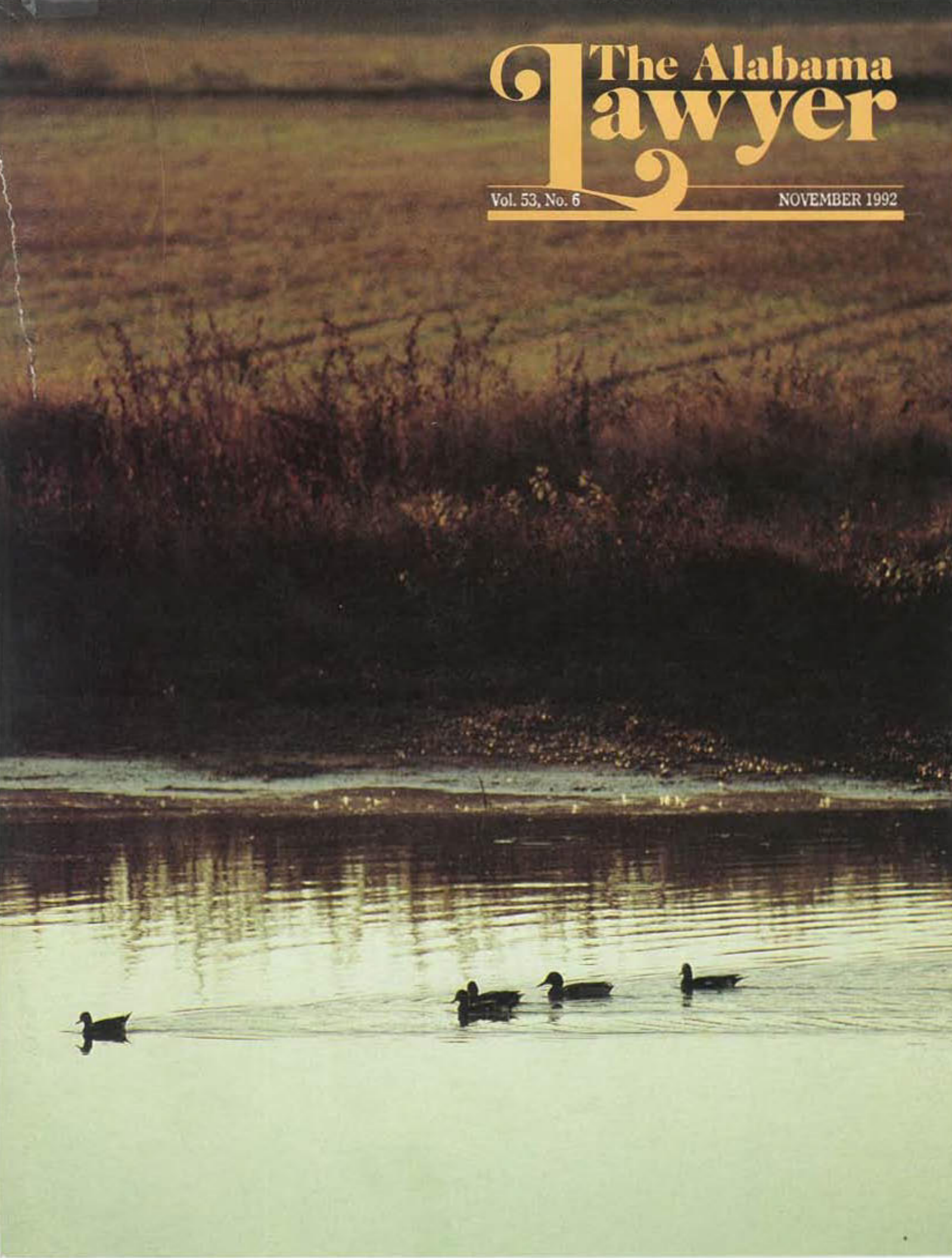
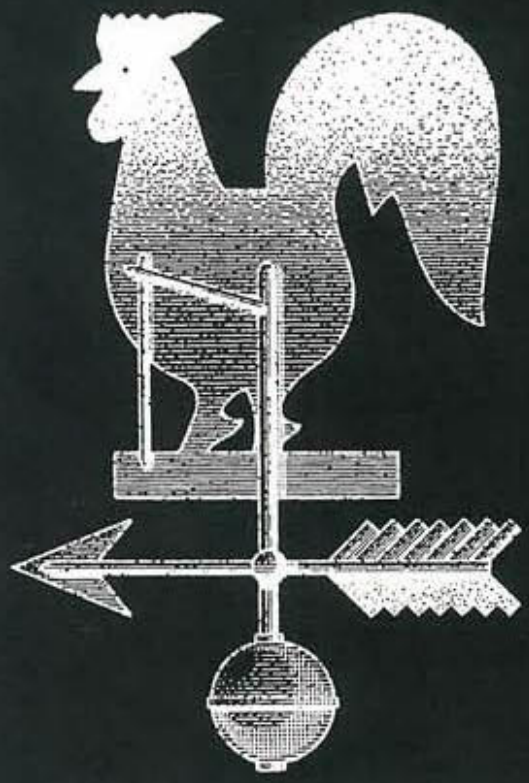


The Alabama Lawyer

Vol. 53, No. 6 NOVEMBER 1992



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Publisher of the *Code of Alabama*

IN BRIEF

November 1992 Volume 53, Number 6

ON THE COVER:

At dusk, ducks create a symmetrical pattern on the tranquil waters of a pond at Wheeler National Wildlife Refuge near Decatur, Alabama.

Photo by Butch Guier, Montgomery

INSIDE THIS ISSUE:

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

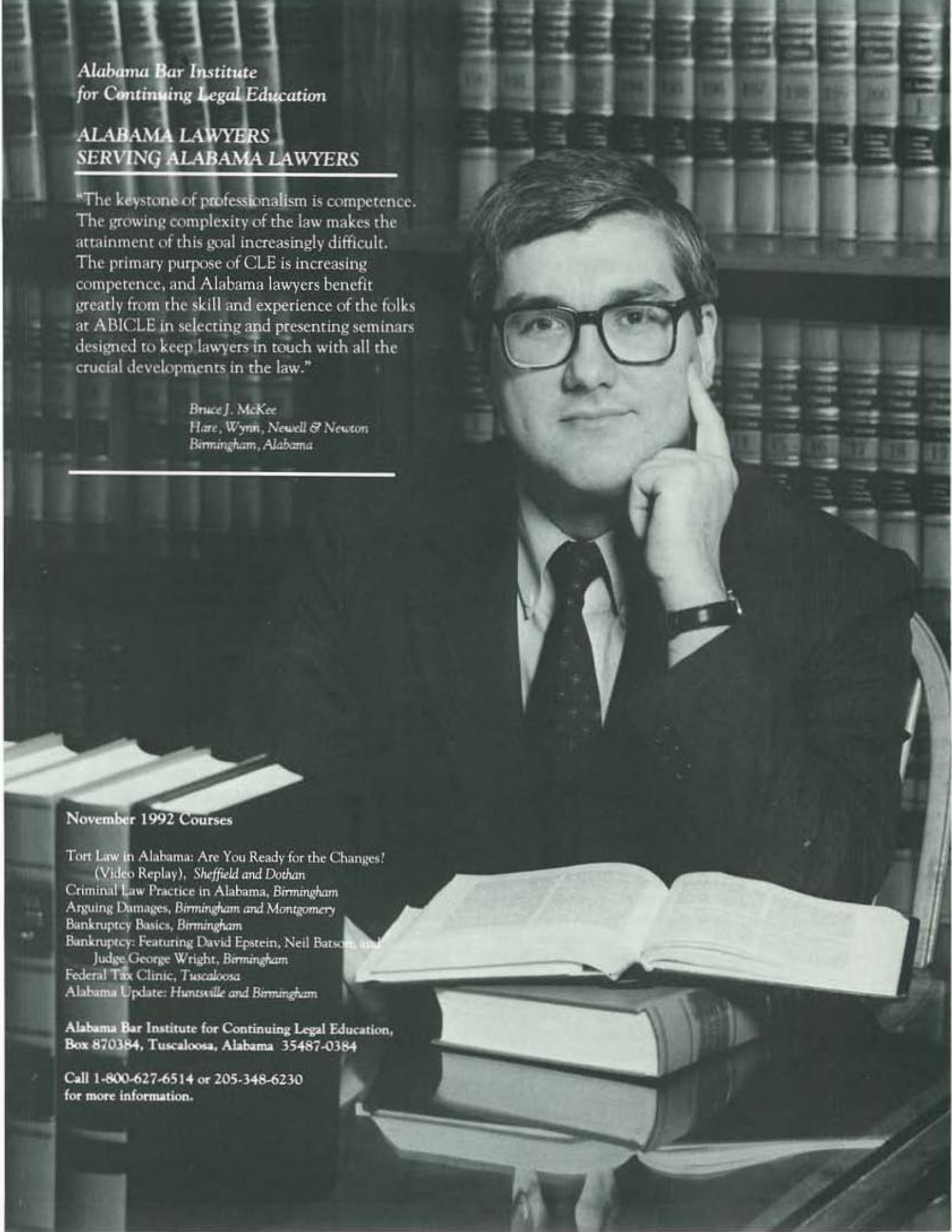
The Alabama Lawyer

Published seven times a year (the seventh issue is a bar directory edition) by the Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101. Phone (205) 269-1515.

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

The Alabama Lawyer is published seven times a year for $15 per year in the United States and $20 per year outside the United States by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Single issues are $3, plus first-class postage, for the journal and $25/$40 for the directory. Second-class postage paid at Montgomery, Alabama.

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



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Arguing Damages, *Birmingham and Montgomery*
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PRESIDENT'S PAGE

At a recent meeting of lawyers and judges, Judge John Patterson told me an interesting story. He said that when he was governor, from time to time he would get a handwritten note from Alabama's then Chief Justice Ed Livingston. It said something like, "John, next time you are this way drop by. I have a little something to discuss with you." Judge Patterson said when he got such a note he did not go see the chief justice "next time he was that way" — he went then! No matter that he had to drop some matter of government in which he was involved. He went on to describe the reason for his prompt response. At that time, the lawyers of Alabama dominated state, county and municipal governments. When the chief justice spoke, he represented a powerful constituency. Regrettably, this is no longer true. And the state of Alabama is worse off for it.

Clarence M. Small, Jr.

Over the past several months, the editors of newspapers across the state have decried the lack of leadership in our government. Our schools are in desperate need of funds. Terms are being shortened, out-of-date textbooks are being shared by too many students, and equipment and facilities are in disrepair. Our illiteracy rate is pushing 25 percent and climbing. Lawsuits are being filed because state courts are underfunded and the prison system's security staff must be reduced to a point that remaining guards are working in extremely dangerous conditions. State troopers have insufficient gasoline to guard and protect our highways. The list could go on and on.

At our Grande Convocation during the Annual Meeting, a panel headed by former Governor Albert Brewer and composed of The University of Alabama System Chancellor Philip Austin, Auburn University President William Muse, and Retirement Systems of Alabama CEO and investment "guru" David Bronner, challenged Alabama lawyers to resume their leadership role in the crisis situations that now face our state. They cited evidence that the sorry state of public education in Alabama is driving industry elsewhere. As technology advances, industry requires an educated workforce and looks for communities where the quality of life is good. Those who believe that the people of a state can be poor and ignorant, and at the same time prosperous, believe in something that never has been and never will be. Alabama lawyers must become involved in the restoration of our state's economic development base from the grass roots of our respective communities to the halls of government in Montgomery.

What can we do about it? At this moment, I am not sure. I am certain, however, that we can do much more than we are doing. Selfishly, lawyers stand to lose mightily if conditions continue to deteriorate. If there is no industry here, there will be no work for lawyers to do. There must be change.

To that end, I am creating the "Alabama First" Task Force which will be headed by past President Walter Byars of Montgomery. It will begin immediately to evaluate problem areas and, by early spring, develop and support program(s) that lawyers can participate in locally to help Alabama move forward. We are not only talking about the recommendation of legislation or lobbying our local representatives to revise our tax structure. There are other things that could be done which amount to nothing more than community self-help. We no longer can completely rely on government to do these things for us. Adoption programs are an example. In some cities, law firms or a group of lawyers have "adopted" a city or county school. They search out used equipment still serviceable but lying idle in a warehouse and make it available to a teacher who needs it. Facilities and grounds can be upgraded through volunteer programs within the community. But, more importantly, we must search out practical and workable solutions and stir the public to act on them. If you want to be involved, I urge you to act now. Call state bar headquarters at 1-800-354-6154 and volunteer. As a profession, we can no longer ignore the economic problems of our state. To do so would be a great disservice, not only to our profession but to the people of this state to whom our primary responsibility is. ■

FACTS/FAX POLL

Here is another extremely unscientific, but thought-provoking poll from the editors of *The Alabama Lawyer*. Just like the one appearing in the September issue of the *Lawyer*, this one is painless, anonymous and even less time-consuming. Take a moment to complete the following questionnaire and then fax it to the state bar headquarters, c/o Margaret Murphy, at (205) 261-6310. The results of this one will be published in the January 1993 issue. (The results of the September poll follow this questionnaire.)

SELECTION / ELECTION OF JUDGES

1. Trial and appellate court judges in Alabama should continue to be elected under the present format:
   a. ___ I agree
   b. ___ I disagree

2. If election of judges is retained, I favor the following election process (check one):
   a. ___ continue with the partisan election of judges
   b. ___ adopt a procedure for nonpartisan election
   c. ___ after the initial election of judges, any subsequent election would be on the basis of their record and not against an opponent.

3. In judicial races, I would favor the following practice with respect to campaign contributions:
   a. ___ retaining the present system which allows unlimited contributions and expenditures
   b. ___ placing some type of limitation on the contributions/expenditures
   c. ___ placing a limit or an absolute prohibition on contributions by lawyers to judicial candidates

4. In filling vacancies in a judicial position, I favor:
   a. ___ appointment by the Governor
   b. ___ appointment by the Governor from a list submitted by a local committee
   c. ___ appointment by a local committee

5. We should follow the federal system of appointing judges for life:
   a. ___ I agree
   b. ___ I disagree

Facts/Fax Poll: RESULTS

In the September issue of the *Lawyer*, the editors asked for your participation in a very informal poll. The nine questions posed were aimed at gaining some insight into how hard do Alabama attorneys really work. Thirty-seven attorneys, out of 9,982 members, responded to the poll, either by faxing or mailing in their answers. Here are the results.

Of those who responded:

1. 70% work over 50 hours per week
   (3% work less than 40 hours and 27% between 40-50 hours)
2. 51% take a full week of vacation every year
   (16% never do and 33% do so infrequently)
3. 76% frequently work on weekends
   (8% never do and 16% do so infrequently)
4. 54% frequently work at night
   (14% never do and 32% do so infrequently)
5. 54% have seen an increase in their workload in the past five years
   (11% have seen a decrease and 35% have seen no change)
6. 57% consider the practice of law sometimes stressful
   (40% consider it very stressful and 3% consider it almost never stressful)
7. 38% work with a firm of five members or less
   (38% work as sole practitioners, 8% work with a firm of six-15, and 16% work with a firm of over 15)
8. 57% are partners in a firm
   (11% are associates, 3% are of counsel and 29% had no answer)
9. 65% practice in a metropolitan area
   (3% work in a rural area, 29% work in a small-town area, and 3% had no answer)

EXECUTIVE DIRECTOR'S REPORT

JUSTICE FOR SALE?

The Wall Street Journal recently printed a story concerning "The scandal of 'Texas justice'. . . ", the possibility that the end was in sight.

The article chronicled a court "take over" attitude in the early '80s which noted that an activist in the effort was reported to have commented at the time, "We've also changed the supreme court. We finally decided we'll just buy the SOBs."

It is troubling to me to hear with increasing frequency the complaints of both members of the bench and the bar that our elections for judicial office are too costly. Some of the comments indicate true doubt that justice can be served when the candidates must raise obscene amounts of money, while most of it is coming from the lawyers who must practice in the court for which the judicial election is being held.

Reginald T. Hamner

I am old enough to remember when a sitting judge rarely had opposition. We did not adopt a Missouri plan, but, in reality, a judge ran on "his" record. Intelligence, hard work and integrity were all a judicial candidate could reasonably offer. Most citizens of an area knew if their judge was possessed of these qualities. A candidate would appear at a political gathering, hand out a campaign card with the county license tag numerals on the reverse side, or buy a cake at the sponsor's cake sale. This was the extent of the campaign. In all or most instances, there was only the one-party primary to win. This simple election process was relatively inexpensive.

Today, with multi-party primaries and a general election to follow, one can easily spend more than the entire salary of the judicial term of office just to win the election. Somebody must pay these costs.

I am also troubled by the perceived need to raise an "incumbency war chest" to scare off opposition two years before the current term expires, as is presently evidenced by invitations to a $500-per-person fish fry or bird supper—with followup calls from the campaign fundraiser.

More media outlets afford very expensive arenas for negative campaigning while the sitting judge has no way to defend false and misleading charges without responding at equally great costs.

It is time for the bench and bar to take meaningful steps to limit the costs of judicial elections. This could include limiting campaign expenditures while holding the candidates responsible to insure compliance, as well as placing absolute limits on the size of attorney contributions, either by an individual lawyer, their family members or a firm.

Nonpartisan elections would reduce the cost by reducing the "number" of "elections" a candidate must finance.

It has been suggested to me that "the bar make it unethical" for a lawyer to contribute more than $100 in any calendar year to any or all judicial election campaigns. If every lawyer contributed the $100 maximum, all judicial candidates would be able to raise a total of $1,000,000. Indeed, the state bar's Task Force on Judicial Selection, chaired by Bob Denniston of Mobile, is currently studying this issue with the hope of offering a plan that will address this problem.

Justice cannot—and will not—be served when those sworn to "do justice" must be bought and paid for. It is indeed sad to see a judge be forced to seek campaign contributions, and then do so using an official letterhead. Likewise, a practicing lawyer could not be pressured to contribute $2,500 to a judicial candidate's campaign and then try to convince most people the contribution is free from duress and given with no expectation other than serving the cause of justice.

We, in Alabama, have worked too hard to achieve a judicial system for our citizens that is the envy of most jurisdictions in the United States. We know the public confidence in all judicial systems continues to falter. I am concerned when our own members begin to lose faith in the system and express a perceived bias, real or imagined. ■

NOTICE

RULE VII

Rules Governing Admission to the Alabama State Bar
Amended May 1, 1992
Admission of Nonresident Attorneys *Pro Hac Vice*

EFFECTIVE October 1, 1992

"Any attorney or counselor-at-law who is not licensed in good standing to practice law in Alabama, but who is currently a member in good standing of the bar of another state, the District of Columbia, or other United States jurisdiction and who is of good moral character and who is familiar with the ethics, principles, practices, customs, and usages of the legal profession in the State of Alabama, may appear as counsel pro hac vice in a particular case before any court or administrative agency in the State of Alabama upon compliance with this rule."

PROCEDURES FOR COMPLIANCE
This is applicable to each applicant for each case.

1. Applicant associates with an attorney (local counsel) who is a member in good standing of the Alabama State Bar and maintains his or her principal law office in this state. The local counsel shall accept joint and several responsibility with the foreign attorney in all matters arising from the particular cause.

   "Before any application is granted, local counsel must appear as attorney of record in the particular cause or consent in writing to the association."

   "In the event local counsel in a particular case is suspended or disbarred from the practice of law in the State of Alabama, the foreign attorney shall, before proceeding further in the pending cause, associate new local counsel who is in good standing to practice law in the State of Alabama and file a verified notice thereof with the court or administrative agency of this state before whom the foreign attorney is appearing."

2. Local counsel (or applicant) obtains hearing date on the application for admission from the court or administrative body where the cause is to be heard. This step is a **MUST**!

   "The notice of hearing shall be given at least 21 days before the time designated for the hearing, unless the court or agency has prescribed a shorter period."

3. Verified application is prepared. **APPLICATIONS WILL BE RETURNED IF ALL ITEMS ARE NOT COMPLETE**. Social Security number of applicant and a certificate of good standing from the bar where applicant regularly practices have been added to the requirements of the original appendix to the supreme court order of May 1, 1992.
   APPLICATIONS SHOULD BE OBTAINED FROM THE ALABAMA STATE BAR.

4. Applicant sends *original* of completed verified application to the court or agency with proof of service by mail on the Alabama State Bar in accordance with the Alabama Rules of Civil Procedure.

5. Applicant sends *copy* of completed verified application and the $100 filing fee to the Alabama State Bar. If the court/agency granted a motion to shorten the time for hearing, a copy of the motion should be attached.

6. The Alabama State Bar will send a **STATEMENT** to the court, counsel of record (or upon any parties not represented by counsel) and the applicant within 21 days (or shorter if granted by court) before the scheduled hearing date indicating:

   Number of times in the preceding three (3) years applicant or any attorney members of applicant's firm have previously made application for admission, including:

   a. name of applicant
   b. date of application
   c. title of court/agency
   d. cause
   e. whether granted or denied

   "NO APPLICATION SHALL BE GRANTED BEFORE THIS STATEMENT OF THE ALABAMA STATE BAR HAS BEEN FILED WITH THE COURT OR AGENCY."

7. Court/agency issues an order granting or denying the application and sends order to local counsel.

8. Local counsel sends copy of order to Alabama State Bar.

PLEASE NOTE: Foreign attorneys now appearing pro hac vice in causes shall conform to these rules in pending proceedings within thirty (30) days following the effective date of October 1, 1992.

Any questions should be directed to Alice Jo Hendrix, PHV Admissions, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101. Phone (205) 269-1515 or 1-800-392-5660 (in-state WATS).

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

Limited liability companies

A limited liability company is a hybrid entity that combines the beneficial tax status of a partnership with the limited liability afforded by corporate structures.

