

The background of the cover is a photograph of four people standing on a green lawn in front of a large, white, two-story house with many windows. A large tree trunk is visible behind the group. From left to right: a man in a dark pinstripe suit and a bright yellow tie; a young man in a white polo shirt with a small logo and khaki pants; a woman in a white blazer and a black skirt; and a young woman in a white cardigan over a colorful floral dress. They are all smiling and looking at the camera.

Georgia Bar Journal

August 2012 • Volume 18 • Number 1

Robin Frazer Clark
50th State Bar President



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- 6 Always find the latest news and press releases for the State Bar.
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by Robin Frazer Clark

Sharing the Abundance and Lifting All Boats

If you have ever heard me speak at a Bar meeting or seminar—or even visited my office—you already know that I am a believer in the philosophy that “a rising tide lifts all boats.” President John F. Kennedy frequently used the phrase, espousing the concept that when the overall economy improves, everyone, regardless of their economic status, benefits.

I have adopted that philosophy to accompany inspirational messages in my public speeches, and the quote is prominently displayed in my law office. To me, it is not so much a political argument as it is a constant reminder of why I practice law—to extend a professional hand to those who need help fixing any leaks that may be causing their boats to take on water.

Another way to think of a rising tide lifting all boats is within the framework of the “abundance mentality.” About 20 years ago, my mentor Steve Cotter introduced me to *The Seven Habits of Highly Effective People*

by Stephen R. Covey, which I read then and have since listened to the audio version multiple times while driving to depositions and soccer games. If you have read the book, you know that Habit Four of the Seven is to Think Win/Win, a paradigm in which agreements or solutions are mutually beneficial.

The Win/Win paradigm is characterized by integrity, maturity and courtesy, respect and appreciation for the other person and his or her point of view. According to Covey, one of the dimensions of the Win/Win paradigm is the abundance mentality, i.e., there is plenty out there for everybody. Those who possess the abundance mentality are able to celebrate the success of others rather than feel threatened by it.

It is clear to me that over the past 50 years, the State Bar of Georgia has not only adopted the abundance mentality, it has taken the mindset to new levels in its service to those of us in the legal profession. Georgia lawyers have at our disposal an (ahem) abundance of resources to help strengthen our law practices and, in turn, benefit our clients—producing the rising tide that lifts all boats. For example:

Law Practice Management Program

This member service helps Georgia lawyers pull together the pieces of the office management puzzle.

“It is clear to me that over the past 50 years, the State Bar of Georgia has not only adopted the abundance mentality, it has taken the mindset to new levels in its service to those of us in the legal profession.”

zle. Whether it's advice on new computers or other office equipment, personnel issues, workflow, file organization, tickler systems, library materials or software, the State Bar offers help when we need it. The Law Practice Management Program's consultants can provide an in-depth evaluation of your office's existing procedures and offer help through its resource library, sample management forms, software library, Fastcase news, "tips of the week," discounted ABA publications and a list of websites designed to make your life easier.

Transition into Law Practice Program

Each year, several hundred beginning lawyers in Georgia make the leap from student to professional. The Transition into Law Practice Program was authorized by the Supreme Court to aid in that transition. The core of the program is to match new lawyers with a mentor during their first year of practice to provide meaningful access to an experienced lawyer equipped to teach the practical skills, seasoned judgment and sensitivity to ethical and professionalism values necessary to practice law in a highly competent manner. The program combines the mentoring component with a CLE component.

Lawyer Assistance Program

A confidential service provided by the State Bar to help its members with life's difficulties, the Lawyer Assistance Program offers a broad range of helping services to members seeking assistance with depression, stress, alcohol/drug abuse, family problems, workplace conflicts, psychological and other issues. The program provides a telephone hotline staffed by trained counselors 24 hours a day, seven days a week; prepaid sessions with a licensed counselor; and work/life assistance includ-

ing help with childcare, elder care and financial issues.

SOLACE

During the last Bar year, my predecessor Ken Shigley appointed a special committee to develop SOLACE (Support of Lawyers/Legal Personnel—All Concern Encouraged). Through the program, members of the legal community will be able to reach out in small, but meaningful and compassionate ways to judges, lawyers, court personnel and law office staff that have a medical crisis in their family. Potential examples of assistance range from a need for a place for a family to stay near a distant hospital during cancer treatment or a transplant, or help in getting an appointment with a medical specialist with a long waiting list.


Visit the "Committees, Programs & Sections" page on the Bar's website for more information on these and other State Bar programs, which are invaluable and remind me that while Georgia lawyers may often find ourselves on opposite sides in the courtroom, ultimately we are all in this together. But perhaps the most powerful illustrations of the abundance mentality are found in the less formal opportunities to learn directly from our colleagues.

Every year, Bar members have countless occasions for networking, ranging from the Annual and Midyear meetings to section meetings, local bar gatherings, CLE seminars and more. You should take these opportunities to turn these sessions into a marketplace of ideas, tapping into the institutional knowledge of your fellow Georgia lawyers, trading ideas and experiences, work product, thoughts, suggestions and anything else that might make your load a bit lighter or your winding path a bit straighter.

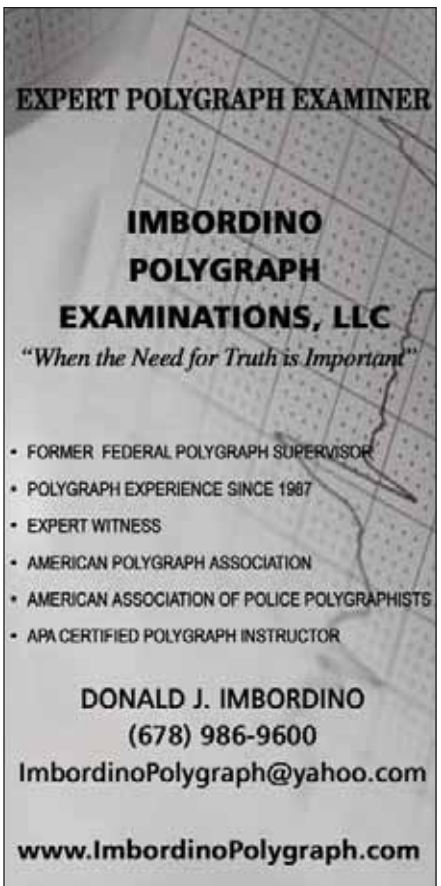
You can, of course, share in the abundance by simply observing your colleagues in action. After more than 20 years as a trial lawyer and trying more than 50 cases,

I continue to learn by watching other Bar members in court. This reinforces my knowledge of evidentiary foundations, watching and reading jurors and picking up new, persuasive arguments. With the abundance mentality, this is not only allowed but welcomed.

As this Bar year begins to unfold and we face the opportunities and potential challenges ahead, let's adopt as our battle cry the often-repeated quote, usually attributed to Benjamin Franklin but also to Thomas Paine: "We must all hang together, or we shall most assuredly hang separately."

Fellow Bar members, I look forward to the amazing journey ahead, moving with you, arm in arm, onward and upward, in brotherhood and fellowship—and, in the spirit of the abundance mentality, lifting all boats. 

Robin Frazer Clark is the president of the State Bar of Georgia and can be reached at robinclark@gatriallawyers.net.



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by Jonathan B. Pannell

From Blue Ridge to Bainbridge to Brunswick

Growing up in a family full of lawyers, most people who are not members of our profession would not have enjoyed holidays with the Pannell family. My grandfather, father, both of my father's brothers, and several cousins were either members of the bench or bar. I spent countless hours during Thanksgiving and Christmas listening to the banter back and forth between them reliving courtroom antics, their dealings with clients and some pointed opinions of opposing counsel. Two decades later, I am a part of the new generation of the Pannell family who decided to make the practice of law my career.

After graduating from the University of Georgia in May of 2000, I took a job in Atlanta with a commercial

real estate firm as an associate in their office leasing group. After 18 months of chasing tenants to sign new office leases in Atlanta, I was home one weekend discussing my job with a college friend of my parents, who of course happened to be an attorney. "Mike, I enjoy real estate, but I wish I could move home and work in the family business. Unfortunately, we don't own the hometown bank or local store." Mike quickly responded, "Jon,

you do have a family business, you just have to spend three years in law school in order to join the business!" The next fall I enrolled at Georgia State University College of Law.

While in law school I had the privilege of working at Troutman Sanders LLP in the newly formed governmental affairs department under the leadership of Pete Robinson. For three and a half years I spent my mornings and afternoons at the State Capitol and then evenings at Georgia State working on my J.D. After graduating in December of 2005, I moved back to Savannah to

join my father and Tom Gray to practice in the area of public finance and municipal bond law.


The practice of law is very important to me and to my family. Not only has it put bread on the table for three generations, but it has solidified the values that each generation has handed down to the next. Integrity, fortitude, humility and leadership are traits that come to mind when I think of the great lawyers who have come before me.

"This year, as the 66th president of the Young Lawyers Division of the State Bar of Georgia, I want to expand upon Stephanie Kirijan's theme of inclusive leadership and focus on geographic inclusiveness."

This year, as the 66th president of the Young Lawyers Division of the State Bar of Georgia, I want to expand upon Stephanie Kirijan's theme of inclusive leadership and focus on geographic inclusiveness. From Blue Ridge to Bainbridge to Brunswick, I want to increase the efforts of the YLD in areas of the state where there are younger lawyers not currently active with the Bar.

The YLD was created in 1947 to further the goals of the State Bar by increasing interest and participation of young lawyers in the Bar and to foster the principles of service to the public. Now 66 years later, there are 26 special committees of the YLD in practice-specific areas such as litigation, real estate and criminal law, and committees that focus on specific causes and issues such as high school mock trial, ethics, disaster legal assistance and minorities in the profession. Many of our programs and publications have gained national recognition by winning several American Bar Association awards. The YLD is truly the service arm of the Bar.

You are automatically a member of the state YLD if you are under the age of 36 or in your first five years of practice. If you are not currently involved with the YLD, I encourage you to get involved with the state YLD or a local YLD affiliate. Take advantage of the opportunities to network with other lawyers from all over the state of Georgia and help give back to your community through one of the YLD's many public service projects.

I hope to see you at an upcoming YLD meeting or event and encourage you to take advantage of the opportunities the YLD has to offer to help young lawyers develop into the next generation of leaders for the Bar and the state of Georgia. 

Jonathan B. Pannell is the president of the Young Lawyers Division of the State Bar of Georgia and can be reached at jonpannell@gpwlawfirm.com.



Photo by Sarah I. Coole

The 2012-13 YLD officers are sworn-in by Chief Justice George H. Carley. (Left to right) Immediate Past President Stephanie Joy Kirijan, Newsletter Co-Editors Shiriki Cavitt and Jennifer A. Blackburn, Secretary Jack Long, Treasurer Sharri Edenfield, President-Elect Darrell L. Sutton, President Jonathan B. Pannell and Chief Justice Carley.

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Apportionment of Damages:

What We Know and What Remains Unsettled

by Eric J. Frisch and C. Joseph Hoffman

The General Assembly enacted Senate Bill 3 in 2005 ostensibly to create “predictability and improvement” in the provision of health care and the resolution of civil claims.¹ One of the provisions attempted to change the economics of tort claims by moving Georgia from a “pure” joint and several liability scheme to an apportionment scheme for adjudicating the financial responsibility of multiple tortfeasors. More than seven years later, this change has yet to yield greater “predictability” for tort litigants. Instead, civil trial participants face unanswered questions and multiple rulings about the mechanics and effect of the statutory scheme. In this article, we highlight the areas that we believe the appellate courts will need to address to help all participants going forward.



