 hours or less) and the potential client is screened for income eligibility (must live at 125 percent of poverty level, currently \$ 1,776 monthly, for a household of four).* ■

Ben Bowden

Ben Bowden is an attorney with Albrittons, Clifton, Alverson, Moody, & Bowden, P.C. in Andalusia. He is a major in the Air Force Reserve, serving in the Judge Advocate General's Corp. He served on active duty with the Air Force as a judge advocate from 1992-1997 at Bitburg Air Base, Germany, and Aviano Air Base, Italy. He is also a member of the Volunteer Lawyers Program/Access to Legal Services Committee of the Alabama State Bar.

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International IP Protection

The steps a company takes to protect its IP domestically will not protect the IP in foreign countries. However, through numerous international agreements, U.S. citizens and corporate entities may obtain legal rights for their IP in foreign countries at parity with foreign nationals. Similar to U.S. law, international laws include strict time periods in which certain actions must be taken to avoid losing IP rights.

Ownership of IP

Because ownership of an invention typically vests in its inventor(s) and ownership of a copyright typically vests in its author(s), every company needs to take affirmative steps to obtain exclusive rights to these properties before the properties are developed. Transfer of exclusive ownership to a company is typically accomplished with employee agreements and work-for-hire agreements. Confidentiality agreements are also valuable for protecting the company's proprietary information and trade secrets. These types of agreements should be routine if a company has employees engaged in research and development or in other creative endeavors, or if the company contracts work outside of the company.

Conclusion

Whether your client has a new product or manufacturing process, a catchy slogan or name for its products or services, or a creative new software program, your client's ability to recognize its IP and its willingness to develop and protect this valuable property could be the key to its prosperity. As attorneys, we must assist our clients in protecting any aspect of their businesses that gives them a competitive advantage. After all, a successful client is a long-term client. ■

Kenneth M. Bush

Kenneth M. Bush, with the firm of Siroto & Permutt, P.C. in its Birmingham office, is registered to practice before the United States Patent & Trademark Office. He graduated *magna cum laude* from Samford University and received his J.D. from the University of Alabama School of Law.



Notices to Show Cause

Notice is hereby given to **Stephanie D. Banks**, who practiced law in Stone Mountain, Georgia, and whose whereabouts are unknown, that pursuant to an Order to Show Cause of the Disciplinary Commission of the Alabama State Bar, dated July 10, 2001, she has 60 days from the date of this publication (November 15, 2001) to come into compliance with the Mandatory Continuing Legal Education requirements for 2000. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 01-4]

Notice is hereby given to **Walter Eugene Braswell**, who practiced law in Birmingham, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated July 10, 2001, he has 60 days from the date of this publication (November 15, 2001) to come into compliance with the Mandatory Continuing Legal Education requirements for 2000. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 01-10]

Notice is hereby given to **Leslie Sheldon Johnston**, who practiced law in Daphne, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary commission of the Alabama State Bar, dated July 10, 2001, she has 60 days from the date of this publication (November 15, 2001) to come into compliance with the Mandatory Continuing Legal Education requirements for 2000. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 01-25]

Notice is hereby given to **Michael Charles Jordan**, who practiced law in Birmingham, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated July 10, 2001, he has 60 days from the date of this publication (November 15, 2001) to come into compliance with the Mandatory Continuing Legal Education requirements for 2000. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 01-26]

Notice is hereby given to **Michael Norman McIntyre**, who practiced law in Birmingham, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated July 10, 2001, he has 60 days from the date of this publication (November 15, 2001) to come into compliance with the Mandatory Continuing Legal Education requirements for 2000. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 01-31]

Notice is hereby given to **Mary Jane Stanford**, who practiced law in Birmingham, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated July 10, 2001, she has 60 days from the date of this publication (November 15, 2001) to come into compliance with the Mandatory Continuing Legal Education requirements for 2000. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 01-44]

Notice is hereby given to **Michael Eric Fowler, Jr.**, who practiced law in Birmingham, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 11, 2001, he has 60 days from the date of this publication (November 15, 2001) to come into compliance with the Client Security Fund assessment requirement for 2001. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of his license. [CSF No. 01-4]

