

# CALENDAR CALL

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA



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# CALENDAR CALL

"Georgia's Largest Law Firm"

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

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By Adam Malone  
*Section Chair*



Since the Fall 2008 edition of Calendar Call, our nation has changed. Campaign season ended, ballots were cast, and our nation celebrated the swearing in of Barack Obama as our 44th president. While our nation faces economic challenges unlike any before, this historic inauguration stands as a symbol of hope and confirmation of the reality of the American Dream for many. A lawyer is once again in the White House and lawyers must solve our nations problems.

The "specialty" of the general practitioner is problem solving. There are more problems now than ever. Many of these problems have never before been experienced and as a result, tend to raise more questions than answers. This is new territory, never before explored, with no map or GPS guidance available. A solid foundation in law and a keen awareness of Constitutional protections must serve as the compass, sextant, and guide for those of us who undertake to pioneer this new frontier.

This edition of Calendar Call is devoted to this mission. We are facing more foreclosures than ever before.

Investment in banks and real estate used to be considered safe for the conservative investor. Subprime lending, unscrupulous speculating, and greed on Wall Street combined with many other factors to create a perfect storm – a perfect storm which has devastated personal finances, business finances, and families. Foreclosures are at an all time high. Bankruptcies are soaring. Divorce rates are climbing.

These problems must be solved. Washington can only do so much. The general practitioner is on the front line, standing in the wilderness with the devastated business and broken family. This issue is devoted to those on the front lines. In this issue, we hope to inform you of Washington's plan and we hope to arm you with the practical information you need to serve those facing foreclosure, bankruptcy, and divorce.

While you are serving those suffering from these problems, we are mindful that as a general practitioner, you are also a small business with employees to manage. In order to help you and your staff through the challenges you face as a small business, the General Practice & Trial Section

and The Law Practice Management Department of the State Bar have organized a program to help. The program is broken into five segments, called Law Staff I through V. The program begins in April at the Bar Center and will cover Ethics, Professionalism and Confidentiality; Administrative Systems and Technology; Bookkeeping and Accounting; Conflict Management – Dealing with the Difficult Client, Bosses, and Co-Workers; and Managing Stress – Organization and Time Management. Paralegal hours are available with these programs and we encourage you to send your staff members. They will receive a certificate upon completion of each program suitable for framing. The program will be repeated in Tifton and Rome. We are also planning a program in Augusta. Please stay tuned and check out our web page for more at [www.gabar.org](http://www.gabar.org).

# The Homeowner Affordability and Stability Plan: A Work in Progress

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On February 18, 2009, President Obama unveiled the Homeowner Affordability and Stability Plan, a new federal program that will provide assistance to lenders and homeowners in preventing foreclosures. The Plan consists of two "Making Home Affordable" programs which are intended to make mortgages more affordable for homeowners who are already behind on payments, as well as for those who are in imminent danger of default. The Department of the Treasury released official guidelines for the Home Affordable Modification Program on March 4, 2009. Likewise, Fannie Mae and Freddie Mac each separately introduced guidelines to the Home Affordable Refinance Program. Despite the volume of material that has been promulgated, many areas of the programs may be subject to additional regulatory and legislative action. Attorneys should be aware of the effect of the programs on foreclosure proceedings, mortgages that are the subject of litigation, and the treatment of mortgages in bankruptcy proceedings, as well as the possible expansion of these effects due to subsequent litigation.

Further, lender organizations may seek legislation to limit the liability servicers have to investors. During the initial process of implementing the programs, borrower clients may need guidance throughout the refinance and modification processes, lender clients will likely need assistance in implementation and compliance, and servicers of loans will require advice on contractual obligations under pooling service agreements or investor service agreements.

## **Home Affordable Refinance Program**

The first Making Home Affordable program, the Home Affordable Refinance Program, only applies to homeowners with loans owned by Fannie Mae or Freddie Mac. The purpose of this program is to provide borrowers respite from adjustable rate mortgages and give homeowners a viable refinancing option in spite of depressed home values and the lack of credit availability from private lenders. The guidelines issued by Fannie Mae and Freddie Mac differ in some respects, but in order to qualify for

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*The Department of the Treasury released official guidelines for the Home Affordable Modification Program on March 4, 2009. Likewise, Fannie Mae and Freddie Mac each separately introduced guidelines to the Home Affordable Refinance Program.*

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## **The Homeowner Affordability and Stability Plan:**

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either program, the borrower's loan to value (LTV) ratio may not exceed 105%, the collateral for the mortgage must be the borrower's primary residence and the borrower must be current on mortgage payments. For purposes of the program, "current" means that the borrower has not been more than thirty days late on a mortgage payment in the preceding twelve months (or, in the event of a newer loan, since the date on the mortgage note). Additionally, any junior liens on the property must be subordinated to the new mortgage.

There are several possible benefits to borrowers refinancing under one of these programs. Each program offers relaxed mortgage insurance requirements, and the refinance should result in reduced monthly payments, a more stable mortgage product (e.g., replacing an adjustable rate mortgage with a fixed-rate mortgage), or both. The Freddie Mac Home Affordable Refinance Program went into effect on April 1, 2009. The Fannie Mae Home Affordable Refinance Program went into effect on April 1, 2009 and will be available for lenders using Desktop Underwriter on or after April 4, 2009. The Home Affordable Refinance Program ends in June 2010.

### **Home Affordable Modification Program**

The other Making Home Affordable program, the Home Affordable Modification Program, is a voluntary program that provides incentives for private lenders who choose to participate. Be advised, however, that while the program remains voluntary for lenders generally, including those lenders who have received bail-out funds in the past, any lender that receives financial assistance in the future under the Financial Stability Plan will be *required* to implement the program. This program is open to all borrowers who have a participating lender and qualify for a modification. For a borrower to

qualify, the collateral must be the primary residence of the borrower and an owner-occupied, single family 1-4 unit property, and the collateral may not be investor-owned, vacant or condemned. In addition, first lien loans on 1 unit properties must have an unpaid balance equal to or less than \$729,750, and the loan must have originated on or before January 1, 2009. Finally, the borrower must provide documentation of income and represent that they have insufficient liquid assets to continue making monthly payments. Note that a borrower in bankruptcy may still be considered eligible for a modification, and borrowers in litigation regarding their existing mortgage may still qualify for modification without waiving their legal rights. Further, pending foreclosure actions will be temporarily suspended during the trial period of a modification (generally 90 days) or, in the event the borrower is not eligible for modification, while the lender is seeking foreclosure alternatives with the borrower. The foreclosure will resume if the borrower does not obtain a modification or if they are unsuccessful with other foreclosure alternatives.

The goal of the Home Affordable Modification Program is to reduce the borrower's front-end debt to income (DTI) ratio to approximately 31%. Front-end DTI is the ratio of PITIA (principal, interest, taxes, insurance and association fees) to monthly gross income. Lenders are responsible for lowering the borrowers DTI to 38%. The program will then match further reductions in monthly payments dollar-for-dollar to reach a front-end DTI of 31%. The new monthly payments will be in effect for five years, and at the end of the five year period, the interest rate on the loan will increase 1% per year until it equals the capped interest rate (determined at the time of the loan modification). Lenders will also calculate the back-end DTI

for the borrower, and if the back-end ratio is greater than or equal to 55% for a borrower who otherwise qualifies for a modification, the borrower must agree to obtain credit counseling from a HUD-approved counselor. Back-end DTI is the ratio of the borrower's total monthly debt (i.e., PITIA, mortgage insurance, car payments, installment payments towards debt, alimony, etc.) to monthly gross income.

Each borrower will be screened to determine if he has had a change in circumstances causing financial hardship that will make him unable to keep the mortgage current. The lender will then perform a standard net present value (NPV) test on each loan that is in imminent default or at least 60 days delinquent to determine if a modification is appropriate. If the NPV test is positive, the lender is required to offer a modification to the borrower. In order to reach the 31% threshold, lenders must first reduce the interest rate (subject to a 2% floor), then (if necessary) the lender should increase the term of the loan up to 40 years, and finally (if necessary), forbear principal, the amount of which will be due at maturity in the form of a balloon payment (provided that the modified balance of the loan may not be lower than the value of the property). Lenders are not required to reduce/forgive principal, but may choose to do so in order to reach the required ratio for modification. If the NPV test is negative, modification is optional, but if a modification is not pursued, the lender must nonetheless seek alternatives to foreclosure (e.g., short sale, deed in lieu of foreclosure, etc.).

If a lender or loan servicer chooses to participate in the program, it must enter into a program agreement with the Department of Treasury's financial agent by December 31, 2009. Note that if a lender or servicer chooses to participate, it must consider all eligible loans under the program guidelines

unless any applicable pooling servicing agreement or investor servicing agreement prohibits doing so. Further, participating servicers must use reasonable efforts to obtain waivers or approvals from any necessary parties. Servicers that choose to participate in this program will receive incentives for modifying loans, as well as additional incentives each year if the loan remains current (up to \$1,000 per year for up to three years). In addition, they may receive a bonus incentive if the loan is modified while the borrower is still current on the existing mortgage. Borrowers will also receive incentives for keeping their loan current (up to \$1,000 each year for up to five years, as well), and these incentives will be directly applied to the principal balance on the loan. The Home Affordable Modification Program is effective immediately, and new borrowers will be accepted into this program until December 31, 2012.

### Future Implications

The Department of the Treasury's program description of the Making Home Affordable Program includes a plan for the Obama administration to seek legislation that would alter the bankruptcy code with respect to mortgages. The program contemplates the possibility of judicial modification of primary residence mortgages, which would allow a bankruptcy judge to "cram-down" the outstanding principal balance of the debtor's mortgage to the current fair market value of the home.

As previously mentioned, the program requires participating lenders to consider all eligible loans under the program guidelines unless the applicable pooling servicing agreement or investor servicing agreement prohibits doing so. In the event an agreement prohibits modification, participating lenders must use reasonable efforts to obtain waivers or approvals from

any necessary parties. Servicers of privately securitized residential loans are generally required to consider the benefits to investors as a whole, and pool servicing agreements and/or investor servicing agreements may limit a lenders ability to modify such loans. Servicers are currently acting to limit their liability with respect to modifications under the new guidelines, which may include seeking approval from ratings agencies, vetting the tax implications of the modification process with respect to investment conduits, or seeking legislation or regulation regarding both the ability of servicers to modify securitized loans and the need for advance funding for servicers participating in the program.