We have tried to be fair to the respective positions of plaintiffs and defendants in our assessment of the issues because the uncertainties affect all parties. Although appellate decisions have affirmed the constitutionality and general applicability of the tort-reform statutes, at present, only a few reported decisions address the practical aspects of how apportionment works. With this framework in mind, we examine O.C.G.A. § 51-12-33, the main statute governing "apportionment" of damages. Next, we analyze how other states have approached issues such as which party bears the burden of proof when there is a request to apportion liability among parties (with and without nonparties) and evidentiary issues that arise when a party seeks to apportion damages to a nonparty.

From "Pure" Joint and Several To "Several" Liability

By moving from a "pure" joint and several liability scheme to an apportionment scheme, the General Assembly altered the economics of recovering damages from multiple tortfeasors. Under "pure" joint and several liability, the plaintiff controlled which of several defendants it wanted to sue for an injury. In the underlying lawsuit, the claimant could obtain a single verdict against the named defendant or defendants, regardless of who was more at fault as compared between them or as compared to nonparties, subject only to a common-law right to setoff the verdict by the amount paid in prior settlements for the same claims (if any). As a result, the named defendant(s) bore 100 percent of the economic loss, which was particularly significant if another tortfeasor was insolvent, immune, or otherwise unable to be joined in the lawsuit. In exchange for shifting the risk of insolvency from the plaintiff to the defendant, the General Assembly

granted a defendant the right to seek contribution. However, the defendant had to file a separate lawsuit and prove the amount it overpaid as compared to the fault of other tortfeasors.

"Proportional Share" Liability

Now, through a combination of Sections 51-12-31 and 51-12-33 of the Georgia Code, the General Assembly has shifted the economic risk of loss (insolvency, immunity, and inability to be joined) from the defendants to the plaintiff. Under Section 51-12-31, when multiple tortfeasors are sued, the plaintiff may recover for an injury caused by any defendant only from the defendant or defendants liable for the injury and the jury may specify the damages to be recovered from each defendant. Under the circumstances, individual judgments are entered against multiple defendants based on the harm only they caused, or what we will call the defendant's "proportional share."

The role of the factfinder should be to assess (1) whether there is liability at all; (2) if so, the entire amount of the verdict to be awarded as compensation; and (3) the proportional share each individual defendant contributed to the injury. Each defendant pays its share, as adjudicated by the factfinder. For example, assuming a case of plaintiff against three named defendants and a total verdict of \$100,000, the factfinder would determine the proportional share for each defendant: A, B, and C. If the factfinder concludes that A was 70 percent liable,

B was 30 percent liable, and C was 0 percent liable, then A pays \$70,000, B pays \$30,000, and C pays \$0.

What About Contribution?

In exchange for limiting a tortfeasor's liability to its proportional share of the damages, the tortfeasor gives up its former right to seek contribution. Using our example above, A could not sue B or C, and B could not sue C, for contribution. This makes economic sense: there is no need for contribution because the factfinder has adjudicated the percentages of fault. Although the tortfeasor bearing the biggest share of the verdict may believe that it overpaid, its argument is likely to fall on deaf ears because the judgment is likely to be considered *res judicata* on the issue of its comparative share of the liability.²

The Effect of Nonparties on Multiple Tortfeasor Litigation

Together with Section 51-12-31, the General Assembly expressed its intent in Section 51-12-33 that a tortfeasor should only bear the risk of loss related to the injury it causes by empowering the jury to determine the comparative fault of everyone who contributed to the alleged damages. The General Assembly made this clear in subsection (e), which allows apportionment to a nonparty even if that nonparty could not be joined or would be immune from suit. We will look at how the Georgia appellate courts have construed Sections 51-12-31 and 51-12-33 together.

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What We Know About How Apportionment Works in Georgia

As of the date of this article, there have been roughly 25 appellate decisions citing Section 51-12-33 following the Tort Reform Act of 2005. Below, we look at how the appellate courts have (and have not) addressed constitutionality, the scope and breadth of the statutes, and some practical applications, such as setoff, burden of proof, and evidentiary issues.

The Apportionment Scheme is Constitutional

There have been attempts to challenge the constitutionality of the new apportionment scheme, but the Supreme Court has upheld the statute.³ In *Couch v. Red Roof Inns, Inc.*, the Court rejected constitutional challenges based on deprivations of the right to a jury trial, due process, and equal protection in the context of jury instructions and inclusion of nonparties on the verdict form. The Court held that Section 51-12-33 did not violate the right to a jury trial because apportionment does not have an effect on any part of the jury's normal functions (i.e., assessment of fault, calculation of damages, etc.).⁴ Similarly, Section 51-12-33 does not violate due process or equal protection because it not vague, does not conflict with any other statute and the General Assembly had a rational basis for "apportioning damages among all tortfeasors responsible for harming a plaintiff in an efficient and orderly manner."⁵ Now that the Supreme Court of Georgia has upheld the constitutionality of Section 51-12-33, it appears that most efforts to declare it unconstitutional are coming to an end.

Apportionment Does Not Apply When Liability is Purely Derivative

One of the first cases applying apportionment came in the case of *PN Express v. Zegel*, in which the

issue was whether an employer-defendant could defend and apportion by claiming that the employee worked for a nonparty entity.⁶ The Court of Appeals of Georgia held that a liable but passive tortfeasor may not reduce its proportional share of liability by attempting to shift the loss to a nonparty. In *Zegel*, the plaintiffs sued a truck driver and an entity that plaintiffs alleged employed the driver under a number of alternative theories for injuries arising out of a wreck. PN Express defended by claiming that it did not employ the driver and by giving notice that certain nonparties directed and controlled the driver or negligently supervised him. PN Express asked the trial court to instruct the jury that they could apportion fault to the nonparties. The trial court declined to give the instruction, although the appellate opinion is silent as to why. The Court of Appeals of Georgia held that the trial court did not have to charge the jury on apportionment because the plaintiffs' theory against PN Express was "entirely based on notions of derivative liability."⁷ In affirming the decision not to give a jury instruction on apportionment, the Court of Appeals of Georgia held that, "where a party's liability is solely vicarious, that party and the actively-negligent tortfeasor are regarded as a single tortfeasor," and thus comparative fault statutes "do not apply."⁸

Although the conclusion regarding apportionment is consistent with established Georgia precedent regarding the treatment of an employer and employee as one tortfeasor, the *PN Express* case is a little difficult to understand because of the way the opinion presents the facts surrounding the request to apportion. It appears that PN Express was arguing that it did not employ the driver and, for that reason, the "real" employer should be included on the verdict form. The Court of Appeals of Georgia apparently rejected this contention based on the plaintiffs' theory of

the case, i.e., the contention that PN Express was vicariously liable. As a matter of procedure, if there was evidence that PN Express did not employ the driver at all, then the trial court could have instructed the jury on apportionment because the jury could have concluded that PN Express was "not liable" at all.

Setting aside the factual nuances of the case, the premise underlying the court's decision is correct: an entity that is truly vicariously liable should not be permitted to apportion damages between it and the person for whom it is derivatively liable. Although the employer may have an indemnification claim against the employee, the employer and employee are properly treated as one entity in the "plaintiff v. defendant" world: either the defendant (regardless of whom he works for) is liable for the injury or he is not. Ultimately, the *PN Express* case appears to be limited to the facts of that particular case, so it is hard to derive any broad lessons from it.

Apportionment Applies When Plaintiff is Not at Fault

Another question that arose early on was whether, under O.C.G.A. § 51-12-33(b), a plaintiff had to be at fault to some degree before a defendant could seek apportionment (either among existing defendants or nonparties). It appeared that there were two plausible interpretations on how to read this subsection. First, subsection (b) could have been read together with subsection (a), meaning that a plaintiff would have to be at fault in some amount before the jury could assess comparative share between any defendants or nonparties. The other interpretation was that subsections (a) and (b) are separate, each providing an avenue for apportionment, and, as a result, the defendants could seek apportionment among themselves or nonparties regardless of whether the plaintiff was at fault.

In *McReynolds v. Krebs*, the Supreme Court recently decided that apportionment is indicated in

all cases involving multiple tortfeasors, regardless of whether the plaintiff is at fault.⁹ In *McReynolds*, the Court held that subsection (b) is “plainly meant to apply even if there is no plaintiff fault” because the General Assembly used the phrase “if any” when referring to reduction of damages for fault of the plaintiff under subsection (a).¹⁰ There is no doubt that the *McReynolds* decision will have an impact by allowing defendants to apportion fault regardless of plaintiff’s conduct.

The only potential remaining argument regarding when a defendant may apportion is the situation in which the plaintiff, who is not at fault, sues *only one defendant*. Because Section 51-12-33 speaks in terms of “defendants” (plural), there is an argument to be made that the sole defendant is not entitled to apportion to nonparties. The counterargument is that Section 51-12-33(c) provides for apportionment to nonparties regardless

of the number of defendants; the *McReynolds* court implied that only subsections (a) and (b) determine applicability while the remaining sections address procedural aspects and other concerns.¹¹

Apportionment of Fault Applies to Immune Nonparties

An important part of Section 51-12-33(c) relates to apportionment of fault to nonparties. Under the plain language of the statute, this includes parties who are immune from liability, even though the effect may be to reduce the amount of money the plaintiff recovers.¹² In *Barnett v. Farmer*, a driver/husband and passenger/wife brought suit for personal injuries and loss of consortium following a car accident. At trial, there was evidence presented that both drivers were negligent. As a result, the jury apportioned fault to the husband/driver and reduced his recovery against the defendant. However, the jury

did not reduce the wife’s recovery against the defendant based on the husband’s fault.¹³ The Court of Appeals of Georgia held this was error because the wife’s award of damages should have been reduced by her husband’s percentage of fault pursuant to the clear intent of the legislature to require a defendant to pay only *his* proportional share of the fault.¹⁴ The court expressly rejected the argument “that application of apportionment to this case violate[d] the interspousal tort immunity doctrine,” explaining that its holding “in no way *requires* [the wife] to file suit against her husband, but instead, precludes her from recovering from [the defendant] that portion of her damages, if any, that a trier of fact concludes resulted from the negligence of her husband.”¹⁵ This is consistent with similar statutes and schemes in Florida, Arizona, Wisconsin, Minnesota, California, Indiana, Kansas, Louisiana, Idaho, and North Dakota that allow assess-

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ment of fault to nonparties who are otherwise immune from liability.¹⁶

Again, viewed in context, the court's interpretation of subsection (d) makes sense: "several" liability means that ultimate recovery and ability to pay are irrelevant as it relates to what the factfinder is asked to do in apportioning liability. Now, assuming a verdict for the plaintiff, the jury determines the full amount of recovery, that is, how much the injury is worth. From there, the named tortfeasors pay only their comparative share of injury. So, if the named tortfeasor is found to be 10 percent liable for a \$1 million injury, that tortfeasor pays for its 10 percent share, even if the other 90 percent is apportioned to someone from whom the plaintiff could never recover.