For the past two years, a committee of the Law Institute has been reviewing this entity. Brad Sklar of the firm of Sirote, Permutt has been serving as draftsman for this Act. In his report at the annual meeting of the Alabama Law Institute in July 1992, he compared a limited liability company (LLC) with subchapter S corporations and limited partnerships. He noted that although this entity started in Wyoming in 1977 and in Florida in 1982, in the last couple of years this business form has become available in Colorado, Kansas, Utah, Virginia, Nevada, Texas, Maryland, West Virginia, Oklahoma, Iowa, Louisiana, Minnesota, Arizona, and Rhode Island, bringing the total to 16 states. Georgia and Indiana each have statutes recognizing and affording protection to foreign limited liability companies. Bills were introduced in four more states, with 16 additional states currently studying limited liability companies.

This interest evolved in response to a 1988 ruling by the Internal Revenue Service which recognized the partnerships status of a Wyoming limited liability company, implying that if properly organized, the LLC can be treated as a partnership rather than a corporation for federal income tax purposes. As a result, "double taxation" of the members of limited liability companies is avoided. This aspect of LLCs has bolstered their popularity, particularly when federal corporate income tax rates were made higher than the maximum rate applicable to individuals.

After approximately two and a half years of drafting and study, the Institute is expecting to have ready for the 1993 Regular Session of the Legislature a limited liability company bill for Alabama. One area of interest is the question of whether limited liability company statutes permit professionals to practice their professions using this form.

It appears that most states allow professionals to conduct their professional practices as an LLC similarly as they allow practice in a professional corporation. Neither the LLC entity nor the PC entity affects one's professional liability to their client. However, the LLC would allow for the individual to escape the double level of taxation.

The committee's final draft should be ready for review in November 1992. Anyone wishing a copy may obtain it by writing the Alabama Law Institute. It is expected that Brad Sklar will have a more detailed article in an upcoming edition of this magazine.

Members of the Limited Liability drafting committee were:

Richard Cohn.....Birmingham	**Louis Braswell**.....Mobile
Bob Denniston.....Mobile	**Jim Bryce**.....Tuscaloosa
Ted Jackson.....Montgomery	**R. Kent Henslee**.....Gadsden
Thomas Mancuso.....Montgomery	**Jim B. Grant**.....Montgomery
George Maynard.....Birmingham	**Mark Maloney**.....Decatur
Michael Rediker.....Birmingham	**Gregory L. Leatherbury, Jr.**.....Mobile
Howard Walthall.....Birmingham	**Bruce Ely**.....Tuscaloosa
Robert Walthall.....Birmingham	**Brad Sklar**.....Birmingham

Business Corporation Act

After four years of study, the Business Corporation Committee, chaired by George Maynard of Maynard, Cooper, Frierson & Gale, is expecting to complete their revision of the Business Corporation Law before the end of 1992. Professor Howard Walthall of Cumberland Law School and Dr. Richard Thigpen of the University of Alabama School of Law are completing the final draft.

Rules of Evidence

The committee of the Institute and the supreme court are completing their draft of Evidence Rules for consideration by the Alabama Supreme Court. The committee, chaired by Pat Graves of Bradley, Arant in Huntsville, has Professor Charles Gamble as the reporter.

The Institute has undertaken the following new projects:

Article 8, UCC "Investment Securities" — The national model revised in 1977 was passed in 48 states but has never been presented for review in Alabama. In May 1992, the National Drafting Board of the Uniform Commercial Code began a second revision of Article 8. The Institute has formed a committee to review this 1992 revision. It is chaired by E.B. Peebles of Armbrecht,

Jackson, while Professor Howard Walthall of Cumberland is the reporter.

Article 3, UCC "Commercial Paper" and **Article 4, UCC "Bank Deposits and Collections"**, as well as **"Joint Bank Accounts"**, are being reviewed by a committee chaired by Larry Vinson of Bradley, Arant, with Professor Gene Marsh of the University of Alabama School of Law serving as professor.

Administrative Procedures Act— Alabama's Administrative Procedures Act became effective October 1, 1982. Now that it is ten years old, a committee is reviewing this law for needed revisions. The committee is chaired by Alvin Prestwood of Capouano, Wampold, Prestwood & Sansone, with Professor Tim Hoff of the University's School of Law serving as reporter.

Criminal Code — The commentary to the Criminal Code, Title 13A of the *Code of Alabama*, is now approximately 15 years old. Retired Judge Joe Colquitt, currently a professor at the University's School of Law, is revising the commentary in light of statutory amendments and case law since the criminal code was enacted. This commentary is scheduled to be included in a revised volume of the *Code of Alabama* that will be published in the spring of 1993.

Alabama Rules of Civil Procedure — Champ Lyons of Coale, Helmsing, Lyons, Sims & Leach has undertaken a review of Alabama Rules of Civil Procedure which were adopted 20 years ago. He is comparing our current civil rules with the Federal Rules of Procedure. Any recommended changes will be presented to the Civil Rules Committee before presentation to the supreme court.

For further information, contact Bob McCurley, Alabama Law Institute, P.O. Box 1425, Tuscaloosa, Alabama 35486 or call (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.

CORRECTION

In the September 1992 issue of *The Alabama Lawyer*, the title of Judge Eric Bruggink's legal article incorrectly appeared as **"Commercial Litigation in the United States *Supreme* Court"** instead of **"Commercial Litigation in the United States *Claims* Court"**. Unfortunately, even though several members of the editorial staff and state bar staff proofed the magazine before it went to press, the error occurred. The editorial board apologizes to Judge Bruggink for any inconvenience or embarrassment this may have caused.

BAR BRIEFS

Francis H. Hare, Jr., with the Birmingham firm of Hare, Wynn, Newell & Newton, and **Michael Rediker**, with the Birmingham firm of Richie & Rediker, were recently appointed by Judge Sam Pointer to serve as co-liaison counsel to the Plaintiffs Steering Committee in connection with the silicone breast implant multi-district litigation recently transferred by the Multi-District Litigation Panel to the federal district court in Birmingham.

Russell E. Hinds, a partner in the Columbus, Georgia firm of Page, Scrantom, Harris & Chapman, recently was elected chair of the Taxation Section of the State Bar of Georgia for 1992-93, and will also serve as a member of the Board of Trustees of the Institute of Continuing Legal Education in Georgia.

Hinds was admitted to the Alabama State Bar in 1981.

Mary Lyn Pike, a member of the Alabama State Bar since 1982 and an employee of the state bar from November 1981 until March 1988, recently became executive director of the American Mental Health Counselors Association in Alexandria, Virginia. Before joining AMHCA, she worked with the Association of Trial Lawyers of America in Washington, DC. She is a native of Tuscaloosa and a graduate of the University of Alabama School of Law.

Ben H. Harris, Jr., a partner in the Mobile firm of Johnstone, Adams, Bailey, Gordon & Harris, recently became a member of the Board of Governors of the American Bar Association. Harris will serve two years, representing the Fifth District, including South Carolina, Alabama, Mississippi and North Carolina. The 33-member board meets periodically during the year to oversee management and administration of the ABA, a 370,000-member organization and among the largest voluntary professional associations in the world.


Harris

Harris is a past president of the Alabama State Bar and of the Alabama Law Foundation. He has served as chair of the state bar's Disciplinary Commission and vice-chair of the state bar's Disciplinary Board, and served five terms on the Executive Committee of the state bar. He also is a past member of the Executive Committee of the Mobile Bar Association.

He is a 1962 graduate of the University of Alabama School of Law.

Sam C. Pointer, Jr., chief judge of the United States District Court for the Northern District of Alabama, was re-elected to the American Judicature Society's Board of Directors at the Society's Annual Meeting August 8 in San Francisco, California.

Pointer is a graduate of the University of Alabama School of Law and New York University Graduate School of Law. He is the current chair of the Advisory Committee on Civil Rules of the Judicial Conference. He is a 1990 recipient of the Samuel Gates American College of Trial Lawyers Award and a 1988 recipient of the Francis Rawle American Law Institute-American Bar Association Award.

Founded in 1913, the American Judicature Society is a national organization of concerned citizens working to improve the nation's justice system.

The firm of **Bradley, Arant, Rose & White** has established an endowed scholarship with the University of Alabama Law School Foundation. The scholarship will provide financial assistance to deserving students who may not otherwise be able to pursue a legal education.

The first student designated to receive money from the scholarship is Lisa Joy Wathey of Milton, Florida. Wathey is a second-year student at the University of Alabama School of Law. She was the top Arts and Science student from the University of Alabama entering law school in 1991. Bradley, Arant has offices in Birmingham and Huntsville, Alabama.

The firm also announces that two attorneys have been elected to serve six-year terms with the Alabama Law Institute. **Laurence D. Vinson, Jr.** of Birmingham was elected to represent the sixth district, and **Patrick H. Graves, Jr.** of Huntsville was elected to represent the seventh district.

Law firm listings in **Martindale-Hubbell** law directory can now be updated throughout the year by using a newly established 800 telephone number: 1-800-MARTIND(ALE), 1-800-627-8463. The directory is available in print, on CD-ROM and online through the LEXIS/NEXIS services. Each annual edition will include all update changes.


Forman

Ross Forman, III of the Birmingham firm of Burr & Forman has been appointed to the Legal Advisory Committee of the Alabama Department of Industrial Relations.

He will guide and advise the director of the department on the rules and regulations relating to the Ombudsman Program which was passed recently under the Alabama Workers' Compensation Reform Act.

Forman is a graduate of Washington & Lee University and the University of Alabama School of Law.

More than four weeks after Hurricane Andrew, the area of south Florida is still working on basic relief efforts for most of the population. Many of the individuals harmed are law firm employees. Some of these individuals (primarily staff positions) did not have any insurance coverage or the coverage is inadequate.

A disaster relief effort has been established to assist law firm employees who suffered losses from the hurricane. **The South Florida Chapter of the Association of Legal Administrators** had previously formed an IRS designated section 509(a)(1) or (2) organization for purposes of a local charity they support. This vehicle allows contributions to be tax-deductible.

If you are in a position to help a fellow law firm employee, send your check in any amount to:

South Florida ALA Charity Fund, Inc.
P.O. Box 112031
Miami, Florida 33111-2031.

A committee of ALA law firm administrators will receive applications for assistance and intends to distribute all funds by Thanksgiving. You will receive a letter which advises you of the recipients.

Any questions regarding this disaster relief fund may be directed to Betsy Cohen (president of the South Florida Chapter) at (305)854-5900 or Carolyn Shafer (chair, Florida Council of ALA) at (407) 689-8180. ■

RIDING THE CIRCUITS

Dale County Bar Association

Pictured at the right are the officers for 1992-93:

President:
George H. Trawick, Ariton

Vice-president:
David Robinson, Daleville

Treasurer:
Ken Sheets, Daleville

Secretary:
Stan Garner, Ozark

Huntsville-Madison County Bar Association

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BUILDING ALABAMA'S COURTHOUSES

SHELBY COUNTY COURTHOUSE

By SAMUEL A. RUMORE, JR.

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

Shelby County

The first Shelby County settlers were Kentuckians and Tennesseans who had fought with Andrew Jackson in Alabama during the Creek Indian War. After the Battle of Horseshoe Bend in 1814, Jackson's forces went home, but many returned later with their families to settle in this beautiful and promising place.

Shelby County was named for Isaac Shelby, a surveyor who became a Revolutionary War hero because of his exploits as leader of a colonial regiment at King's Mountain, North Carolina. He was born in Maryland, lived for a time in both Virginia and North Carolina, and then settled in Kentucky. He was the first governor of Kentucky, serving from 1792 to 1796. He served as governor a second time from 1812 to 1816, and led Kentucky troops in the War of 1812 at the Battle of the Thames. He died in Kentucky in 1826. Counties in nine states, plus the city of Shelby, North Carolina near King's Mountain, have been named in his honor.

Shelby County was established by act of the Alabama Territorial Legislature on February 7, 1818. This act also created a Superior Court of Law and Equity with semi-annual sessions and a county court with quarterly sessions, each session to last no more than six days. Courts were to be held temporarily at the home of William S. Wallace. The first county court was organized April 7, 1818.

Shelby County Courthouse, constructed in 1854

Historic marker denotes history of Shelby County's 1854 courthouse, which replaced a small wooden building

The first county seat was located at Shelbyville, approximately 12 miles northeast of Montevallo. Shelbyville no longer exists, but this first courthouse site is within the town limits of present-day Pelham.

On January 4, 1820 the county paid Thomas Amis Rogers $53 for the erection of a permanent courthouse building at Shelbyville. It was a chinked log cabin, reported to be 24 feet long, 20 feet wide, 8 feet high, with a clapboard roof and benches. Courts were held in this little log courthouse until 1826.

In 1821, seven commissioners were appointed to select a permanent county seat location. Apparently they failed in this mission because, in 1822, seven new commissioners were appointed to undertake the same task.

Two communities vied for the county seat honor—Montevallo and Columbia. Montevallo had the support of citizens in the Cahaba Valley. Columbia, named in honor of Christopher Columbus, was supported by the residents of Wilson-

ville, Harpersville and the surrounding communities. It was a close election, but due to its central location in the county, Columbia won.

A few years later, when Columbia applied for a post office, city leaders learned that Alabama already had a Columbia, with a post office, located in Henry County, now in present-day Houston County, on the Chattahoochee River. Therefore, when its post office was established in 1826, Columbia in Shelby County was named Columbiana, the new name continuing the tie to Christopher Columbus.

A frame school building was acquired by the county for the first courthouse in Columbiana. This little structure was not intended for long-term use, but it served as the county court building for 28 years, until 1854.

The first permanent structure built as a courthouse was a two-story frame building erected at a cost of $2,500. It had two large rooms and two smaller ones on the ground level and a large courtroom on the second floor.

In 1881, the building was expanded. A grand jury room was built in the rear and a vestibule in the front. The structure took the shape of a Greek cross with intersecting gabled and hipped roof sections. It was given a new exterior of red brick. The architectural style of the renovated courthouse was Italianate.

This building served as the Shelby County Courthouse from 1854 to 1908. In subsequent years, it was used as a boarding house and a hotel. It again became a public building in 1955 when the City of Columbiana acquired the structure for its city hall. It served in this capacity until 1976. The building has been renovated and, in recent years, has housed the county museum. It was named to the National Register of Historic Places and is now one of the state's oldest courthouse buildings still standing.

1908 Shelby County Courthouse after 1991 restoration

The single greatest challenge to Columbiana's position as Shelby County seat came from its neighbor, Calera, in 1894. Calera had been settled as early as 1815 by John R. Gambel, one of Andrew Jackson's soldiers. "Calera" means "lime" in Spanish, and it acquired this designation due to the lime works located there. A railroad extended to Calera as early as 1853, and the small town prospered. Calera would later become important as a stop on the railroad line between Montgomery and Birmingham, and the highway between these two cities passed through the town. Meanwhile, Columbiana remained well off the beaten path.

In 1894, an election took place to determine whether the courthouse would remain in Columbiana or be moved to Calera. Allegations of voter fraud surrounded the election. Supposedly, a coal mine operator who lived in Columbiana carted 200 workers to vote in the election at Montevallo and then transported the men to Columbiana where they allegedly voted again. Another report claimed that a master mechanic from the nearby town of Shelby was employed to remove the bottom of a number of ballot boxes so that votes for Calera could be changed or removed. After the air cleared, Columbiana was declared the winner and remained the county seat.

The citizens of Calera did not give up, though. In 1901, Shelby County was represented in the state legislature by a Mr. Dean in the House of Representatives and a Mr. Oliver in the Senate. Both men were from Calera. It appears that a local bill was passed by the Legislature that year to alter the boundary lines of the town of Calera. However, the bill that the Governor actually signed into law was radically different from the bill passed on the floor of the Legislature. Someone somehow made a substitution, and the bill which the Governor signed did not alter the boundary lines of the town of Calera, but, instead, transferred the courthouse from Columbiana to Calera. It provided for the issuance of $30,000 in bonds by the county for construction, and it further made it a misdemeanor for any public official to refuse to go to Calera to perform the duties of his office.

What a turn of events! What a surprise! What a fraud! The two Shelby legislators were condemned for their stealth, and for failing to properly report the bill. Newspaper editors cried that the legislation was a "clear-cut, out-and-out steal". Without a vote of the people, the courthouse would be moved to a town without a courthouse building, and the people of Shelby County would have to pay a debt of $30,000. Calera wanted that courthouse.

The controversy became more heated each week. The Shelby County Democratic Executive Committee passed a resolution calling the removal "an infringement upon the rights and liberties of the citizens of Shelby County." Letters poured into Montgomery requesting that the law providing for the removal of the courthouse be nullified. *The Montevallo Sentinel* editorial-

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

ized that the people of Calera could not justify this action, even if they had been wronged in the prior election by the people of Columbiana. Two wrongs did not make a right.

The controversy was resolved quite dramatically. The Constitutional Convention of 1901 was coincidentally meeting during the period of the controversy and it resolved the matter in the body of the constitution it adopted. Section 41 of the Alabama Constitution still provides that the county seat of Shelby County will remain at Columbiana unless it is authorized to be removed by a vote of the people. Thus, Shelby County is the only county in Alabama to have a constitutional section mandating the location of its county seat. Extraordinary grievances require extraordinary solutions!

The Constitution was voted on in a statewide referendum on November 11, 1901. It was ratified by a statewide majority exceeding 25,000 votes. Ironically, though, Shelby County voted against ratification by a majority of 1,706 votes.

The controversy lingered until February 1, 1904, when another election took place between Calera and Columbiana as the county seat choice. This time, the election was decided on the merits, avoiding the charges of fraud that had surrounded the first election. Calera argued its convenience, being located on a highway as well as a railroad. Columbiana boasted its central location, existing building, pure water and, best of all, no new taxes to pay off a heavy debt for a new courthouse and jail. When the results were in, Columbiana won again.

Ironically, shortly after the election victory, Shelby County leaders made plans for a new courthouse in Columbiana. They justified their plans on the basis that the new building would be funded by a bond issue rather than new taxes. The cornerstone for the new building was laid in 1905 and the building was completed in 1908.

This structure contains elements from several architectural styles. It has a modified classic portico containing four Roman order Corinthian columns. The marble stonework could be classified as Gothic. An octagonal dome has Renaissance Revival windows. And the basic plan of the original building could be considered Greek Revival. The builder for this structure was B.G. Bynum Construction Company. The last bonds for this building were paid off in 1953.

Artist's rendering of 1854 Courthouse with 1991 additions

During 1954 and 1955, a three-story annex was added to this courthouse. This building cost $355,000 and the contractor was E.C. Coston. Martin Lide was the architect.

By the 1980s an expanded facility was needed. During the intervening years, many dramatic changes had taken place in Shelby County. The northern part of the county had become the fastest growing area in the state of Alabama and the population had mushroomed. Therefore, in 1989 bids were let for the renovation and expansion of the Shelby County Courthouse. Originally, a $3.5 million contract was awarded to Coston Construction Company, Inc. of Birmingham. Kenneth C. Coston, head of the company, was the son of E.C. Coston, contractor for the 1954 addition. The design contract for the structure was awarded to Al Dampier of Dampier and Associates, Architects and Planners, of Alabaster. The 20,000-square-foot expansion was expected to be completed by November 1990, when the groundbreaking ceremony took place May 1, 1989.

This project brought on nearly as much controversy as the courthouse removal fight. There were many delays and changes of plans. The project was stopped in order to test the strength of concrete in the existing building. There were weather delays. Judges ordered work to stop when the noise interfered with the conduct of their business. The design was changed. There were arguments over costs, and the county commission changed membership four times during the project.

Architect Al Dampier pointed out to this author that the project also had several inherent problems. The new structure was to wrap around portions of the existing building. The old courthouse and its annex had six non-aligning floors which had to be linked and then connected to the new structure. Also, there was a need for new heating and cooling equipment for the entire building, and the structure had to be handicapped-accessible as well as brought up to code standards. Finally, over $40,000 was spent to remove asbestos.

The new addition was not completed until December 1991. No formal dedication has yet taken place. No final figures on the total cost have been released, but the published newspaper reports indicate that more than $4.8 million was borrowed by the county for the project.

The design of the new building was intended to blend with the style of the old. The original marble stonework came from a quarry near Talladega. The stone this time was obtained from the Georgia Marble Company and installed by the Garner Stone Company. The former chocolate-colored dome and cupolas were painted a new cream-colored shade. The interior design provides non-public hallways for the use of judges, lawyers, court personnel and prisoners, and there is room for expansion. This courthouse should serve Shelby County well for many years. ■

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ENTERTAINMENT LAW:

Is There Such An Animal and Could There Be One In Alabama?

by GAIL CRUMMIE WASHINGTON

Glitz and glamour, high-powered lunches and careers made and broken! These are a few of the many connotations that may come to mind when one thinks of America's entertainment industry. Whether it be music, motion picture, television or theater, lawyers have been and will continue to be intricately involved in the overall evolution of the entertainment industry. Serving in a variety of roles, from that of in-house counsel to outside advisors, entertainment lawyers never go unnoticed since they are often the industry's true movers and shakers.

However, an often-asked question in the legal profession is exactly what is "entertainment law." In his article "Defining Entertainment Law," 4/3 *The Entertainment and Sports Lawyer* (1986), Melvin Simensky, a noted New York-based entertainment attorney, acknowledges the notion within the legal profession that entertainment law is incapable of being defined. Yet, he and a colleague attempt to provide a definition:

> Entertainment law, as practiced in the United States, is that body of principles governing activities within the entertainment industry in this country. This industry has five branches: movies, television, live theater, music and print publishing. Among these branches are common issues, such as the structure of power relationships within the branches; the importance of credit or billing; the methods of structuring compensation and related issues; creative control and the interests at stake in seeking to obtain or restrict such control; the different methods by which rights and creative products may be transferred; and representations, warranties, and indemnities relating to risks particularly characteristic of the entertainment world.

In addressing these issues, entertainment attorneys must draw upon general areas of the law such as contracts, business organizations, real estate, tort, copyright, trademark, taxation, and labor relations. However, what distinguishes entertainment lawyers from other members of the bar is found in the two advantages they offer their clients - "a thorough knowledge of the internal workings of the entertainment industry and an abundance of contacts in the business." *See* Comment, *Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 Calif. L. Rev. 471, 484 (1992). As Simensky notes, "in the world of entertainment law, business, not law, dominates."