### Conclusion

Depending on the number of private lenders that participate and whether any legislation regarding bankruptcy or servicer liability is passed in the coming months, these programs may have important implications for both lender and borrower clients. The programs are currently limited in application due to uncertainty of how many lenders will take part in the program; however, it is likely that a number of lenders will require additional TARP assistance and will be required to participate. Thus, it is important for practicing attorneys to familiarize themselves with the guidelines for both of these programs, because both borrowers and lenders will likely require legal assistance. As the foregoing programs may provide relief for clients in foreclosure, bankruptcy or litigation over a mortgage, attorneys should frequently check for lender participation in the Home Affordability Modification Program. A list of participating lenders is expected to be posted at [www.makinghomeaffordable.gov](http://www.makinghomeaffordable.gov) as lenders enter into program agreements with the Department of the Treasury.

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Letter from the American Bankers Association to the Director of the Federal Housing Finance Agency dated February 6, 2009, available at: <http://www.aba.com/NR/rdonlyres/6322717B-69AC-11D5-AB86-00508B95258D/58209/2609ForeclosureEdLockhartletter.pdf>



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# Divorce in Times of Recession and Declining Valuation

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*Neal W. Dickert recently returned to the law firm of Hull, Towill, Norman, Barrett & Salley on January 1, 2008, after serving eleven years as a Superior Court Judge with the Augusta Judicial Circuit. Mr. Dickert concentrates his practice in the areas of general civil and commercial litigation, mediation and arbitration, and appellate practice. Before his election to the Superior Court bench, Mr. Dickert practiced with the law firm from 1974 to December, 1996. Mr. Dickert is the author of the Georgia Handbook on Foundations and Objections, published by Thomson-Reuters.*

No one can seriously doubt that the present economic recession impacts domestic relations practice. There can be a debate, however, as to how and in what fashion domestic issues are affected. As any judge presiding over domestic disputes can attest, financial issues are at the heart of many of these cases. While most members of the public would probably expect infidelity to be the leading cause of divorce, my experience as a trial judge left me with the impression that financial disputes between spouses, economic stress over financial control of the household, and other related questions were probably the most common cause of marriage breakups. Recent surveys and commentaries have suggested that divorce filings are down as a result of the present recession. It is certainly possible that hard times bring people together and cause couples to focus on issues other than economics. Some commentators have also suggested that the high financial cost of divorce also causes people to put off or delay filing. Nevertheless, no one can doubt certain areas of this practice will obviously increase and other areas bring about interesting legal questions.

Most assuredly child support recovery filings (the bane of most trial judges) will likely increase. One would also expect filings for general contempt caused by the failure to comply with the economic obligations of a divorce decree to increase. The substantial increase in foreclosures has multiple effects. Not only will someone lose a house,

but an innocent spouse may have unintended damage from impaired credit. As an example, most divorce decrees award the marital home to one party. That party also is usually given the obligation to make all the mortgage payments. If the property goes into foreclosure and the "innocent spouse" is still legally obligated on the loan, that person's credit will most assuredly be impacted in a negative way by the foreclosure. Other than the right to explain this negative information under the Fair Credit Reporting Act and a possible contempt against the frequently insolvent former spouse, this person will have no other recourse. In representing parties in a divorce, counsel should obviously make every effort to avoid this eventual problem by imposing at least a "best efforts" duty on the spouse receiving the property to refinance the debt to remove the other spouse from the obligation. Accomplishing that may be a real challenge in today's economic climate.

Another interesting area of concern relates to declining real and personal property valuations during the marriage. One such area relates to retirement and/or 401(k) plans. When I heard cases involving these plans, it was very common to have one or both spouses be vested in a plan that predated the marriage. In easily 90% of the cases I heard where this issue arose, lawyers would present this question in a very simple and straightforward manner. The attorneys would ascertain the value of the retirement account at the time of

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## Divorce in Times of Recession

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the marriage, present evidence as to the value of the account at the time of the divorce (which, in my experience, almost always involved increases in valuations) and would ask me to make an equitable division of the difference between the two numbers. This process, although simple and easy to compute, is clearly wrong, and in volatile markets can lead to significant disparity from the correct approach in the ultimate decision on equitable division. It is clear, under the rationale of the *Stokes v. Stokes*, 246 Ga. 765, 273 S.E.2d 169 (1980), *Thomas v. Thomas*, 259 Ga. 73, 377 S.E.2d 666 (1989), and other cases dealing with the division of property that is partially marital and partially separate, that the pre-marital or separate property should include not only the value of that property at the time of the marriage, but some reasonable and fair return on that property during the marriage. In prosperous times as these accounts grow, the spouse that brings this asset into the marriage is penalized by the approach I just described. Assets in a 401(k) account that a spouse brings to the marriage will have been held by that person for a longer period of time than the account assets acquired during the marriage. Thus, the return on that premarital investment in real dollar terms will be higher than the return on the investment made after the marriage. For the purpose of explanation, let's assume the value of a spouse's plan at the time of the marriage is \$100,000. After the marriage, that spouse contributes \$5,000 per year in marital funds into the plan for five years. At that time, the parties file for divorce. If the average return after the marriage is five (5%) percent per annum on the entire account, the plan would be worth \$156,689 at the time of the divorce.

Using the approach of simply taking the difference between the value at the time of the marriage (\$100,000) and the value at the time of the divorce (\$156,689), the increase of \$56,689 would be marital. By calculating a five (5%) percent return on the \$100,000 pre-marital amount and post-marital contribution separately would result in a value of \$127,628.15 for the pre-marital value, as opposed to a value of \$29,061 for the marital component. Thus, there is a difference of \$27,638 in the two approaches. In an environment like today where values have been falling, it is conceivable, or even likely, that the value of the account at the time of the marriage may be greater than the value at the time of the divorce. Using the approach of simply comparing the two valuations would result in no amount of the 401(k) account being divided as marital property. This would greatly benefit the spouse who entered the marriage with the prior 401(k) and penalize the other spouse. It would also be wrong. If contributions were being made during the marriage, this sum (even if the return were negative) would clearly result in a marital component of this asset. It is important to a client in these cases to make sure the correct information is presented to the court. It is unlikely that a trial judge will be able to make a correct assessment of these values unless appropriate information is presented. If you simply take the difference in valuation from the value at the time of the divorce and compare this to the value at the time of the marriage, the judge has no basis to calculate the allocation correctly. There is information available on the internet that would track stock quotes, give charts and returns on funds, stocks, EFT's, etc. Particularly in these times with

volatile markets, it is important to your clients that the appropriate information be presented to the trial court to allow a fair division of these retirement funds.

Another interesting point occurs as a result of declining real estate values. Parties frequently find themselves "upside down" in a marital home, and in many cases the only option for the court would be to allow the foreclosure and resulting loss of the house to occur. In other situations, the courts have to address equitable division of property brought into the marriage by one party. This set of facts involves the famous and somewhat complex "source of funds" rule set forth in *Thomas v. Thomas*, 259 Ga. 73, 377 S.E.2d 666 (1989). All of the cases of which I am aware that apply this rule have done so in the context of rising real estate values, as opposed to real estate values that fall during the marriage. The basic facts of *Thomas* involved real property purchased prior to the marriage by the wife, the value of which increased by \$90,905 during the marriage. The court, in applying the rule, considered the down payment made by the wife plus the debt reduction during the marriage as the "total equity paid." The court then calculated the ratio of the amount of debt reduction due from marital funds to the total equity paid and came out with a number of seven (7%) percent. The court then applied that percentage to the increase in valuation of the property during the marriage and added the debt reduction from marital funds, to reach a marital component subject to equitable division. In *Thomas*, that number totaled \$12,756.

If instead of an increase in property value during the marriage, what would happen if the equity declines? One might argue that there is no marital component to divide

and the entire property would go to the spouse who purchased the property before the marriage. A review of the application of the source of funds rule applied in the case of *Hubby v. Hubby*, 274 Ga. 525, 556 S.E. 2d 127 (2001), would lead, however, to a different conclusion. In *Hubby*, the house was purchased by the husband before the marriage for \$145,500. He made \$80,500 as a down payment on the house and financed \$65,000. Marital funds were used to pay down the mortgage by \$1,983 and \$2,585 respectively from the initial financing and a refinancing. The house was worth \$183,000 at the time of the divorce. While this number is not given in the opinion, one can extrapolate from the formula used that the house increased by \$32,017 during

the marriage. The court calculated a percentage relationship between the down payment (\$80,500) to the debt reduction during the marriage (\$4,568) and concluded these percentages to be 94.6% for the down payment and 5.4% for the marital debt reduction. The court then applied that percentage, not to the increase in the valuation of the house during the marriage, but to a term it defined as the "net equity," which according to the court represented the husband's down payment, the mortgage reduction during the marriage, plus the market appreciation during the marriage. This sum totaled \$117,085. The court thus found that 5.4% of this number, or \$6,322, to be marital. If, hypothetically, this property had reduced in value by

\$10,000 during the marriage, an application of the formula used in *Hubby* would still result in a marital component to the property subject to equitable division, even though the property declined in value. For example, assuming the same \$80,500 payment, debt reduction of \$4,568 and a \$10,000 reduction in value during the marriage (instead of a \$32,017 increase as occurred in *Hubby*), "net equity" would then be \$75,068. Applying the same percentage of 5.4% would lead to a marital component of \$4,053.67, that would be subject to equitable division. While this amount is less than the debt reduction during the marriage, it still represents recognition of a marital component and seems an appropriate application of the rule of *Thomas*.

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# Georgia Real Property Foreclosure

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*Mark Coleman Walker was born in Tallahassee, Florida on October 14, 1960. He received a B.A. in Political Science in 1983 from Valdosta State College where he was also a member of Omicron Delta Kappa honor society and President of Sigma Alpha Epsilon. He received his J.D. in 1987 from Mercer University.*

*Mark began his career with Davis and Neel in Atlanta, specializing in bankruptcy, foreclosure and lender liability law. He later became a partner with the firm, which became Davis and Walker, and in 1994 started his own firm. In 1998 he and his wife, law school classmate, Mary House, began practicing together as the law firm of Walker & House in Stockbridge, Georgia which merged with Smith, Welch & Brittain in 2006. Mark is a member of both the Georgia and Henry County Bar Associations.*

Real Property foreclosure law in Georgia is generally governed by two (2) code sections. O.C.G.A § 44-14-180 is the authority with regard to judicial foreclosure sales; however, judicial foreclosure sales these days are relatively uncommon in the Georgia foreclosure setting. O.C.G.A § 44-14-162, et seq., and Georgia case law directs how a non-judicial foreclosure should be conducted. Non-judicial foreclosures are, by far, what most often occurs in Georgia today.