Apportionment Applies Even When the Theory of Liability is Different Among the Tortfeasors

The Supreme Court of Georgia recently addressed whether the factfinder may apportion fault between tortfeasors against whom there are different standards of liability.¹⁷ In the case of *Couch v. Red Roof Inns, Inc.*, an unknown criminal attacked the plaintiff, who was staying in a hotel. The plaintiff sued the hotel's owner for failing to keep the premises safe.¹⁸ The hotel's owner wanted to put the criminal on the verdict form as a responsible party. The District Court certified two questions to the Supreme Court of Georgia: whether the factfinder could consider the "fault" of the criminal and whether inclusion of the criminal in jury instructions and on the verdict form violated the plaintiff's constitutional rights to a jury trial, due process, or equal protection.¹⁹

Writing for the five-justice majority, Justice Melton explained that the term "fault" in the apportionment statute encompasses all persons or entities who contributed to the alleged injury and includes negligent and intentional acts. Thus, in the *Couch* case, the Court

held that the factfinder should consider the intentional acts and comparative fault of the criminal in the verdict.²⁰ The Court held the factfinder's consideration of the fault of a nonparty criminal does not violate the right to a jury trial, due process, or equal protection because apportionment provides an efficient and orderly manner of assessing damages among all people responsible for causing harm.²¹

In addition to negligent security cases, another "tort reform" provision raises interesting questions regarding apportionment of fault to a nonparty when the nonparty is a provider of "emergency medical services" under Section 51-1-29.5. Under that statute, proof that a nonparty provider of "emergency medical services" was at fault may require clear and convincing evidence of gross negligence. Accordingly, the plaintiff may choose not to sue the tortfeasor for whom a higher quantum of proof and standard of care is required. Nevertheless, that should not prevent the jury from apportioning damages to those nonparties. What is interesting, and unanswered, is whether a defendant seeking to apportion to a nonparty whose conduct falls under the rubric of Section 51-1-29.5 would be required to prove gross negligence by clear and convincing evidence as well.

There is No Right of Contribution After Liability Has Been Apportioned

Historically, a joint tortfeasor that believed it had overpaid could seek contribution under O.C.G.A. § 51-12-32. Although Section 51-12-32 still exists, it is applicable only when O.C.G.A. § 51-12-33 does *not* apply.²² Thus, when the factfinder apportions damages, a defendant does not have a right of contribution against co-defendants or nonparties.²³

The *McReynolds* court addressed contribution as well. In that case, the plaintiff was injured in a car accident and brought suit against the driver and the manufacturer of

their car.²⁴ The manufacturer settled pre-suit and the driver/defendant sought contribution against the manufacturer if she were to be found liable.²⁵ In dismissing the contribution claim, the trial court ruled that the defendant could not seek contribution, but could ask the jury to apportion the damages to the nonparty manufacturer (even though the defendant was the sole defendant).²⁶ At trial, the defendant did not present any evidence of the manufacturer's fault. As a result, the jury returned a verdict for \$1.2 million solely against the defendant.²⁷ On appeal, the Supreme Court of Georgia affirmed the lower courts' rulings that when there is apportionment, the defendants have no right of contribution.²⁸

This reasoning makes sense in light of the goal of apportionment: making sure that the factfinder determines the total amount of damages and then the proportional share of each wrongdoer. In the context of *McReynolds*, had the defendant presented evidence of the manufacturer's fault, then the factfinder could have assessed the evidence and adjudicated the issue. If the factfinder had determined that the manufacturer was 50-100 percent at fault, then the named defendant would have no argument and, consequently, no need for a contribution action. Although the *McReynolds* defendant believed she overpaid (100 percent liability), the jury apparently had no evidence to convince them otherwise.

Defendants Bear the Burden of Proving the Fault of a Nonparty

The General Assembly did not address the burden of proof applicable to apportioning fault to nonparties. Predictably (and perhaps, correctly), plaintiffs argue that the defendant seeking apportionment bears the burden of proving that the nonparty is at fault. Most people see a request for apportionment as an "affirmative defense," although it is not included in the list of defenses that must be affirmatively pled.

Likewise, it is unclear whether all named tortfeasors have to give notice of apportionment or whether a co-defendant can “bootstrap” off of the notice filed by another co-defendant. In *Union Carbide Corp. v. Fields*, the Court of Appeals of Georgia recently characterized use of the apportionment statute as an “affirmative defense,” explaining that “the fault of a nonparty cannot be considered for the purposes of apportioning damages without some competent evidence that the nonparty in fact ‘contributed to the alleged injury or damages.’”²⁹

In *Union Carbide*, the plaintiff brought product liability claims against a number of manufacturers, suppliers, and sellers of certain asbestos-containing products. Although the defendants noticed a number of nonparties for purposes of apportionment, plaintiff moved for summary judgment on such notices, claiming the defendants failed to present sufficient evidence of fault. The trial court agreed and precluded the defendants from attempting to apportion fault. On appeal, the defendants relied upon the plaintiff’s own complaint and sworn affidavit in support of the complaint claiming asbestos exposure to many of the nonparties’ products. In affirming the grant of summary judgment, the court rejected plaintiff’s allegations as insufficient, noting that defendants failed to offer “any evidence, expert or otherwise, showing that [plaintiff’s] alleged exposure to these five nonparties’ products in fact contributed to the development of [plaintiff’s] mesothelioma.”³⁰

The *Union Carbide* decision confirms what was suspected by many: defendants carry the burden of providing competent evidence to permit a jury to apportion fault, similar to an affirmative defense. In *Union Carbide*, however, the court held that the burden of proof requires sufficient evidence to survive summary judgment, rather than the lower “any evidence” standard typically used to evaluate jury instruction issues on appeal. This is consistent with appel-

late court decisions in other states.³¹ The *Union Carbide* decision, however, appears to conflict with earlier decisions by the Court of Appeals of Georgia, which used the lower “any evidence” standard.³²

What Remains Unsettled

The unanswered questions relate primarily to how the litigants, the trial court, and the factfinder should deal with nonparties who are on the verdict form for apportionment. In the text of Section 51-12-33, the General Assembly did not address topics such as the scope of the pleading requirement before a defendant can seek apportionment and whether a defendant can seek third-party relief under theories such as equitable indemnification or equitable subrogation. In the next section, we analyze these issues and look at how other states have approached these problems.

Are There Special Pleading Requirements?

The General Assembly set forth a basic “notice” requirement in the statute, but did not address how a trial court is to address the sufficiency of the notice. For example, in a professional malpractice case, is the defendant required to file an affidavit with its notice? Is the defendant required to hire an expert that will specifically opine as to the standard of care of the nonparty, or can the defendant professional serve in that role? Can the defendant rely on the opinions of the plaintiff’s expert?

California has addressed the type of evidence required.³³ In *Wilson v. Ritto*, a defendant/surgeon sought to apportion fault to a nonparty doctor that performed prior surgery on the plaintiff.³⁴ During the trial, the defendant provided expert testimony criticizing the nonparty doctor for failing to use certain procedures in performing an earlier surgery that should not have been performed in the first place.³⁵ However, the expert did not testify that the conduct fell below the standard of care. The appellate court

held that apportionment amounted to an affirmative defense requiring “substantial evidence” of fault, and that mere criticism of a nonparty was not enough because “fault is measured by the medical standard of care.” Accordingly, without specific expert testimony as to the breach of the standard of care, the defendant could not apportion fault to the nonparty.³⁶ We are not aware of any current cases on appeal in Georgia on this issue.

Does a Third-Party Claim for Equitable Indemnification Still Exist?

The Court of Appeals of Georgia addressed the status of third-party complaints in *Murray, et al v. Patel*.³⁷ In *Murray*, the plaintiffs were injured when their car, driven by their son, Patel, struck a disabled vehicle in a roadway. Plaintiffs sued the driver and owner of the disabled vehicle, Murray and Hill. Defendants filed a third-party complaint against Patel, alleging that his negligence was the “sole and proximate cause” of plaintiff’s injuries and requesting indemnification if defendants were to be held liable.³⁸ The trial court dismissed the third-party complaint on a motion to dismiss. The Court of Appeals reversed, holding that the third-party complaint should not have been dismissed because the defendant included a claim for indemnification.³⁹

Unfortunately, the court never explained the basis for upholding the indemnity claim. Rather, the court only wrote that the claim was properly pled and therefore the trial court should not have dismissed it.⁴⁰ As a result, it appears that some sort of third-party relief may still be viable. But beyond the discussion in *Murray*, the Georgia appellate courts have not addressed this issue since the passage of SB3. Accordingly, there is no clear direction on what “implied indemnification” means or how it might work in a trial setting.

Another unanswered question is whether the old line of cases involving indemnification for “active” and “passive” tortfeasors survives. As mentioned before, the Court of

Appeals of Georgia has held that a “passive” employer and an “active” employee are treated as one unit for purposes of calculating the proportional share of liability among multiple tortfeasors. What is less clear is under what circumstances “active” and “passive” liability may still apply outside of the vicarious liability context. For example, one issue is whether a claim for indemnification still exists, because, with apportionment, the jury is supposed to assess each party’s individual comparative contribution to the injury. If the scheme works correctly and each defendant pays for its proportional share of damage, then it becomes harder to imagine a scenario in which one party could seek non-contractual indemnification from someone else. Similarly, if the person to be indemnified (indemnitee) is named and the person who is supposed to indemnify them (indemnitor) is not, but is a potential tortfeasor themselves, then it would seem that the indemnitee should insist that the indemnitor be put on the verdict form. Again, these questions remain unanswered at this time.

Are Prior Settlements Admissible into Evidence?

In Section 51-12-33, fault can be apportioned to settling parties. The question arises whether the fact of settlement is admissible to prove fault. Under pre-apportionment caselaw, the answer was generally “no” in the context of setoffs and determining joint and several liability. However, with apportionment, the appellate courts will need to decide whether the factfinder should be told about the existence of settlement because such evidence could help the factfinder apportion fault appropriately and fully. The counterargument is that admitting such evidence might discourage early resolution of claims. Under the revised evidence code, evidence of a settlement or attempts to settle are generally inadmissible to prove liability.⁴¹ However, such evidence may be admissible to prove bias

or prejudice by a witness, among other things.⁴² Accordingly, there may be circumstances when a settlement may be relevant to assist with the apportionment of damages, although the appellate courts will need to guide litigants about those circumstances.

Ethical Issues

Recently, we have heard about legal malpractice issues arising out of the application of Sections 51-12-33(c) and (d). For plaintiffs’ counsel, the concerns surround failing to name or dismissing a party against whom an existing party is then able to point the finger. For defense counsel, most of the concerns surround filing the notice of nonparty fault too late. One problem, of course, is that the statute requires the notice be filed 120 days before trial. Most people do not know, however, when trial is going to start. In addition, defense counsel may have concerns about not filing the notice at all or the effect of failing to file it on time.

For all attorneys, we believe this issue—whom to sue and against whom to point the finger—is something that you should consider discussing with your client very early and documenting the discussion in writing. The new Rules of Professional Conduct require attorneys to obtain “informed consent” about litigation strategy. Although litigators still get the benefit of judgmental immunity, this could become an area that weakens that immunity. The bottom line is that explaining the issue and the rationale behind the recommended strategy may be a prudent way to proceed.

Conclusion

The appellate courts have just begun to provide guidance on the new apportionment of damages scheme. Many questions remain unanswered, such as whether there are special pleading requirements, whether and under what circumstances a claim for indemnification still exists, and whether

er prior settlements are admissible as relevant to apportionment. Hopefully, future opinions will provide the much needed “predictability and improvement” the General Assembly sought in 2005.