Notice is hereby given to **Michael Charles Jordan**, who practiced law in Birmingham, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the disciplinary commission of the Alabama State Bar, dated June 11, 2001, he has 60 days from the date of this publication (November 15, 2001) to come into compliance with the Client Security Fund assessment requirement for 2001. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of his license. [CSF No. 01-07]

Suspensions

- Gadsden attorney **John Edward Cunningham** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar dated September 7, 2001. On May 10, 2001, a letter with a copy of a complaint received by the Office of General Counsel was sent to Cunningham. He was requested to respond within 14 days of the date of the letter. Between June 6, 2001, and September 6, 2001, after no response was received, three more letters were sent to Cunningham by certified mail, and two telephone calls were made to Cunningham's office. Cunningham failed or refused to respond to any correspondence relating to the complaint filed with the bar. Therefore, on September 7, 2001, the Disciplinary Commission entered an order summarily suspending Cunningham for his refusal and/or failure to respond to a lawful demand for information from an admissions or disciplinary authority. [Rule 20(a); ASB Pet. No. 01-015]
- Scottsboro attorney **Eileen Robinson Malcom** was summarily suspended from the practice of law in Alabama on May 1, 2001, pursuant to Rule 20(a) of the Alabama Rules of Disciplinary Procedure. On May 18, 2001, a hearing was held pursuant to Malcom's petition to dissolve the summary suspension. On May 22, 2001, the Disciplinary Board issued an order denying said petition. On June 25, 2001, Malcom entered a Conditional Guilty Plea to Charge II, Rule 8.1(b) of the Alabama Rules of Professional Conduct, of the charges filed against her on May 22, 2001. These charges were based on a complaint filed with the Alabama State Bar against Malcom and Malcom's non-response to the bar concerning this complaint. On September 10, 2001, the Supreme Court of Alabama entered an order accepting the terms and conditions of the Disciplinary Commission's order of July 12, 2000. This order suspended Malcom for a period of 90 days, but gave credit for the time she had been summarily

suspended. The remaining 34 days will be held in abeyance pending her successful completion of a two-year probationary period. [ASB No. 01-25(A)]

- The Supreme Court of Alabama issued an order affirming the three-year suspension of former Birmingham attorney **Sean Edward McLaughlin** effective May 26, 2001. McLaughlin represented two clients who were heirs of an estate. The administratrix of the estate was represented by counsel. McLaughlin would periodically contact the opposing attorney's client without her attorney or her attorney's knowledge through letters he sent to the administratrix. McLaughlin's letters were unprofessional. McLaughlin would angrily confront the opposing lawyer, erroneously filed a *lis pendens*, and contacted the opposing lawyer's client directly. McLaughlin violated rules 1.1 [competence], 4.2 [communication with person represented by counsel] and 8.4(g) [misconduct] of the Alabama Rules of Professional Conduct. [ASB No. 99-101(A)]
- Anniston attorney **Genubath Coke Williams** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar effective August 23, 2001. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that a complaint had been filed against Williams alleging that Williams was held in contempt of court for failing to honor a subpoena issued by the Alabama Department of Revenue. During the investigation of the complaint, Williams failed to respond to repeated requests for information from the Office of General Counsel. [Rule 20(a), Pet. No. 01-14]
- The Supreme Court entered an order based upon the decision of Panel I of the Disciplinary Board suspending Bessemer attorney **Rita Davonne Hood** from the practice of law in the State of Alabama for a period of 91 days. The Board suspended the imposition of the 91-day suspension and placed Hood on probation for a period of two years, conditioned on her serving 45 days of the

91-day suspension. She was automatically reinstated to the practice of law upon the expiration of the 45-day suspension. Other conditions of probation were ordered, including, but not limited to, participation in a mentoring program and a specific prohibition that her mother, Betty M. Hood, a non-lawyer, not have any involvement with Hood's continued practice of law. In ASB No. 99-126(A) Hood admitted to failing to properly supervise her mother, Betty M. Hood, a non-lawyer employee, who was engaging in the unauthorized practice of law, a violation of Rule 5.3(a), A.R.P.C. In ASB No. 99-137(A), Hood admitted to failing to properly supervise her mother, a non-lawyer employee, who was engaging in the unauthorized practice of law, to failing to diligently pursue the matters on behalf of the client, and to failing to reasonably communicate with the client regarding the status of the matters.