On May 13, 2008 Governor Perdue executed Senate Bill 531 and as of that date it became law. This Bill requires that any security instrument or assignment vesting the secured creditor with title to the security instrument shall have to be filed prior to the time of sale with the Clerk of Superior Court in the County wherein the property lies. Also, notice provisions which are required under the previous code now also have to include the name, address and telephone number of the individual or entity who has authority to negotiate, amend or modify all the terms of the mortgage with the borrower.

## I. Beginning the Foreclosure Process for the Creditor.

There are several things that are needed from the client prior to beginning the foreclosure process. These materials will allow the attorney to determine the actual debt, the security, the amount past

due and any other matters that may be needed during the foreclosure.

The client should provide you with a copy of the Promissory Note which has been executed by the borrower. Also, the client needs to provide to you the Security Instrument which generally is either a Security Deed, Deed to Secure Debt or a Security Agreement. If the Security Instrument has been purchased from another lender, the client also needs to provide to you copies of the assignments to confirm that the client is actually the current holder of the Security Instrument.

The client also should provide to you a copy of the title insurance policy, assuming one is available, so if there is an issue with regard to the chain of title or superior deeds you will have it available to (hopefully) have them resolved with the title insurance company. Sometimes, title insurance policies have not been issued, or alternatively, the client cannot locate them, and thus that may be something that has to be obtained later in the process.

The client should also provide to you a payment history of the loan in case there is a dispute with regard to payments from the borrower. The client should also provide to you a principal balance of the loan as well as the current past due amount which is sometimes called the "arrearage". Another nice thing to receive from the client in the beginning steps is a "reinstatement amount", which is the amount that would bring the loan current and

stop the foreclosure, assuming the client would rather have the loan current as opposed to foreclosing the property. On the reinstatement amount, you need to add your fees and expenses so a full reinstatement amount can be determined for your client. Also, depending on when the reinstatement amount was received during the foreclosure process, it is important to confirm through what date the reinstatement amount is good through, i.e. to make sure no other payments have come due during the foreclosure process.

## II. Reviewing the Documents to Catch Problems Pre- Foreclosure.

Assuming you have received all of the materials from the client which are necessary to proceed with foreclosure, it is now time to review the materials to confirm (1) that all the parties are proper, (2) that there is in fact a default, (3) that the client is currently the proper holder of the Note, (4) that the non-judicial foreclosure language is, in fact, in the body of the security instrument and (5) to determine whether or not the loan is some type of a government loan wherein (6) the governmental agency has to receive some kind of notice and, in fact, (7) that the governmental agency has received the same.

### A. The Promissory Note.

Upon receipt of the Promissory Note, it is important to review the Note to confirm that it is a valid Promissory Note and that the parties are the appropriate parties. If you are dealing with a Note that has been assigned from another lending institution, your client would step into the shoes of that lending institution and it would be a proper Note. Also, you need to review the language concerning the maturity to confirm that this loan has not matured, because if it has matured, any type of reinstatement of this loan would not be appropriate.

The Note also needs to be reviewed to confirm the default provisions which may require the client or the attorney to give some type of notice of default prior to proceeding with the foreclosure process.

### B. The Security Instrument.

Upon reviewing the Security Instrument, you need to confirm that the parties are again the correct parties. As indicated in the above paragraph, if this was a loan which was actually done by a prior mortgage holder, you need to confirm you have the correct assignments vesting the property into your client.

The next thing you need to do is check the security instrument with regard to any language in the instrument concerning any notice of default which is required to be given to the borrower prior to foreclosure. Generally, most security instruments have some type of language with regard to default notices to the borrower. Some are a ten day notice, which is required by certified mail, some are thirty day notices, which are generally not required to be by certified mail, but which will substantially slow down the foreclosure process because of the thirty day time frame. Other notice requirements are notices that give the borrower a right to reinstate the loan up to five days before the foreclosure sale, assuming the borrower pays fees and costs. Also, there are some security instruments that have no default provisions, and thus foreclosure can proceed with absolutely no default notice whatsoever being given.

You also need to review the security instrument to confirm that the non-judicial foreclosure language is, in fact, in the body of the security instrument. If it is not in the body of the security instrument, you will have to proceed with a judicial foreclosure sale under O.C.G.A. § 44-14-180. See Evans v. Merrill Lynch Business Financial Services, Inc. 446 S.E. 2d 214 (1994). The non-judicial foreclosure language generally references the fact that the

lender (your client) is an attorney-in-fact for the borrower or has a power of attorney for the borrower to proceed with a foreclosure under Georgia law.

It is also necessary to check the security instrument to determine whether or not this is an FHA or a VA loan. This is important because in these loans there are certain notices required to the government agencies prior to a foreclosure sale, which would not in effect void the foreclosure sale; however, it would put the title insurance in jeopardy for the lender. Also, it is important to confirm that the intangible taxes were paid at closing, which you should be able to see on the front of the security instrument to confirm that they have been paid, or that could also cause some type of a penalty to the lender.

### C. Default Provisions.

The next thing to be reviewed would be the payment history and the other materials from the client to confirm there actually has been a default under the Note and the security instrument. Provisions of the Note and security deed regarding defaults are strictly construed and enforced as written. See Verner v. McLarty 99 S.E. 2d 590 (1957).

Generally speaking, there are four (4) types of defaults found in most security instruments in the State of Georgia. The first is a default in payment. This is the most common of all of defaults simply because if the borrower is not paying, the client becomes aware of it quite quickly. The other default that is fairly common is the fact that the debtor either failed to pay the property taxes, or alternatively, allows the insurance to lapse on the property, which assuming the security instrument has such language in it, would cause a default. The other two types of defaults, generally, are where the borrower changes the property from which it originally was secured, as well as what is termed a "due on sales clause", which means

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that if the borrower were to sell the property without authorization from the lender, the lender could call the Note in default, and thereby due and payable.

Another point to keep in mind in confirming a default has occurred is whether or not the debtor is military personnel. The reason for this is that the Soldiers and Sailors Civil Relief Act of 1940 may come into play. See 50 U.S.C. § 501 through 590. Note 50 U.S.C. § 501-590 does not come into play, unless the security instrument was executed before the borrower was placed into military service.

### III. The Title Search.

Upon receipt and review of the materials from the client, it is now time to have a title search completed to confirm the position of the client with regard to this real property. This is a very important point because borrowers, at times, convey property to other people, fail to pay taxes, get into litigation or there may be other mortgages out there that have not been satisfied but need to be addressed prior to foreclosure. This step will require you to either have a company who completes title searches perform one for the property, or you could go down to the County Records and review the same yourself. I would suggest a title insurance company of some type because they insure their searches as to their accuracy, so if in fact something is missed, they could be liable as opposed to you.

It is important to review the grantor and grantee indexes with regard to the property to confirm there are no superior mortgages which are in front of your client's mortgage unless your client is in a second mortgage position. Either way, it is still nice to have this reviewed to make sure there are no other mortgages out there. In reviewing the deed records, you would also confirm that any and all assignments have been filed vesting the property into your client from a

prior lender. Also, the title search may show that the debtor has taken out a second or third mortgage wherein that mortgage company may want to payoff your client's position and thus totally avoid the foreclosure process.

Most counties in the State of Georgia now have all the liens, tax liens, federal tax liens and lis pendens positioned in one book which is referenced as a General Execution Docket (GED). It is important to review this to confirm that there are no liens that are superior to the position of your client prior to the foreclosure sale. Understand that anything that is superior to your client, assuming it is not an exception on the title insurance policy, will remain superior even after the foreclosure sale.

In reviewing the GED, beware if the Internal Revenue Service has placed a federal tax lien on the property. This is critical concerning a foreclosure sale, because the IRS has a priority if they have not received notice of the foreclosure sale no later than 25 days prior to the actual foreclosure sale. Specifically, you need to look for federal tax liens that are junior to your security instrument because hopefully, anything senior would have been taken care of by the title insurance policy or already paid off.

With respect to federal tax liens that are junior to your security interest, you have to give the Internal Revenue Service 25 days notice prior to the foreclosure sale. This is required for any federal tax lien that is filed at any time, prior to thirty days of the foreclosure sale. Once the Internal Revenue Service receives the notice, they have 120 days from the foreclosure date to redeem the property from the purchaser, the purchaser being either your client or a third party purchaser at the foreclosure sale. If after 120 days the Internal Revenue Service has not redeemed the property, the foreclosure sale is a valid foreclosure sale and the IRS has no other remedy. However, if you fail to give the notice to the IRS, their junior lien becomes superior to your foreclosure deed which would be

filed at the foreclosure sale. Thus, it is imperative to make sure there are no federal tax liens of record at the time the foreclosure sale is conducted.

Some counties still have separate indexes for federal tax liens and lis pendens. It would be advisable for you to check with the Clerk of the Superior Court of the county wherein you are in the process of foreclosing to confirm that there are no separate indexes that need to be reviewed prior to foreclosure.

### IV. Preparing the Advertisement.

Now that you have reviewed the materials, had the title search completed and confirmed your client's position in the property, it is time to get the advertisement started.

The first thing that needs to be done is to contact the newspaper in the county where the property lies that is the legal organ for that county. Each county in the State of Georgia has a designated legal organ where the Sheriff's Sales are published. See O.C.G.A. § 9-13-140.

The best way to determine what the actual legal organ is, is to either contact the Sheriff's Office in the county, or alternatively, contact the Clerk of Superior Court to determine the legal organ of the county.

After you have determined what paper is the legal organ for the county, the next thing you need to do is to contact the newspaper and determine what the deadline is for an advertisement to be submitted for your foreclosure sale. A foreclosure ad must run once a week for four (4) consecutive weeks prior to the foreclosure date. See O.C.G.A. § 9-13-140. Foreclosure sale dates in Georgia are the first Tuesday of the month, unless the first Tuesday falls on a holiday (New Years or 4<sup>th</sup> of July) and if it does fall on a holiday, then it is the first Wednesday of the month. See O.C.G.A. § 9-13-141.