Eric Frisch is a partner with Carlock Copeland & Stair, specializing in the defense of hospitals, doctors and lawyers in professional malpractice suits.



C. Joseph Hoffman is an associate with Carlock, Copeland & Stair focusing his practice on the defense of financial, legal and real estate professionals in malpractice cases.

Endnotes

1. SB 3, Section 1 (2005).
2. It does not appear that the General Assembly abrogated O.C.G.A. § 23-2-71 (contribution as an equitable remedy) in SB 3. However, we are not sure how much force that code section will have going forward because equity follows the law.
3. *Couch v. Red Roof Inns, Inc.*, 2012 WL 2681399, Case No. S12Q0625 (Justice Melton, July 9, 2012).
4. *Id.* at *6.
5. *Id.*
6. *PN Express, Inc. v. Zegel*, 304 Ga. App. 672, 697 S.E.2d 226 (2010).
7. *Id.* at 680, 697 S.E. 2d at 233.
8. *Id.*
9. *McReynolds v. Krebs*, 290 Ga. 850, 725 S.E.2d 584 (March 23, 2012), *reconsideration denied*, (Apr. 11, 2012).
10. *Id.* at 852, 725 S.E.2d at 587.
11. *Id.* (explaining that subsections (a) and (b) “open with the same broad statement of applicability” and “subsections (c) through (g) address apportionment of fault to nonparties, preserve existing defenses or immunities . . . and prohibit recovery where the plaintiff is 50 percent or more responsible for the injury or damages claimed”).
12. *Barnett v. Farmer*, 308 Ga. App. 358, 707 S.E.2d 570 (2011).

13. *Id.* at 362, 707 S.E.2d at 574, n.12.
14. Left untouched, the net effect of the unapportioned verdict would have resulted in the defendant paying more than his proportional share of the liability. For example, if the jury returned a total gross award of \$100,000 for loss of consortium and apportioned liability 60 percent defendant and 40 percent husband, the wife should have recovered only \$60,000 after reduction of the damages because of her husband's culpability. Without apportionment, she would receive the whole \$100,000 and the defendant would overpay.
15. Barnett, 308 Ga. App. at 362, 707 S.E.2d at 573-74.
16. See *Allied-Signal, Inc. v. Fox*, 623 So. 2d 1180 (Fla. 1993) (Supreme Court of Florida holding that Florida's comparative fault scheme requires consideration of all potential tortfeasors regardless of whether the potential tortfeasor is immune from liability). See also *Nance v. Gulf Oil Corp.*, 817 F.2d 1176 (5th Cir. 1987) (applying Louisiana law); *Johnson v. Niagara Machine & Tool Works*, 666 F.2d 1223 (8th Cir. 1981) (applying Minnesota law); *Roberts v. ACandS, Inc.*, 873 N.E.2d 1055 (Ind. Ct. App. 2007); *Ebach v. Ralston*, 510 N.W.2d 604, 607 (N.D. 1994); *DaFonte v. Up-Right, Inc.*, 828 P.2d 140 (Cal. 1992); *Dietz v. General Electric Co.*, 821 P.2d 166 (Ariz. 1991); *Pocatello Indus. Park Co. v. Steel W.*, 621 P.2d 399 (Idaho 1980); *Brown v. Keill*, 580 P.2d 867 (Kan. 1978); *Connar v. West Shore Equipment, Inc.*, 68 Wis.2d 42 (Wis. 1975).
17. *Couch v. Red Roof Inns, Inc.*, 2012 WL 2681399, Case No. S12Q0625 (Justice Melton, July 9, 2012).
18. *Id.* at fn. 1.
19. *Id.* at *1.
20. *Id.* at *2-3.
21. *Id.*
22. O.C.G.A. § 51-12-32 ("Except as provided in Code Section 51-12-33 . . ."). See also *McReynolds v. Krebs*, 290 Ga. 850, 725 S.E.2d 584 (March 23, 2012), *reconsideration denied*, (Apr. 11, 2012) (explaining that O.C.G.A. 51-12-32's "effect was limited by the 2005 amendments which added the words "[e]xcept as provided in Code Section 51-12-33").
23. *McReynolds*, 290 Ga. at 852-53, 725 S.E.2d at 587-88.
24. *Id.* at 850, 725 S.E.2d at 586.
25. *Id.*
26. *Id.* at 852, 725 S.E.2d at 587-88.
27. *Id.* at 853, 725 S.E.2d at 588.
28. *Id.* at 852, 725 S.E.2d at 587.
29. *Union Carbide Corp. v. Fields*, 2012 Ga. App. LEXIS 308, *13 (Mar. 20, 2012).
30. *Id.* at *20.
31. See, e.g., *Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262, 1264 (Fla. 1996) ("defendant has the burden of presenting at trial that the nonparty's fault contributed to the [plaintiff's injuries] in order to include the nonparty's name on the jury verdict"); *McGraw v. Sanders Co. Plumbing & Heating, Inc.*, 667 P.2d 289, 295-96 (Kan. 1983) (burden of proof by a preponderance of the evidence).
32. Cf. *Pacheco v. Regal Cinemas, Inc.*, 311 Ga. App. 224, 229, 715 S.E.2d 728, 733, n.13 ("[a] trial court has a duty to charge the jury on the law applicable to issues which are supported by the evidence. If there is even slight evidence on a specific issue, it is not error for the court to charge the jury on the law related to that issue.>").
33. *Wilson v. Ritto*, 129 Cal.Rptr.2d 336 (Cal. App. 2003).
34. *Id.* at 340-41.
35. *Id.*
36. *Id.* at 342. See also *Burchfield v. CSX Transp., Inc.*, CIVA.107-CV-1263-TWT, 2009 WL 1405144 (N.D. Ga. May 15, 2009) (not reported) (finding that failure to introduce expert testimony on the standard of care prevented defendant's assertion of fault against nonparty where court found expert testimony was necessary for jury to determine fault).
37. 304 Ga. App. 253, 696 S.E.2d 97 (2010).
38. 304 Ga. App. at 254, 696 S.E.2d at 98.
39. 304 Ga. App. at 255, 696 S.E.2d at 99.
40. *Id.*
41. O.C.G.A. §24-4-408(a).
42. O.C.G.A. §24-4-408(c).

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Georgia's First City Hosts the 2012 Annual Meeting

by Jennifer R. Mason

Savannah. The name brings to mind images of historic squares, oak trees draped with Spanish moss, large freight container ships moving slowly up and down the Savannah River and the feeling of that southern charm that can't quite be put into words. It was into a setting like this that State Bar members descended the last week of May for the 2012 Annual Meeting. Georgia's fourth largest city welcomed Bar members, their families and guests with open arms as they traveled to the Westin Savannah Harbor Golf Resort and Spa for a weekend of fun, food and education. Attendees also had the opportunity to witness the swearing-in of Robin Frazer Clark as the second woman to be elected president of the State Bar.

Opening Night Festivities

Those who attended the opening night event enjoyed a low-key, family-friendly evening with some of the most beautiful weather that would be seen all weekend. A brief but powerful afternoon coastal storm swept away the hot, humid air and left behind cooler temperatures and a wonderful breeze.



Photos by Sarah I. Coole, Jennifer R. Mason and Stephanie J. Wilson

While attendees and guests enjoyed the Opening Night Festival on the Harbor Lawn, a candy maker worked on creating warm, buttery, melt-in-your mouth pralines.

The lawn in front of the hotel was transformed into a gathering place for Bar members and their families for whom catching up with old friends and getting acquainted with new ones was the order of the evening. Guests were entertained by the musical sounds of DJ Rockin' Randy and "Travlin' Max" while they

enjoyed the open bars and buffet complete with a candy maker who tempted one and all with warm, buttery, melt-in-your-mouth pralines. Those who had a taste for more competitive entertainment tested their athletic skills in the golf driving cage or the baseball, football, soccer and hockey practice areas. Keg racers and an Orbitron machine were available for people who were looking for a little more thrill in their activities and the little ones had a wide array of inflatable play areas to choose from.

Weekend Business

The morning and afternoon business events, including CLEs, section-sponsored breakfasts and committee and board meetings were held in the Savannah International Trade and Convention Center adjacent to the hotel. In a new CLE format, attorneys were able to move from one CLE to another on a track system depending on their specific interests. Topics included criminal justice reform, residential real estate, solo/small firm boot camp, hot topics in family law, the ever-popular war stories series and Fastcase training. Along with the CLE opportunities, section-sponsored events and several committee meetings provided Bar members the opportunity to network and reconnect with colleagues. Law school and section receptions were hosted at the Westin Savannah and were a wonderful precursor to evening events that included the YLD Dinner and Swearing-In Ceremony and the Presidential Inaugural Dinner. Organized social events included the annual YLD/Pro Bono 5K Fun Run and the tennis and golf tournaments.

Board Meeting Highlights

Following the presentation of awards at the June 1 plenary session, the board received a report by Gerald Davidson and Paula Frederick and by unanimous voice vote, approved the proposed dis-



Peggy and Denny Galis, who had their first date 50 years ago at the 1962 State Bar Annual Meeting, celebrate that anniversary during the Opening Night Festival.

ciplinary rules changes to Rule 7.2, 7.3(a)(5) and 7.3, and by majority voice vote, approved the proposed rules changes to Rule 4-219 and 4-228. The board then received a report on Memorials by President Ken Shigley, followed by reports on the Long Range Planning Committee by Pat O'Connor, the Investigative Panel by Chris Ray, the Review Panel by Tony Askew and the Formal Advisory Opinion Board by Jim Ellington, the Supreme Court of Georgia by Chief Justice George H. Carley, the Court of Appeals of Georgia by Chief Judge John J. Ellington, the State of the Senate by Sen. Bill Hamrick (chair of the Senate Judiciary Committee) and the House of Representatives by Rep. Wendall Willard (chair of the House Judiciary Committee).

President Shigley presented the Chief Justice Thomas O. Marshall Professionalism Award to Chief Justice George H. Carley and attorney Robert G. Wellon.

The State Bar of Georgia paid tribute to Chief Justice Carley in the plenary session with presentations by his former law partner Walt Drake, Justice Robert Benham and Past President Sonny Seiler, in addition to remarks given by Past President John C. Sammon.

During the plenary session, President Ken Shigley delivered his outgoing remarks as required by the bylaws of the State Bar. A copy of these remarks can be found on page 26 of the *Bar Journal*.

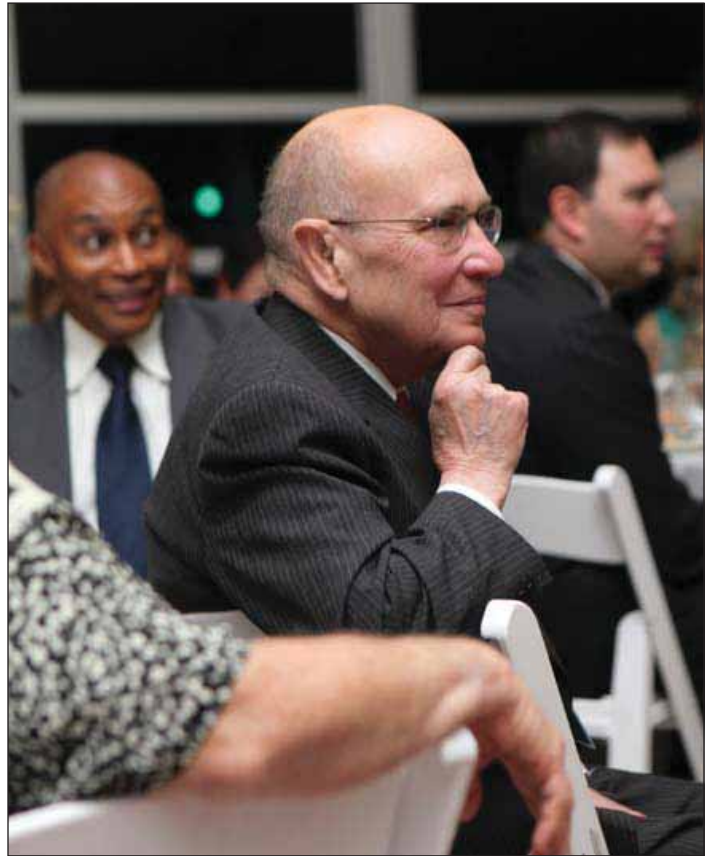
Robin Frazer Clark presided over the 243rd Board of Governors meeting on Saturday, June 2.