Public Reprimands

- Birmingham attorney **Mary Riseling Amos** was publicly reprimanded by the Disciplinary Commission of the Alabama State Bar for failing to provide competent representation to a client, willfully neglecting a legal matter entrusted to her, failing to adequately communicate with a client, failing to make reasonable efforts to expedite litigation consistent with the interests of a client, and making a false statement of material fact to a tribunal, violations of rules 1.1, 1.3, 1.4(a), 3.2, and 3.3(a)(1), Alabama Rules of Professional Conduct. On February 17, 2000, Amos was retained to represent a client in an uncontested divorce. The client paid Amos's fee of \$179. The client met with Amos again on March 7, 2000. At that time, the client paid the filing fee, provided a telephone number for her husband and signed the divorce documents. During this meeting, Amos told the client that it would take six weeks to obtain the divorce. The client waited six weeks and then contacted Amos's office a number of times by telephone to obtain information concerning the status of her divorce. Each time she called, Amos's answering machine was either out of

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order or full. Eventually, the client contacted the Jefferson County Circuit Clerk's Office and discovered that her divorce had not been filed. Thereafter, the client filed a grievance with the Alabama State Bar. On September 1, 2000, after the grievance was filed, Amos filed the divorce. Amos's husband and office manager, Danny J. Amos, notarized the client's signature on September 1, 2000, although the client actually signed the document on March 7, 2000, when Amos presented the document to her for her signature. [ASB No. 00-169(A)]

- Tuscumbia attorney **Ouida Yvette Brown** was publicly reprimanded by the Disciplinary Commission of the Alabama State Bar for willfully neglecting a legal matter and for failing to adequately communicate with a client, violations of rules 1.3 and 1.4(b), respectively. Brown was retained on July 9, 1997 to represent a client in an action for damages resulting from a motor vehicle accident that occurred on April 16, 1996. Brown did not file the complaint in the case until April 17, 1998, after the statute of limitations had passed. In September 1998, the trial court dismissed the complaint, based upon the statute of limitations. However, Brown did not promptly notify the client of the court's order of dismissal, which was based upon Brown's failure to timely file the complaint. [ASB No. 99-003(A)]
- On September 7, 2001, Alabaster attorney **Russell Louis Hubbard** received a public reprimand without general publication, in connection with the complaint filed against him on October 4, 2000. In 1997, while Hubbard was living in Mississippi,

Laura Humphreys swore out a felony harassment warrant against him. After Hubbard returned to Alabama, he filed a lawsuit on June 11, 1998 against Ms. Humphreys in the United States District Court for the Northern District of Alabama for false arrest, defamation and civil rights violations. This lawsuit was dismissed sua sponte by the court for lack of personal jurisdiction. The case was dismissed "...without prejudice to the right of the plaintiff to file his action in an appropriate Mississippi court." Hubbard then filed the identical action in the Circuit Court of Shelby County, Alabama on June 16, 1998. That court also dismissed the case for lack of jurisdiction. Hubbard sought reconsideration of the dismissal and also appealed the dismissal to the Alabama Court of Civil Appeals. During the pendency of Hubbard's appeal in the Shelby County case, he filed suit in a federal court in the State of Mississippi. On July 17, 2000, the Shelby County Circuit Court granted a motion for sanctions against Hubbard in the amount of \$6,500. In its order regarding sanctions, the court found that "...this civil litigation which has been commenced and pursued in this court by Hubbard was frivolous, groundless in fact and law, vexatious, imposed for an improper purpose, and was without substantial justification. . ." A copy of this order was forwarded to the Alabama State Bar. The Disciplinary Commission found Hubbard's actions constituted a violation of Rule 3.1 [meritorious claims and contentions] of the Rules of Professional Conduct. No prior discipline was involved or considered. [ASB No. 00-232(A)] ■

Hooked on Alcohol or Drugs?