The materials which are required in

the actual advertisement that is going to be published in the paper has been established through the Georgia Code as well as case law. All required materials have to be in the body of the advertisement and there are some other materials which may not necessarily be required under Georgia law, but are helpful in the foreclosure advertisement.

## V. Notices.

It is important to accelerate the Note that is secured by the property prior to the foreclosure date. In order for

a Note to be accelerated, some action must be done to accelerate the Note, i.e. an acceleration letter. See Gilbert v. Cherry 221 S.E. 2d 472 (1995).

Pursuant to O.C.G.A. § 44-14-162.1 through 162.4, the Borrower must be sent notice of the impending foreclosure no later than 30 days prior to the foreclosure sale. This notice needs to include a copy of the advertisement which has been sent to the paper for publishing. Also, this notice must be sent by certified and regular mail to the property address, or to another address that the borrower has designated and given notice of to

the client. There are some instances when this notice is not required, for example, if raw land is involved.

## VI. Handling the Actual Sale.

Now that your ad has run for four (4) consecutive weeks prior to the foreclosure day, you are ready to take the foreclosure to sale. Pursuant to O.C.G.A. § 44-14-162 and 9-13-140, the foreclosure sale actually takes place on the Courthouse steps of the Superior Court of the county wherein the property is located.

Prior to going to the Courthouse steps, you need to receive bidding instructions from your client. Generally, your client will either give you a flat bid, which would be an exact amount for you to bid on the property, or alternatively, the client could give you a bid wherein you would start at a certain amount and go up to a higher amount if there is competitive bidding. The client, in determining this bid, will review the actual value of the property so that they can establish exactly what they would want their bid to be on the property.

The legal hours of sale on the first Tuesday of the month are 10:00 a.m. to 4:00 p.m., O.C.G.A. § 9-13-140. The foreclosure has to be conducted during these times and thus if you are doing more than one county on the foreclosure day, it is imperative that you hustle and keep an eye on the clock so you make sure you get to all counties on time. Any foreclosure which is not conducted during these hours is not a valid foreclosure.

It is important again to recheck the Deed Records to determine whether or not there are any new assignments or any other liens which have not been addressed or located from the date of your earlier title examination. The reason this is important, is that as you all are aware, some of the Clerk's offices are several months behind in recording liens and other instruments in the records that could have been locat-

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### 1.) Contents of the advertisement which are required under Georgia law are as follows:

-The legal description of the property upon which the client is attempting to foreclose has to be included. O.C.G.A. § 44-14-162 and 9-13-140. This legal description needs to be exact as it appears on the original security instrument.

-The name of the Grantor (debtor) has to be listed in the advertisement. Credit Investment Corp v. Maddox 184 S.E. 859 (1936).

- The current holder of the Deed (the client) has to be shown in the body of the advertisement.

-The time and place of the sale has to be in the body of the advertisement. Oliver v. Wayne 188 S.E. 535 (1936). Generally, the time and place is a pretty general reference to the extent that you say in the advertisement that it will be foreclosed during the "legal hours of sale" on the first Tuesday of the month.

-The next thing that is required is a reference to the actual Power of Sale which is in the security instrument which allows the client to actually conduct the non-judicial foreclosure sale. Gormley v. Rowan 171 S.E. 262 (1933).

### 2.) Contents not required but helpful.

There are other things which can be placed in the foreclosure advertisement which under Georgia law are not required, but may be helpful in allowing any potential purchaser to understand which property is actually being foreclosed on, and what is the exact position of your client in this property. Some examples of contents which are not required but are helpful is a reference to any superior liens or mortgages which are of record, the actual street address of the property upon which the foreclosure is taking place, as well as the current owner of the property. If street address is included it must be printed in bold type.

### 3.) Errors in advertisement.

If all the legal requirements are met minor errors (typographical errors) will not void a foreclosure sale unless the errors are so serious or misleading that it may cause the foreclosure to be void, or alternatively would kill the bid at the foreclosure sale.

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ed. A perfect example of this would be a federal tax lien which was filed 45 days prior to the foreclosure sale, however, was not picked up on your original title examination. If a federal tax lien would have been picked up on the second review of the records, and it is outside the thirty days from your foreclosure date, you would have to cancel your foreclosure sale, give the IRS notice and re-schedule your foreclosure, again publishing and going through the entire process.

Now that you have re-looked at the Deed Records and determined everything is still okay and your client is in the same position that has been advertised, it is time to actually conduct your foreclosure sale. In conducting your foreclosure sale you would then go to the Courthouse steps and actually read the advertisement which has been published in the paper for the four weeks out loud to any people who are at the Courthouse steps. Even if there is no one at the steps, you still have to read out loud the advertisement which has run in the paper. You may feel a little strange standing out there talking to yourself or reading out loud with nobody there; however, it is a requirement for a valid foreclosure sale.

After reading the ad, you will then open the bidding on the property. You will announce your opening bid that you had previously received from your client and make that bid on behalf of your client. If there are no other bids after three cries, you will then announce that the property has been sold to your client and close the bidding. A foreclosure sale is deemed completed at the time that the bids have been closed, and not when the Deed Under Power of Sale is filed, which I will discuss further in the next section. Thus, your client becomes the owner of the property at the time that the bid is closed.

There are times when after you have opened the bidding by making a bid on behalf of your client, an interested third party may bid a higher amount.

If no one else bids and this individual has bid higher than your client, the third party actually would become the owners of the property. Foreclosures are cash foreclosures, and thus the third party purchaser has to have actual cash or certified funds that total the amount of the bid at the foreclosure sale. O.C.G.A. § 9-13-166.

### VII. Completing the Process.

After the foreclosure has been conducted, the bidding has been closed, you are now ready to prepare your Deed Under Power of Sale. O.C.G.A. § 44-14-162 and its sub-parts sets out all the requirements that are necessary in preparing your Deed Under Power of Sale. After the Deed Under Power of Sale has been prepared it needs to be sent to the client along with a Transfer Tax Form for execution.

After receipt of these documents back from your client, it is then time to proceed with sending the Deed Under Power of Sale to the court for filing. If there was a federal tax lien that you had given notice to the IRS regarding this Deed, it is required that you attach a copy of the Notice that you sent to the Internal Revenue Service to the Deed Under Power of Sale for filing.

You should also note that there are no transfer taxes that need to be paid on a foreclosure sale. Upon sending the Deed Under Power of Sale to the Court, along with any attachments if applicable, you will, however, need to send the appropriate filing fees, so the Court will file the Deed accordingly. It is a good practice to send a self addressed, stamped envelope along with your Deed, so upon recording of the Deed Under Power of Sale they can send you back the original. After you have received the filed Deed Under Power of Sale from the Court, you can send it to your client and the foreclosure process is completed.

### VIII. Miscellaneous Items.

Another instrument which is now

rarely used, but has been used some in the past, is an instrument called a Land Sales Contract. These Contracts are, in essence, Contracts to purchase property wherein the landlord/lien holder continues to own the property until the Contract is fully performed, and then at that time, the landlord/secured holder conveys the property to the debtor. This situation is quite similar to a lease situation in that the debtor never has had the property deeded to him and thus a foreclosure, either non-judicial or judicial, is necessary. Land Sales Contracts are more similar to a Lease Purchase Contract as opposed to a security instrument.

When the property sells for a bid amount substantially higher than the bid amount of your client, in this situation (i.e. where a property sells for an amount of money which is greater than your client's bid) you would need to look at the security instrument and see exactly what your client would be entitled to from these excess proceeds. Your client is generally entitled to statutory attorney's fees, expenses, any costs advances, for example taxes, insurance, etc. If there are still excess proceeds after your client has received everything they could receive under the security instrument, the remaining money should be paid to any junior lien holder which you determined of record. If there are no junior lien holders, taxes or anything else which is showing of record, and if there is still money from the excess proceeds, then that money has to be returned to the borrower.

### IX. Conclusion.

Non-judicial foreclosure sales in the State of Georgia are considered an extreme remedy to the extent that there is no Court involvement in the conducting of this type of foreclosure sale. Thus, extreme caution needs to be made to confirm that all the proper steps have been taken in conducting these non-judicial foreclosure sales.



# The Federal Interstate Land Sales Full Disclosure Act and Recent Litigation

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Once a little known consumer protection law, the Interstate Land Sales Full Disclosure Act (15 U.S.C. §1701, *et seq.*) (the "ILSFDA"), is now garnering a lot of attention in the battle between real estate developers and speculative purchasers. During the upswing of the real estate market, enjoyed by developers and purchasers alike, purchasers entered into contracts for to-be-built condominium units and homes in planned communities. While real estate values were on an incline, purchasers were happy to sign contracts for agreed purchase prices for property to be built in the future. Now that the real estate market has dropped perceptibly, these once eager purchasers are looking for a way to avoid these same contracts. Counsel for purchasers looking to get out of real estate contracts are looking to the ILSFDA.

This article provides a brief overview of the ILSFDA and highlights some of the ILSFDA issues being addressed, with frequency by the courts.

## I. ILSFDA Background

In 1968, in response to widespread fraud in the sale of land, Congress enacted the ILSFDA to protect real estate consumers through disclosure. In enacting the ILSFDA, Congress sought to protect consumers from buying land as homesites, when the land was not, in fact, suitable as a homesite. The example of Florida swamp land is sometimes used in

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connection with describing the history of the ILSFDA. The ILSFDA's primary consumer protection mechanism is disclosure, although it also includes prohibitions on the use of misleading or unlawful sales practices and the inclusion, in certain circumstances, of consumer protection provisions in the purchase contract. The disclosures required by the ILSFDA are intended to enable consumers to make informed decisions about the purchase of real property. Except for property that is exempt from the ILSFDA (as discussed below) the ILSFDA requires developers to provide detailed disclosures about the developer and the real estate development to each consumer before a binding contract for a lot is signed.

The ILSFDA is administered by the Secretary of Housing and Urban Development ("HUD"). HUD has promulgated regulations that are codified as 24 CFR Part 1700-1730.0100 (1996, as amended) ("Regulations").

Pursuant to the ILSFDA, developers engaged in marketing real estate using any means or instruments of interstate commerce (e.g., mail, email, telephone, etc.) may not sell or lease subdivision lots pursuant to a common promotional plan, by way of (i) any means or instruments of transportation or communication in interstate commerce or (ii) the mails, unless a Statement of Record is in effect, or the transaction qualifies for an exemption from the ILSFDA. The Statement of Record is the documentation filed with HUD to register a development pursuant to the ILSFDA, as more particularly discussed below. It is important to note that the ILSFDA applies to all property marketed within the United States using the foregoing instruments, regardless of whether the property is located within the United States.