Highlights of the meeting included:

- The board approved the following presidential appointments:
Investigative Panel
 District 1: Christian Steinmetz III (2015)
 District 2: John M. Stephenson (2015)
 District 3: William Dallas NeSmith (2015)
 District 3: Ramon Alvarado (2013)
 District 4: Katie Wood (2015)
Formal Advisory Opinion Board
 At-Large: Edward E. Carriere Jr. (2014)
 At-Large: Letitia A. McDonald (2014)
 Emory University: James B. Hughes Jr. (2014)
 Georgia Assoc. of Criminal Defense Attorneys: Joseph Scott Key (2014)
 Georgia District Attorneys Assoc.: Kenneth W. Mauldin (2014)



(Left to right) Dr. Robert Lee Aston receives a special award honoring his work and commitment for deserving veterans from outgoing President Ken Shigley during the plenary session.



Chief Justice George H. Carley listens intently as he is roasted by Hon. Lawton Stephens during the YLD 65th Anniversary Dinner.

Georgia State University: Roy M. Sobelson (2014)

Investigative Panel: Laverne Lewis Gaskins (2013)

John Marshall Law School: Jeffrey Alan Van Datta (2014)

Review Panel: Charles B. Marsh (2013)

- The board approved President Clark's 2012-13 appointments to Standing, Special, Program and Board committees.
- The board elected Cliff Brashier as executive director for the 2012-13 Bar year.
- The board approved the appointment of Dawn Jones to the Chief Justice's Commission on Professionalism for a two-year term.
- The board approved the reappointments of Wade W. Herring, C. Ben Garren Jr., Patricia A. Gorham and Tamara M. Woodard to the Georgia Legal Services Board of Trustees for two-year terms.

- The board approved the proposed 2012-13 election schedule.
- The board received a copy of the future meetings schedule.
- As required by Article V, Section 8 of the Bylaws, the board:
 - Authorized the president to secure blanket fidelity bonds for the Bar's officers and staff handling State Bar funds.
- As required by Article V, Section 6 of the Bylaws, the board:
 - Directed the State Bar and related entities to open appropriate accounts with such banks in Atlanta, Ga., but excluding any banks that do not participate in the IOLTA Program, and other such depositories as may be recommended by the Finance Committee and designated by the Executive Committee of the Board of Governors of the State Bar of Georgia, said depository currently being Merrill

Lynch, and that the persons whose titles are listed below are authorized to sign an agreement to be provided by such banks and customary signature cards, and that the said banks are hereby authorized to pay or otherwise honor any check drafts, or other orders issued from time to time for debit to said accounts when signed by two of the following: treasurer, secretary, president, immediate past president, president-elect, executive director, general counsel and office manager provided either the president, secretary or treasurer shall sign all checks or vouchers, and that said accounts can be reconciled from time to time by said persons or their designees. The authority herein given is to remain irrevocable so as said banks are concerned until they are

notified in writing, acknowledge receipt thereof.

- Designated the employment of an independent auditing firm, to be selected by the Executive Committee after recommendation of the Audit Committee, to audit the financial records of the State Bar for the fiscal year 2011-12.
- President Clark addressed the Board of Governors and presented an overview of her proposed program of activities for the 2012-13 Bar year (see page 30.)
- Executive Committee elections were held with the following results: Elizabeth L. Fite, Patrick T. O'Connor, Rita A. Sheffey and Phyllis J. Holmen.
- Treasurer Patrise Perkins-Hooker presented a report on the Bar's finances and investments, and the board received the income statement for the 9 months ending March 31.
- Following a presentation by Treasurer Perkins-Hooker, the board approved the proposed 2012-13 Operation and Bar Center budgets as submitted by unanimous voice vote.
- Paul Painter Jr. and Tom Bordeaux welcomed the State Bar to Savannah and presented President Clark with a congratulatory letter from the mayor of the city.
- Cliff Brashier provided a report on the proposed Spring Street viaduct improvements, scheduled to begin in 2013, and will have a major impact on access to and from the State Bar's parking deck. According to the Georgia Department of Transportation, Spring Street will be closed for at least a two-year period, leaving Marietta Street the only way to enter and exit the deck. The State Bar is looking at the possibility of securing parking spaces at a nearby garage as an alternative to parking in the deck, and the State Bar's General Counsel

is working on eminent domain loss of access issues.

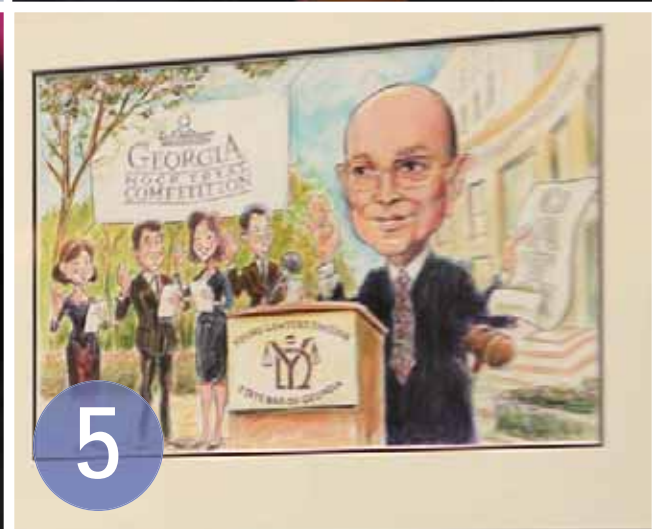
- YLD President Jonathan Pannell presented a report on the activities of the Young Lawyers Division. He thanked everyone that attended the YLD Dinner and Swearing-In Ceremony, and Hon. Lawton Stephens for hosting the evening's roast of Chief Justice George H. Carley. He recognized YLD President-Elect Darrell Sutton, and recognized and thanked YLD Immediate Past President Stephanie Joy Kirijan for her many accomplishments this Bar year. He reported that he plans to expand on the YLD's theme of inclusive leadership. He announced that he is asking the YLD Board of Directors to go around the state and recruit new lawyers to get involved and attend YLD meetings. He asked the Board of Governors members to identify and encourage young lawyers in their law firms and legal community to become involved in Bar activities. He plans to strengthen the existing YLD programs and committees, particularly the Leadership Academy, and the annual Signature Fundraiser and Legislative Luncheon. He

thanked Chief Justice George H. Carley for being an instrumental leader of the Bar, for participating in his 20th (and last) YLD swearing-in ceremony and for his many years of support to the YLD.

- Tom Boller provided a preview of the 2013 legislative session.
- Hon. Sam Olen, attorney general of Georgia, being unable to personally attend the Annual Meeting, presented the Georgia Law Department address by video.
- Paula Frederick provided an update on the activities of the ABA House of Delegates and upcoming ABA Annual Meeting in Chicago.
- The board received written reports from the Fee Arbitration Program, the Law Practice Management Program, the Long-Range Planning Committee, the Military Legal Assistance Program, the Professionalism Committee, the Unlicensed Practice of Law Program, the Transition into Law Practice Program, the Chief Justice's Commission on Professionalism and the BASICS Program.
- The board received written annual reports from the fol-



(Left to right) Judge Pam Boles, Sally Shigley and Sally Lockwood at the Opening Night Festival at the 2012 Annual Meeting of the State Bar of Georgia.



Photos from the Annual Meeting

1. Justice Robert Benham and wife Nell along with Judge Larry Mims and wife Joyce.
2. Outgoing President Ken Shigley presents Ann Overbeck of the Walton County Bar Association with the Best New Entry Award. The award is presented to recognize the excellent efforts of those local and voluntary bar associations that have entered the Law Day, Award of Merit or Newsletter competitions for the first time in four years.
3. The 2012-13 Executive Committee (*left to right, top row*): Elizabeth L. Fite, Treasurer Patrise M. Perkins-Hooker, President-Elect Charles L. "Buck" Ruffin, Rita A. Sheffey, President Robin Frazer Clark, YLD Immediate Past President Stephanie Joy Kirijan, Phyllis J. Holmen, Brian D. "Buck" Rogers and Patrick T. O'Connor. (*Left to right, bottom row*) David S. Lipscomb, Secretary Robert J. Kauffman, YLD President Jonathan B. Pannell, YLD President-Elect Darrell L. Sutton and Immediate Past President Kenneth L. Shigley.
4. People of all ages enjoyed the Opening Night Festival, including little Alice Geoffroy, daughter of Michael and Tara Geoffroy.
5. The Young Lawyers Division presented Chief Justice George Carley with a caricature to thank him for his many years of service to the YLD.
6. Jenny Mittelman and Ken and Sally Shigley at the Opening Night Festival.
7. The 2012 Tradition of Excellence Award recipients (*left to right*) Chairman Darren Penn; David B. Bell, Augusta, (plaintiff); H. Andrew Owen, Atlanta, (defense); Lawrence S. Sorgen, Hiawasse, (general practice); Judge Phyllis Kravitch, Atlanta (judicial); and incoming chair Laura Austin.
8. (*Left to right*) Bret and Tedra Hobson with Leslie and Ivy Cadle during the Opening Night Festival.
9. (*Left to right*) Winners of the 2012 Tennis Tournament: Margaret Washburn, Hon. R. Rucker Smith and Caroline Brashier.
10. Board Member Tom Chambers and Past President Lester Tate at the Supreme Court Reception.
11. No event would be complete in Savannah without sweet, fresh pralines.
12. The Opening Night Festival was held outside in the nice Savannah breeze.





2011-12 President Ken Shigley presents the Employee of the Year Award to Michelle Garner, meetings director of the State Bar.

lowing sections: Animal Law, Aviation, Bankruptcy, Business Law, Corporate Counsel, Eminent Domain, Environmental Law, Franchise and Distribution Law, Individual Rights Law, Intellectual Property Law, Judicial, Labor and Employment Law, Nonprofit Law, School and College Law, Taxation Law, Tort and Insurance Practice, and Workers' Compensation.

- Seth Kirschenbaum directed the board members to the BASICS report in the board agenda that provided statistical information on the program's recidivism rate.

Annual Awards

During the plenary session, outgoing President Ken Shigley recognized specific Bar members and organizations for the work they have done over the past year.