Though Alabama is not frequently thought of as having an entertainment industry, as more major entertainment artists relocate to the Southeast, it will not be long before the influx of industry heavyweights to the region will be felt even in this state. *See* Sotto, *Major Concert Promoter Moves to City's Entertainment Mecca*, Atlanta Business Chronicle, July 8, 1991, at 1A. The outlook looks bright when one considers the number of contributions Alabama has already made to the entertainment industry with the likes of country music stars Hank Williams, Jr. and *Alabama*, and Eddie Kendrick, formerly of *The Temptations*, and Lionel Ritchie. Moreover, Alabama is full of budding, undiscovered talent. If the legal profession in this state hopes to avoid further exportation of what could be an interesting and worthwhile legal practice, a commitment must be made to assist undiscovered artists during the early stages of their careers. It is during these early stages that competent legal advice is so vital, for it is during the initial stages when key crucial contractual relationships are formed. Legal mistakes during those early years have proved costly in later years for a number of noteworthy entertainers.

Prime evidence of the fact that the state holds potential in the entertainment area is the number of independent record production companies that have already been launched in Alabama. Typically headed by either recording studio owners or individuals with close connections with New York-or L.A.-based record companies, these companies are scouring the state for undiscovered music artists. Once found, a period of time generally ranging from six months to a year is invested in "developing" their skills - namely choosing songs, defining a stage look, and recording a "demo" tape that may include as little as three songs to a whole album.

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An overall survey of the potential for entertainment legal work in Alabama within all five branches of the entertainment industry is beyond the scope of this article. Chances are greater that a musician will seek the services of an Alabama attorney before any other type of artist. This is especially true when one considers the fact that the music business is no longer centralized in New York or Los Angeles as are the other branches of the entertainment industry. Therefore, this article will briefly explore the various legal services that can be offered to those seeking careers in the music business.

Advancing technology has made it possible for a 16-year-old in Anytown, U.S.A. to produce a collection of songs that, if typically worthwhile, could capture the attention of a record company executive. Such initiative, along with true talent, is likely to lead to an offer of an exclusive recording deal. These "deals" are often memorialized in contracts of up to a 100 pages or more. It is generally at this point that the "undiscovered talent" will seek, and should seek, the advice of an attorney. However, before addressing the various contractual provisions that are typically encompassed in a recording contract, counsel to a music artist must address a number of other issues.

Assuming the artist is a group comprised of several members, the initial task is to draft an agreement among its members. Because of conflict of interest rules in this state, as well as in other jurisdictions, this initial step may involve several attorneys. A group agreement, as they are often called, essentially sets forth the form of business the group will assume in carrying out its affairs in the music industry. Typically, this will be either a loan-out corporation or as a partnership. Key issues to be addressed in a partnership or shareholder agreement are division of profits, allocation of duties, ownership of the group name and leaving member provisions.

A trademark search must be conducted to determine whether the name the group is using or has decided to use is actually available. If so, an application for federal trademark protection should be filed to protect not only the name but any logos the group may have adopted. Obtaining these exclusive rights may prove a wise move in later years of their career. The merchandising potential that lies in a group name is demonstrated by the phenomenal marketing dollars amassed by the group "New Kids on the Block."

Once these initial matters have been properly addressed, the attorney for the group can turn his or her attention to the recording contract. While it is true that entertainment contracts generally have clauses or provisions unlike any other type of contract, they are not as insurmountable as they may seem. A number of treatises or drafting guides are available to the legal profession such as *Entertainment Industry Contracts* by

Gail Crummie Washington

Gail Crummie Washington is a member of the state bars of Alabama and Illinois. She received her law degree from the University of Alabama School of Law where she served as associate editor of the *Alabama Law Review*. She is an associate with the Birmingham firm of Maynard, Cooper, Frierson & Gale.

Donald C. Farber (Matthew Bender/New York). The prime areas of negotiation in a recording contract are typically the terms of the agreement and how it will be measured, royalty percentages and calculations, allocation of creative control between the record company and the group, merchandising rights, and ownership of the copyrights in the group's songs.

At the same time, a music group may be considering signing an exclusive management contract. Before addressing the terms in such a contract, the attorney should assess the reputation of the proposed manager or management company. While the group may be quite fond of a certain individual because he or she is a family member or personal acquaintance, prudent attorneys often counsel their clients not to allow such attachments to dictate who should manage the group. A personal manager should have experience in and/or knowledge of the business in addition to contacts and a plan. If these qualities are present, the contract with the personal manager should address such areas as term, options to extend, management commissions, services to be performed, and reimbursement of manager expenses.

The next contractual arrangement to face a new music group is that with a booking agency. The booking or talent agent will be charged with the task of procuring employment for the group. He or she may be a solo operator or an agent within a large agency such as William Morris (New York) or Triad Artists (Los Angeles). Large agencies often have branch offices in other cities such as Nashville or Atlanta.

With a booking agency contract, the key areas of negotiation are the type of engagements produced on behalf of the group, agent commissions and transfer of earnings to the group. As with the personal manager, however, the booking agent should be reputable, have either strong contacts in or knowledge of the music business.

Once a group is ready to render live performance dates, a number of people will have to be hired, such as secretaries, road managers, stage hands, and wardrobe and makeup assistants. As with the other key figures in the artist's life, it is wise to hire such staff support pursuant to written employment agreements. Assuming the services of these individuals are regulated by a union, of which there are several in the entertainment industry, these employment agreements must address a number of labor-related issues.

As with most people, assuming the group incurs some degree of financial success in the business, matters in the areas of taxation, consumer transactions, real estate, estate planning, domestic relations, and tort are sure to follow. Such matters, while sometimes requiring knowledge of entertainment issues, are generally no more onerous for an entertainer than for any other individual.

Treading the entertainment law waters may be a new experience for many members of the legal profession in this state. However, in addition to the previously mentioned drafting treatises, a number of industry associations are available to assist. These associations, such as the Recording Industry Association of America (New York) and the American Society of Composers, Authors and Publishers (New York), offer a wealth of information. From sample contracts to seminars, they can be valuable when building an entertainment law practice.

Lawyers in the Atlanta and Nashville areas are gearing up to address the legal needs facing those members of the entertainment industry who are choosing to relocate to the Southeast. Clearly, they recognize that there is such an animal as "entertainment law." Similar efforts by Alabama attorneys could result in rewarding extensions of their current law practices. ■

BREWER AND COLE: ALABAMA CONSTITUTIONAL LAW

Governor Albert P. Brewer

Former Governor Albert P. Brewer is Distinguished Professor of Law and Government at the Cumberland School of Law of Samford University. At Cumberland, Governor Brewer teaches Alabama Constitutional Law, Law Office Practice and Management, and Professional Responsibility. He also teaches undergraduate courses in state and local Government and Alabama History at Samford.

Governor Brewer is uniquely qualified to write about the Alabama Constitution. His distinguished career includes service as Alabama's Governor, Lieutenant Governor, and Speaker of the House of Representatives. He has been an active member of the Alabama State Bar since 1952, enjoys an excellent reputation as an able advocate, and is a frequent lecturer at continuing legal education seminars.

Professor Charles D. Cole

Charles D. Cole, Professor of Law at the Cumberland School of Law of Samford University, presently teaches Constitutional Law, Civil Procedure and Legal Process. He has served on the faculty at Cumberland for over twenty years and has received several outstanding teaching awards.

Professor Cole has served the State of Alabama as Director of the Alabama Judicial Conference Criminal Justice Survey, Director of the Permanent Study Commission on Alabama's Judicial System, and Executive Secretary of the Judicial Commission of Alabama. He has written numerous law journal articles, monographs and court studies. Professor Cole has lectured extensively in both the United States and Brazil concerning constitutional law, judicial independence, judicial education and court organization.

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NEGOTIATING AND LITIGATING COMPUTER CONTRACTS

SELECTED ISSUES

By S. REVELLE GWYN and ALAN T. ROGERS

INTRODUCTION

From Charles Babbage's design of his analytical machine in 1840 through Maurice Wilkes' first stored program calculator in 1949 to present-day personal computers, computer networking and customized software, the computer industry's history has been short while its growth has been tremendous. Word processing, technical data analysis, spread-sheets, inventory control, production and sales reports, communications, invoices, and purchase orders — all contain information that involves computers, whether lap-top, mainframe or something in between.

Few lawyers in active practice can escape the impact of computer technology on their own practices and on their clients' businesses. Failure of a computer system can damage a business. With increased commercial reliance on computer systems has come growth in involvement of lawyers in negotiating and litigating contracts for computer hardware or software.

The phrase "computer contracts" is broad — covering everything from a consumer's purchase of over-the-counter, canned software/hardware packages to large, commercial purchases of complete computer hardware and software systems and licenses to access third party data bases — that this summary cannot be all-inclusive. This article looks at selected issues in the negotiation and litigation of agreements to acquire computer technology with an emphasis on acquisition of a computer system from hardware and software vendors.[1] More often than not, software is the issue, — and it is here that lawyers must also be prepared to adapt existing legal principles or create new ones to keep pace with the changing technology and industry practices.[2]

GENERAL CONSIDERATIONS

The parties' economic and business goals should determine the type of contract that binds them and, as a consequence, the law governing the interpretation of the agreement. Generally, computer contracts fall within three areas: the sale or lease of goods (*e.g.*, computer hardware), the allocation or ownership of intellectual property rights (*e.g.*, software licensing agreements or software development contracts), and the maintenance or service of hardware or software (*e.g.*, programming updates, equipment servicing). An agreement often includes several of these features.

As in other contract negotiations, the parties can express their commercial expectations and protect (to the extent the law allows) against the failure of those expectations by careful drafting. Parties who disregard this axiom of contract practice may find that they must rely on a body of law that they never intended (and which may be unsatisfying) to interpret their agreement. Contracts to acquire computer hardware or software are often like other commercial agreements to purchase equipment (in the case of hardware and some types of software) or agreements to obtain the assistance or services of third parties (in the case of maintenance or customized software products).

Not surprisingly, a computer contract may contain provisions addressing the goods or services covered by the agreement, consideration, express warranties and/or disclaimers of express or implied warranties, the term or period for performance, limitations on remedies, assignment rights, choices of law and/or forum, *force majeure*, indemnification, liquidated and other damages, severability, the buyer's absolute requirement to pay, and arbitration or other alternative dispute resolution procedures. From the viewpoint of both negotiation and litigation, documents such as requests for proposals, vendors' bids and proposals and vendors' standard contracts may form the basis of a written agreement in a computer system transaction. In these contracts, certain issues must be addressed by the attorney involved in the drafting or the attorney called upon in the event of a dispute. The following discussion will focus on five of these areas: the treatment of software as a "good" under Article 2 of the Uniform Commercial Code ("UCC"); choices of law and forum; contractual limitation of damages; available causes of action; and alternative dispute resolution.

SOFTWARE AS A "GOOD"

Hardware systems meet the definition of "goods" under Article 2 of the Uniform Commercial Code (the "UCC"). Similarly, mass-produced or mass-marketed software programs often are treated as goods because of the way in which they are marketed and distributed. However, where parties negotiate for a special software design or for specific hardware and customized software, their expectations are less easily identified. Is the buyer bargaining for a specific result or is he seeking an assurance that the product will meet a specific level or quality of performance?

Is something so intangible as computer software - a set of mathematical instructions - a "good" for purposes of Article 2? Should computer contracts that include not only hardware, but also customized software and related training and documentation services, fall within uniform rules such as the UCC? These questions have not been addressed by the Alabama Supreme Court, but courts in other states have held that computer software is a "good" under Article 2 and that mixed services/goods contracts in the computer setting can be considered overall as a transaction in goods for purposes of the UCC.[3]

S. Revelle Gwyn
S. Revelle Gwyn is a graduate of the School of Law of The University of North Carolina at Chapel Hill. She currently is vice-chair of the Corporate Counsel Section of the Alabama State Bar and a member of the Business Law Section of the American Bar Association and its Committee on Technology and Intellectual Property.
She is a member of the firm of Balch & Bingham in the Huntsville office.

Alan T. Rogers
Alan T. Rogers is a partner in the Birmingham office of Balch & Bingham and a 1980 graduate of Tulane Law School. He is a member of the state bars of Louisiana and Alabama and a member of the Computer Litigation Committee and Alternative Dispute Resolution Committee of the Section of Litigation, American Bar Association.

Article 2 of the UCC applies to "transactions in goods." The UCC defines goods as "[a]ll things (including specially manufactured goods) which are movable at the time of identification to the contract." Software, if viewed strictly in the form of a disc or tape, is a moveable thing within Article 2, but the physical form of the software is not the functioning part of the product since "software" incorporates intangible, intellectual qualities that could fall outside the scope of Article 2.

The decision in *Advent Systems, Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991) is illustrative of the trend in courts that face this "intangibility" issue. Advent Systems produced software for computers. Unisys, a computer manufacturer, agreed with Advent to jointly market one of Advent's systems, but the relationship ended with Advent's suit for breach of contract, fraud and other recovery. An issue arose as to whether the relationship between Advent and Unisys was one for the sale of goods subject to the terms of the statute of frauds as announced in the UCC. Because the agreement lacked an express provision on quantity, Unisys insisted that the statute of frauds banned enforcement.

Advent argued that the agreement's requirement for services kept it out of Article 2, *i.e.*, the predominant feature of the agreement was one involving "services" and not "goods." Advent also argued that the software referred to in the agreement as a "product" was not a "good," but intellectual property within the ambit of Article 2.

The Third Circuit concluded that "computer software is a good within the Uniform Commercial Code." The Court held that the intellectual property characteristics of a computer program do not alter the fact that, once in the form of disc, tape or other medium, the program is tangible, moveable and available in the marketplace. The Court went on to note:

> The fact that some programs may be tailored for specific purposes need not alter their status as "goods" because the Code definition includes "specially manufactured goods."
>
> The topic has stimulated academic commentary with the majority espousing the view that software fits within the definition of a "good" in the UCC.
>
> Applying the UCC to computer software transactions offers substantial benefits to litigants and the courts. The Code offers a uniform body of law on a wide range of questions likely to arise in computer software disputes: implied warranties, consequential damages, disclaimers of liability, the statute of limitations, to name a few.
>
> The importance of software to the commercial world and the advantages to be gained by the uniformity inherent in the UCC are strong policy arguments favoring inclusion. The contrary arguments are not persuasive, and we hold that software is a "good" within the definition in the Code.
>
> 925 F.2d at 675-76.

As noted in *Advent*, scholarly articles urge the inclusion of software as a good within the UCC. Both scholars and courts have wrestled with comparisons between the intangible qualities of software and the intangible characteristics of music tapes, albums or discs, books, lyric sheets, and even automobiles (*i.e.*, the transformation of an intangible idea into physical form).[4] The difficulty remains in the fact that commercially-used software is often created or customized for the customer, meaning that the physical form of the software can mask an ever-changing, intangible quality of the "product," and that software as sold, leased or licensed may be difficult to define and quantify.

Although the UCC was not at issue, the Alabama Supreme Court addressed the question of whether computer software is "tangible personal property" for purposes of the Alabama use tax in *State v. Central Computer Servs.*, 349 So. 2d 1160 (Ala. 1977). In a 5-3 opinion, with one recusal, the court noted only "an incidental physical commingling of the intangible information . . . and the tangible magnetic tapes and punched cards themselves," and held that "the essence of this transaction was the purchase of nontaxable intangible information." The court concluded that "computer software does not constitute tangible personal property for purposes of [the use

Between July 25 and September 25, 1992 the following attorneys, firms and contributors made pledges to the Alabama State Bar Building Fund. Their names will be included on a wall in the portion of the building listing all contributors. Their pledges are acknowledged with grateful appreciation.

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tax]." *Id.* at 1162-1163. The Alabama Department of Revenue has adopted a regulation that recognizes the *Central Computer Services* holding and imposes sales and/or use tax on the "cost of tapes, cards, disks and any other tangible personal property used in providing software to the customer." Ala. Dept. of Rev. Reg. 810-6-1-.37(3).

Related issues include the often-present service characteristic of computer contracts, such as that presented in the *Advent* case, and the prevalence of lease or license transactions as opposed to sales. Services can include the creation or customization of software programs, installation and de-bugging, employee training, and authoring "documentation" (*i.e.*, training or operation) manuals and charts. Do these elements of a computer project mean the contract is really one for services as opposed to the sale of goods? The hardware vendor may be involved in the sale of goods, and yet the software vendor may be providing a design and installation service as much as a "good" for sale. Should the UCC apply to only a portion of the transaction?

With an apparent eye toward uniformity and perceived ease of application, courts and scholars typically use a "predominant purpose" test to classify the transaction as one for the sale of goods. The *Advent* decision is a good example: in an agreement that included services such as the development of field publications, diagnostic and test procedures, installation manuals and consultation, the Court nevertheless found that the contract's main purpose was to transfer "products" (which the Court equated with "goods") and held that Article 2 applied to the whole transaction. The Court noted that the predominance test has been criticized, but chose to follow it as opposed to making the contract divisible. The Court also noted that the services in this case were not substantially different from those generally accompanying package sales of computer systems consisting of hardware and software.[5]

For an interesting comparison with Alabama precedent, consider *Skelton v. Druid City Hospital Board*, 459 So. 2d 818 (Ala. 1984) in which the Alabama Supreme Court was faced with an argument that ventral hernia repair surgery in which a suturing needle broke and injured the plaintiff was a "transaction in goods" within Article 2 of the UCC. Recognizing that there was no "sale" of the needle to the plaintiff, and agreeing that the transaction was "more akin to a lease or rental of equipment than a sale," the court concluded that Article 2 applied, because the use of the term "transactions" is broader than the term "sales." As for the fact that the needle was only a small part of the service of surgery being rendered, the court cited several cases in which services/goods transactions were held subject to the UCC and summarily concluded that "Druid City [was] a 'seller' of goods within [the UCC]."

For a number of reasons, including high equipment costs, technological change (and resulting hardware and/or software obsolescence) and the inherent nature of the subject the computer industry often relies on hybrid arrangements in which title to the property covered by a contract does not pass to the buyer. Whether these transactions are known as leases (frequently used for hardware) or licenses (frequently used for software), neither technically meets the requirement of Section 2-106(i) that title pass as part of a sale transaction. Courts have split on the issue, with some applying Article 2 to lease arrangements (*see, e.g., United States Welding v. Burroughs Corp.*, 587 F. Supp. 49 (D. Colo. 1984); *Office Supply Co. v. Basic/Four Corp.*, 538 F. Supp. 776 (E. D. Wisc. 1982)) and others declining to take that approach (*see, e.g., W. R. Weaver Co. v. Burroughs Corp.*, 580 S.W.2d 76 (Tex. Civ. App. 1979); *In re Community Medical Center*, 623 F.2d 864 (3d Cir. 1980)). With the adoption by some states of UCC Article 2A, focusing on leases, the issues posed by Section 2-106(i) (requiring the passing of title for a sale to occur) may become less important.[6] Article 2A applies to the transfer of a right to the possession or use of "goods" and establishes criteria for what constitutes a "lease." It is not clear what impact, if any, the adoption of this article may have on agreements in which software is licensed, as opposed to leased or sold. Although Alabama has not yet adopted Article 2A, it is expected that our Legislature soon will enact its provisions.[7]

The limited utility of trade secret law

and the ease with which software can be copied have lead to reliance on patent and copyright laws to protect software. *See, e.g., Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 61 U.S.L.W. 2003, 23 U.S.P.Q. 2d 1241 (2d Cir., June 22, 1992); *Whelan Assoc. Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986). In the context of acquiring software, buyers and sellers should recognize that neither the UCC nor the common law relating to service contracts protects the economic value that the creator of software may have under federal copyright and patent laws. These separate statutes may govern rights that the parties retain (in the case of the seller) or receive (in the case of the buyer) to reproduce, distribute, modify, adapt, further license, or transfer the software or combine it with other software programs.[8] The question of whether or not software is a "good" is distinct from the question of how the software creator protects the intellectual value of the program. Whether or not the software performs on the buyer's existing hardware or new hardware provided by someone else is a question of performance and the parties' expectations of the quality and quantity of such performance, not a question of ownership or control of the intellectual property rights. It is also important to distinguish between questions of the performance of goods (i.e., a disc or tape) and the information or data that a disc or tape contains. In the latter case, the content (i.e., the data or information) of the disc or tape may be of paramount importance to the buyer, and applying Article 2 or product liability standards of liability may be inappropriate.[9]

Courts generally will interpret hardware contracts against Article 2 of the UCC and its full array of commercially-accepted warranties, remedies and other provisions. In the case of customized software, reliance on Article 2 may be less certain, and the body of case law (or common law) that has evolved around service contracts may be determinative.[10] To the extent that such customized software agreements also may address the ownership of software design or hardware design features, the federal laws relating to copyrights and patents and the common law relating to trade secrets may be relevant.

CHOICE OF LAW/ CHOICE OF FORUM

Alabama law allows for the parties to choose the law of another state to govern their rights under a contract, thereby allowing choice of law provisions. Ala. Code § 7-1-105(1) (1975). One must be mindful, however, that choice of *forum* clauses will not be honored by Alabama courts, *Keelean v. Central Bank of the South,* 544 So. 2d 153 (Ala. 1989), although federal courts in Alabama will honor both choice of law and choice of forum clauses. *See, e.g., Stewart v. Dean Michaels Corp.*, 716 F. Supp. 1400 (N. D. Ala. 1989).

For tort claims such as fraud, Alabama law follows the *lex loci delicti* rule. An Alabama court will determine the substantive rights of an injured party according to the law of the state where the injury occurred. *Norris v. Taylor,* 460 So. 2d 151 (Ala. 1984). Where an injury occurs in a jurisdiction other than where the wrongful act or omission took place, the law of the jurisdiction where the injury was sustained controls. *See Norris, id.*

In contract actions, Alabama follows the *lex loci contractus* rule, which works to resolve substantive contract issues by the law of the place where the contract is made, unless the contract is executed with a choice of law provision or view toward its performance in a different state. *See, e.g., Ex parte Owen*, 437 So. 2d 476 (Ala. 1983); Gamble, *Alabama Law of Damages* § 1-6 at p.6. The practitioner should be mindful, however, that the rule of *lex fori* may operate to control the remedy for the enforcement of a contract. *See, e.g., Fleming v. Pan American Fire & Casualty Co.,* 495 F.2d 535 (5th Cir. 1974); *Ex parte Owen,* 437 So. 2d 476 (Ala. 1983).