Except for exempt transactions, a developer may not sell lots within the United States, regardless of where the lots are located, unless the subdivision is registered with HUD. Thus,

unless a subdivision or condominium (collectively referred to herein as a "project") is registered with HUD pursuant to the ILSFDA or qualifies for an exemption from the ILSFDA, a developer cannot mail promotional materials or project information into or within the United States or return telephone calls or email requests for information about a project when such request originates from within the United States.

In addition to the ILSFDA, many states (and the District of Columbia) have their own interstate land sales laws. The marketing and sale of property within the United States must be carried out in compliance with both the federal and any applicable state land sales laws. Compliance with state land sales laws is beyond the scope of this article.

### A. Registration under the ILSFDA.

Registration under the ILSFDA requires submission of a Statement of Record to HUD. The project will not be registered, however, until HUD has issued an effective date for the Statement of Record. The Statement of Record consists of two parts, a consumer disclosure document called a Property Report and the Additional Information and Documentation ("AID"), which is comprised of documentation and information that supports the disclosures made in the Property Report. The Property Report must be provided to each purchaser prior to the purchaser's execution of a purchase contract. The Property Report provides consumers with information about the project, including, without limitation, descriptions of the infrastructure and recreational facilities and anticipated construction schedules, any applicable owners association, real estate taxes, and title encumbrances and restrictions on the use of a lot or unit. The purchaser must acknowledge receiving the Property Report by signing a receipt. The AID is submitted to HUD but is not required to be dis-

tributed to purchasers.

### B. Exemptions under the ILSFDA.

The ILSFDA provides three types of exemptions: (1) full statutory exemption; (2) partial statutory exemption; and (3) regulatory exemption. For purposes of the discussion herein we have highlighted a few of the more frequently used exemptions in the first two categories. Section II of this Article discusses two exemptions that have been the subject of recent litigation.

**1. Full Statutory Exemptions.** A transaction that is fully exempt from the ILSFDA is exempt from all provisions of the ILSFDA, including registration and the Anti-Fraud Provisions (discussed below).

Some of the more frequently used full statutory exemptions include the sale of lots in a subdivision containing less than twenty-five lots, the Improved Lot Exemption (as defined below) and the sale of land to builders who acquire the land for the purpose of engaging in the business of constructing a residential building or for resale to persons engaged in such activity.

The sale of land improved with a residential building ready for occupancy is exempt from the ILSFDA. Also exempt, is the sale of land pursuant to a contract that obligates the seller to construct a residential building on the land within two years from the date the purchaser executes a purchase contract for a home or unit on the land. Both of the foregoing scenarios are what is commonly referred to as the "Improved Lot Exemption". The Improved Lot Exemption is often used by developers of condominiums. As the real estate market has declined litigation over the nuances of the Improved Lot Exemption has increased. Section II of this article provides a discussion of several issues related to the Improved Lot Exemption that have received a lot of attention recently by the courts.

**2. Partial Statutory Exemptions.** A transaction that is partially exempt from the ILSFDA is exempt from the ILSFDA's registration and disclosure requirements but not from its prohibition of unlawful or misleading sales practices and certain contract disclosure requirements, collectively the "Anti Fraud Provisions" (discussed below). One of the more commonly used partial statutory exemptions is the "100 Lot Exemption". The 100 Lot Exemption is available to the sale of lots and/or units in a project that will contain less than a total of 100 lots and/or units. For purposes of the 100 Lot Exemption, the 100 lot and/or unit count does not include lots or units that qualify for a full statutory exemption from the ILSFDA. (The 100 Lot Exemption is actually for up to 99 lots and/or units).

No notice to or approval from HUD is required to market and dispose of property under the 100 Lot Exemption. The developer is, however, responsible for maintaining complete records in order to demonstrate that requirements of the exemption have been met.

As discussed above, use of a partial statutory exemption from the ILSFDA does not relieve a developer from compliance with the Anti-Fraud Provisions of the ILSFDA. The Anti-Fraud Provisions prohibit, among other activities, use of any device, scheme or artifice to (1) defraud; (2) obtain money or property by means of an untrue statement of material fact; (3) omit to state material facts necessary to make the statements regarding the lot or subdivision not misleading; or (4) engage in any transaction, practice, or course of business which operates as a fraud or deceit upon a purchaser. The Anti-Fraud Provisions also require a developer that represents that the roads, sewers, water, gas, electric service and/or recreational amenities will be provided or completed within a project by the developer, to contractually obligate itself to com-

plete, or cause to be completed, such infrastructure or amenities.

Section II of this article provides a discussion of issues related to the 100 Lot Exemption recently considered by the courts.

## II. Recent Litigation over the ILSFDA

**A. Improved Lot Exemption.** The Improved Lot Exemption provides an opportunity for developers to market and sell homes and condominium units that are to be completed at a future date without having to file a Statement of Record with HUD. Use of an exemption from registration under the ILSFDA, such as the Improved Lot Exemption, can be appealing since preparation and filing of a Statement of Record is an added expense in the development budget. However, as more and more litigation arises over whether a developer truly complied with the requirements of the Improved Lot Exemption, the costs of utilizing the exemption may become more expensive than registering the project with HUD pursuant to the ILSFDA.

At first glance, the Improved Lot Exemption appears straightforward. Compliance with the exemption, however, is complex, as evidenced by the litany of recent case law concerning whether a developer did or did not comply with the Improved Lot Exemption.

The following are issues that have been litigated in recent disputes between purchasers and developers over whether a developer is in fact entitled to the protections afforded by the Improved Lot Exemption. As discussed in Section III below, failure to comply with the Improved Lot Exemption can be very costly, especially when purchase contracts thought to be binding become open to rescission at the option of purchasers.

**1. When the Two-Year Build Period Begins to Run.** Pursuant to the

guidelines issued by HUD, the "Supplemental Information to Part 1710: Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act Table of Contents" (the "Guidelines"), the "two-year period normally begins on the date the purchaser signs the sales contract." Nevertheless, the start of the two-year build period seems to be a point of contention. For example, in Ahn, Sun Kyung, et al v. Merrifield Town Center, the seller argued that a purchase contract for construction of a condominium unit qualified for the Improved Lot Exemption where the contract required the seller to complete the unit within two years of the date the seller ratified the contract, rather than the date the purchaser signed the contract. The Ahn Court, consistent with the Guidelines, held that the two-year period under the Improved Lot Exemption must begin running from the date the purchaser signs a purchase agreement.

**2. Whether The Seller's Obligation To Construct Within Two Years Is Illusory.** A contract between a developer and purchaser for the purchase of a lot or unit under the Improved Lot Exemption must obligate the developer to complete construction of the residential building within two years of the date the purchaser signs the purchase contract. The contract must not allow nonperformance by the developer at the developer's discretion. If the purchase contract conditions the developer's obligation to complete the home or the unit the contract may not be exempt. This exemption is intended to provide an exemption from registration under the ILSFDA for completed homes and those that are completed within two years of the date of sale. If the house or unit is not completed within the two-year period, the developer is at risk of losing the protections offered by the exemption.

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What constitutes an “obligation” of the developer to construct a home within the two-year build period continues to be debated. As such, developers should keep the following in mind before entering into a purchase contract in reliance upon the Improved Lot Exemption.

Be wary of purchaser conditions. The Guidelines specifically state that a “contract that conditions construction upon acts of a buyer will not exempt the sale.” Moreover, what constitutes an obligation to construct depends upon general principles of contract law and thus will be influenced by the contract law of the governing jurisdiction.

Some courts have held that the developer’s obligation to construct must be unconditional. For example, the Florida Supreme Court, in Samara Dev. Corp. v. Marlow, 556 So.2d 1097 (Fla. 1990), ruled that the contract must contain an unconditional commitment to complete construction within two years. Other courts disagree, holding that the obligation does not have to be unconditional. For example, in its ruling in Van Hook v. Residence at Coconut Point, LLC, the United States District Court for the Middle District of Florida stated “[m]any federal courts, including the undersigned, have not taken the unconditionally obligate language of Samara literally.” The Van Hook Court went on to quote Stein v. Paradigm Mirsol, LLC, noting that the Stein Court stated that “[t]o ‘obligate’ the timely completion does not require that the contract be unconditional, so long as the condition(s) does not render the apparent obligation illusory. The [Stein] Court held that a contract obligates completion of construction within two years ‘when that commitment to do so is real and not illusory.’ Under this approach, the presence of a condition is not determinative. Rather, the court examines the condition(s) to determine whether the apparent obligation to construct within two years

is real or is rendered illusory by the condition(s).” (internal cites omitted)

In the absence of further guidance from HUD or the Supreme Court of the United States, developers should carefully consider the inclusion of purchaser conditions in contracts to be used in transactions made in reliance upon the Improved Lot Exemption. Any contract condition, which if not satisfied by the purchaser allows the developer to terminate the contract, relieving the developer of its obligation to complete construction, provides an argument for purchaser’s counsel that the contract is illusory. If the developer’s obligation to construct is determined to be illusory, the Improved Lot Exemption will not apply.

**3. Provisions Allowing Nonperformance – Limit Force Majeure Provisions.** Related to the above discussion, is whether an overly broad force majeure provision in a contact will render the developer’s obligation to construct illusory.

The Guidelines provide that “contract provisions which allow for nonperformance or for delays of construction completion beyond the two-year period are acceptable if such provisions are *legally recognized as defenses to contract actions in the jurisdiction where the building is being erected*. For example, provisions to allow time extensions for events or occurrences such as acts of God, casualty losses or material shortages are generally permissible... as a general rule delay or nonperformance must be based on grounds cognizable in contract law such as impossibility or frustration and on events which are beyond the seller’s reasonable control.” (emphasis added).