Chief Justice Thomas O. Marshall Professionalism Award

The 11th Annual Chief Justice Thomas O. Marshall Professionalism Award, sponsored by the Bench and Bar Committee of the State Bar of Georgia and selected by all living past Bar presidents, hon-

ors one judge and one lawyer who have and continue to demonstrate the highest professional conduct and paramount reputation for professionalism. This year's recipients were **Hon. George H. Carley**, chief justice, Supreme Court of Georgia, Atlanta, and **Robert G. Wellon**, attorney and counselor at law, Atlanta.

Georgia Association of Criminal Defense Lawyers Awards

The Georgia Association of Defense Lawyers (GACDL) announced that the 2011 GACDL award was presented to **H. Bradford Morris**.

The Inaugural G. Terry Jackson Friend of the Constitution Award was presented posthumously to **G. Terry Jackson**.

GACDL presented 2011 President's Awards to **Russell C. Gabriel**, **Robert G. Rubin**, **Brian Steel**, **Christine A. Koehler**, **Sabrina Rhinehart** and **Nicholas A. Lotito**.

Local and Voluntary Bar Activities Awards

The **Thomas R. Burnside Jr. Excellence in Bar Leadership Award**, presented annually, honors an individual for a lifetime

of commitment to the legal profession and the justice system in Georgia, through dedicated service to a voluntary bar, practice bar, specialty bar or area of practice section. This year's recipient is **Julie M. T. Walker**, nominated by the Georgia Association of Black Women Attorneys.

The **Award of Merit** is given to voluntary bar associations for their dedication to improving relations among local lawyers and devoting endless hours to serving their communities. The bar associations are judged according to size.

- 101 to 250 members: **Gainesville-Northeastern Bar Association**
- 251 to 500 members: **Stonewall Bar Association of Georgia, Inc.**
- 501 members or more: **Atlanta Bar Association**

The **Best New Entry Award** is presented to recognize the excellent efforts of those local and voluntary bar associations that have entered the Law Day, Award of Merit or Newsletter competitions for the first time in four years. This year's recipient was the **Walton County Bar Association**.

The **Best Newsletter Award** is presented to local and voluntary bars that provide the best informational source to their membership, according to their size.

- 251 to 500 members: **Gwinnett County Bar Association**
- 501 members or more: **Georgia Defense Lawyers Association**

The **Law Day Award of Achievement** is presented to local and voluntary bar associations that best plan Law Day activities in their respective communities to commemorate this occasion. The bar associations are judged in size categories.

- 51 to 100 members: **Dougherty Circuit Bar Association**

- 101 to 250 members: **Blue Ridge Bar Association**
- 251 to 500 members: **Gwinnett County Bar Association**
- 501 members or more: **Cobb County Bar Association, Inc.**

The **Best Website Award** is given to local and voluntary bar associations with websites that exemplify excellence in usefulness, ease of use, content and design in meeting the needs of the website's targeted audience. The bar associations are judged in size categories.

- 251 to 500 members:
DeKalb Bar Association
- 501 members or more:
Atlanta Bar Association

The **President's Cup Award** is a traveling award presented annually to the local or voluntary bar association with the best overall program. This year's recipient was the **Atlanta Bar Association**.

Pro Bono Awards

The **Dan Bradley Award** honors the commitment to the delivery of high quality legal services of a lawyer of Georgia Legal Services Program or the Atlanta Legal Aid Society. The award honors the memory of Georgia native and Mercer Law graduate Dan J. Bradley, who was president of the federal Legal Services Corporation.

The 2012 Dan Bradley Award was presented to **David A. Webster** in recognition of his dedication to access to justice for low-income Georgians; for his leadership in high-quality advocacy; for his generosity in sharing his time and talents with public interest lawyers and the legal aid community; and for a career that reflects commitment to professionalism and quality legal services.

The prestigious **H. Sol Clark Award** honors an individual lawyer who has excelled in one or more of a variety of activities that extend civil legal services to the poor.

The State Bar of Georgia Access to Justice Committee selected two recipients for the 2012 H. Sol Clark Award, **Debra A. Segal**, for her deep commitment to the development and institutionalization of pro bono services in the nonprofit and law firm environments; for her leadership role on the national level in the development of pro bono standards; and for her devotion to professionalism and service to the ideal of justice for all; and **William E. Hoffmann Jr.**, for his dedication to, and passion for, justice; for his great assistance in building and nurturing pro bono programs for the poor and marginalized; and for his personal commitment to many individual pro bono clients.

The **William B. Spann Jr. Award** is given each year either to a local bar association, law firm project or a community organization in Georgia that has developed a pro bono program that has satisfied previously unmet needs or extended services to underserved segments of the population. The award is named for a former president of the American Bar Association and former executive director of the State Bar of Georgia.

The State Bar of Georgia Access to Justice Committee presented the 2012 William B. Spann Jr. Award to the **General Practice and Trial Law Section of the State Bar of Georgia**. The committee recognized the General Practice and Trial Law Section for its instituting an annual Ask a Lawyer Day pro bono program that serves as a model for local bar associations and other sections of the State Bar of Georgia; for creating opportunities for lawyers to assist poor and marginalized clients across the state; and for commitment to equal access to justice under the law.

The **A Business Commitment Pro Bono Business Law Award** is presented by the Access to Justice Committee of the State Bar of Georgia to honor business law pro bono contributions of an individual lawyer, corporate legal department

or law firm to the nonprofit community and community economic development sector in Georgia.

The 2012 A Business Commitment Pro Bono Business Law Award was presented to **Kilpatrick Townsend & Stockton LLP**, for its deep commitment to pro bono business legal services for the nonprofit sector as evidenced by the many pro bono business law matters handled by the firm's lawyers on behalf of dozens of nonprofits serving diverse communities. The firm was commended for its dedication to professionalism and to quality pro bono legal services for nonprofits that make Georgia communities a better place to live.

Section Awards

Section awards are presented to outstanding sections for their

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Georgia Lawyers
Insurance Program/ProAssurance

3 Gavel
Daily Report

1 Gavel
ABA Retirement Funds
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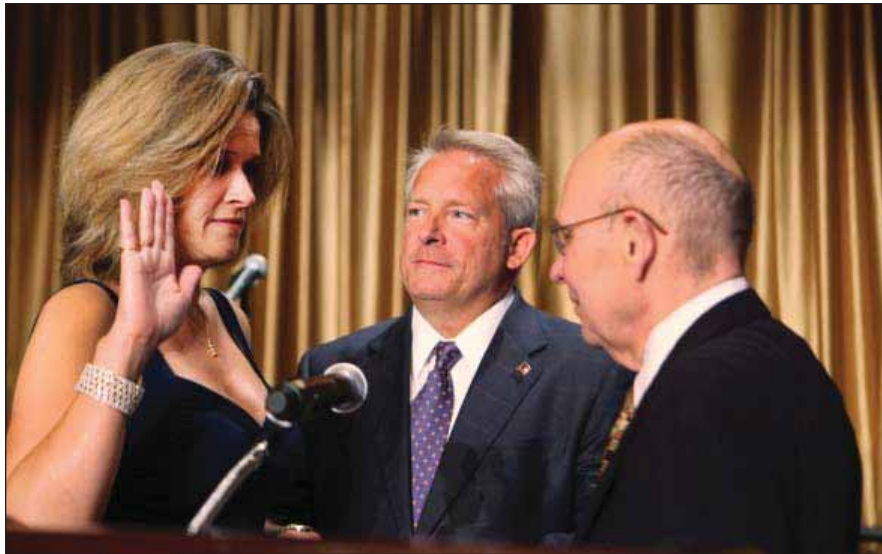
Sections

Silver Level
Fiduciary Law

Bronze Level
Criminal Law
Labor & Employment Law

Copper Level
Dispute Resolution

Other
Administrative Law
Creditors' Rights
Entertainment & Sports Law
General Practice & Trial Law
Individual Rights Law
Judicial



Chief Justice George H. Carley administers the oath of office to 2012-13 President Robin Frazer Clark while her husband Bill looks on.

dedication and service to their areas of practice, and for devoting endless hours of volunteer effort to the profession.

- **Section of the Year:**
Intellectual Property Law Section, A. Shane Nichols, chair
- **Section Award of Achievement:**
Family Law Section, Randall M. Kessler, chair

Committee Award

The Military Legal Assistance Program Committee presented a special award to attorney **Robert Lee Aston**, honoring his work and commitment and perseverance in securing approval from the Air Force's Board of Corrections of long overdue military medals to deserving veterans principally for their service during World War II and in Vietnam. Thus far, by virtue of the effort by Dr. Aston, more than 100 retrospective military medals have been authorized.

Following the committee award, Shigley recognized **Reuben Word**, an active member of the bar since 1950, providing service to the public for more than 60 years. Word is the father of Gerald Word, Coweta Circuit, Post 1 representative.

Tradition of Excellence Awards

The Tradition of Excellence Awards are presented each year

to selected Bar members in recognition of their commitment to service to the public, to Bar activities and to civic organizations. The 2012 recipients were: **H. Andrew Owen**, Atlanta (defense), **Lawrence S. Sorgen**, Hiawassee (general practice), **Hon. Phyllis Kravitch**, Atlanta, (judicial) and **David B. Bell**, Augusta, (plaintiff).

Young Lawyers Division Awards

Award of Achievement for Outstanding Service to the Profession: **Jessica C. Cabral** and **Karen S. Kurtz**.

Award of Achievement for Outstanding Service to the Bar: **Jennifer Blackburn** and **Meredith L. Wilson**.

Award of Outstanding Service to the Public: **Ana Maria Martinez**, **Jonathan R. Poole**, **Deepa N. Subramanian** and **Kristi W. Wilson**.

Award of Outstanding Service to the YLD: **Marquetta J. Bryan** and **Edward T. McAfee**.

Dedication to the YLD Award: **Stacy Rieke**.

The Distinguished Judicial Service Award was presented to Chief Justice **George H. Carley**.

The Ross Adams Award was presented to **J. Henry Walker IV**.

The 65th Anniversary Inclusive Leadership Award was presented to **Donna G. Barwick**.

The recipient of the YLD Ethics and Professionalism Award was **Ivy N. Cadle**.


Passing of the Gavel

Saturday evening's festivities began with a reception honoring the justices of the Supreme Court of Georgia, followed by dinner in an elegantly decorated ballroom. After dinner and prior to the swearing-in ceremony, 2011-12 President Ken Shigley presented two important Bar awards. The Employee of the Year Award was presented to Michelle Garner, director of meetings, for her dedication, service and support of the State Bar.

Shigley also presented the Distinguished Service Award, the highest accolade bestowed on an individual lawyer by the State Bar of Georgia to **N. Harvey Weitz** (see page 40). Weitz was honored for his "conspicuous service to the cause of jurisprudence and to the advancement of the legal profession in the state of Georgia."

Following the awards presentation, Chief Justice George H. Carley swore in Robin Frazer Clark as the 50th president of the State Bar of Georgia. Clark placed her left hand on the Bible and repeated the following:

I, Robin Frazer Clark, do solemnly swear that I will execute the office of president of the State Bar of Georgia, and perform all the duties incumbent upon me, faithfully, to the best of my ability and understanding, and agreeable to the policies, bylaws and rules and regulations of the State Bar of Georgia; the laws and Constitution of the United States. So help me God.

The evening concluded with dancing to the sounds of Atlanta band Flavor. 



Jennifer R. Mason is the assistant director of communications for the State Bar of Georgia and can be reached at jenniferm@gabar.org.