CONTRACTUAL LIMITATION OF DAMAGES

Buyers who approach the acquisition of computer systems with a clear understanding of what they want and the level at which the seller should perform enhance their chances of reaching an acceptable contract. Sellers who understand the consequences of allowing the contract to be characterized as one for goods or services or even one in which the goods and service elements are comingled can more realistically define

their performance expectations.

Courts give commercial contracts (and the parties' intentions that those agreements embody) substantial deference, particularly those involving sophisticated businesses.[11] For example, Alabama law permits contractual exclusions of consequential and special damages. *See, e.g., Kennedy Electric Co. v. Moore-Handley, Inc.*, 437 So. 2d 76, 81 (Ala. 1983). Limitation of liability provisions also are routinely enforced by courts in data processing-related contacts. *See, e.g., Farris Engineering Corp. v. Service Bureau Corp.*, 276 F. Supp. 643 (D.N.J. 1967), *affirmed* 406 F.2d 519 (3d Cir. 1969). It has been argued that anything beyond the amounts paid or exchanged under the contract are consequential damages. In *Liberty Financial Management Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40 (Mo. Ct. App. 1984), the court noted as follows in the context of a data processing contract:

> Relatively minor errors [by the data processor] at any stage in the process could have major consequences . . . [Plaintiff] could and did agree to the exoneration clause and [plaintiff] cannot now be heard to say that its agreement was against public policy.
>
> *Id.* at 48.

The court in *Liberty Financial* went on to discuss the value of the performance of the contract as a correct measure of damages, as opposed to consequential damages. The court's approach is reinforced by UCC § 2-715 and § 2-719, which refer to consequential damages, while § 719(3) allows the limitation or exclusion of consequential damages. Section 719(1) also permits limitations on the remedies sought — for example, limiting the buyer's remedies to repair and replacement.

Although the distinction between limitation of liability provisions and exculpatory clauses may not be clear, the basic rule in Alabama is that exculpatory clauses affecting the public interest are invalid. The Alabama Supreme Court has identified six criteria that must be met in order for an exculpatory clause to be declared invalid as contrary to public policy; the clause must concern or involve:

> a business of a type generally thought suitable for public regulation;
>
> a party seeking exculpation that is engaged in performing a service of great importance to the public;
>
> such a party that holds itself out as willing to perform this service for any member of the public who seeks it;
>
> such a party that possesses a decisive advantage of bargaining strength;
>
> such a party that confronts the public with a standardized contract of adhesion or exculpation which does not allow purchaser to pay an additional fee to obtain protection against negligence; and
>
> as a result of the transaction, the person or property of the purchaser is placed under the control of the seller and thereby is subject to the risk of carelessness by the seller or its agent.

Morgan v. South Central Bell Tel. Co., 466 So. 2d 107 (Ala. 1985) (liability of telephone company was limited to amount of charges for its advertising where the plaintiff claimed that its listing in the Yellow Pages had been negligently omitted).

The criteria set forth in the *Morgan* case limit the scope of the traditional rule in Alabama announced by the Alabama Supreme Court in 1978:

> Our conclusion is based on the general rule in this state that a party may not contract against the consequences of his own negligence . . . Stated differently, as between the contracting parties, the provisions of the contract which would exempt one of the parties from the consequences of its own negligence is void as against the public policy for the reasons that such a provision would foster negligence in the performance of a contract and not deter it.

Alabama Great Southern R.R. Co. v. Sumter Plywood, 359 So. 2d 1140, 1145 (Ala. 1978).

Limitation of liability considerations are often directed at the seller's obligations. A buyer dissatisfied with its com-

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puter system may claim substantial impact on its business, so that the value of the computer system — from the buyer's standpoint — becomes more than the contractual amount paid to the seller. Limitation of liability and exculpatory clauses therefore are an important means of reaching early agreement between buyer and seller as to the legal effect of performance problems.

CAUSES OF ACTION

Even though the UCC may apply to the sale, lease or license of software, the provision of UCC § 1-203 (as adopted in Alabama), which provides that all contracts carry with them an obligation of good faith, does not create a substantive cause of action in tort and does not support a claim in contract. In Alabama, UCC § 1-203 is directive rather than remedial. *Government St. Lumber Co. v. AmSouth Bank N.A.*, 553 So. 2d 68, 72 (Ala. 1989). Alabama courts have routinely limited the "bad faith" cause of action to the insurance context, so that breach of a computer contract does not give rise to an action for bad faith. *Lake Martin v. Alabama Power Co.*, 26 A.B.R. 4194 (July 1992).

In many computer contract disputes, absent personal injury or property damage, product liability theories also will fail. The Alabama Extended Manufacturer's Liability Doctrine does not apply to product defects that result in damage to the product as opposed to injury or damage to persons or other things. *See, Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So. 2d 671 (Ala. 1989); *Wellcraft Marine v. Zarzour*, 577 So. 2d 414 (Ala. 1990). Because product liability theories are intended for other contexts, the contractual or warranty theories, such as warranties of merchantability (UCC § 2-314) and fitness for a particular purpose (UCC § 2-315), may be considered by some as more appropriate for the computer contract setting.

One tort theory that does arise in this setting is fraud and misrepresentation, oftentimes centering on the initial negotiations. The Alabama fraud statutes found at *Alabama Code* § 6-5-100, *et seq.*, (1975) seem to have had a revival in recent years, and some have viewed the debate over the "justifiable reliance" standard as also creating new distinctions between fraud in a commercial setting as compared to individual consumer transactions. Where fraud allegations are mixed with breach of contract theories, however, the practitioner should also consider the recent decision in *Liberty Nat'l Ins. Co. v. Jackson*, 1992 *Westlaw* 192755 (Ala. July 1992) in which the Court addressed the interplay between these theories of recovery.

PRACTICAL CONSIDERATIONS IN NEGOTIATION

The scope or size of the contract or project can determine the degree to which either the buyer or seller is concerned about crafting an agreement that reflects their true objectives. Off-the-shelf purchases of pre-packaged software or individual hardware or integrated hardware systems may be subject to Article 2 of the UCC. The buyer is purchasing an item (or good) that meets certain performance criteria; the seller may not be responsible for training employees, providing up-grades or servicing or assuring compatibility with existing equipment or software. In this context, it is easy for a "battle of forms" to occur. If the parties do not read the fine print and understand what has been said or written as additional terms or counteroffers, each is likely to find that some crucial part of its form is not in the final agreement.

In larger projects, a buyer may develop its own specifications or use a consultant to prepare a request for proposal or adopt performance criteria to assure that its commercial needs are met by the seller and the proposed expenditure justified. The greater the expertise demonstrated by the buyer (or its consultant), the less likely the seller will be to accept responsibility for the selection of equipment or the software design features. Similarly, sellers may be reluctant to assume that a buyer will have an adequately trained work force or that a buyer's internal procedures (which may be crucial to the success of the equipment or program operation) will be implemented or observed. These issues may be magnified when hardware is being purchased from "Seller A" and software is being purchased from "Seller B." The buyer may expect each seller to provide a defect-free product that can be

fully integrated with the other, as well as a solution to its business problem. Each seller, however, may be concerned only in meeting its limited obligation to provide hardware or software and may not be willing to assume responsibility for the consequences of the entire operation of the computer system.

In addition to describing the subject of the contract, the agreement may specify the standard or quality of performance (*e.g.*, fitness for a particular purpose, merchantability, amount of training, type of documentation, or manuals to be supplied) that the parties expect. If specifications or a request for proposal describe the software, hardware or services to be provided under the contract, these should be included in the agreement. If they are developed prior to or apart from the contract, one or more barriers may prevent their use as a standard for performance (*e.g.*, an integration clause in the contract, the parol evidence rule or the statute of frauds). In addition, these collateral or additional writings may not meet the Article 2 test for treatment as a "consistent additional term."

Equally important is an agreement on how defects will be cured or otherwise handled. The method for handling defects is directly related to how the parties view their bargain or, put another way, their expectations. If the buyer is merely acquiring goods or tools to solve a problem, the usual Article 2 rules regarding acceptance, payment and rejection may be adequate. On the other hand, the buyer may be acquiring a complete package of goods and activities needed to solve a problem. In this event, hardware that is not compatible with existing equipment, software that does not perform within the design specifications or other similar problems may leave the buyer with worthless equipment (at least in terms of the contract), an unfinished project and substantial business losses.

If a seller is to have an opportunity to cure a defect, the parties should have a clear understanding of how these adjustments will affect the buyer's cost and rights to pursue other remedies, its ability to revoke any prior acceptance and its opportunities to demand recision. A contract that requires substantial testing prior to acceptance may be construed as having shifted the burden to the buyer of assuring that the equipment or software is without defect.[12] How much testing is "substantial testing" may best be determined in light of the parties overall commercial goals as evidenced by the contract. If the buyer is acquiring a tool (whether hardware or mass-marketed software), minimal testing may be appropriate. On the other hand, an integrated hardware and software system that is specially developed to handle the buyer's tasks may require phases of testing.

The computer industry has grown accustomed to limiting a seller's liability for performance, especially the performance of software. Unless an agreement expressly provides that specific response times (that is, the time required to execute a task) or other activities or features are the essence of the bargain, it can be somewhat difficult to establish later that the software (or hardware) must function above a minimum standard. A buyer may be required to accept and pay for software or equipment that does not perform (for the buyer's purposes) in the time, with the degree of accuracy for the number or type of tasks needed, with the amount of user or employee training or in some other way that the buyer expected.[13]

While disclaimers of warranties for performance may be appropriate with respect to unintentional or ordinary defects, such disclaimers should not apply to intentional defects that are not inserted for the purpose of providing security against infringement or abuse of intellectual property rights (such as prohibited copying or modification). The buyer may not be in a position to identify so-called "computer viruses" or to know the history or "chain of title" of a software program. The seller may have access to information that allows it to represent and warrant that the seller knows of no intentional defects or viruses that could result in a malfunction of the software or other parts of the computer system.[14] In some instances, it may be appropriate to expand the scope of such a representation and warranty to include the computer systems of third parties from or to which the virus may foreseeably be transmitted.

The seller's familiarity with the soft-

ware and hardware also may make it responsible for any third-party claim that the buyer's use or operation of the hardware or software in the form delivered by the seller infringes on the rights of others. The seller may be in the best position to know (or find out) whether infringement claims are likely. While a buyer may require a seller to defend and save the buyer harmless from any damages and expenses incurred in the litigation or settlement of an infringement claim, the seller also may require the right to obtain a license to use the software or hardware that is alleged to have been infringed or to provide the buyer with a suitable replacement in order to limit the seller's total expenditure for the claim.

PRACTICAL CONSIDERATIONS IN LITIGATION

Where hardware and software have been partially or totally installed, both customer and vendor must quickly isolate the problem areas if a dispute has arisen. General dissatisfaction on the part of either side is a poor basis for pushing along the dispute. An ongoing, evolving project can leave problem areas poorly documented or researched from the standpoint of the litigants who later join issue. The following is a brief outline of useful steps:

1. **Witnesses** - Identify and, as soon as possible, interview vendor and customer project managers, vendor programmers, customer end-users and outside consultants involved.
2. **Documents** - Identify and, where possible, secure vendor's initial and revised specifications and any proposed specifications or requirements authored by customer; contract and all related addenda and correspondence; vendor's and customer's project outlines; vendor and customer project logs; vendor source code; vendor-, customer- or consultant-authored flowcharts and user instructions; and user logs.
3. **Experts** - There are many academic and industry experts, including computer consulting firms. Also, consider whether an industry specific expert is needed, that is, one who is technically familiar with the computer issues involved, as well as the industry application in your particular case. Also consider any individuals or companies that perform computer out-sourcing responsibilities in that particular industry.

INSURANCE COVERAGE

Typical general liability policies of insurance may not be triggered in contractual/warranty disputes over a computer contract. With claims flowing between the vendor and the customer, all parties nevertheless should place appropriate carriers on notice, particularly if more customized errors and omissions polices are involved. If tort claims are included, general liability policies may be triggered under certain circumstances. *See, e.g., Universal Underwriters Ins. v. Youngblood,* 549 So. 2d 76 (Ala. 1989) (claims of negligent or reckless fraud may fall within insurance coverage).

ALTERNATIVE DISPUTE RESOLUTION

Disputes involving computer contracts, because of the possible complexity of the issues, lend themselves to alternative forms of resolution. Alabama courts cannot specifically enforce agreements to arbitrate unless those agreements involve interstate commerce. The public policy of this state encourages arbitration, but Alabama Code § 8-1-41 states that an agreement to submit a controversy to arbitration "cannot be specifically enforced." If the contract is one involving interstate commerce, however, and the contract contains an arbitration agreement voluntarily entered into by the parties, the Federal Arbitration Act may preempt the Alabama statutory prohibition. *H. L. Fuller Constr. v. Industrial Dev. Bd. of Vincent,* 590 So. 2d 218 (Ala. 1991) (*also see* 26 A.B.R. 321).

Alabama's approach to arbitration is one that promotes amicable settlements, but avoids agreements made in advance to defeat the jurisdiction of our local courts. Until recently, there was a question of the amount or level of inter-

state commerce that must be involved in a contract before an arbitration provision could be enforced. The preemption of the Federal Arbitration Act is dependent on whether the contract involves interstate commerce. Must the connection between the contract and interstate commerce be substantial, moderate or slight? In 1989, the Alabama Supreme Court required that the parties to the contract have "contemplated substantial interstate activity" before a pre-suit arbitration agreement could be enforced. *Ex parte Warren*, 548 So. 2d 157, 160 (Ala. 1989). Three years earlier, in 1986, the Alabama Supreme Court had described the requirement of interstate commerce as one that should be construed "very broadly," so that the slightest nexus of the agreement with interstate commerce would suffice to enforce the arbitration clause. *Ex parte Costa & Head (Atrium), Ltd.*, 486 So. 2d 1272, 1275 (Ala. 1986).

Earlier this year, the Alabama Supreme Court resolved the issue by limiting *Warren* to its peculiar facts and adopting the *Costa* "slightest nexus" standard. In *Ex parte Brice Building Co.*, 26 A.B.R. 4250 (1992), the court allowed application of the Federal Arbitration Act in a case in which an Alabama plaintiff contracted with an Alabama architect and an Alabama builder to construct a building in Alabama. The contract was negotiated in Alabama. Because the contract provided for one party's use of certain building materials from out of the state and the use of a California subcontractor, the court held that there was a connection between the contract and interstate commerce — a connection that the court called "tenuous," but sufficient to provide a slight nexus.

Consider also the recent decision of the Alabama Supreme Court in *A. J. Taft Coal Co., Inc. v. Randolph*, 26 A.B.R. 4616 (July 31, 1992) in which the court agreed with the slight nexus standard, but disallowed enforcement of arbitration in spite of the fact that the agreement had in part been signed out of state, certain parties to the agreement lived out of state and payments under the agreement were mailed through the United States Mail.

In what may be the first program of its kind in the country, The Florida Bar has set up a voluntary mediation process for computer hardware and software disputes. The computer mediation project offers specially trained mediators with backgrounds in computer litigation, along with a set of mediation rules adapted for computer-related disputes. The mediator is authorized to hire an independent technical expert. The rules were adapted from the regular mediation rules of the American Arbitration Association. At present, Alabama does not have an equivalent to Florida's computer mediation project. Information about the Florida effort can be obtained from the authors of this article. ■

ENDNOTES

1. This discussion does not attempt to consider technology transfers or other technology transactions (*e.g.*, financing transactions secured by collateral comprised of copyrights or patents in software or hardware or technology ownership, use or development).
2. Computer hardware can perform many tasks. Generally, it is sold with so-called "operating software" that allows it to run. Special task or so-called "application software" (*e.g.*, word processing, spread sheet, communications, technical or data analysis) is required to perform specific jobs. This article uses the term "software" in this latter sense.
3. *See, e.g., Hi Neighbor Enterprises v. Burroughs Corp.*, 492 F. Supp. 823 (N. D. Fla. 1980); Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply?*, 35 Emory L.J. 853 (1986).
4. *Advent Sys., Ltd. v. Unisys Corp.*, 925 F.2d 670 (*3d Cir. 1991*); *Systems Design & Management Info., Inc. v. Kansas City Post Office Employees Credit Union*, 14 Kan. App. 2d 266, 788 P.2d 878 (1990); *Communications Groves, Inc. v. Warner Communications, Inc.*, 136 Misc. 2d 80, 527 N.Y.S.2d 341 (N. Y. Civ. Ct. 1988); *Austin's of Monroe, Inc. v. Brown*, 474 So. 2d. 1383 (La. Ct. App. 1985); Rodau, *supra* note 3.
5. *See, e.g.*, Rodau, *supra*.
6. Article 2A was proposed in 1987 by the American Law Institute, National Conference on Commissioners on Uniform Commercial Code.
7. The Alabama Legislature considered, but fail to enact, versions of Article 2A in the 1992 and 1991 Regular Sessions. Similar legislation is likely to be proposed in the future.
8. The federal copyright statutes (17 U.S.C. §§ 101, *et seq.*) grant the author of a work (including software) the exclusive right to reproduce, distribute, display, perform and use the work in a compilation or derivative work for a statutorily-specified period of time. The author, in turn, may grant others all or a portion of the bundle of rights which constitute the copyright in a work. Similarly, the federal patent statutes (35 U.S.C. §§ 100, *et seq.*) grant the inventor or discoverer of a process, machine, manufacture, or composition of matter (collectively, the "invention") which is described in a patent the exclusive right to make, use or sell the invention for a statutorily-specified period of time. The holder of the patent also may grant others all or a portion of his rights in the patented invention. Under both the copyright and patent laws, a person who purchases a copy of software or an item of patented hardware or software has acquired certain rights in that copy or item, but has not acquired ownership rights in the copyright or patent. These latter rights must be granted by contract, generally in the form of an assignment or license. (*See generally*, Nimmer and Nimmer, NIMMER ON COPYRIGHT (Matthew Bender & Co. 1992); Chisum, PATENTS (Matthew Bender & Co. 1992).
9. *Blue Ridge Bank v. Veribanc Inc.*, 866 F.2d 681 (4th Cir. 1989); *Sunward Corp. v. Dun & Bradstreet, Inc.* 811 F.2d 511 (10th Cir. 1987); *cf., Aetna Casualty & Sun v. Jepperson & Co.*, 642 F.2d 339 (9th Cir. 1981) (product liability analysis used to impose liability for misleading information on flight instrument charts); *Winter v. JP Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991).
10. *Data Processing Servs., Inc. v. 2H Smith Oil Corp.*, 492 N.E.2d 1329 (Ind. Ct. App. 1986); *Geotech Energy Corp. v. Gulf States Telecommunications & Info. Sys., Inc.*, 788 S.W. 2d 386 (Tex Ct. App. 1990).
11. *American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wash. 2d 217, 797 P.2d 477 1990); *Land & Marine Servs. v. Diablo Data Sys., Inc.*, 471 So. 2d 792 (La. Ct. App. 1985); *Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993 (5th Cir. 1976).
12. *See Medical Accounts Management, Inc. v. Black*, 1990 Tex. App. LEXIS 1634 (Tex Ct. App. 1990).
13. *See, USM Corp. v. Arthur Little Sys., Inc.*, 28 Mass. App. Ct. 108, 546 N.E.2d 888 (1989); *Consolidated Data Terminal v. Applied Digital Sys., Inc.*, 708 F.2d 385 (9th Cir. 1983).
14. *See American Computer Trust Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473 (D. Minn. 1991); *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991).