Some courts have narrowed the Guidelines. For example, in Michael Disimone, et al. v. LDG South II, LLC, the U.S. District Court determined that a contract with the language below did not contain a true commitment to construct a condominium

unit within two years. The contract provision in question provided, in relevant part that the two-year completion date could “be extended by reason of delays incurred by circumstances beyond Seller’s control, such as acts of God, *or any other grounds cognizable in Florida contract law as impossibility or frustration of performance, including without limitation, delays occasioned by rain, wind and lightning storms*...” (emphasis added). The Court determined that although *some* contract defenses under Florida law would not render the contract illusory, this is not true for *all* contract defenses. The Court was further persuaded that the inclusion of “any other grounds” and “including without limitation” in the foregoing provision expanded the developer’s bases of delay. The Court held that the two year construction obligation was illusory, and as such the sale under the contract was not exempt from the ILSFDA.

The Disimone case illustrates the importance of a narrowly drafted force majeure provision in purchase contracts entered into in reliance upon the Improved Lot Exemption.

**4. The Contract Must Not Negate The Purchaser’s Right To Specific Performance.** Developers must be careful not to limit a purchaser’s remedies. As set forth in the Guidelines, “[c]ontracts that permit the seller to breach virtually at will are viewed as unenforceable because the construction obligation is not an obligation in reality.” An example provided in the Guidelines of a contract provision that is unacceptable under the Improved Lot Exemption is a provision that provides for a refund of the purchaser’s deposit if the seller is unable to close the sale for reasons normally within the seller’s control.

In addition, is important that a purchaser’s right to specific performance not be waived either directly or indirectly as such contracts are considered by HUD to lack “a re-



alistic obligation to construct.” A purchaser’s right of specific performance does not have to be specifically stated in the purchase contract, however, it must be available. For example, a purchase contract that restricted the purchaser’s remedies for the seller’s failure to build a dwelling unit within two years of the earnest money deposit was held not to satisfy the requirements of the ILSFDA in Markowitz v. Northeast Land Co., 906 F.2d 100 (9th Cir. 1990); and a contract which listed the purchaser’s remedies as return of the deposit or specific performance, but excluded damages, was deemed to not meet the conditions for the exemption in the view of the Florida Supreme Court in Samara Dev. Corp. v. Marlow, 556 So.2d 1097 (Fla. 1990).

### **B. 100 Lot Exemption.**

The 100 Lot Exemption is available for sales in a subdivision that contains, or will contain, less than 100 lots and/or condominium units. Thus, what constitutes the “subdivision” for purposes of complying with the 100 Lot Exemption is a determining factor for whether the exemption is available.

**1. Common Promotional Plan.** Whether the 100 Lot Exemption is available to a project can be affected by whether the project is marketed in conjunction with other projects so as to result in a “Common Promotional Plan” between the multiple projects. The ILSFDA defines “Common Promotional Plan” as “a plan, undertaken by a single developer or a group of developers acting in concert, to offer lots for sale or lease; where such land is offered for sale by such a developer or group of developers acting in concert, and such land is contiguous or is known, designated, or advertised as a common unit or by a common name, such land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of a common promotional

plan.” Suggested guidelines for determining if a “Common Promotional Plan” exists between multiple developments include, without limitation: (1) same or similar name or identity; (2) common sales agents; (3) common sales facilities; (4) common advertising; (5) common inventory; (6) common management; and (7) ten percent (10%) or greater common ownership of the lots offered.

**2. Contract Provisions.** An issue that has recently been resolved by the courts, is whether purchase contracts entered into in reliance upon a partial statutory exemption, such as the 100 Lot Exemption, must comply with the contract requirements set forth under §1703(d) of the ILSFDA (requiring that a recordable legal description, a notice and cure period, and cap on damages be included in the contract). The general consensus among practitioners, and even HUD, had been that contracts that complied with a partial statutory exemption were not subject to the requirements of §1703(d). This changed in October 2007 when the U.S. District Court for the Southern District of Florida, in Pugliese v. Pukka Dev., Inc., ruled that purchase contracts relying upon the 100 Lot Exemption must comply with §1703(d) of the ILSFDA. In reaching this decision the Pugliese Court discounted the weight of a HUD opinion directly conflicting with the Court’s position. The decision in Pugliese caused concern among developers and their legal counsel as it was likely to open many purchase contracts to rescission by purchasers because the specific contract provisions set forth under §1703(d) of the ILSFDA had not previously been considered a requirement to compliance with a partial statutory exemption and thus not customarily included in such purchase contracts. This decision was ultimately overturned in December 2008 by the United States Court of Appeals, which held in favor of

the developer, finding that the purchaser’s contention that §1703(d) applies to contracts complying with a partial statutory exemption improperly added language to the ILSFDA. The Appeals Court decision in Pugliese provided good news for developers that have been relying upon partial statutory exemptions.

### **III. Statute Of Limitations**

Claims of a violation of the ILSFDA are subject to a three year statute of limitation. For most claims, this three year period begins to run on the date that the purchaser signs a purchase contract. Actions for the following alleged violations of the ILSFDA, however, may be brought within three years of the date that the violation is discovered or should have reasonably been discovered: actions related to the sale or lease of a lot or unit that is not subject to a full statutory exemption where the developer allegedly (a) employed a device, scheme, or artifice to defraud; (b) obtained money or property by means of any untrue statement of a material fact, or any omission of a material fact necessary to make the statements made not misleading; or (c) engaged in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

### **IV. Penalties For Violations of The ILSFDA**

Liability for violations of the ILSFDA can be far reaching. The developer, its officers, directors, partners, employees, agents and successors all may be held liable for violations of the ILSFDA. Violators risk both civil and criminal liability, and under certain circumstances violations may open purchase contracts up to rescission at the option of the purchaser.

Civil liability for violations of

*Continued on next page*



## Land Sales Full Disclosure

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the ILSFDA may include monetary damages, specific performance or any other relief that the court deems equitable. In addition, a person who knowingly and materially violates the ILSFDA may also be fined up to \$1,100.00 per violation up to a maximum of \$1,100,000.00 per person during any one-year period. Criminal liability for violations of the ILSFDA may include fines of up to \$10,000.00 and/or imprisonment for up to five years.

In a non-exempt transaction, if the developer fails to deliver a Property

Report to a purchaser prior to the purchaser's execution of a purchase contract, the purchaser has a two-year right of revocation. This right of rescission can be devastating to a developer that is told by a court that all of the purchase contracts that the developer believed complied with an exemption from the ILSFDA did not meet the requisites for the exemption. The loss of the exemption means that each purchase contract the developer entered into prior to delivering the purchaser a Property Report, which is likely all of the pur-

chase contracts since the developer believed the sales were exempt from the ILSFDA, will be open to rescission by the purchasers.

We are likely to see more case law dealing with the ILSFDA as purchasers continue to seek ways to avoid their real estate purchase contracts. For developers, this increased attention on the ILSFDA should serve as a reminder of the need to comply with the ILSFDA and the importance of having a well developed land sales compliance program.



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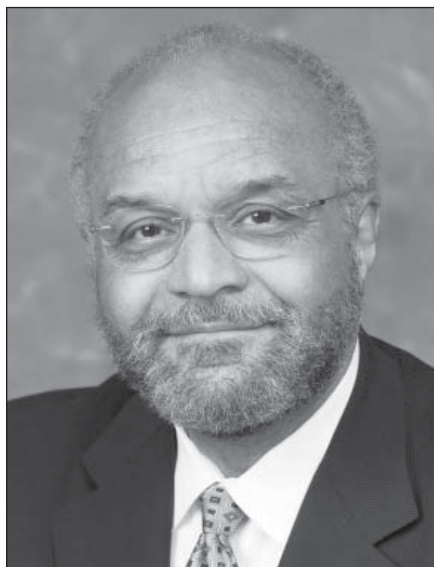
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# Professionalism 2009

**Honorable Herbert E. Phipps**

**Georgia Court of Appeals**



Judge Herbert E. Phipps was born to J.W. Phipps and Marion Gadson Phipps in Baker County, Georgia. He and his wife, Connie Curry Phipps, have a son, Herbert, Jr., who resides in Atlanta, and a daughter, India, who resides in Oceanside, California.

Judge Phipps earned a B.A. degree, with a major in Political Science, in 1964 from Morehouse College. He has traveled extensively in Europe and Asia and taught English at Thammasatt University and private schools in Bangkok, Thailand. In 1971, he earned a Juris Doctor degree from Case Western Reserve University School of Law in Cleveland, Ohio, where he served as an editor of the *Law Review*.

Judge Phipps returned to Albany,

Georgia in 1971 to join the general law practice of C.B. King. The firm emphasized civil rights litigation. They successfully represented plaintiffs in civil rights cases involving school desegregation, voting rights, jury discrimination, student rights, police brutality and discriminatory employment practices. From 1983 to 1995 Judge Phipps engaged in the solo practice of law.

In 1980, Judge Phipps was appointed part-time Magistrate and Associate Judge of the Dougherty County State Court, where he served eight years. In 1988, he was appointed to the Dougherty Circuit Juvenile Court, where he served as judge for seven years. Governor Zell Miller appointed him Judge of the Dougherty Circuit Superior Court in 1995, and he was elected to a four-year term in 1996. Governor Roy Barnes appointed him to the Court of Appeals of Georgia on July 12, 1999, and he was elected statewide in November 2000 to serve a full six-year term. In November 2006, he was reelected to his second six-year term.

Judge Phipps was awarded a Master of Laws in the Judicial Process from the University of Virginia School of Law in 2004. In 2006, the State Bar of Georgia recognized Judge Phipps with the Justice Robert Benham Award for Community Service. In 2007 he was inducted into the Society of Benchers of Case Western Reserve School of Law. Judge Phipps's Commencement Address to the Class of 2007 of Case Western Reserve School of Law, "Lawyers - the Guardians of Truth and

Justice," is published at 58 *Case Western Reserve Law Review* 483 (2008).

Judge Phipps serves as Chairman of the Board of Directors of SB&T Bank of Albany and Americus. He serves on the Board of Directors of the Georgia Appleseed Center for Law and Justice. He is a member of the Georgia Committee on Access and Fairness in the Courts and of the Georgia Supreme Court Pandemic Commission, and serves as an advisor to the State Bar's Commission on Judicial Service. He is First Vice-President of the Lawyers Club of Atlanta. He is a member of Bethel A.M.E. Church in Albany and Sigma Pi Phi Fraternity, Delta Delta Boule'. He is a member of several local, state and national bar associations.