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End of Year Report

by Kenneth L. Shigley

The bylaws of the State Bar of Georgia specify the duties of the president. One of the responsibilities is to "deliver a report at the Annual Meeting of the members of the activities of the State Bar during his or her term in office and furnish a copy of the report to the Supreme Court of Georgia." Following is the report from 2011-12 President Kenneth L. Shigley on his year, delivered June 1 at the State Bar's Annual Meeting.

Chief Justice Carley . . . and all the rest of y'all, thank you for your encouragement and support in a year that my late father-in-law would have called, with a twinkle in his eye, reasonably adequate.

A year ago, I noted that our worst mistakes are mathematical in that we miscalculate the brevity of life and the length of eternity. Brevity is the most striking aspect not only of our lives but especially of a one-year-term as State Bar president. Few great objectives can be taken from idea to completion in one year. Bar leadership is necessarily a marathon relay.

A year ago, I noted that if we were able to accomplish anything during the year, it would be by standing upon the shoulders of all of the great Bar leaders who have come before, many of whom are here today. We have been blessed with harmonious relationships at the Capitol this year, and that was primarily due to the blood, sweat and tears of Bar presidents who served in a time of political transition in Georgia, especially Robert Ingram, Jay Cook, Gerald Edenfield, Jeff Bramlett, Bryan Cavan and Lester Tate. They left big shoes for me to fill.

When I saw the presidency looming, I had been a solo practitioner for 16 years, so I linked up with a law firm of old friends at Chambers, Aholt & Rickard to have some infrastructure and backup. They have done everything I asked of them and I appreciate that.

Thirty years ago last week, I met a smart, funny young woman on a church beach retreat. On the 30th anniversary of the day we met, our daughter graduated from college, and she is now engaged to a guy she met on a Campus Crusade spring break trip. Is there a pattern here? Without Sally's loving support, I wouldn't have amounted to a hill of beans. What a long and winding road we have traveled together. Thank you, sweetheart.

This job would have been impossible without the best Bar staff in America—led by Cliff Brashier, Sharon Bryant, Michelle Garner and about 72 others. If I name more I will commit sins of omission.

The members of the Executive Committee, committee chairs and a great many of you doing yeoman's work have been absolutely essential.

I cannot say enough good about those fellow lawyers with whom we have worked at the Capitol—Gov. Deal, Speaker Ralston, Majority Whip Edward Lindsey, Chairmen Wendell Willard, Bill Hamrick and Rich Golick, and the governors' executive counsel, Ryan Teague, as well as all the members of the House and Senate Judiciary Committees. It has been refreshing to find the Bar and the lawmakers on the same side of the table working on issues rather than aligned against each other.

A year ago, I suggested we should be like good Boy Scouts and leave the campground a little cleaner and a little better than we found it; to be good stewards of our profession and court system. That we have done.

A year ago, we talked of being good stewards of the criminal justice system that now incarcerates 1 out of 70 Georgians and costs more than a billion dollars a year just for prisons. As State Bar president, I had the privilege of serving on the Criminal Justice Reform Council as an appointee of Gov. Deal. The Bar's Criminal Justice Reform Committee, chaired by my good friend Pat Head, played an important role, and I hope it will have an even more important role going forward. We hoped to help Georgia become both tough on crime and smart on crime, turn tax burdens into tax payers and protect public safety while salvaging lives of folks who are in trouble mainly because of substance abuse, stupidity or mental illness.

That legislation passed and was signed into law by Gov. Deal. The job is not finished, but this is a good first step toward assuring that there are always prison beds available for the dangerous folks we are rightly scared of, while those we are merely mad at can be dealt with in less expensive, and we hope more effective ways.

A year ago, we talked of improving support for the indigent defense system. With your help, we helped to relieve the pressure on the system regarding representation of co-defendants by PDs in the same circuit where there is no actual conflict of interest; and the Legislature appropriated \$40 million of the \$41 million raised by designated fines and fees. It's not perfect, but it's an incremental step toward providing more adequate defense for citizens accused of crimes. However, there is more to do, both in adequately funding indigent defense and adequately screening financial eligibility for appointed counsel.

A year ago, we talked about taking the proposed Juvenile Code off the back burner, putting it out for comment and seeing if we could move it forward. In our meeting last August, we devoted a lot of your time to vetting the pros and cons.



Photo by Sarah I. Coole

2011-12 President Kenneth L. Shigley gives his end of the year report to the Board of Governors during the plenary session at the Annual Meeting.

After a number of necessary compromises in legislative committees, it was passed by the House, passed by the Senate Judiciary Committee, we informally polled you between meetings and the Executive Committee endorsed it. Then it stalled after brand new and much higher budget estimates appeared at the end. The Juvenile Code will be part of the work of the Criminal Justice Reform Commission, on which I will continue to serve in the coming year. I am hopeful that it will be ready for your endorsement and for passage in the next session of the General Assembly.

A year ago, we talked about being good stewards of our court system. The Next Generation Courts Commission, chaired by Judge Lawton Stephens, was tasked with developing proposals for the future of courts in Georgia. It is organized into committees assigned to discuss and make recommendations on business process improvements, funding, education and outreach, program improvements and technology. It includes a broad cross section of representatives from every class of courts, members of the State Bar, the Administrative Office of the Courts, clerks of court, state legislators and court

administrators. The National Center for State Courts Business Process Reengineering Project is providing research and staff support. Work so far includes topics such as: e-filing, statewide electronic access to court files, the role of accountability court, maintaining education needs in the courts despite limited funding, responding to business needs more efficiently such as through remote interpretation and identifying funding challenges expected over the next decade.

A year ago, we talked about how it is time for Georgia to catch up with Alabama in electronic court filing. We have made some progress this year but we are not there yet. Work on this has been an education on the Byzantine politics in the relationship between the judicial branch of government and the three interlocking organizations of Superior Court clerks. We have moved the ball forward. We will get there, but not on my watch.

A year ago, we talked about stewardship of our legal system through legislative improvements. This year we helped gain passage of the Uniform Interstate Depositions and Discovery Act and the International Arbitration Act. This spring we launched a

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Law Practice Management Program

The Law Practice Management Program is a member service to help all Georgia lawyers and their employees put together the pieces of the office management puzzle. Whether you need advice on new computers or copiers, personnel issues, compensation, workflow, file organization, tickler systems, library materials or software, we have the resources and training to assist you. Feel free to browse our online forms and article collections, check out a book or videotape from our library, or learn more about our on-site management consultations and training sessions, 404-527-8772.

Consumer Assistance Program

The purpose of the Consumer Assistance Program (CAP) is to serve the public and members of the Bar. Individuals contact CAP with questions or issues about legal situations, seeking information and referrals, complaints about attorneys and communication problems between clients and their attorneys. Most situation can be resolved informally by CAP's providing information and referrals to the public or, as a courtesy, contacting the attorney. CAP's actions foster better communications between clients and attorneys in a non-disciplinary and confidential manner, 404-527-8759.

Lawyer Assistance Program

This free program provides confidential assistance to Bar members whose personal problems may be interfering with their ability to practice law. Such problems include stress, chemical dependency, family problems and mental or emotional impairment, 800-327-9631.

Fee Arbitration

The Fee Arbitration program is a service to the general public and lawyers of Georgia. It provides a convenient mechanism for the resolution of fee disputes between attorneys and clients. The actual arbitration is a hearing conducted by two experienced attorneys and one non-lawyer citizen. Like judges, they hear the arguments on both sides and decide the outcome of the dispute. Arbitration is impartial and usually less expensive than going to court, 404-527-8750.

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My friends, you have allowed me the privilege of a lifetime, an immensely broadening personal and professional experience, both exhilarating and exhausting. Now my time is up, and I will be both succeeded and surpassed by my good friend, Robin Clark, whose skills, efficiency and political acumen far exceed mine.

joint task force with the Georgia Chamber of Commerce to develop a proposed uniform court rule on discovery of electronically stored information, one that we hope will improve upon the federal model.

A year ago, we talked about stewardship of the Bar Center, which is incomparable among state bars in the United States, which is now paid for and subsidizing Bar dues rather than the opposite. Laying the ground for long term planning for utilization by future generations, we have included in the Bar Center Committee lawyers with backgrounds in architecture, engineering and energy efficiency.

A year ago, we talked about updating our communications infrastructure in the Bar website to incorporate media and technologies that did not exist a decade ago. That has been done.

Judicial pay remains a chronic concern that the Bar should address. The purchasing power of judicial salaries at both federal and state levels has declined significantly over the past generation. Due to the complex mix of county-by-county variations, the analysis at the state level is quite complex. We should commission an economic analysis of this decline in purchasing power and the impact on the pool of judicial applicants. Most of us recognize that judicial salaries are not competitive with what a successful private practice lawyer in his or her prime can earn. While the desire to be a judge and to render public service may override a pay differential, it's hard for lawyers to make that sacrifice in their prime earning years when they expect to send their children to expensive colleges.

A year ago, we talked about launching a Continuity of Law Practice Committee to address situations where solo and small firm lawyers die, become disabled or otherwise become unable or unavailable to take care of their clients. Chaired by Craig Stafford, this committee developed a proposed rule for receiverships in these situations which is on our agenda today. Next it will adapt for Georgia planning guides that were developed by other state bars that lawyers can easily use to make contingency plans.

A year ago, we talked about protecting consumers from the predators within our profession. The Fair Market Practices Committee, chaired by Gerald Davidson, developed amendments to lawyer advertising rules including constitutionally permissible disclosure and disclaimer provisions relevant to consumer choice—on our agenda today—and is working on an aspirational statement on professionalism in lawyer advertising and improved measures to police our own ranks.

A year ago, we talked about starting a Bar Leadership Institute. The Local and Voluntary Bars Committee, led by Tom Herman and Rita Sheffey, put on the Bar Leadership Institute in April. I expect it will grow in years to come.


A year ago, we talked about supporting and mentoring lawyers who feel called to build their lives and careers in small towns. The Main Street Lawyers Committee worked to develop a program of instruction and mentoring for lawyers who want to build their lives and careers in Georgia's many fine small towns, as fitting smoothly into small town life is differ-

ent from big city law practice. In March, they held the first Main Street Lawyers CLE program at Mercer Law School.

A year ago, we talked about adopting the SOLACE program that originated with the Louisiana Bar as a means for members of the legal community—lawyers, judges, law office staff, court staffs—who have a medical crisis in their family, to reach out to the statewide legal community for small but practical assistance. Under the leadership of Judge Bill Rumer and Karlise Grier, that seed has been planted.

A year ago, we talked about charging the Long Range Planning Committee, chaired by Pat O'Connor, with the task of addressing trends affecting the legal profession and how the organized bar can respond to those. I refer you to the excellent report of that committee.

My friends, you have allowed me the privilege of a lifetime, an immensely broadening personal and professional experience, both exhilarating and exhausting. Now my time is up, and I will be both succeeded and surpassed by my good friend, Robin Clark, whose skills, efficiency and political acumen far exceed mine. I urge you to support and encourage her as you have supported and encouraged me.

God bless you all. 



Kenneth L. Shigley is the immediate past president of the State Bar of Georgia and can be reached at ken@carllp.com.

Remarks to the Board of Governors

State Bar of Georgia Annual Meeting—June 2, 2012

by Robin Frazer Clark

The following is excerpted from Robin Frazer Clark's remarks during the 2012 Annual Meeting in Savannah.

Thank you, Ken, for that kind introduction and for your outstanding leadership as our president during the past year. And thank you to all of the past presidents here today. Whatever success we are able to achieve in the coming year will only be possible because of the foundation established during the first half-century of this great organization.