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(800) 627-6514

BUSINESS TORTS AND ANTITRUST
Birmingham, Tutwiler Hotel
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

COMPLYING WITH THE AMERICANS WITH DISABILITIES ACT (VIDEO)
Gadsden
Cumberland Institute for CLE
Credits: 3.0
(800) 888-7454

AUTOMOBILE LITIGATION (VIDEO)
Gadsden
Cumberland Institute for CLE
Credits: 3.0
(800) 888-7454

12 Thursday

ARGUING DAMAGES
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

BASICS OF BANKRUPTCY
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

FRAUD LITIGATION IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

WORKERS' COMPENSATION IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

13 Friday

ARGUING DAMAGES
Montgomery, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

BANKRUPTCY
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

WRITING FOR LAWYERS
Birmingham, Hoover Complex
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

COMPLYING WITH THE AMERICANS WITH DISABILITIES ACT (VIDEO)
Dothan
Cumberland Institute for CLE
Credits: 3.0
(800) 888-7454

FRAUD LITIGATION IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

AUTOMOBILE LITIGATION (VIDEO)
Dothan, Holiday Inn West
Cumberland Institute for CLE
Credits: 3.0
(800) 888-7454

17 Tuesday

BASIC BANKRUPTCY IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

18 Wednesday

BASIC BANKRUPTCY IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

CURRENT ISSUES IN GOVERNMENT CONTRACTING IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

19 Thursday

ALABAMA UPDATE
Huntsville, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

PRACTICAL PROBLEMS IN PROFESSIONAL RESPONSIBILITY
Montgomery, Clarion Riverfront Inn
Cumberland Institute for CLE
Credits: 12.0
(800) 888-7454

19 Thursday

CURRENT ISSUES IN GOVERNMENT CONTRACTING IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

MALPRACTICE AVOIDANCE FOR THE '90s
Birmingham, Boutwell Auditorium
Attorneys Insurance Mutual of Alabama
Credits: 5.5 Cost: $150
(205) 980-0009

19-20

FEDERAL TAX INSTITUTE
Tuscaloosa, Bryant Conference Center
University of Alabama
Credits: 13.3
(205) 348-6224

20 Friday

ALABAMA UPDATE
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

PRACTICAL PROBLEMS IN PROFESSIONAL RESPONSIBILITY
Mobile, Admiral Semmes
Cumberland Institute for CLE
Credits: 12.0
(800) 888-7454

25 Wednesday

TAX STRATEGIES FOR THE 1990S
Montgomery
Tax Reduction Institute Seminars, Inc.
Credits: 6.5 Cost: $295
(206) 776-7262

DECEMBER

2 Wednesday

PLANNING OPPORTUNITIES WITH LIVING TRUSTS IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

3 Thursday

ALABAMA UPDATE
Montgomery, Civic Center
Alabama Bar Institute, Inc.
Credits: 6.0
(800) 627-6514

4 Friday

EVIDENCE
Birmingham, Civic Center
Alabama Bar Institute, Inc.
Credits: 6.0
(800) 627-6514

ANATOMY OF A DIVORCE
Birmingham, Tutwiler Hotel
American Academy of Matrimonial Lawyers (Alabama Chapter)
Credits: 6.8 Cost: $125
(205) 251-4300

7 Monday

PERSONNEL LAW UPDATE
Birmingham, Wynfrey Hotel
Council in Education Management
Credits: 5.5 Cost: $295
(415) 934-8333

9 Wednesday

TRYING THE AUTOMOBILE INJURY CASE IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

WORKERS COMPENSATION IN ALABAMA
Montgomery
Lorman Business Center, Inc.
Credits: 6.0 Cost: $115
(715) 833-3940

10 Thursday

RULES OF PROFESSIONAL CONDUCT
Mobile, Riverview Plaza
Alabama Bar Institute for CLE
Credits: 12.0
(800) 627-6514

TRYING THE AUTOMOBILE INJURY CASE IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

11 Friday

RULES OF PROFESSIONAL CONDUCT
Montgomery, Madison Hotel
Alabama Bar Institute for CLE
Credits: 12.0
(800) 627-6514

ESTATE PLANNING
Birmingham, Pickwick Conference Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

EVIDENCE (VIDEO)
Birmingham, Pickwick Conference Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

INSURANCE LAW UPDATE
Mobile
Lorman Business Center, Inc.
Credits: 3.8
(715) 833-3940

14 Monday

MOTION PRACTICE (VIDEO)
Tuscaloosa, Law Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

15 Tuesday

DAMAGES (VIDEO)
Tuscaloosa, Law Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

BASIC PROBATE IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

16 Wednesday

EVIDENCE (VIDEO)
Tuscaloosa, Law Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

BASIC PROBATE IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

17 Thursday

RULES OF PROFESSIONAL CONDUCT
Huntsville, Civic Center
Alabama Bar Institute for CLE
Credits: 12.0
(800) 627-6514

CLE REMINDER

1992 CLE Transcripts
will be *mailed* on or about
December 1, 1992

All CLE credits
must be *earned* by
December 31, 1992

All CLE transcripts
must be *received* by
January 31, 1993

TORTS (VIDEO)
Tuscaloosa, Law Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

18 Friday

ALABAMA UPDATE
Mobile, Riverview Plaza
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

RULES OF PROFESSIONAL CONDUCT
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 12.0
(800) 627-6514

MOTION PRACTICE (VIDEO)
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

23 Wednesday

COMPLYING WITH THE AMERICANS WITH DISABILITIES ACT (VIDEO)
Birmingham
Cumberland Institute for CLE
Credits: 3.0
(800) 888-7454

AUTOMOBILE LITIGATION (VIDEO)
Birmingham, Samford University
Cumberland Institute for CLE
Credits: 3.0
(800) 888-7454

29 Tuesday

MASTERING THE 1993 TAX SEASON — AN ANNUAL UPDATE
Mobile, Ramada Inn
Alabama Society of Certified Public Accountants
Credits: 8.0 Cost: $155
(205) 834-7650 ■

ADDRESS CHANGES

Complete the form below ONLY if there are any changes to your listing in the current *Alabama Bar Directory*.
Due to changes in the statute governing election of bar commissioners, we now are required to use members' office addresses, unless none is available or a member is prohibited from receiving state bar mail at the office. Additionally, the *Alabama Bar Directory* is compiled from our mailing list and it is important to use business addresses for that reason.
NOTE: If we do not know of a change in address, we cannot make the necessary changes on our records, so please notify us when your address changes.

_____ - _____ - _____ Member Identification (Social Security) Number

Choose one: ☐ Mr. ☐ Mrs. ☐ Hon. ☐ Miss ☐ Ms. ☐ Other _____

Full Name _____

Business Phone Number _____

Race _____ Sex _____ Birthdate _____

Year of Admission _____

Firm _____

Office Mailing Address _____

City _____ State _____ ZIP Code _____ County _____

Office Street Address (if different from mailing address) _____

_____

City _____ State _____ ZIP Code _____ County _____

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When Is A Bankruptcy Lurking In The Shadows Of A Divorce Case?

By HERNDON INGE, III

The "advanced" family law practitioner is the target of this article. A more fundamental discussion of the relationship between divorce and bankruptcy can be found in my previous *Alabama Lawyer* article.[1]

Even the advanced family law practitioner does not customarily plan for the consequences of his client's judgment of divorce just in case the other spouse should file for relief under Chapter 7 of the Bankruptcy Act. It is understandable for the divorce practitioner to concentrate his primary efforts toward obtaining advantageous divorce terms, whether by settlement or trial, to obtain custody, more periodic support and more property settlement, and to pay less of the marital debts. Just as it is easier to forget to plan on how you can actually collect your client's divorce awards after the divorce, and to forget to plan the income tax consequences of certain divorce transactions, it is easy to forget to plan how a bankruptcy judge might review the same judgment of divorce which you have worked so hard to obtain.

STATUTORY EXEMPTIONS

While it is elementary for the divorce practitioner to list and present detailed evidence on each of the assets and liabilities for equitable distribution by the divorce judge, did you know that many of those same assets are simply ignored and set aside for the debtor, by category, by a bankruptcy judge? So do not assume that since the other spouse will be getting substantial assets in the divorce, e.g. equity in his residence, equity in his car, half a house of furniture, closets full of clothing, an interest in partnership investments, or vehicles, tools or equipment in his business, that he has not already planned to file bankruptcy to try to escape his financial responsibilities to his former wife owed from the divorce.

Every divorce practitioner must understand that in a bankruptcy case, the debtor can claim as exempt from liquidation many of those same assets which he won through negotiation in the divorce settlement, or won in the divorce trial, and many of those assets will simply be set aside for the debtor by the bankruptcy court, by category, and not liquidated by the bankruptcy trustee to pay his creditors. And then, with all of his assets exempted by the bankruptcy judge, he can proceed to have all of his debts discharged, including at least any obligation owed to your client which resembles property settlement from the divorce, and therefore, he will receive only the benefits from both legal proceedings. So as long as the bankruptcy debtor can keep certain assets (*see Table 1*, page 419) within the exemption valuation limitations, these assets can be excluded from the bankruptcy estate and be kept by an Alabama debtor instead of being sold to pay to his bankruptcy creditors.

So it should not be assumed that your client's divorce entitlements are safe just because the other spouse is to receive substantial assets from the divorce, e.g. half of the furniture, furnishings, appliances, and personal belongings acquired during the marriage, a net equity in his residence of approximately $5,000, or tools and motor vehicles used in his business, partnership interests, wearing apparel, burial lots, life insurance proceeds, crops, benefits of an annuity contract, and certain bank deposits. He may still file for bankruptcy and try to discharge the alimony, child support, property settlement and attorney fees awarded to your client in the divorce. And, if the other party to the divorce should file bankruptcy, do not think for one minute that all his assets will become part of the bankruptcy estate, to be sold, and the net sales proceeds to be divided among his creditors, including your client, his former wife. This will not happen!

Some additional steps the divorce practitioner can take when he suspects that the other spouse's divorce property settlement may fall within these exemptions, and his share of the marital debts exceeds $10,000, can be found in my *Alabama Lawyer* article[19].

You should now be alerted that a skilled bankruptcy practitioner can strategically orchestrate the divorce settlement negotiations so under the final divorce terms, his client can receive only those assets which will be exempt in bankruptcy, planning all along to file for a Chapter 7 bankruptcy after the divorce is completed. It also should be noted that with clever bankruptcy counseling by a skilled bankruptcy practitioner, with no unethical conduct on the lawyer's part and no fraudulent transfers on the bankruptcy debtor's part, over 90 percent of all bankruptcy debtors can survive the bankruptcy procedure, without losing any assets at all. So, through bankruptcy, he can likely keep all his assets, and wipe out all of his debts, including property settlement obligations owed to his former wife and children, if you do not aggressively do your job.

BANKRUPTCY WARNING SIGNS TO A DIVORCE PRACTITIONER

There is generally no predictable profile of a person likely to file for Chapter 7 bankruptcy relief, other than the profile of a middle-class or upper middle-class American. Usually, one race of debtor is not more likely to file for bankruptcy relief than another, though there are certain nationalities and religions that are less likely to file. There are fewer Middle Eastern and Far Eastern debtors filing for bankruptcy relief. There are not many Latin debtors. And the work ethics of certain religions are less likely to file for relief under the Bankruptcy Code than others. Generally, the active members of more fundamental religions are less likely to file for bankruptcy relief because of the peer pressure or the teachings of their faith. Also, upper-class debtors with a high volume income can usually find other ways out of their financial predicament without filing for bankruptcy, while debtors who are hourly wage earners or have lower incomes find fewer opportunities to incur substantial debts, requiring bankruptcy relief.

There are, however, several factors that should set off bankruptcy alarms to the divorce practitioner that the other spouse may be a candidate for bankruptcy games:

TABLE 1: ASSET EXEMPTION VALUATION LIMITATIONS

Homestead of debtor (includes mobile home)	$5,000[2]
Burial plots	100 percent[3]
Miscellaneous personal property of debtor	$3,000[4]
Necessary wearing apparel of debtor	100 percent[5]
Family portraits or pictures and all books used by debtor	100 percent[6]
Proceeds from life insurance policies (includes cash surrender value, loan value and dividends)	100 percent[7]
Growing or ungathered crops	100 percent[8]
Worker Compensation benefits	100 percent[9]
Partnership property (except partnership debts)	All[10]
Veterans Administration benefits (including life insurance)	100 percent[11]
Federal Civil Service death benefits	100 percent[12]
Veterans' Group Life Insurance benefits and Servicemen's Group Life Insurance benefits	100 percent[13]
Deposits used in U.S. servicemen's savings institutions by servicemen while on permanent duty assignment outside U.S.	100 percent[14]
ERISA benefits	100 percent[15]
Tools used personally by and essential to debtor's business	100 percent[16]
Vehicle used by and essential to debtor's business	100 percent[17]
Cooking utensils, cooking stoves, table, tableware, chairs in actual use by debtor	100 percent[18]

Herndon Inge, III

Herndon Inge holds an undergraduate degree in English from the University of the South, Sewanee, Tennessee, and a law degree from Cumberland School of Law. He has published articles in *The Alabama Lawyer*, the ABA's *The Compleat Lawyer*, The ABA's *Prosecutor's Journal*, *Fair$hare*, and the *Alabama Family Lawyer* on various aspects of family law and is presently serving as editor of the *Alabama Family Lawyer*. He is a member of the Family Law Section of the Alabama State Bar, the American Bar Association and the Mobile County Bar Association, and is a Fellow in The American Academy of Matrimonial Lawyers.

a. The other spouse has incurred during the marriage, and agrees to assume in the divorce, many out-of-state "credit" cards, e.g. Wells Fargo MasterCard, CitiBank Visa, *etc.*, each with a large account balance. "Charge" accounts at local department stores or clothing stores do not necessarily activate a bankruptcy warning, so long as the accounts have been historically kept current, since this may only indicate that the other spouse buys the family's needs on a charge account. Several out-of-state "credit" accounts, and especially if they have not always been kept current, should be considered differently, however, as the other spouse may have been intentionally "kiting" these accounts by borrowing money on one "credit" account to make minimum payments on others, planning this bankruptcy for a long time.

b. If the net equity in the house the other spouse is to get in the divorce and use as his residence is less than $7,500 or if the house to be his actual residence has a large equity, which he could easily pledge against a new post-divorce home equity loan to limit his equity to under $5,000, watch out! In this way, if he files for bankruptcy, he can keep his homeplace even after the bankruptcy as it would be within his homestead exemption[20].

c. If you know that the other spouse's divorce attorney has experience in bankruptcy litigation, it is likely he will also be advising his divorce client on his options of bankruptcy relief. If the other spouse's lawyer is a general practitioner, or concentrates on domestic relations only, he may not be so familiar with the bankruptcy alternatives as to advise the divorce client accordingly.

d. If your divorce client is to get the marital residence, but the other spouse is to maintain the payments on the mortgage, and the other spouse has a history of being delinquent in paying the mortgage payments on the house during the marriage, he may be a candidate for discharge of the obligation to pay your client's mortgage through bankruptcy. Also, if the other spouse has a history of delinquency on his consumer accounts, or has too many consumer accounts, he may also be a candidate for discharge in bankruptcy. After you discovered the other spouse's regular monthly net income in the divorce, and if the sum of the minimum or regular monthly payments of the marital debts which he is agreeing to assume in the divorce settlement exceeds 60 percent of his average monthly net income, bankruptcy alarms should go off, as it is generally accepted that a person needs at least 40 percent of his average monthly net income to provide for his own housing, food, automobile mortgage, clothing, and other necessities and expenses. If the other spouse is agreeing to pay marital debts with minimum or regular monthly payments exceeding 60 percent, then it is likely that he does not intend to pay the marital debts but intends to seek bankruptcy relief, or, though he actually intends to pay the marital debts, after he discovers that he cannot pay his own basic expenses to live after paying the minimum payments on those marital debts, he will be forced to seek financial relief through bankruptcy, or through his mere disappearance.

e. If the spouse is willing and even eager to assume more than half the marital debts, in consideration for paying less periodic alimony or child support to your client, or in consideration for more cash, savings, life insurance policies, equity in the homeplace, or other assets within the statutory bankruptcy exemptions discussed above, then the bankruptcy alarms should go off that he may be intending to seek bankruptcy relief to discharge his obligation to pay the property settlement to your client, while claiming his divorce property settlement rewards as exempt and paying less alimony or child support.

f. If any close friend, fellow worker or family member of the other spouse has ever filed for bankruptcy relief, it is likely they will discuss with the other spouse the financial "good deals" afforded through bankruptcy.

OFFENSIVE BANKRUPTCY LITIGATION

Though several offensive strategies will be discussed below, your client's best chance to protect her divorce-related entitlements from discharge in bankruptcy is either to file an application for relief from the automatic bankruptcy stay, under 11 U.S.C. § 362(b)(2), that the debtor's obligations to your client are for "maintenance and support" and therefore not dischargeable in bankruptcy, or, if the application for relief from the automatic stay is denied in bankruptcy or if your client's specific claims are questionable under bankruptcy review, then

to file a complaint to determine the non-dischargeability of your client's claims, under Bankruptcy Rules 4007 and 4004. Under both of these bankruptcy proceedings, you are attempting to persuade the bankruptcy court to find that your client's individual claims are not discharged by her former husband's bankruptcy proceeding since at least some of her claims are specifically excluded from discharge under 11 U.S.C. § 523(a)(5), as alimony, maintenance and support of the debtor's spouse or child. This is your client's best chance of getting paid her divorce entitlements since only her claims will survive her former husband's bankruptcy discharge, and the claims of all the other creditors have now been discharged. In this way, your client can pursue collection of her divorce-related claims against her former husband's post-bankruptcy assets and current income, while all of his other debts will have been discharged. Hence, your client will be the only creditor standing in line to collect her claims.

Another offensive alternative is for your client to file in the bankruptcy proceeding a complaint to determine non-dischargeability under Bankruptcy Rule 4007 alleging that her former husband's discharge in bankruptcy should not apply to her as the debtor obtained money or property in the divorce settlement "by false pretenses, false representation or actual fraud" in negotiating or structuring the divorce settlement, and therefore your client's claims should be excluded from any discharge under 11 U.S.C. § 523(a)(2). This allegation is often difficult to prove and the bankruptcy hurdle is a high one. The divorce practitioner should also consider this aggressive "bankruptcy" strategy in conjunction with the aggressive "divorce" strategies of applying for a new trial under Rule 59(a) or for relief from the divorce judgment under Rule 60(b)(3) of the Alabama Rules of Civil Procedure. Remember that under the "fresh start" principles of bankruptcy, this strategy should only be considered in the exceptional case.

If the divorce practitioner suspects that the other spouse may file for bankruptcy relief or if the divorce practitioner is willing to add additional steps to his customary divorce procedures, he can add additional proof in the divorce action which could obstruct the other spouse's claim of exemptions in the event of bankruptcy. This can be done by the divorce practitioner's consistently establishing high valuations of all assets in the divorce, by additional and specific facts set out in the witness deposition if the divorce action was settled, or by detailed and specific proof through the witness testimony if the divorce action is litigated. This proof should establish high valuations of each asset to fix the value of each asset in the divorce, laying the foundation to prove that the value of each asset which the debtor may later claim on his bankruptcy schedules as exempt, is substantially less than the valuation of that same asset already established by sworn testimony several months earlier in the divorce. In this way, those assets which the debtor claims as exempt in bankruptcy which have values which exceed his statutory exemptions and are therefore objectionable under the Bankruptcy Rule 4003(b), shall be sold for ultimate distribution to the creditors.

There are three other available theories of relief, though these should only be used in the aggravated case:

a. 11 U.S.C. § 727(a) - The debtor will be denied his requested bankruptcy relief as the court will refuse to discharge his listed debts if it can be proven that he has sold, concealed or destroyed assets with the intent to defraud his creditors within one year before the filing of his bankruptcy petition, or if he has committed a fraud on the bankruptcy court, or if he has failed to cooperate with the bankruptcy trustee by producing records and explaining transactions, or if he has understated his income. This offensive strategy is not specifically advantageous to your divorce client since, if such allegations are proven and the bankruptcy court denies the bankruptcy discharge, all of the creditors will be standing in the line, along with your divorce client, to collect their claims from the debtor. Though this is generally easier to prove than other offensive strategies, *e.g.* actual fraud on creditors or actual fraud on the bankruptcy court, if the debtor can defensively convince the bankruptcy court that this was merely an oversight, then he will likely be allowed to amend his bankruptcy schedules and it is likely that his discharge will not be denied. And, remember that your client must prove that this bankruptcy misconduct was "intentional".

b. 11 U.S.C. §§ 105 or 707(b) - Your divorce client, as a creditor, can also request that the debtor's entire bankruptcy petition be dismissed for "substantial abuse" of the bankruptcy process. It should also be understood

that this federal statute specifically establishes a "presumption in favor of granting the relief requested by the debtor" and therefore a heavy burden of proof is placed upon any objecting creditor. It should also be remembered that if the entire bankruptcy petition is dismissed, little may be gained by your client. This "offensive" strategy may be appropriate in the single asset case, the single debt case, or the case where the debtor fails to attend bankruptcy proceedings or meetings seeking to merely delay the bankruptcy process or to simply "buy time", never intending to complete his bankruptcy proceeding.

c. Bankruptcy Rule 1017(e) - If your divorce client can convince the trustee or the bankruptcy court itself to pursue this remedy, the bankruptcy court can dismiss the debtor's bankruptcy petition also for "substantial abuse". This offensive strategy is also difficult to prove, especially since the debtor is now preferred in bankruptcy and the burden of proof is, therefore, on your client. This offensive strategy is generally utilized if the debtor is using the bankruptcy process offensively to gain an advantage over a creditor, your client, rather than defensively. It should also be remembered that a dismissal of the entire bankruptcy proceeding may not give your divorce client any preferred status at all in the bankruptcy proceeding, but this process is available in the appropriate case.

CONCLUSION

Increased bankruptcy filings will force divorce practitioners to become alert to telltale bankruptcy alarms, and to prepare accordingly. As Congress and creative bankruptcy practitioners expand the "good deals" available through bankruptcy, more spoils won on the divorce battlefield will be lost through bankruptcy. Only alert divorce practice can limit these losses. ■

Endnotes

1. "The Relationship Between Divorce and Bankruptcy", 51 *The Alabama Lawyer* 143 (May, 1990).
2. § 6-10-2, 1975 *Code of Alabama*.
3. § 6-10-5, 1975 *Code of Alabama*.
4. § 6-10-6, 1975 *Code of Alabama*.
5. § 6-10-6, 1975 *Code of Alabama*.
6. § 6-10-6, 1975 *Code of Alabama*.
7. §§ 6-10-8 and 27-14-29, 1975 *Code of Alabama*.
8. § 6-9-41, 1975 *Code of Alabama*.
9. § 25-4-86(b), 1975 *Code of Alabama*.
10. § 10-8-72(3), 1975 *Code of Alabama*.
11. 38 U.S.C. §3101(a).
12. 5 U.S.C. §8130.
13. 38 U.S.C. § 770(g).
14. 10 U.S.C. §1035(d).
15. 29 U.S.C. § 1056(d), see also 26 C.F.R. § 1.401(a)-130.
16. § 6-10-126(a)(4), 1975 *Code of Alabama*.
17. § 6-10-126(a)(3), 1975 *Code of Alabama*.
18. § 6-10-126(a)(1), 1975 *Code of Alabama*.
19. *Supra*, p. 146-149.
20. § 6-10-2, 1975 *Code of Alabama*.

NOTICE

RULE VII

Rules Governing Admission to the Alabama State Bar

Amended May 1, 1992

Admission of Nonresident Attorneys *Pro Hac Vice*

EFFECTIVE October 1, 1992

"Any attorney or counselor-at-law who is not licensed in good standing to practice law in Alabama, but who is currently a member in good standing of the bar of another state, the District of Columbia, or other United States jurisdiction and who is of good moral character and who is familiar with the ethics, principles, practices, customs, and usages of the legal profession in the State of Alabama, may appear as counsel pro hac vice in a particular case before any court or administrative agency in the State of Alabama upon compliance with this rule."