Judge Phipps has served on Georgia's Judicial Nominating Commission, the Georgia Supreme Court Commission on Racial and Ethnic Bias, and the Georgia Indigent Defense Council Advisory Committee. He is a former member of the State Bar Board of Governors and past President of the Dougherty Circuit Bar Association. He has served as President of the Albany Association for Retarded Citizens, the Albany Sickle Cell Foundation, the Faith Fund Foundation and The Criterion Club, and was a member of the 1987-88 Leadership Albany Class. He has served on the Albany Technical Institute Board of Directors, the Albany/Dougherty Chamber of Commerce, and the Southwest Georgia Home for Convalescent and Aging Persons.

In 1989, Georgia's Chief Justice Harold Clarke wrote, "Ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers." (Georgia State Bar Journal) This lecture will focus on that higher standard.

A lawyer has no greater responsibility than to "... Assist in Maintaining the Integrity and Competence of the Legal Profession." N.Y. Code of Professional Responsibility, Canon One. Everything that can be said about professionalism boils down to two words: INTEGRITY and COMPETENCE. When admitted to the bar, we took an oath to truly and honestly, justly and uprightly demean ourselves. Thereafter, that oath should be our guide as we practice law, because it embodies the ideals of professionalism. A lawyer should personify those ideals.

Professionalism is more than a requirement that must be satisfied to keep your law license. Professionalism is fundamental to the strength of the profession.

An essential component of professionalism is personal appearance. In his book, *You Are the Message*, Roger Ailes says: "A lawyer is Exhibit A in his case; . . . the first and last piece of evidence the jury sees." The impression that you make will dignify or damage your own image, and the image of the profession.

A few years ago, Lance Caughfield, a Texas lawyer, wrote: "When I stand before an appeals court panel, I know the [judges] are taking stock of my credibility. They are judging more than my brief and the logic of my argument. They are sizing me up personally, based on my composure,

the way I speak, and even - I shudder to think - the way I look." Lance Caughfield, *Litigation*, Summer 2001, Vol. 27, No. 4.

Trial judges have the same thoughts about lawyers. Also, many trial judges say that, except when a disability prevents it, a lawyer who stands, to address the court or to question a witness, is a more effective advocate. Your appearance and demeanor are always under scrutiny.

I had a grandfather who could read the character of dogs.

He could spot a suck egg dog a mile away. If you have ever lived on a farm, as I did during my childhood, you may know that there is nothing more despised than a suck egg dog.

Grandad used to say: "That's a suck egg dog." I would ask: "Grandaddy, how do you know that's a suck egg dog; he's not sucking eggs now?"

He would answer: "Well, if you suck eggs for a while, pretty soon you begin to look like you're sucking eggs even when you're not." Actions affect appearance.

Bad habits and sharp practice affect a lawyer's appearance and demeanor, too. After a while, you take on the appearance of the way you practice law - as a person of high character, or a person of low character.

Like the old Gillette commercial, a lawyer should always:

**Look sharp!  
Feel sharp! and  
Be sharp!**

George Sharswood, a leading authority on legal ethics, said: ". . . No [person] can ever be a truly great lawyer who is not in every sense of the word a good [person]. . . . A lawyer without the most sterling integrity may shine for a while . . . ,

but his light will soon go out [in the shadows of his corrupt behavior.]" A good lawyer does not have one set of moral principles for professional life and a different set for private life. A good lawyer adopts a lifestyle of professionalism - a lifestyle of truth, honesty, integrity and fairness.

A good lawyer simply does the right thing, with the right attitude, in all dealings, with any party, witness, lawyer, or court. Never let anger, frustration or some other emotion get the better of you. Your presentation is weakened when it includes ridicule and disrespect of anyone.

The late heavyweight champion, Floyd Patterson, was a very sensitive man in a brutal sport. He said, "You can hit me and I won't think much of it. But you can say something that will hurt me very much." Words can hurt people, destroy relationships, and diminish the persuasiveness of your presentation to judges, juries and others. Moreover, a hostile tone in your briefs and other writings may overshadow the merits of your argument.

If you are easily angered, your adversary may bait you into offensive behavior to his or her advantage. If you are already rude, abusive, and disagreeable, your adversary will not have to bait you.

The record can be a valuable friend of professionalism. When your adversary and the court know that you are skillful at making a record that accurately reflects everything said and done, the level of professionalism rises. Make a record. Because, like almost everything else, when it is appropriate to complain about professional misconduct on appeal,

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*Professionalism is more than a requirement that must be satisfied to keep your law license. Professionalism is fundamental to the strength of the profession.*



## Professionalism

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if it is not in the record, it did not happen. Do not make assertions in your appellate brief that are not supported by the record. Make a record, whatever the issue, because you do not win your appeal in the appellate court, you win it in the trial court.

If your trial strategy requires the offer of evidence that may embarrass the judge, inform the judge in advance of trial so a decision can be made about whether to recuse. There is no proper occasion to embarrass the judge, or another lawyer, intentionally by ambush.

For example, if you are defending a client being prosecuted for shooting deer at night, hope that the client does not testify that he intended to share the deer with the judge, unless that is essential to his defense.

A South Georgia deputy was on trial for shooting deer at night. After the state put on its evidence, the defense lawyer called the defendant to the witness stand. He admitted that he had shot the deer at night and said that he had planned to share it with the judge and the district attorney. The defense asked no further questions. The district attorney immediately jumped up and asked, "You didn't give any deer to the district attorney, did you?" The answer was no, and the D.A. had no further questions. The judge appeared to be upset as he called the lawyers to the bench. Everyone in the small courtroom heard him ask the D.A., "Why didn't you ask him whether he gave the judge some?" Everyone heard the D.A. answer, "Judge, I didn't know what the answer was going to be." The judge said, "Get back out there and ask him!"

A professional transgression can make you and your work suspect for a long time. Several years ago, over the course of a two-day trial, I determined that a lawyer had lied about an exhibit. He had intentionally introduced evidence that he knew was false. I have not trusted him or his

work since. If your professional fault is a result of the poor quality of your work, you can redeem yourself by doing good work. But if your transgression is a result of your dishonesty, you may never recover.

As we celebrate the bicentennial of his birth, we can still hear echoes of the voice of Abraham Lincoln as he spoke to lawyers about honesty. He said to lawyers, "resolve to be honest at all event; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer!" ABA Planning Guide, Law Day 2009, Talking Points pp. 24-25.

A trial judge often makes rulings from the bench that are close calls. With no time for extensive research, the judge relies on the lawyers to inform him or her about the facts and the law in the case. It helps the judge to rule correctly when working with competent and trustworthy lawyers. Assuming that the lawyers are equally smart and well prepared, substandard professional conduct by either side will tilt the scales in favor of the other side. Conduct yourself in a manner that earns the court's trust.

In close cases, whichever way the judge rules, often the standard of appellate review will lead to affirmance. Therefore, be careful that the ruling is based on the comparative weight of the competing claims, without the negative influence of a violation of professional standards.

Never threaten a judge with what you will do if the judge rules against you (that you will appeal or request a certificate of immediate review). Not long ago, while arguing a pretrial motion, a lawyer said: "Judge, if you rule against me, I will get a certificate of immediate review, and take this to the Court of Appeals. I think the judges there will see it my way." The judge did rule against him, but he did not get a certificate of immediate review. On the other hand, it is bad practice and shows a lack of judicial temperament for the judge to threat-

en a lawyer with what the court will do if reversed on appeal.

Judges are not exempt from the ideals of professionalism. A party who thinks that the court has committed error has the right to seek appellate review without the judge taking offense. Professionalism requires you to respect the judge's authority; it does not require you to let the judge try your case.

Do not be quick to threaten your adversary and his or her clients with motions and sanctions. Ill-tempered behavior will aggravate the situation and reflect poorly on you and on the profession. Professionalism between adversaries will facilitate the resolution of many matters by letters, e-mails, and telephone calls, rather than a multitude of motions.

Never attempt to manipulate the court into committing reversible error. If it takes reversible error for you to win, you have not won. Do not introduce evidence that you know is inadmissible, or inject matters into your closing argument to the jury that you know are improper, even if the opposition and the judge allow it.

The test is not whether your behavior will be tolerated; the test is whether it is right. Practice law with passion. But remember that excess passion can not hide insufficient preparation. Too much drama will dilute your credibility.

Aristotle said: "Credibility is the most powerful means of persuasion." Groucho Marx said: "The secret of life is honesty and fair dealing. If you can fake that, you've got it made."

Lawyers know well the importance of clarity and precision in oral and written expression. A lawyer must be clear, accurate and reliable. You have heard the expression, "Say what you mean, and mean what you say."

A few years ago I heard a popular baseball player say, "The problem I have with the media is that they always print what I say, and not what

I mean.”

Lawyers should say and write what they mean, and others should know that they can rely on it.

A lawyer must never hide or omit anything that should be fully disclosed. Lawyers know well the command of the oath which says “. . . tell the truth, the whole truth and nothing but the truth.”

We use substitutes for many things every day. But there are no substitutes for TRUTH, HONESTY, INTEGRITY and FAIRNESS. There is no substitute for professionalism in a lawyer.

A lawyer’s life is complicated by many competing claims on his or her loyalties and duties. Claims imposed by a lawyer’s clients, business, and our society often conflict with moral, ethical, and professional claims. Do not allow any tension that may be created by these competing claims to affect adversely your representation of clients. The pressure of competing claims may tempt a lawyer to do what is expedient rather than what is honest and fair. If you are guided by the oath we took, you will defeat that urge.

Strict adherence to professional standards can abate problematic behavior. When faced with a complaint, nothing protects a lawyer like integrity.

The cowboy, Roy Rogers, liked to keep his horse, Trigger, close at hand. Rogers said that Trigger kept him out of a lot of trouble.

He said that “sometimes it just happens where you’re standing over here, and your horse is over there, and there’s a whole heck of a lot of trouble in between. What you want in the worst way is to get to your horse . . . and clear out . . .” Professionalism is your horse. Do not let anything separate you from it.

Do not accept a case merely because someone can and will pay you. One of a lawyer’s most important obligations is to inform clients that there are many problems for which

the law does not provide a desirable remedy.

Sometimes it may be wrong to pursue a legal right when the cost of winning – for example, to finances or to relationships – outweighs the value of anything that may be gained by winning. Many clients will not want to hear that but, in the long run, they will respect you for telling them the truth up front. A lawyer must have the courage to tell clients the unpleasant truth. Lawyer credibility and respect for the profession are put at risk when a lawyer accepts a frivolous case that he or she knows is a loser. Sometimes employment must be declined. Clients pick and choose among lawyers; and lawyers should select clients with care and deliberation.