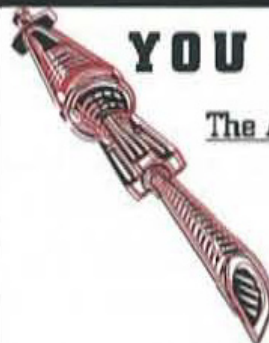
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9. Publication of Statement of Ownership:
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10. Signature and Title of Editor, Publisher, Business Manager, or Owner:
Margaret Murphy, Managing Ed. 10-3-01

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	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)	13,500	13,710
(1) Paid or Requested Circulation (Sum of 15a, 15b, 15c, 15d, 15e, and 15f)	13,200	13,300
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e. Total Paid and Requested Circulation (Sum of 15a and 15c)	13,200	13,300
f. Total Distribution (Sum of 15b and 15d)	13,300	13,405
g. Copies not Distributed	200	245
h. Total (Sum of 15g and h.)	13,500	13,710
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Margaret Murphy, Managing Ed. 10-3-01

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Notices

• NOTICE FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS AND ADOPTION

NOTICE: In the Court of Common Pleas of Berks County, Pennsylvania, Orphans' Court Division Case No: 76972

Notice is hereby given that the Petition for the Involuntary Termination of Parental Rights of Gayle L. Hirneisen, whose last known address is 132 County Road 881, Jones, Dallas County, Alabama, 36749, and the Petition for the Adoption of Christopher DeTemple have been filed in the above named Court, praying a degree of Involuntary Termination of Parental Rights of Gayle L. Hirneisen and praying for decree of Adoption of Christopher DeTemple.

The Court has fixed the 6th day of February, 2002, at 9:30 a.m. in the courtroom of Peter W. Schmehl, at the Berks County Courthouse, 633 Court Street, Reading, Berks County, Pennsylvania, as the time and place for the hearings of the said Petitions, when and where all or any other persons interested, including Gayle L. Hirneisen, may appear and show Petitions should not be granted.

Rebecca Batdorf Stone, esquire, 317 East Lancaster Avenue, Shillington, Pennsylvania 19607; phone (610) 775-0477. ■

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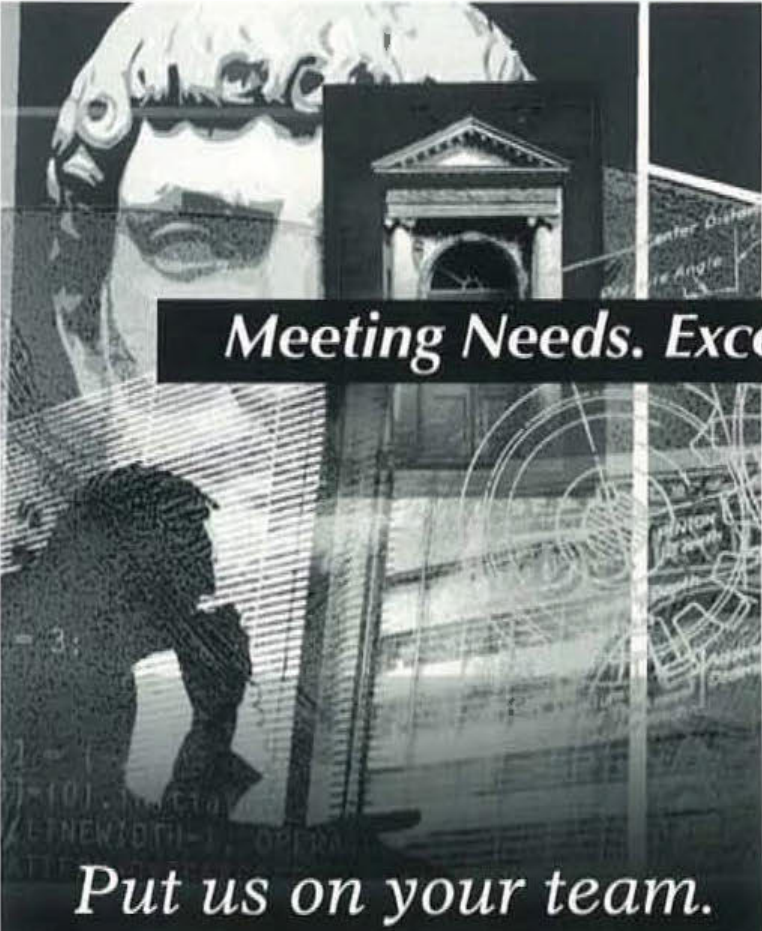
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