PROCEDURES FOR COMPLIANCE
This is applicable to each applicant for each case.

1. Applicant associates with an attorney (local counsel) who is a member in good standing of the Alabama State Bar and maintains his or her principal law office in this state. The local counsel shall accept joint and several responsibility with the foreign attorney in all matters arising from the particular cause.

   "Before any application is granted, local counsel must appear as attorney of record in the particular cause or consent in writing to the association."

   "In the event local counsel in a particular case is suspended or disbarred from the practice of law in the State of Alabama, the foreign attorney shall, before proceeding further in the pending cause, associate new local counsel who is in good standing to practice law in the State of Alabama and file a verified notice thereof with the court or administrative agency of this state before whom the foreign attorney is appearing."

2. Local counsel (or applicant) obtains hearing date on the application for admission from the court or administrative body where the cause is to be heard. This step is a **MUST**!

   "The notice of hearing shall be given at least 21 days before the time designated for the hearing, unless the court or agency has prescribed a shorter period."

3. Verified application is prepared. **APPLICATIONS WILL BE RETURNED IF ALL ITEMS ARE NOT COMPLETE**. Social Security number of applicant and a certificate of good standing from the bar where applicant regularly practices have been added to the requirements of the original appendix to the supreme court order of May 1, 1992.
   APPLICATIONS SHOULD BE OBTAINED FROM THE ALABAMA STATE BAR.

4. Applicant sends *original* of completed verified application to the court or agency with proof of service by mail on the Alabama State Bar in accordance with the Alabama Rules of Civil Procedure.

5. Applicant sends *copy* of completed verified application and the $100 filing fee to the Alabama State Bar. If the court/agency granted a motion to shorten the time for hearing, a copy of the motion should be attached.

6. The Alabama State Bar will send a **STATEMENT** to the court, counsel of record (or upon any parties not represented by counsel) and the applicant within 21 days (or shorter if granted by court) before the scheduled hearing date indicating:

   Number of times in the preceding three (3) years applicant or any attorney members of applicant's firm have previously made application for admission, including:

   a. name of applicant
   b. date of application
   c. title of court/agency
   d. cause
   e. whether granted or denied

   "NO APPLICATION SHALL BE GRANTED BEFORE THIS STATEMENT OF THE ALABAMA STATE BAR HAS BEEN FILED WITH THE COURT OR AGENCY."

7. Court/agency issues an order granting or denying the application and sends order to local counsel.

8. Local counsel sends copy of order to Alabama State Bar.

PLEASE NOTE: Foreign attorneys now appearing pro hac vice in causes shall conform to these rules in pending proceedings within thirty (30) days following the effective date of October 1, 1992.

Any questions should be directed to Alice Jo Hendrix, PHV Admissions, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101. Phone (205) 269-1515 or 1-800-392-5660 (in-state WATS).

DISCIPLINARY REPORT

Disbarment

• Mobile attorney **Cecil Barlow Monroe** was disbarred from the practice of law by order of the Supreme Court of Alabama, effective February 7, 1992. A total of 20 charges was brought against Monroe by the Office of General Counsel of the Alabama State Bar. The Disciplinary Board of the Alabama State Bar found Monroe guilty on 17 of the 20 charges and imposed public discipline in 16 of the charges. Those charges are as follows:

ASB 88-140: Monroe was employed to file a claim against the estate of his client's deceased brother. Monroe failed or refused to file the claim or correspond with his client. When the client discharged Monroe and employed another attorney, Monroe refused to refund the fee he had been paid for filing the claim. The Disciplinary Board determined that Monroe should receive a public reprimand with general publication.

ASB 88-711: In May 1986, Monroe was retained to represent a client in a personal injury case. Thereafter, Monroe agreed to pay the client's chiropractor out of any settlement or judgment proceeds. However, when the settlement proceeds were obtained, Monroe refused to pay the doctor. The doctor thereafter sued the client and in respondent thereto, the client paid the outstanding doctor's bill. Thereafter, Monroe executed a promissory note to the client for the amount of the doctor's bill, plus interest and attorneys' fees, but then subsequently defaulted on payment of the note. The Disciplinary Board imposed discipline on Monroe in the form of a public reprimand with general publication.

ASB 89-146: Monroe was employed to collect past due loan payments for a bank. Monroe misappropriated the money he collected rather than send it to the bank to be credited to the debtor's account. The debtors sued Monroe and the bank and obtained a $900,000 judgment. The Disciplinary Board suspended Monroe from the practice of law for 45 days.

ASB 89-541: Monroe was retained by a client to appeal a ruling from the county school board. Monroe failed or refused to file the appeal or to perform any other service for his client. After the client discharged Monroe, Monroe refused to refund any portion of the fee he had been paid. After the client filed a complaint with the Mobile County Grievance Committee, Monroe refused to respond to the complaint. The Disciplinary Board suspended Monroe from the practice of law for 91 days.

ASB 89-692: Monroe was employed by a client to file certiorari to the United States Supreme Court from an adverse ruling of the 11th Circuit Court of Appeals. At the time Monroe accepted employment and charged the client a fee, the deadline for filing a petition for certiorari had run some six weeks earlier. Monroe continued to charge and receive money from the client with promises and representations that he would obtain relief for her. The Disciplinary Commission determined that Monroe should be suspended from the practice of law for a period of 45 days.

ASB 89-711: In March 1988, Monroe charged a client $1,500 to file an appeal in a paternity suit. Monroe's brief on appeal consisted of two paragraphs of argument. The appeal was dismissed because it had been taken before there was a final order as to child support payments. Monroe charged the client another $1,500 to file a second appeal, but failed or refused to file the appeal or refund any portion of the fee he was paid. The Disciplinary Board suspended Monroe for a period of 45 days.

ASB 90-093: In January 1989, Monroe was retained to represent a client before the Board of Pardon and Parole. Thereafter, Monroe failed to represent the client before the board and failed or refused to take any other action on behalf of his client or to refund any portion of the fee he was paid. The Disciplinary Board determined that Monroe should receive a public reprimand with general publication.

ASB 90-203: Monroe was given an insurance proceeds check from a burial insurance policy by a client to hold, pending an investigation into whether the check was for the correct amount. Monroe failed or refused to take any action to determine if the check was in the correct amount and subsequently lost or misplaced the check. The Disciplinary Commission determined that Monroe should receive a public reprimand with general publication.

ASB 90-272: A client of Monroe's filed a complaint with the Mobile County Grievance Committee alleging that Monroe would charge an excessive fee in a criminal case. Monroe failed or refused to respond to the complaint or communicate in any way with the Grievance Committee of the Mobile Bar Association, despite repeated requests by certified mail to do so. The Disciplinary Commission determined that Monroe should be suspended from the practice of law for a period of 90 days.

ASB 90-302: Monroe charged a client to probate her mother's estate when the only asset of the estate was a house which was owned by the deceased mother and her surviving brother under a joint deed with right of survivorship. The Disciplinary Board determined that Monroe should be suspended from the practice of law for a period of 120 days.

NOTICE

EDWARD LEWIS HOHN, attorney at law, whose whereabouts are unknown, must answer the Alabama State Bar's Rule 25(a) Petition No. 92-03 within 28 days of November 15, 1992 or, thereafter, the Rule 25(a) Petition contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in this matter before the Disciplinary Board of the Alabama State Bar.

Disciplinary Board
Alabama State Bar

ASB 90-389: Monroe represented a client who was attempting to purchase a partner's interest in a bail bonding business. The client put $35,000 in Monroe's trust account to effectuate the purchase. Monroe converted the $35,000 to his own use and failed or refused to repay the client any portion thereof. The Disciplinary Commission determined that Monroe should be disbarred from the practice of law.

ASB 90-394: Monroe was employed by a client to represent her daughter in connection with a murder charge. Monroe failed or refused to take any action to represent the daughter and refused to refund any portion of the money he had been paid. The Disciplinary Commission determined that Monroe should be suspended from the practice of law for a period of 180 days.

ASB 90-494: Monroe was employed by a client to represent her interest in connection with a petition which had been filed to appoint a guardian for the client's sister. Monroe failed or refused to perform any services on behalf of his client and refused to refund any portion of the fee that had been paid. The Disciplinary Commission had determined that Monroe should be suspended from the practice of law for a period of one year.

ASB 90-499: Monroe was employed by a client to represent the client's son on a criminal charge. Monroe failed or refused to provide any services on behalf of the son and refused to refund any portion of the fee he had been paid. After a complaint was filed with the Mobile County Grievance Committee, Monroe agreed with the committee to refund the fee he had been paid, but subsequently failed or refused to do so. The Disciplinary Committee suspended Monroe from the practice of law for a period of 15 months.

ASB 90-790: Monroe was employed by a client to have certain personal property of an estate appraised, but failed or refused to have the appraisal done or to refund any portion of the fee he was paid. The Disciplinary Commission determined that Monroe should be suspended from the practice of law for a period of 30 days.

ASB 90-791: Monroe was employed to represent a husband and wife in connection with a proposed adoption. Monroe collected $1,000 from the couple for a Department of Human Resources home study, but never paid the money to DHR and refused to refund any portion of it to his clients. The Disciplinary Commission determined that Monroe should be suspended from the practice of law for a period of two years.

Surrender of License

By order of the Supreme Court of Alabama, Mobile attorney **William Edwin May's** license to practice law was cancelled and annulled, effective September 14, 1992. The order of the supreme court was based upon May's surrendering of his license to practice law in the State of Alabama. May surrendered his license due to a disciplinary investigation of him concerning alleged misconduct. [ASB No. 92-301]

Suspensions

• Effective July 25, 1992, attorney **David Norman Blaikie** has been suspended from the practice of law for noncompliance with the Mandatory Continuing Legal Education Rules. Blaikie is now living in Richmond, Virginia. [CLE No. 92-04]

• Effective July 15, 1992, Birmingham attorney **Houston L. Brown** was suspended from the practice of law for noncompliance with the MCLE Rules, and on August 13, 1992 was reinstated. [CLE No. 92-06]

• Effective July 15, 1992, Phenix City attorney **Richard C. Hamilton** was suspended from the practice of law for noncompliance with the MCLE Rules. [CLE No. 92-19]

• Effective July 15, 1992, Birmingham attorney **James B. Morton, II** was suspended from the practice of law for noncompliance with the MCLE Rules. [CLE No. 92-35]

• Effective July 25, 1992, attorney **Hugh Hudson Smith** was suspended from the practice of law for noncompliance with the MCLE Rules. Smith is now living in Washington, D.C. [CLE No. 92-42]

Public Reprimands

• Gadsden attorney **John Cunningham** was publicly reprimanded on July 15, 1992 in connection with his han-

dling of a personal injury matter. He failed to cooperate in the bar's investigation of the grievance that ensued from the case. On May 30, 1990, Cunningham was retained to represent a minor who was injured in an accident. The case was ultimately settled in October 1991. The minor's mother filed a grievance against Cunningham after the settlement of the case. She alleged that he convinced them to accept the settlement on incomplete information, failed to communicate and keep her informed, and was not truthful about certain matters associated with the case.

Cunningham never responded to the allegations of the complaint, in spite of several written requests that he do so. Rule 8.1(b) of the Rules of Professional Conduct provides that a lawyer shall not fail to respond to a lawful demand for information from a disciplinary authority. [ASB No. 91-727]

• Bessemer attorney **John Howard McEniry, III** was publicly reprimanded for violating DR 6-101(A) which prohibits an attorney from willfully neglecting a legal matter entrusted to him. On April 22, 1992, McEniry was found guilty of neglecting a legal matter entrusted to him and given a public reprimand with general publication. He was the attorney for a solvent estate, but between 1987-90 he did nothing to bring the estate to a close, despite the urgings of other attorneys involved. McEniry made promises but never followed through. He was ultimately replaced by a court-appointed administrator. McEniry had been previously disciplined for neglecting client matters. [ASB No. 89-576]

• Mobile attorney **Thomas Jeffrey Glidewell** was given a public reprimand without general publication. On September 11, 1992, Glidewell represented a plaintiff in a Jones Act case. The plaintiff's case was ultimately dismissed by the United States District Court for the Southern District of Alabama due to Glidewell's egregious pre-trial discovery violations. He failed to respond to critical defense interrogatories. When finally ordered to do so within three days of the pre-trial conference, many of Glidewell's answers were incomplete or stated "will supplement". Four days before the scheduled trial, Glidewell tried to amend the pre-trial order by adding issues, documents and four expert witnesses. In dismissing the case, the U.S. District Court found that there had been a "clear record of delay or willful contempt and that lesser sanctions would not suffice". Glidewell was accordingly disciplined by the bar for willfully neglecting a legal matter, failing to seek the lawful objectives of his client, failing to carry out a contract of employment, and damaging a client during the course of the professional relationship. [ASB No. 91-751]

• Birmingham attorney **David B. Norris** was publicly reprimanded by the Alabama State Bar on September 11, 1992 for making a misleading communication concerning services he was to perform on behalf of a client. The reprimand was administered to Norris upon his conditional plea of guilty to a violation of Disciplinary Rule 2-101(B). In December 1987, Norris was retained to handle a personal injury action on behalf of a client. The client had been injured while working on a loading dock in Atlanta, Georgia. Norris and the client entered into a contract whereby Norris was to "prosecute all claims for injuries and damages as a result of client's injury." The personal injury claim could not be settled prior to the two-year statute of limitations so Norris associated an Atlanta firm which filed suit and retained a recovery for the client. However, the potential worker's compensation claim was never filed within the statutory period. [ASB No. 90-705(B)]

• On September 11, 1992 Birmingham attorney **James Edmund Odum, Jr.** was publicly reprimanded by the Alabama State Bar for willfully neglecting a legal matter entrusted to him, and for failing to keep a client reasonably informed about the status of a matter and/or promptly complying with reasonable requests for information.

Odum agreed to handle an eviction matter for a client. The client promptly paid, upon request, Odum's fee for representation in the matter. However, the client did not hear anything from Odum for quite some time and contacted Odum concerning the status of the eviction proceedings. Odum informed the client that the matter was proceeding on schedule and that he would contact the client within a week as follow-up to inform him about the status of the case.

The client still heard nothing from Odum. Having other business in Birmingham, the client arranged to meet with Odum to discuss the matter. At this meeting, Odum admitted to the client that he had done nothing to commence the eviction proceedings, and further admitted that he did not even open a file in the case.

The client filed a formal grievance against Odum with the state bar which was investigated by the Birmingham Bar Association Grievance Committee. Odum failed to respond to several requests by that body for a written response to the client's grievance. The client did eventually receive a full refund of the fee from Odum.

Odum's conduct was found to have violated Rule 1.3, Alabama Rules of Professional Conduct (willful neglect of a legal matter entrusted to an attorney), and Rule 1.4(a) (requires attorney to keep a client reasonably informed about the status of a matter and promptly complying with reasonable requests for information). [ASB No. 91-659] ■

C·L·E REMINDER

1992 CLE Transcripts will be *mailed* on or about **December 1, 1992**

All CLE credits must be *earned* by **December 31, 1992**

All CLE transcripts must be *received* by **January 31, 1993**

1992 Bar Leadership Conference

The fourth annual Alabama State Bar Leadership Conference was held September 9, 1992 in the new, but not quite finished, addition and refurbished facilities of the state bar headquarters in Montgomery. The conference provides bar leaders from across the state with information on the operation of the state bar and allows them to meet other leaders of the Alabama State Bar as well. Approximately 70 local bar officers, section officers and state bar committee and task force chairs spent the morning listening to speakers describe state bar operations and programs. Following lunch, separate breakout sessions were held for each of these groups. The breakout session for section leaders led by **Karen Bryan**, chair of the Environmental Law Section, and **Olivia Jenkins**, chair-elect of the Administrative Law Section, dealt with ways to increase and retain section members. **Tom Bryant**, chair of the Local Bar Activities and Services Committee, and **Barbara Rhodes**, Executive Director of the Mobile Bar Association, led a breakout session for local bar officers dealing with how to be a more organized local bar leader. **Melinda Waters**, director of the Alabama Volunteer Lawyers Program and **Bill Bass**, president of Insurance Specialists, Inc., discussed program ideas for increasing lawyer participation in local bar association. **Lynne Kitchens**, chair of the Adult Literacy Task Force and **Lewis Page**, chair of the Task Force on Lawyer Mentoring, assisted by state bar President **Clarence Small** led the session for committee and task force chairs and discussed what they need to know in order to plan a successful year.

Local bar presidents, section officers and committee and task force chairs who were unable to attend the conference may obtain a copy of the Bar Leadership Handbook by writing state bar headquarters. ■

Local bar presidents and committee and section chairs came from around the state to attend the general session.

Alabama State Bar President Clarence M. Small, Jr. welcoming attendees to the 1992 Bar Leadership Conference held September 9 in the new state bar facilities

Robert Lusk, chair of the Law Day Committee, speaking at the morning session

Karen Bryan (left), chair of the Environmental Law Section, and Olivia Jenkins, chair-elect of the Administrative Law Section, leading the afternoon breakout session for section leaders

About Members, Among Firms

ABOUT MEMBERS

Patricia W. Cobb Stewart announces the relocation of her office to 111 South Broad Street, Scottsboro, Alabama 35768. Phone (205) 259-3582.

Rufus R. Smith, Jr., formerly with Farmer, Price, Smith, Hornsby & Weatherford, announces the opening of his firm, with offices at 103 S. St. Andrews Street, Dothan, Alabama 36302. The mailing address is P.O. Drawer 6629. Phone (205) 671-7959.

Wilford J. Lane announces the relocation of his offices to 1500 Wilmer Avenue, Anniston, Alabama 36201. Phone (205) 238-8353.

Everette A. Price, Jr. announces that he has returned to the practice of law, effective October 19, 1992, with offices located at 109 Blacksher Street, Brewton, Alabama 36426.

Christopher H. Griffith, formerly with Wilson & Day, announces the opening of his office, located at 247 S. Eighth Street, Gadsden, Alabama 35901. Phone (205) 546-6977.

D. William Rooks announces that he has completed the LL.M. degree in environmental law at Tulane University and is opening offices at 2026 2nd Avenue, North, City Federal Building, Suite 900, Birmingham, Alabama 35203. Phone (205) 251-6972.

Kathryn McC. Harwood, formerly associated with Rosen, Cook, Sledge, Davis, Carroll & Jones, announces the opening of her offices at 1020 Lurleen Wallace Boulevard, North, Tuscaloosa, Alabama 35401. Phone (205) 759-2516.

Calvin M. Whitesell, Jr. announces the opening of his offices, effective September 1, 1992. The firm's address is 428 S. Perry Street, Montgomery, Alabama 36104. Phone (205) 834-5999.

L. Byron Reid announces the opening of his offices at 223 N. Midway Street, Clayton, Alabama 36016. The mailing address is P.O. Box 356, Clayton, Alabama 36016. Phone (205) 775-3443.

AMONG FIRMS

Lynn W. Jinks, III and **L. Bernard Smithart** of Jinks & Smithart and **Lynn Robertson Jackson** announce the formation of **Jinks, Smithart & Jackson.** Offices will be located at 219 N. Prairie Street, Union Springs, Alabama (mailing address is P.O. Box 350, Union Springs 36089), and A.B. Robertson Building, 1 Court Square, Clayton, Alabama (mailing address is P.O. Box 10, Clayton 36016. Phone (205) 738-4225 in Union Springs and (205) 775-3508 in Clayton.

Michael E. Riddle, formerly state counsel for Chicago and Ticor Title insurance companies, announces that he has joined **Lawyers Title Insurance Corporation** as Alabama area counsel. His new mailing address is 2200 Woodcrest Place, Suite 330, Birmingham, Alabama 35209. The mailing address is P.O. Box 10766, Birmingham, 35202. Phone (205) 868-1009 or 868-1000.

Richard Alexander announces that **Frank L. Thiemonge, III**, formerly with Shinbaum, Thiemonge & Howell of Montgomery, has become associated with the firm of **Alexander & Associates**. Offices are located at Suite 2500, First National Bank Building, Mobile, Alabama 36602. Phone (205) 438-9002.

London, Yancey, Elliott & Burgess announces the relocation of its offices to 2001 Park Place, North, Suite 1000, Park Place Tower, Birmingham, Alabama 35203.

William F. Addison, Elizabeth Vickers Addison and **Shirley Darby Howell** announce the formation of **Addison, Addison & Howell**, and the relocation of their offices to 1201 Bell Building, 207 Montgomery Street, Montgomery, Alabama 36104. Phone (205) 269-0700.

M. Douglas Ghee announces that **Bud Turner** is no longer associated with the firm, and that **Rod Giddens** has joined as a partner. Also joining the firm as an associate is **Stanton Glasscox**. Offices are located at 500 AmSouth Bank Building, Anniston, Alabama. The mailing address is P.O. Box 848, Anniston, 36202. Phone (205) 236-2543.

Johnston, Barton, Proctor, Swedlaw & Naff announces the relocation of its offices to AmSouth/Harbert Plaza. The new mailing address is 2900 AmSouth/Harbert Plaza, 1901 Sixth Avenue, North, Birmingham, Alabama 35203-2618. Phone (205) 322-0616.

Lange, Simpson, Robinson & Somerville announces that **William A. Major, Jr.**, formerly senior vice-president and general counsel of SONAT, has joined the firm at its Birmingham office, located at 1700 First Alabama Bank Building, Birmingham, Alabama 35203.

Algert S. Agricola, Jr. and **Jean M. Seay** announce the formation of **Agricola & Seay**, with offices located at 111 Washington Avenue, Montgomery, Alabama 36104. Phone (205) 832-9900.

Bryan E. Morgan, former executive director of the Office of Prosecution Services in Montgomery, is now a full-time assistant district attorney for Joel M. Folmar, district attorney, 12th Judicial Circuit. The mailing address is P.O. Box 1102, Enterprise, Alabama 36331. Phone (205) 347-1142.

The Alabama State Employees' Association announces that **Mark J. Williams** has become its chief counsel. He was formerly with the firm of Beasley, Wilson, Allen, Mendelsohn, Jemison & James.