Trying to save a case that the adversarial process has shown to be a loser may cost you goodwill and credibility. A lawyer has a responsibility to persuade a client to withdraw a claim, or abandon a position, when it becomes evident that the defense is unassailable or that the claim has no merit.

This obligation applies to prosecutors, too. A prosecutor should never pursue a charge that the prosecutor knows can not be supported by evidence. Government lawyers took the same oath as other lawyers to truth, honesty, integrity and fairness.

A case should survive or not based on the procedural or substantive merits of the claim or defense. Sometimes, with your best efforts you lose because you deserve to lose.

A lawyer must impress upon clients the importance of doing right at every stage, including honest and complete discovery responses. If a client rejects your advice and insists upon a corrupt or unprofessional course of action, have the courage to say, “I can no longer represent you.” Do not become complicit in the offer of false evidence or testimony, or in hiding what should be disclosed.

In civil and criminal matters, there are many decisions that belong to the client after the client has been fully advised by the lawyer. With appropriate deference to the client’s decisions, a competent lawyer will manage the client’s expectations and will not let the client’s unreasonable expectations manage the lawyer. It has been said, “We owe our clients our utmost zeal, energy, time and talent. We do not owe them our reputations.” Lance E. Caughfield, *Credibility*, 27 LITIG. 27, 31 (2001).

There may come a time when you have to say to a client, “It’s your case, but it’s my reputation and my profession.” If ever your reputation is all that you have left, you will still have your most valuable asset. Therefore, the proverb: “A good name is rather to be chosen than great riches.” Prov. 22:1. You may earn and lose more than one fortune, but a good reputation, once lost, may never be regained.

Having been in the profession for many years, I know the value of good staff. Nevertheless, there is a limit to how much trust you should place in nonlawyers. There is a point beyond which it is professionally unwise for you to delegate responsibility for your client’s business to a nonlawyer. In a law practice, many circumstances arise that are so risky that they demand the personal attention of a lawyer. I have seen several lawyers try unsuccessfully to climb out of holes dug for them by nonlawyer staff. Never trust staff to do anything that you will not be able to correct if something goes wrong. Your professional reputation is too valuable to trust others with it.

Shakespeare wrote in King Richard The Second (Act 1, Scene 1): “The purest treasure mortal times afford is a spotless reputation . . . mine honor is my life; both grow in one; take [my] honor from me, and my life is done.”

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## Professionalism

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The world has changed much since Shakespeare's time. But what has not changed is human nature. A spotless reputation is still a treasure. When respect for any lawyer is tarnished, respect for the profession is diminished.

As a State and as a profession, we have failed to furnish competent and ample legal representation to the poor. Georgia's indigent defense program is bogged down in a shameful funding crisis. If professionalism means anything, it means that lawyers have a duty to speak up for and protect the rights of those who cannot do so for themselves. We have an obligation to provide competent and sufficient legal representation to the poor.

People are still mistreated, not only on the basis of poverty, but also because of race, gender, religion, sexual orientation, ethnicity, disability and other attributes. There is still a gap between the theory and the practice of equality. Lawyers must help close that gap.

As a lawyer, you have the special training to do more public good than does a member of any other profession. This profession entrusts us with awesome power, from which flows great responsibilities. Often you will find that justice in the most fundamental sense is being denied. Yet many who have the power to do the right thing will look the other way, or not even care. A good lawyer is sensitive to the injustices of society, and accepts a reasonable share of responsibility for correcting them. Obviously, one lawyer cannot right every wrong. But do not underestimate what one committed person can do. Do not underestimate the good that you can do in the regular course of your law practice. Whatever the nature of your practice, from time to time, as you go about your business, you will see opportunities to right wrongs or otherwise do some good. You will confirm your oath each time you openly confront injustice rather

than censor your thoughts and behavior. If you ignore the injustice and wrongdoing that you encounter along the way, late in your career, you may be left wondering about the missed opportunities, and wishing you could do it over.

Today's wrongdoings often are more subtle than in the past. But for the victims, there is little comfort in the assertion that today's treatment is better than yesterday's. As lawyers, none of us should be appeased by that assertion. Injustice to anyone anywhere should make any lawyer uncomfortable. A little over 2,000 years ago, the Greek philosopher, Thucydides, was strolling down the streets of Athens when a fellow approached him and asked: "When will justice come to Athens?" The answer he gave holds true for us today. He said: "Justice will not come . . . until those who are not injured are as indignant as those who are injured."

Often lawyers see people at their worst. It has been said that the sewer of society runs through the courthouse. Montesquieu. At times we may be tempted to treat some individuals with contempt and scorn. But regardless of who or where from, each individual involved in our justice system must be treated with respect.

It is unacceptable for lawyers and judges to stand by quietly while other lawyers and judges act unprofessionally toward anyone, including those at the bottom of the social ladder, even toward an habitual outlaw. You might ask, "Why shouldn't I just live and let live? Why should I care or bother?" You should care and bother because if you tolerate unprofessional conduct in others, eventually it will seep into your own behavior. What you will accept and tolerate in others, says something about who you are, too. Your allegiance to the ideals of professionalism will have a positive influence on others. Always treat people better than you think they deserve.

Although commitment to professionalism may sometimes cost you money, it is a price worth paying. It will be a sound investment in your future, the future of the profession, and the future of our nation.

The practice of law is a public service profession that provides an opportunity to earn a comfortable living. But, unless you love the law more than you love getting paid, you may be unhappy in the profession, and you are more likely to go wrong professionally. You will never be thoroughly satisfied in the profession if money is the most important goal you seek. As you strive to succeed, remember that high achievement without high character is a prescription for trouble.

A few years ago, I heard an interview of Shameka Copeland, a young blues singer. She had grown up traveling with her father who was a blues musician. When she told him that she wanted to be a blues singer he suspected that she was too impressed with the fortune and fame.

He told her: "Nobody wants to hear someone sing because she gets paid. Sing because you have to sing. Sing because you will get sick if you don't."

On the day I graduated from Morehouse College, our college president, Dr. Benjamin E. Mays, said to us: "[In the years to come], . . . you will make my spirit glad if you are known in life by the quality of your work and the integrity of your character, rather than the quantity of your possessions."

I hope that each lawyer here is well compensated. Also, I hope that each of you can say that doing well financially has never been your primary goal, and that neither fame nor fortune is the accomplishment of which you are most proud. I hope that you are most proud that, throughout your practice, you have steadfastly demonstrated a professional and personal commitment to truth, honesty, integrity and fairness. The oath

you took requires nothing less.

While civility and professionalism are fundamental, adherence to those standards in your law practice does not require you to be weak or timid. It is much easier to settle disputes in the conference room, if your adversary knows that you are not afraid to go to the courtroom. Vigilant and vigorous lawyers are essential to a just society. At the same time, you can be aggressive without being contemptuous.

Whether you are in a solo practice representing individuals and small businesses or in a large law firm representing giant corporations and governmental entities, an essential component of your practice must be an attitude of truth, honesty, integrity and fairness.

This attitude defines who you are, how you practice, and what you will not tolerate in others. A lawyer should not see injustice and do nothing. Silence in the face of injustice ignores our responsibility to the general public and to the profession. Recently I spoke to a class of middle school students about my career as a civil rights lawyer, and was asked, "What makes a lawyer a civil rights lawyer?" I responded that every good lawyer is a civil rights lawyer.

A lawyer who is courageous and competent, who does right and demands the same from others, may not be loved by everyone, but will be respected. Respect for doing right is always better than being popular for doing wrong.

A courageous lawyer will irritate people and may be maligned and misunderstood. Nevertheless, stand your ground. Do not be intimidated or discouraged. Lawyers must be competent, honest and courageous; it is not essential for lawyers to be popular. I have known many competent, honest and courageous lawyers who were unpopular. They were unpopular because they had the courage to do what was right when others were doing the opposite.

I have known many lawyers and judges who were popular because they were on the side of oppression and injustice. The character of the man or woman determines whether the law is an instrument for oppression, or a tool for justice.

Years ago, I saw a district attorney prosecute several people for controversial charges that he knew were not supported by law or evidence. After hearing motions to dismiss the charges, or at least set bail so the individuals could get out of jail, the judge instructed the lawyers to come to his chambers. In the privacy of his chambers, the judge told the lawyers that he knew that there was no support for the charges and that they should be dismissed. But then he told them that he would neither dismiss the charges nor set bail. "Because," he said, "I have to live in this little town." Then he returned to a packed courtroom where he announced that the motions to dismiss were denied, no bail would be set, and the defendants would remain in jail. The courageous, competent and honest defense lawyers were unpopular "in this little town." But the district attorney and the judge were very popular. I would like to tell you that this is only a distant memory of a past practice, but unfortunately, relics of this type of injustice remain with us.

Have the courage to do the right thing when the whole world is watching; have the character to do the right thing when no one is watching.

Aristotle said that, at his best, man is the noblest of all animals; separated from law and justice, he is the worst. Aristotle, *Politics*, in 2 *The Complete Works of Aristotle* 1988 (Jonathan Barnes ed., Princeton Univ. Press 1984).

As a lawyer, your work and integrity will be challenged. Therefore, your work must be superior and your personal record pristine. High personal standards are as important as high professional standards, and

must not be neglected. Often personal problems lead to professional problems. A lawyer compromised and discredited by substandard professional or personal conduct cannot be an effective advocate.

When I was in private law practice with the late C. B. King, a celebrated civil rights lawyer for whom the federal courthouse in Albany has been named, as we represented unpopular people, in unpopular causes, he always insisted that we maintain the highest standards. I pass to you some timeless advice he gave me. He said: "Always be on your best professional and personal behavior, because you cannot fight and beg at the same time." In that same vein, he told me: "Always pay your taxes, and never prepare your own returns."

As you strive to maintain the integrity and competence of the legal profession, do not let anyone or anything come between you and the basic principles of truth, honesty, integrity and fairness. Because, when it comes to professionalism, you are Exhibit A, YOU ARE THE MESSAGE.



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is pleased to announce the renaming of the firm to

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in recognition of the partnership, effective May 1, 2009,  
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We are also pleased to announce the addition of associate attorney,

**JENNIFER I. GRAYSON**

who was recently admitted to the Georgia State Bar. Ms. Grayson is  
a UGA Law graduate specializing in forensic accounting, business  
litigation and family law.

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