Charles R. Malone, formerly with the Tuscaloosa firm of Wooldridge & Malone, and **Herbert M. Newell, III**, formerly with the Tuscaloosa firm of Tanner & Guin, have formed **Malone & Newell. Robert V. Wooldridge** will be *of counsel* to the firm. Offices are located at Suite 300, Secor Bank Building, 550 Greensboro Avenue, Tuscaloosa, Alabama 35401. Phone (205) 349-3449.

Joseph L. Dean, Jr. and **J. Tutt Barrett** announce the formation of a partnership under the name of **Dean & Barrett**, with offices at 457 S. 10th Street, Opelika, Alabama 36801. The

mailing address is P.O. Box 231, Opelika, Alabama 36803-0231. Phone (205) 749-2222.

Lewis, Brackin & Flowers announces the relocation of their offices to 209 W. Main Street, Dothan, Alabama 36301. Phone (205) 792-5157.

Morris, Haynes & Ingram announces that as of August 1, 1992 **E.C. Hornsby, Jr.** has become a member of the firm and **John F. Dillon, IV** and **Jennie Lee Kelley** have joined as *of counsel*. Offices are located at 100 S. Main Street, Alexander City, Alabama. The mailing address is P.O. Box 1449, Alexander City, 35010. Phone (205) 329-2000.

Parsons & Eberhardt announces that **Clyde Alan Blankenship**, former city attorney for the City of Huntsville, has become a member of the firm, now known as **Parsons, Eberhardt & Blankenship**. Offices are located at AmSouth Center, 200 W. Clinton Avenue, Suite 703, Huntsville, Alabama 35801. Phone (205) 533-2172.

Bell Richardson announces that **John J. Callahan, Jr.** and **Michael E. Lee** have become members of the firm.

Capouano, Wampold, Prestwood & Sansone announces that **Ben Andrew Fuller**, former law clerk to Judge Sam Taylor of the Alabama Court of Criminal Appeals and former staff attorney to Justice Henry B. Steagall, II of the Alabama Supreme Court, and **R.W. Russell** have become associated with the firm. Offices are located at 350 Adams Avenue, Montgomery, Alabama 36104; the mailing address is P.O. Box 1910, Montgomery, 36102. Phone (205) 264-6401.

Wayne P. Turner and **Terry P. Wilson**, formerly of Turner & Wilson, and **William P. Sawyer**, formerly of Weiss & Sawyer, announce the formation of **Turner, Wilson & Sawyer**. The mailing address is P.O. Box 98, 428 S. Lawrence Street, Montgomery, Alabama 36101-0098. Phone (205) 262-2756.

Cecily L. Kaffer and **Harry S. Pond, IV** announce the formation of **Kaffer & Pond**, with offices at 150 Government Street, Suite 3003, Mobile, Alabama 36602. Phone (205) 438-1308.

Pierce, Carr & Alford announces that **John Charles S. Pierce**, formerly with Spain, Gillon, Grooms, Blan & Nettles, has joined the firm. The mailing address is P.O. Box 16046, Mobile, Alabama 36616. Phone (205) 344-5151.

Rives & Peterson announces that **Ahrian Davis Tyler**, formerly a judicial clerk for the Honorable Sharon Lovelace Blackburn of the U.S. District Court, Northern District of Alabama, has become an associate. She is a 1990 *summa cum laude* graduate of Cumberland School of Law. Offices are located at 1700 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 328-8141.

Schoel, Ogle, Benton & Centeno announces that **Paul A. Avron** has become associated with the firm. He is a graduate of Florida Atlantic University and Cumberland School of Law. Offices are located at 505 N. 20th Street, 600 Financial Center, Birmingham, Alabama 35203. Phone (205) 521-7000.

Barnett, Bugg & Lee announces that **Linda T. Timpson** has become associated with the firm. Offices are located at Monroe County Bank Building, Suite 200, Monroeville, Alabama 36460.

Gorham & Waldrep announces that **James A. Hoover** has become an associate of the firm. Offices are located at 2101 6th Avenue, North, Suite 700, Birmingham, Alabama 35203. Phone (205) 254-3216.

George K. Elbrecht announces that **Robert C. King** has become an associate of the firm. Offices are located at Monroe County Bank Building, Suite 205, Monroeville, Alabama 36460. Phone (205) 575-2451.

Harris, Caddell & Shanks announces that **J. Noel King** has become associated with the firm. Offices are located at 214 Johnston Street, S.E., Decatur, Alabama. The mailing address is P.O. Box 2688, Decatur 35602. Phone (205) 340-8000. ■

ALABAMA STATE BAR RECENT ADMITTEES

AUGUST 1992

Ernest William Ball.....Madison, Alabama

David Hall Carter.....Rockford, Alabama

Sharon Anne Donaldson.....Birmingham, Alabama

Anthony Nicholas Lawrence, III.....Pascagoula, Mississippi

Sebrena Retonya Moten.....Montgomery, Alabama

Tammy Denise Mountain.....Birmingham, Alabama

Ray Charles Thomason.....Tuscaloosa, Alabama

YOUNG LAWYERS' SECTION

By SIDNEY W. JACKSON, III, President

In order to have greater involvement among young lawyers across the state, the by-laws of this section are being revised. A meeting of the Executive Committee of the Young Lawyers' Section was held September 25, 1992 to discuss the proposed draft. Once the draft is approved by the Executive Committee, it will be presented to the board of bar commissioners sometime this year. Our immediate past president, Keith Norman of Montgomery, appointed Robert Baugh of Birmingham to head up an implementation committee to provide a first draft of the by-laws. Assisting Robert are Hal Albritton of Andalusia, Denise Ferguson of Huntsville, Rhonda Pitts of Birmingham, Judson Wells of Mobile, and Norbert Williams of Montgomery. If *approved*, several striking changes will occur.

One prominent change will be the manner in which the officers are elected. A statewide mail-out balloting and election of the treasurer's position will take place in the same manner as the election of the state bar's officers. This may be an expensive undertaking but will provide greater access to the election process by the several thousand young lawyers statewide. Presently, only the treasurer's position will be contested, as the other offices (secretary, president-elect and president) will step up automatically. The Executive Committee will nominate two young lawyers for the position of treasurer. Any young lawyer can be placed on the ballot by a petition accompanied by 25 names supporting nomination for the post. Traditionally, the officers have been elected at the annual meeting of the state bar in July of each year.

Sidney W. Jackson, III

Another major change is the makeup and tenure of the Executive Committee. Currently, the committee consists of 24 members, which include the four elected officers and the immediate past president. The proposed change mandates at least one member from each congressional district and automatic appointments of an officer of the local affiliates, including Huntsville, Tuscaloosa, Birmingham, Montgomery, Mobile, and the Wire Grass area. All remaining slots will be appointed by the president.

There are several new restrictions applying to members of the Executive Committee. The most radical change is that an appointed member can serve for only one three-year term. If a member has to drop out or becomes 36 years old during his or her tenure, a substitute can be appointed. Currently, there is no time limit on the length of service on the Executive Committee.

The draft of the amended bylaws to be presented to the board of commissioners will be printed in its entirety in upcoming issues of *The Alabama Lawyer*.

Finally, there is a lot to be done during the upcoming year. We will put on the bar admissions ceremony for the summer and winter admittees, stage mock trial competitions for various high schools throughout the state, put on several seminars, including the popular SanDestin Seminar in May, provide delegates to the American Bar Association annual and semi-annual meetings, coordinate programs with the local affiliates who provide various local services, and many, many more activities. Anyone who would like to get involved can contact me at (205) 433-3131. ■

YLS Committee Appointments

One very important function of the YLS is to provide a liaison for the various committees of the Alabama State Bar to the section. The committee members for 1992-93 and the committees they will serve on are:

Fred D. Gray, Jr.
P.O. Box 239
Tuskegee, Alabama 36083
Access to Legal Services

Lee Copeland
P.O. Box 347
Montgomery, Alabama 36101
Bench and Bar Relations

Charles L. Anderson
P.O. Box 2189
Montgomery, Alabama 36102-2189
Citizenship Education

J. Timothy Smith
2140 11th Avenue, South
Suite 300
Birmingham, Alabama 35205
Disaster Response

Barry Ragsdale
P.O. Box 55727
Birmingham, Alabama 35255
Ethics Education

Amy Slayden
407 Franklin Street
Huntsville, Alabama 35801
Adult Literacy

James Edward Smith
505 N. 20th Street
Suite 1100
Birmingham, Alabama 35203
Indigent Defense

Warren Laird
1801 Corona Avenue
Jasper, Alabama 35501
Judicial Building

Judkins M. Bryan
P.O. Box 213001
Montgomery, Alabama 36121
Lawyer Public Relations

Ernest F. Woodson, Jr.
P.O. Box 2821
Mobile, Alabama 36652
Local Bar Activities

William O. Walton, III
P.O. Box 2069
Opelika, Alabama 36803
Military Law

Laura Crum
P.O. Box 116
Montgomery, Alabama 36101
Permanent Code Commission

Thomas J. Methvin
P.O. Box 4160
Montgomery, Alabama 36103
Prepaid Legal Services Commission

Duane Wilson
P.O. Box 032206
Tuscaloosa, Alabama 35403
Professional Economics

Mark Newell
P.O. Box 2987
Mobile, Alabama 36601
Alternative Dispute Resolution

Robert J. Hedge
P.O. Box 894
Mobile, Alabama 36601
Appellate Courts

Johnny Brutkiewicz
First National Bank Building
Mobile, Alabama 36601
Correctional Institutions

Joe C. Cassady, Jr.
P.O. Box 780
Enterprise, Alabama 36331
Insurance

James H. Seale, III
P.O. Box 241
Greensboro, Alabama 36744
Judicial Selection

Archibald T. Reeves, IV
P.O. Box 123
Mobile, Alabama 36601
Law Day

Steven A. Martino
P.O. Box 66705
Mobile, Alabama 36660
Lawyer Advertising

William Lewis Garrison, Jr.
2100 South Bridge Parkway
Suite 650
Birmingham, Alabama 35209
Lawyer Mentoring

Peter S. Mackey
P.O. Box 1583
Mobile, Alabama 36633
Legal Education

Chris Coumanis
P.O. Box 2841
Mobile, Alabama 36652
Legislative

Linda S. Perry
166 Government Street, Suite 100
Mobile, Alabama 36602
Minority Participation

Willie J. Huntley
P.O. Drawer 850249
Mobile, Alabama 36685
Professionalism

William O. Walton, III
P.O. Box 2069
Opelika, Alabama
Unauthorized Practice of Law

Arthur T. Powell
P.O. Box 844
Mobile, Alabama 36601
Committee on Substance Abuse in Society

Howard W. Neiswender
P.O. Box 032206
Tuscaloosa, Alabama 35403
Task Force on Specialization

Stephen R. Copeland
P.O. Box 290
Mobile, Alabama 36601
Task Force on the Quality of Life

HIGHLIGHTS

THURSDAY

Margaret S. Childers, chair of the Administrative Law Section, opened "Administrative Law Update: Recent Decisions and Discovery in Administrative Agency Proceedings."

Phillip E. Adams, Jr., state bar president for 1991-92, introduces Gilbert R. Campbell, Jr., executive director of the Tennessee State Bar, who, in turn, introduces . . .

. . . . Robert L. Steed, Atlanta lawyer, columnist, humorist and the 1992 Bench & Bar Luncheon speaker.

Laurie Cline led the Thursday and Friday afternoon LEXIS® Training Sessions for attorneys.

The 1992 Membership Reception was well-attended by members and their spouses.

1992 ALABAMA STATE BAR ANNUAL MEETING

HIGHLIGHTS

FRIDAY

Past presidents gathered once again for their annual reunion/breakfast.

Bruce P. Ely, speaking to the Communications Law Section

While attorneys attended different section programs, spouses boarded a bus to tour Birmingham's new Kirklin Clinic and had lunch at The Club.

India Johnson, of the American Arbitration Association, and a speaker of the the afternoon Plenary Session, "Introduction to Civil Mediation"

Production numbers from the Summerfest Broadway Series included "Kismet", "Annie" and, at right, "Joseph and the Amazing Technicolor Dreamcoat".

1992 ALABAMA STATE BAR ANNUAL MEETING

HIGHLIGHTS

SATURDAY

Former Alabama Governor Albert P. Brewer moderates "Alabama — Her Potential and Possibilities", featuring . . .

. . . Dr. David Bronner, CEO of the Retirement Systems of Alabama, Dr. William Muse, president of Auburn University, and Dr. Philip Austin, chancellor of the University of Alabama System.

President Adams, during the Grande Convocation, presents the Alabama State Bar Award of Merit to Steven W. Ford of Tuscaloosa . . .

. . . Robert W. Lee, Jr. of Birmingham and . . .

. . . Thomas Brad Bishop of Birmingham.

President Adams passes the gavel to incoming state bar president Clarence M. Small, Jr.

Pictured above at the conclusion of 1992 Annual Meeting are 1992-93 President-elect James R. Seale of Montgomery, past President Phillip E. Adams, Jr. of Opelika, current President Clarence M. Small, Jr. of Birmingham.

Delinquent Notice

Licensing/Special Membership Dues 1992-93

ALL ALABAMA ATTORNEYS

The dual invoice for licenses or special memberships was mailed in mid-September and was to be paid between October 1 and October 31. If you have not purchased an occupational license or paid special membership dues, you are now delinquent!

IN ACTIVE PRIVATE PRACTICE:

Any attorney who engages in the active private practice of law in Alabama is required to purchase the occupational license. The practice of law is defined in Section 34-3-6, *Code of Alabama*, 1975, as amended. (Act #92-600 was passed by the Alabama Legislature and amended Section 40-12-49, *Code of Alabama*, 1975, effective October 1, 1992.)

Occupational License.....$230 (includes automatic 15 percent late penalty)

NOT IN ACTIVE PRIVATE PRACTICE:

An attorney not engaged in the active private practice of law in Alabama may pay the special membership fee to be a member in good standing. Judges, attorneys general, United States attorneys, district attorneys, etc., who are exempt from licensing by virtue of a position held, qualify for special membership. (Section 34-3-17 & 18, *Code of Alabama*, 1975, as amended)

Special Membership Dues.....$100 (penalty not applicable)

Direct any questions to:

Alice Jo Hendrix, membership services director, at 1-800-354-6154 (in-state WATS) or (205) 269-1515 **immediately**!

In the Spirit Of Public Service

by KEITH B. NORMAN

Members of the legal profession have been decrying a diminution of mutual respect, civility and courtesy among lawyers across the nation for sometime now. Even within the ranks of our own bar, a sense of need to rekindle the spirit of professionalism has caused the state bar to examine a role for it to play in restoring a pride of service. In 1990, Alabama State Bar President Harold Albritton established a task force on professionalism and appointed former state bar President Bill Scruggs of Fort Payne as its chair.

The Task Force on Professionalism examined the efforts underway by other states, particularly the two-day mandatory course for new lawyers in Virginia and the inclusion of professionalism in CLE courses as required by Georgia and several other states. Representatives of the task force travelled to Virginia and observed the Virginia State Bar's course on professionalism and talked with bar leaders, as well as course faculty members, about their program's operation. In addition, task force members met with staff members from Georgia and discussed their Commission on Professionalism's plan to raise the professional aspirational level of Georgia lawyers by using MCLE professionalism courses. Studying these and other efforts convinced the task force that Alabama lawyers would benefit from a similar program.

Consequently, on April 10, 1992, the task force presented its report to the board of bar commissioners for consideration. The report contained six recommendations to bolster professionalism in Alabama. They are set out below.

1. A DEFINITION OF PROFESSIONALISM

The task force's first recommendation was the adoption of a definition of professionalism. During our profession's self-examination of its professional values in Alabama and elsewhere, discussion has evolved as to what do we mean by "professionalism." The task force suggested the following definition:

The pursuit of the learned art of the law as a common calling, with a spirit of service to the public and the client, undertaken with confidence, integrity and civility.

2. A LAWYER'S CREED

In addition to the Oath of Attorneys as prescribed by the Alabama Code, the task force's second recommendation was the adoption of the following creed:

To my clients, I offer truthfulness, competence, diligence and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.

To the opposing parties and their counsel, I offer fairness, integrity and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.

To the courts, and other tribunals, and to those who assist them, I offer respect, candor and courtesy. I will strive to do honor to the search for justice.

To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.

To the profession, I offer assistance. I will strive to keep the law a profession and our profession a calling in the spirit of public service.

To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients.

3. CODE OF PROFESSIONAL COURTESY

The task force's third recommendation was the adoption of a code of professional courtesy, otherwise referred to as rules of engagement:

1. A lawyer should never knowlingly deceive another lawyer.
2. A lawyer must honor promises and commitments made to another lawyer.
3. A lawyer should make all reasonable efforts to schedule matters with opposing counsel by agreement.
4. A lawyer should maintain a cordial and respectful relationship with opposing counsel.
5. A lawyer should seek sanctions against opposing counsel only where required for the protection of the client and not for mere tactical advantage.
6. A lawyer should not make unfounded accusations of unethical conduct about opposing counsel.
7. A lawyer should never intentionally embarrass another lawyer and should avoid personal criticism of another lawyer.
8. A lawyer should always be punctual.
9. A lawyer should seek informal agree

ment on procedural and preliminary matters.

10. When each adversary proceeding ends, a lawyer should shake hands with the fellow lawyer who represents the adversary, and if the lawyer loses, the losing lawyer shall refrain from engaging in any conduct which engenders disrespect for the court, the adversary or the parties.
11. A lawyer should recognize that adversaries should communicate to avoid litigation and remember their obligation to be courteous to each other.
12. A lawyer should recognize that advocacy does not include harassment.
13. A lawyer should recognize that advocacy does not include needless delay.
14. A lawyer should be ever mindful that any motion, trial, court appearance, deposition, pleading or legal technicality costs someone time and money.
15. A lawyer should believe that only attorneys, and not secretaries, paralegals, investigators or other nonlawyers, should communicate with a judge or appear before the judge on substantive matters. These nonlawyers should not place themselves inside the bar in the courtroom unless permission to do so is granted by the judge then presiding.
16. A lawyer should stand to address the court, be courteous and not engage in recrimination with the court.
17. During any court proceeding, whether in the courtroom or chambers, a lawyer should dress in proper attire to show respect for the court and the law.
18. A lawyer should not become too closely associated with the client's activities, or emotionally involved with the client.
19. A lawyer should always remember that the purpose of the practice of law is neither an opportunity to make outrageous demands upon vulnerable opponents nor blind resistance to a just claim; being stubbornly litigious for a plaintiff or a defendant is not professional.

A LAWYER'S CREED

To my clients, I offer truthfulness, competence, diligence and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.

To the opposing parties and their counsel, I offer fairness, integrity and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.

To the courts, and other tribunals, and to those who assist them, I offer respect, candor and courtesy. I will strive to do honor to the search for justice.

To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.

To the profession, I offer assistance. I will strive to keep the law a profession and our profession a calling in the spirit of public service.

To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through

4. PROFESSIONALISM TRAINING IN LAW SCHOOLS

The task force's fourth recommendation was that ethics education in the law schools receive greater emphasis and that the Alabama State Bar should provide seminars at the law schools located in this state on the subject of professionalism. In addition, the task force recognized that cooperation with the law schools is necessary to implement this program and that additional education in the law schools on the subject of professionalism and ethics may necessarily vary among the law schools.

5. COOPERATION WITH ALABAMA TRIAL JUDGES

The task force's fifth recommendation was that trial judges be more deeply involved in both establishing and monitoring the professional conduct of lawyers in litigation.

6. MANDATORY PROFESSIONALISM TRAINING FOR NEW LAWYERS

The task force's final recommendation was the adoption of an additional rule to the Mandatory Continuing Legal Education Rules and Regulations requiring the completion of an eight-hour course of professionalism by all newly admitted members of the bar within 12 months of their admission.

The board of commissioners accepted the task force's report and approved the aspirational goals of the plan for lawyer professionalism as well as mandatory professionalism training. Presently, a rule is being drafted for consideration by the Alabama Supreme Court requiring mandatory professionalism training for all newly licensed lawyers. The Ethics Education Committee, among other bar committees, is currently working on plans to develop a curriculum for the mandatory professionalism training course for new lawyers and ideas to enhance professionalism training in the state's law schools.

The success of the Task Force on Professionalism lies with the individual members of the bar. Each of us must make a constructive effort to stop the decline of professionalism. No amount of instruction, pleading or cajoling will work unless each of us is willing to make a personal commitment to abide by each element of A Lawyer's Creed and the Code of Professional Courtesy. Let us all rededicate ourselves to the spirit of public service which is the essence of this profession and make this commitment.■

RECENT DECISIONS

By DAVID B. BYRNE, JR. and WILBUR G. SILBERMAN

SUPREME COURT OF THE UNITED STATES

Chain of custody—missing link

Garrett v. State, 26 ABR 4024 (June 26, 1992). In *Garrett*, the supreme court granted certiorari to determine if the State established an unbroken chain of custody of the marijuana introduced into evidence. In reversing the court of criminal appeals, the supreme court reaffirmed the time-honored rule that demonstrative evidence will not be admitted in a criminal trial if the State does not prove an unbroken chain of custody of the evidence.

David Thorne, a forensic scientist and the supervisor of drug chemistry at the Alabama Department of Forensic Sciences Laboratory testified that he received the evidence from Mark Cruise, another employee of the department. Cruise did not testify and *Garrett* objected that the chain of custody was not proved. The trial court overruled the objection.

In reversing, the supreme court relied upon its 1991 decision in *Ex parte Holton*, 590 So.2d 918 (Ala. 1991), wherein the court said:

> The chain of custody is composed of 'links'. A 'link' is anyone who handled the item. The State must identify each link from the time the item was seized. In order to show a proper chain of custody, the record must show each link *and also* the following with regard to each link's possession of the item: (1) [the] receipt of the item; (2) [the] ultimate disposition of the item, i.e., transfer, destruction, or retention; and (3) [the] safeguarding and handling of the item between receipt and disposition...
>
> If the State, or any other proponent of demonstrative evidence, fails to identify a link or fails to show for the record any one of the three criteria as to each link, the result is a 'missing' link, *and the item is inadmissible*. If, however, the State has shown each link and has shown all three criteria as to each link, but has done so with circumstantial evidence, as opposed to the direct testimony of the 'link', as to one or more criteria or as to one or more links, the result is a 'weak' link. When the link is 'weak', a question of credibility and weight is presented, not one of admissibility.

Garrett is clearly a case of a missing link in the chain of custody. Because there was no evidence at all of the identity of the person to whom Officer Williamson had given the marijuana or the person from whom Cruise received the evidence, the three factors regarding possession are irrelevant. There was not even circumstantial evidence of the identity or identities of that person or persons, and, therefore, the court could not reach the question of circumstantial evidence to supply a "missing link."

Check may be worthless, but prosecution is not debt collection service

Piggly Wiggly No. 208, Inc. v. Melba Dutton, clerk of the District Court of Morgan County, and Bob Burrell, District Attorney of Morgan County, 26 ABR 3921 (June 19, 1992). Piggly Wiggly No. 208, Inc. and 81 other Morgan County merchants sought a writ or mandamus from the Circuit Court of Morgan County, compelling the district attorney and clerk of the Morgan County District Court to prosecute or allow the prosecution of worthless check cases without requiring, as a condition precedent, that the merchants execute affidavits stating that they had not previously turned over the bad checks to a check collection agency.

In an opinion authored by Justice Houston, the supreme court's analysis of the problem began with the provisions of Article 1, Section 20 of the Constitution of Alabama of 1901, which states:

> That no person shall be imprisoned for debt.

Justice Houston's opinion relied in part upon the reasoning of Judge Tyson of the Alabama Court of Criminal Appeals in *Bullen v. State*, 518 So.2d 227, 233 (Ala.Crim.App. 1987). *Bullen* holds that:

> The criminal law was not designed to enforce the payment of a debt or to ajudicate civil disputes between parties...The mere failure to pay a debt, while furnishing a basis for a civil suit, is not sufficient to constitute a crime. The improper employment of a statute to enforce payment of a debt is an unconstitutional application of that statute.

The Alabama Supreme Court has condemned the use of threat of prosecution as a means of collecting a debt by '[those] who seek only payment of debts and have no interest in criminal prosecution other than as a means of collecting money allegedly due them.' *Tolbert v. State*, 321 So.2d at 232. Thus, if one is prosecuted under a statute, he must be prosecuted for the crime which he has committed, not for the debt that he owes or to make him pay it. *Cottonreeder v. State*, 389 So.2d 1169 (Ala.Crim. App. 1980).

The difference between the improper use of a statute as a means of punishment for debt and the proper use of a statute as a means of punishment for a

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

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

criminal act is intent. *Harris v. State*, 378 So.2d 257 (Ala.Crim.App.), *cert. denied*, 378 So.2d 263 (Ala. 1979).

Justice Houston's opinion concludes with a bright line rule:

In conclusion, we note that upon one's conviction of writing a worthless check, the law authorizes the requirement of restitution to the victim. See *Ala. Code 1975*, §15-18-65 et seq. These statutory provisions authorize the requirement of restitution as an incident to criminal prosecution; they do not make district attorneys 'de facto' debt collectors, as the merchants suggest. As previously stated, it would be an unconstitutional exercise of power for district attorneys to undertake the prosecution of check writers for the purpose of debt collection....Because subjective intent, which is the polestar by which the constitutionality of a prosecution under the Worthless Check Act must be determined, is often difficult to ascertain, it stands to reason that the person in the best position to assess the merits of a criminal prosecution under that act is the district attorney.

Criminal discovery—right to inspect documents carries with it right to copy documents

State v. Day, et al. 26 ABR 4587 (July 31, 1992). The defendant and three others were indicted on charges of securities fraud. The circuit court, *ex mero motu*, ordered the district attorney to produce to the defendants materials expressly discoverable under Alabama Temporary Rules of Criminal Procedure, 18.

Following a number of discussions involving defendants' lawyers and the district attorney, the parties agreed to meet for document inspection. At the meeting, the district attorney produced a large number of documents including (1) virtually the entire file of the district attorney; (2) numerous charts and diagrams prepared by the Alabama Securities Commission; and (3) various other materials contained in the investigatory files of the Commission.

During the course of the meeting, the lawyers for the defendants examined, indexed and separated those materials they wanted to copy. The separated documents included a "large stack" of materials containing various charts and diagrams too large to be reproduced at any facility in Oneonta. Counsel for the defendant offered to take the materials

to Birmingham, copy it over the weekend, and return the documents the following Monday. The district attorney refused.

After successive unsuccessful attempts to obtain copies of the segregated documents, the defendants filed a joint motion to compel the State to produce copies of the documents or to allow their reproduction by the defendants. After a hearing on the motion and an in camera review of the documents, the trial court denied the motion whereupon the defendants sought a writ of mandamus to the supreme court.

In an opinion authored by Justice Adams, the supreme court granted the defendants' petition for writ of mandamus.

In reversing the trial court, Justice Adams reasoned:

The right to *inspect* documents contemplated, as a matter of course, the attendant right to *copy* the documents. See *Dixon v. Club, Inc.*, 408 So. 2d 76, 81 (Ala. 1981). This rule merely recognizes that, as a practical matter, the 'right to inspect without the concomitant right to copy would [be] a meaningless gesture.' *Id.* Thus, having voluntarily and intentionally expanded the scope of discovery by opening its files to the defendants, the State cannot retreat within the narrow perimeter of the court's discovery order, or of Rule 18, on which the order was based, in order to prevent reproduction. To do so would be fundamentally unfair in a case such as this one, in which the defendants can demonstrate their reasonable and detrimental reliance on the quasi openness of the State.

Gender-based strikes—hint of things to come

Ex parte Murphy, 26 ABR 2370 (March 20, 1992). Murphy's petition for writ of certiorari presented a single issue: whether the court of criminal appeals erred in holding that the principle of *Batson v. Kentucky*, 476 U.S. 79 (1986) does not apply to the use of gender-based peremptory strikes. The supreme court, in a per curiam opinion, denied the writ by a six-to-three margin.

Justice Hugh Maddox, who was joined by Justices Adams and Ingram, sharply dissented and suggested that the principle of *Batson* does extend to gender-based strikes. Justice Maddox reasoned that:

Based upon my reading of *Batson* and the cases of the United States Supreme Court extending *Batson*, I conclude that *Batson* does apply to gender-based strikes. It appears to me, based on the various holdings of the United States Supreme Court, that when the issue of gender-based strikes is squarely presented to it, that Court will hold that the State, in a criminal case, cannot use its peremptory challenges to exclude either men or women, as a cognizable group, from jury service solely because of their sex.

Although I realize that most jurisdictions refuse to hold that the *Batson* principle is applicable to gender-based strikes, and although I realize that there is apparent disagreement among the United States courts of appeals on the question, I, nevertheless, believe that my dissenting views in *Ex parte Dysart*, 581 So.2d 545 (Ala. 1991), are sound, and that when the issue is squarely presented to the United States Supreme Court that Court will expand the *Batson* principle to apply to gender-based strikes in instances where men or women, as a cognizable group, are excluded from jury service solely because of their sex.

Justice Maddox ends his opinion with an interesting twist that should guide the criminal practitioner, as follows:

Alabama's policy regarding the right of a person not to be excluded from jury service is plain: 'A citizen shall not be excluded from jury service in this state on account of race, color, religion, *sex*, national origin or economic status. *Ala. Code* 1975, §12-16-56.

Defendant's right to interview State's witnesses

Nichols v. State, 26 ABR 3470 (May 22, 1991). This case presents the issue of whether the defendant was denied a fair trial by what he claims effectively amounted to a denial of the right to discuss the case, prior to trial, with the State's witnesses.

Defendant was indicted for the offense of murder during a robbery in the first degree made capital by §13A-5-40(2), *Code of Alabama* (1975). Prior to trial, the district attorney's office sent out to all prospective State witnesses a letter stating in pertinent part:

Between now and the time of trial, you may be contacted by an attorney representing the defendant. He may ask you for an oral statement, written statements, or tape-recorded statement. Should this occur, you may refuse to discuss the case with him if you wish. Should you decide to discuss the case, you may require that someone from the District Attorney's Office be present or that any discussion take place in the District Attorney's Office. If you decide to discuss the case, we request that you do so with a member of the District Attorney's staff present.

On the day of trial, defendant filed a motion for an order requiring witnesses to discuss the case with defense counsel and for a continuance. The trial court overruled the motion as being untimely. The jury returned a guilty verdict. The court of criminal appeals reversed the conviction, holding that the district attorney's letter prevented Nichols' attorney from attempting to question a witness prior to trial.

The supreme court, in an opinion authored by Justice Kennedy, reversed the court of criminal appeals and held that the letter on its face did not interfere with the defendant's right to a fair trial. Second, Justice Kennedy observed that defendant failed to prove any specific demonstrable prejudice resulting from his lawyer's not talking with a witness prior to trial.

The supreme court's decision began with the black letter principle:

A prosecutor may not prevent a witness from giving a statement to a defense attorney. Any defendant may attempt to question a witness prior to trial, absent any intimidating forces. However, a witness has the right to refuse to be interviewed. [See *United States v. Rice, 550 F.2d* 1364, 1374 (5th Cir.), *cert. denied*, 434 U.S. 954 (1977)] [A defendant's right to access to a witness exists co-equally with the witness's right to refuse to say anything.]

In *United States v. Pepe*, 747 F.2d 632, 654-55 (11th Cir. 1984), the Eleventh Circuit held that "appellants seeking a reversal based on prosecutorially impaired access to witnesses must allege specific demonstrable prejudice in order to set forth a constitutional claim." Mere hypothetical or general prejudice will not suffice. See also *United States v. Clemones*, 577 F.2d 1247 (5th Cir. 1978).

In reversing the court of criminal appeals, Justice Kennedy's decision rests on two prongs: First, he did not believe that the letter, on its face, interfered with Nichols' right to a fair trial and amounted simply to a request that a member of his office be present during any interview. Second, the defendant failed to prove any specific demonstrable prejudice resulted from his lawyer's inability to talk with the witness prior to trial.

Double jeopardy—Blockbuster revisited

Smith v. State, 26 ABR 2706 (April 17, 1992). The Supreme Court of Alabama granted certiorari to review the court of criminal appeals' decision which held that a defendant who had previously been convicted of criminal mischief, §13A-7-22, for destroying school property, could subsequently be tried and convicted of burglary in the third degree, §13A-7-7, for unlawfully entering or remaining in a school building *with intent to destroy school property*. The supreme court, in an opinion authored by Justice Maddox, reversed on the ground that the defendant's right against being twice placed in jeopardy was violated.

The undisputed evidence demonstrated that the conduct giving rise to both offenses arose out of an incident at the East Three Notch Elementary School in Andalusia. The conduct that made the basis of the criminal mischief charge, according to the majority opinion, "was [the defendant's] alleged destruction of the glass panels in the main entrance, the principal's door, a secretary's door, and a classroom door and [defendant's] alleged use of a concrete block on the school property." The conduct that made the basis of the burglary charge "was [the defendant's] alleged action in unlawfully entering or remaining in the school with the intent to destroy school property."

The supreme court's decision adopts Judges Bowen and Taylor's dissent which was based upon the supreme court's decision in *Grady v. Corbin*, 495 U.S. 508 (1990).

In *Grady, supra*, the supreme court held:

To determine whether a subsequent prosecution is barred by the Double Jeopardy Clause, a court must first apply the traditional *Blockburger [v. United States*, 284 U.S. 299 (1932)] test. If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred. *Brown [v. Ohio*, 432 U.S. 161 (1977)].

[However], a subsequent prosecution must do more than merely survive the *Blockburger* test. As we suggested in *[Illinois v.] Vitale*, [447 U.S. 410 (1980)], the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an 'actual evidence' or 'same evidence' test. The critical inquiry is what the State will prove, not the evidence the State will use to prove that conduct.

In his dissent, Judge Bowen critically noted:

The inquiry mandated by *Grady* is whether the State, in order 'to establish an essential element of an offense charged in [the second] prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted....'

Here, the first prosecution was for criminal mischief—[intentionally] destroying school property. The second prosecution was for burglary—unlawfully entering or remaining *with the intent to destroy school property*. Thus, to establish the intent to destroy school property, an essential element of burglary and the offense charged in the second prosecution, the State proved conduct ([intentionally] destroying the property) which constituted the offense of criminal mischief for which the defendant had already been prosecuted.

In agreeing with Judge Bowen's dissent, the supreme court simply concluded that the defendant was twice put in jeopardy, thereby mandating reversal.

BANKRUPTCY

Substantive consolidation of general partnership and two general partners

Federal Deposit Insurance Corp. v. Colonial Realty Co., 966 F.2d 57 (2nd Cir. June 1, 1992). In a case of first impression, the Second Circuit held that there was nothing fundamentally wrong in combining assets and liabilities of the general partners with that of the partnership, each of the estates being in Chapter 7 bankruptcy. The court said that Bankruptcy Rule 1015 (b) autho-

rizes such action—that the propriety of such depends on material considerations affecting the substantive rights of creditors of the separate estates. The court rejected the argument of the FDIC that substantive consolidation is equated with the equitable doctrine of piercing the corporate veil, and, thus, should not be invoked to merge estates of individuals. It concluded its opinion by stating that the sole aim is fairness to all creditors, and that each case must be determined on its own facts.

Failure to list all assets as basis for denial of discharge

In the matter of Ronald R. Beaubouref, 966 F.2d 174, (5th Cir. July 16, 1992). The debtor failed to list ownership of shares of stock in a business corporation in which he owned approximately 50 percent of the stock. The complaint (filed by debtor's brother) to deny discharge did not allege the concealment, and the debtor claimed "surprise." The court, citing F.R.C.P. 15(b), rejected this argument, holding no prejudice resulted to the debtor, especially since no continuance was requested. Insofar as the denial of discharge is concerned, the court said that the plaintiff had met the burden of §727(a)(4)(a) since the schedules omitted all references to the debtor's ownership and participation in the corporation, and although a discharge should not be denied because of an honest mistake in omitting items from the schedules, the facts here indicated "reckless indifference to the truth and, therefore, the requisite intent to deceive." The court also said it made no difference that the stock may have been worthless, quoting the Eleventh Circuit case of *In re Chalik*, 748 F.2d 616, 617 (1984) for its autority on this point.

Comment: This case should act as a warning to lawyers in preparing the schedules and statement of affairs, that the client should be interviewed carefully to ascertain that the information is correct. Conceivably, malpractice could be involved by not acquainting the debtor fully with the importance of furnishing full and correct information.

Bank's administrative freeze of account

Goodrich Employee's Federal Credit Union v. Fred Patterson, 23 B.C.D. 407, ____F.2d____, (11th Cir. July 29, 1992). This case held that a credit union had violated §362 automatic stay when it placed an administrative freeze on the debtors' account when the debtors filed for bankruptcy. The debtors were current on their account when they filed but the credit union, upon receiving the information, closed the account and would not allow withdrawals nor would it honor checks drawn upon the account. The Eleventh Circuit began its opinion by stating this was *an issue of first impression* as to whether the freezing of a bank account, the filing of a proof of claim showing a loan balance reduced by the savings account balance, and the suspension of services may be violations of the automatic stay of §362(a), and of the anti-discrimination provisions of §525.

The appellate court affirmed decisions of the Bankruptcy Court and the District Court in holding these constituted violations. The defense of the credit union was that it had no other adequate protection to preserve its secured interest in the debtors' account and that the debtors had no equity in the accounts based upon common law, contractual, and statutory liens. In its opinion concerning the credit union's claim to a right of set off, the court stated the credit union did not have a valid right of set off when it froze the accounts as there was no mutuality of obligations under Alabama law. The debtors were not delinquent on the loan when the credit union froze the account. The court went further, stating that if there had been a valid right of set-off, freezing the account was contrary to the policy of the Bankruptcy Code which does not provide for the self-help. It stated that the correct procedure would have been not to freeze the account but file an ex-parte motion under §362(f) or §362(e) and pay the money into the registry of the Bankruptcy Court. The Eleventh Circuit then determined that the district court was correct in finding violations of subsections 3, 4 and 7 of §362(a) of the Bankruptcy Code, that the acts of the credit union constituted an act to obtain possession of property of estate, an act to attempt to enforce a lien against property of the estate, and an act to recover a claim against the debtor that arose before the commencement of the case. The Eleventh Circuit also agreed with the Bankruptcy Court that there had been a violation of subsection (7) of §362(a) because the credit union had filed a proof of claim asserting a set-off. Finally, the court, in holding a violation of §525, held that the debtors were considered as employees of the credit union and, thus, there was discrimination against them solely on the basis of their bankruptcy filing. Comment: This case is probably going to cause a great deal of restraint upon lending institutions. At this writing, it is not known whether efforts will be made to take the case to the U.S. Supreme Court. Probably, conflict in the circuits can be shown.

Eleventh Circuit allows administrative priority threshold claim against debtor for payment of civil penalties imposed as punishment for environmental violations

Alabama Surface Mining Commission v. N.P. Mining Co., Inc., 963 F.2d 1449 (11th Cir. June 23, 1992). In a lengthy opinion which reviewed U.S. Supreme Court law, both pre-1978 Code and post-Code, it was held that penalties incurred by the debtor while operating under Chapter 11, for its first year as debtor-in-possession and then with a trustee, constituted an administrative expense. The administrative expense priority for fines totalled over $2,000,000 and, thus, if allowed, would prevent any distribution to unsecured creditors. The Eleventh Circuit reviewed the matter as purely one of law, not factual, stating that this was a threshold question which never had been decided in any circuit previously. It found that punitive civil penalties assessed for post-petition mining activities do qualify as administrative expense under Title 11, §503(b)(1)(A), basing its decision on federal policy found in 28 U.S.C. §959(b) requiring trustees to operate an estate in compliance with state law. It did limit the administrative priority to the penalties incurred as a consequence of mining operations subsequent to the filing of the petition and while the business was still operating, but not to any assessed for violations which occurred prior to the filing of the petition. ■

• M·E·M·O·R·I·A·L·S •

Frank J. Martin

Frank J. Martin, 87, a Gadsden attorney and former chairman of the Gadsden City Board of Education, died April 30, 1992.

Martin was the senior partner with the firm of Inzer, Martin, Suttle & Inzer, now Inzer, Stivender, Haney & Johnson, and retired from full-time practice in 1970.

Martin served as a member of the Board of Education from 1947-1962 and was chairman from 1959-1962.

He was a member of the board of directors of the American National Bank (now AmSouth) and of the Life Insurance Company of Alabama.

He was also a trustee of the International Endowment Foundation of Jacksonville State University.

Martin was a member of the Kiwanis Club, the Gadsden Country Club and the First United Methodist Church.

Martin attended the University of Alabama and the University of Alabama School of Law.

He volunteered for military service during World War II and was commissioned a captain in the Judge Advocate General's Department of the U.S. Army. He served in the Pacific, attaining the rank of lieutenant colonel, and earned the Army Commendation Ribbon.

Martin was a member of the Etowah County Bar Association, the Alabama State Bar and the American Bar Association and was elected a fellow of the American College of Trial Lawyers in 1956.

Martin is survived by his wife, Clara Jackson Martin; his daughter, Ann Rutland, of Birmingham; his son, Frank J. Martin, Jr., of Alexandria, Virginia; seven grandchildren; and a great-grandson.

The family suggests that memorials may be sent to the Frank Jackson Martin Scholarship Fund at the University of Alabama School of Law.

— Reprinted in part from
The Gadsden Times
April 30, 1992 edition

William Whyte Bedford
Birmingham
Admitted: 1966
Died: June 14, 1992

James Ledbetter Beech, Jr.
Jasper
Admitted: 1948
Died: September 13, 1992

Rowan S. Bone
Gadsden
Admitted: 1950
Died: September 17, 1992

Allan Roff Camero
Mobile
Admitted: 1935
Died: July 1, 1992

John Ed Campbell
Alexandria, Virginia
Admitted: 1945
Died: October 14, 1991

Stephen Beasley Coleman
Mountain Brook
Admitted: 1927
Died: September 7, 1992

Joseph Mathes Scott Dawson
Scottsboro
Admitted: 1933
Died: May 19, 1992

Richard Vaiden Evans, Jr.
Birmingham
Admitted: 1941
Died: July 2, 1992

Marvin Williams Goodwyn, Sr.
Newport Beach, California
Admitted: 1940
Died: December 23, 1991

Robert B. Harwood, Sr.
Tuscaloosa
Admitted: 1926
Died: October 22, 1991

William Christian Hines
Brewton
Admitted: 1938
Died: July 21, 1991

Greer Marechal Murphy
Mobile
Admitted: 1939
Died: December 31, 1991

Frank Blanchard Parsons
Fairfield
Admitted: 1942
Died: August 3, 1992

Julius Seth Swann, Jr.
Gadsden
Admitted: 1967
Died: September 4, 1992

Julian Leon Touro
Palm Beach, Florida
Admitted: 1933
Died: August 28, 1991

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  Salary is commensurate with experience. State Farm provides a comprehensive benefits package which includes profit sharing, company-funded retirement plan and cost of living salary adjustments.

  Please respond only in writing to: **State Farm Insurance Companies, Attn: Personnel Dept., P.O. Box 2661, Birmingham, Alabama 35297.**
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December 1, 1992 to: **Legal Services Corporation of Alabama, Inc., 802 Chestnut Street, Gadsden, Alabama 35901, Attn: Ruth S. Ezell, managing attorney.** Legal Services Corporation of Alabama, Inc. is an equal opportunity employer.

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NOTICE

EDWARD LEWIS HOHN,

attorney at law, whose whereabouts are unknown, must answer the Alabama State Bar's Rule 25(a) Petition No. 92-03 within 28 days of November 15, 1992 or, thereafter, the Rule 25(a) Petition contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in this matter before the Disciplinary Board of the Alabama State Bar.

Disciplinary Board
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