This evening, when I am sworn in as the 50th president of the State Bar of Georgia, it will be the greatest single honor of my legal career. When you first elected me as an officer of the Bar, I made a promise that I would never take your support for granted. Today, as we embark on the year ahead, full of exciting opportunities and, undoubtedly, many unexpected challenges, I renew that promise. I will never take your support or your good will for granted as I work to serve the State Bar of Georgia and our beloved profession.

I was raised in rural Kentucky, which to most of you may sound redundant. I am proud of that rural heritage. As the author William Cowper once wrote, "God made the country, and man made the town."

My town was Sturgis, Ky., which optimistically boasted a population of 1,800 people and one traffic



Photo by Sarah I. Coole

2012-13 President Robin Frazer Clark addresses the Board of Governors during the Annual Meeting.

light. There was one high school in the entire county, Union County High School.

My father is a pharmacist who owned his own drug store, and my mother was a professor teaching in a nearby community college. But my home was surrounded by crops of corn and soybeans and lots of livestock farms, with hogs and cattle. It was one of the few places on earth where an excuse for being late to school because you were held up by cows in the road was accepted as legitimate.

We were all little guys in Sturgis. There were no big shots. When everyone in town is trying to scrape by to the next day, it tends to equalize things. We were all in it together, and everyone wanted everyone else to succeed.

Education was held with high respect in my family. I was lucky enough to go to Vanderbilt University and even graduated, much to my own amazement. A series of personal decisions led me to go to law school at Emory Law School, where I graduated in 1988.

I have been practicing law in Atlanta ever since. I am a sole practitioner (which I understand is rare for State Bar presidents) and a trial lawyer, representing plaintiffs in personal injury lawsuits. That is 100 percent of my practice. I always represent the little guy and love doing it . . . seeking justice on their behalf. This comes from a love of serving others.

My parents taught my brothers and me that we were put on Earth to serve others. My mom and dad have always been two wonderful role models of service to others. As Dr. Martin Luther King Jr. said, "Life's most persistent and urgent question is, 'What are you doing for others?'"

So it is within this framework of humility and service that I practice law and that I serve the State Bar of Georgia. I know we have that much in common because you, as members of the Board of Governors, serve the people of Georgia and the legal profession every day out

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of your sense of service and sacrifice and carry out your duties with honor and integrity, love and respect. I appreciate you.

It is true that when I take the oath tonight as president of the State Bar of Georgia, I will be only the second woman ever to do so. I am proud to embark on the trail blazed by Linda Klein some 15 years ago. Linda continues to be an inspiration in Bar leadership, now at the national level as we have witnessed her ascension up the ABA ladder, presently serving as chair of the ABA House of Delegates.

A few years ago, I was also only the second woman ever elected as president of the Georgia Trial Lawyers Association. That year gave me invaluable leadership experience and really was the platform from which I developed many strong and lasting relationships with state legislators, which I will talk a bit more about in a few minutes.

In my opinion, diversity of leadership—with proportional representation reflecting the makeup of any organization—is a key to its ongoing health and strength.

While our State Bar is comprised of 34 percent women, I am only the second woman president. But help is on the way. We are fortunate to have another woman now as an officer, our new treasurer, Patrise Perkins-Hooker, who served the past year as secretary. The Young Lawyers Division has done an exemplary

job of promoting diversity and inclusion in its leadership. I congratulate Stephanie Kirijan on her efforts in that regard this past year. Therefore, there should be some natural progression in the years to come as the big Bar tries to follow in the YLD's footsteps.

When the leadership of an organization is truly representative of the membership, the members more readily support the organization and are much more committed to it. I believe diversity in and of itself is a positive desired thing because it allows all points of view to be heard and considered. It makes one stop and reconsider the framework through which you view all issues and makes you actually take a minute and put yourself in someone else's shoes before reaching any decision.

Diversity

Diversity builds strength and stamina, which is a Darwinian concept but has proven true throughout all of nature. Nature favors diversity. As author James Ellison said, "The real death of America will come when everyone is alike."

Therefore, I intend to promote diversity and inclusion while I am president. I will make diversity appointments to various committees and will always look to include points of view from all sectors and practices of the Bar.

For example, until just this April, ICLE did not have any policy to include diversity on faculty panels of seminars. When I saw

the statistics that out of the 1,600 or so speakers at ICLE seminars in 2011, only 28 percent were women speakers and only 8 percent were minority speakers, I felt we could and should do better at inclusion in these seminars.

At my request, the ICLE Board in April approved and adopted a policy on faculty diversity, which states in part: "Diversity and inclusion in the faculty pool on substantive legal issues will enhance the mission of ICLE" and that "program chairs shall make every effort to implement this policy and assure that they have done so."

Legislative Program

When I served as president of the Georgia Trial Lawyers Association, I had the honor and duty of representing GTLA members and their clients at the Capitol on various pieces of legislation. I testified at committee hearings and lobbied for and against legislation, all with the end goal of protecting and preserving the civil justice system and the Seventh Amendment right to trial by jury.

I also served as the GTLA Representative on Chairman Wendell Willard's Evidence Code Study Committee, the bicameral committee that revised and recommended the legislation that eventually became the evidence code bill enacted in 2011.

This gave me invaluable experience working with legislators and building relationships with them, understanding first where they are coming from and then seeking to be understood by them.

When I first ran for an officer's position on the State Bar Executive Committee, there were 34 lawyer-legislators in the House and Senate. I am proud to say that 32 of them endorsed me in that contested race, and the only two who didn't are no longer in the General Assembly. It's not because all 32 of them agreed with me on every issue (I'm sure they didn't); it's because of the beneficial relationships and under-

standing that we had established over a period of time.

So my goal is to use this experience with the state Legislature to the benefit of the State Bar by strengthening our presence at the Capitol. I believe it is better to have lawyer involvement in the drafting of laws prior to passage rather than afterward, when unintended consequences are realized and the complaining starts.

In an ideal world, we would have more lawyers serving in the Legislature. We all realize that's quite a sacrifice and very difficult to carry on a law practice while doing so. The next best thing is for the Bar to have a prominent seat at the table whenever laws that may change the criminal or civil justice system are being contemplated, to have our Bar members invited to make the proposed legislation better so that it truly accomplishes what it sets out to accomplish but in so doing doesn't damage the justice system in its wake and doesn't reduce or strip the rights of Georgia citizens.

Capitol Counsel

I have sometimes had members of the Advisory Committee on Legislation or the Board of Governors tell me they have never been down to the Capitol, or have never contacted their representative or state senator about an issue. We have to improve on that. That is a glaring omission on our part.

I will begin a program to get ACL members, board members and any member of the Bar the opportunity to visit the Capitol for a day and see what goes on there. We may call it "Capitol Counsel" or "Capitol Bootcamp." We will have you, our lawyers, go to Senate Judiciary or House Judiciary or House Non-Civil Judiciary Committee or Senate Special Judiciary hearings to understand the process.

Those participating will meet with your individual representative and senator while there and offer to be a resource on what-

ever field of law you practice. You will start building the relationships with legislators that are key to having a seat at the table and are key to having input in the very laws that affect your clients' lives and your own law practices.

We will begin a grassroots component to this program and get the numerous local bar associations involved down at the Capitol too, by attending a day at the Legislature as a group and having lunch with their legislators. The State Bar will provide the platform for this to happen.

Judicial Pay Raise

I intend to make one of our legislative priorities a judicial pay raise. It is well past time for our judges to have a pay raise. The last one was in 1999, and it simply is not fair for our judiciary to go 13 years without a pay raise. These are public servants, and no one is serving as a judge to get wealthy.

But most importantly, a judicial pay raise will help ensure we maintain qualified experienced judges on Georgia benches and qualified, competent candidates will continue to run for the bench when there is an opening.

We all know what a challenge this issue will be. Back in 2008, under Gerald Edenfield's leadership, the State Bar took on an initiative to urge our leaders at the Capitol to implement a judicial salary increase. This was a monumental effort as Gerald successfully enlisted the support of a broad array of opinion leaders ranging from Sam Nunn to Randy Evans to George Israel, who at the time was president of the Georgia Chamber of Commerce and was rarely on the same side of the issues as the State Bar.

The effort was successful in that both the House and Senate gave final approval to a modest 5 percent pay raise for judges and district attorneys, literally in the closing minutes of the 2008 legislative session. We had only just begun celebrating this great achievement,



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however, when then-Gov. Perdue dashed our hopes with a stroke of his veto pen.

Later that year, as you recall, the economy tanked, and state revenues went into a three-year downward spiral, during which time any proposal for a public pay increase would have been fruitless. But today, state revenues have at least stabilized, and the new state budget is \$800 million larger than last year's. It is time again to revisit the issue of judges' pay.

The length and difficulty of this effort is not unlike the heroic saga of Henry Knox and the "Noble Train of Artillery" from the Revolutionary War. Knox was a 25-year-old bookseller from Boston. He became a colonel under Gen. George Washington, although he had no military experience, and is credited with suggesting to Washington that retrieving the cannons that had been captured at the fall of Forts Ticonderoga and Crown Point in upstate New York on Lake Champlain could have a decisive impact on the siege of Boston and the war itself.

Washington put Knox in charge of the retrieval expedition, which began Dec. 5, 1775. Hauling 60 tons of cannons and other armaments by ox-drawn sleds, Knox and his team traversed some 300 miles of ice-covered rivers and snow-draped Berkshire Mountains to the Boston siege camps. They crossed the frozen Hudson River four times. A journey that was expected to take two weeks actually took more than six weeks as Knox overcame challenge after challenge, not the least of which were the occasions when the cannons crashed through the ice on river crossings.

The weapons train finally reached Gen. Washington on Jan. 27, 1776. The cannons were immediately deployed and soon drove the British forces out of Boston Harbor. Like Henry Knox's feat, our judicial pay raise effort will take enormous energy and commitment, but I am hopeful for a successful conclusion. Always

remember, there is joy in the struggle. I need your help.

This year, the State Bar will fund updated research on judicial compensation and the loss of purchasing power of judicial salaries to help in this fight. I believe we now have a governor who is respectful of the judiciary as an equal branch of government and who knows how hard our judges work. I believe Gov. Deal's respect for the judiciary will go a long way in making the judicial pay raise happen in the 2013 legislative session, and this will be a top priority of our legislative package.

Juvenile Code Rewrite

I also anticipate that we will be able to get the Juvenile Code passed in the 2013 legislative session. The various stakeholders worked tirelessly last year together to reach a consensus on that bill, and I believe we finally have it in the form that everyone can live with, thanks to compromise by everyone involved. The only hold-up this year was concern over some funding issues.

I have talked to House Majority Whip Edward Lindsey, about this, and you heard Chairman Wendell Willard confirm it yesterday. They and I will be working together to get hard numbers on the funding to everyone's satisfaction, including the governor's office, so we can get this new Juvenile Code passed.

There will be other programs that are in midstream, started by other presidents that I will continue.

Criminal Justice Reform Committee

This is a shadow committee of the State Bar that has worked alongside the Governor's Criminal Justice Reform Commission. We believe the newly enacted Criminal Justice Reform Bill will be undergoing some tweaking in the coming year. Our Criminal Justice Committee, chaired by Cobb District Attorney Pat Head, will continue its good

work in making recommendations to the Commission and offering testimony to the House Non-Civil Judiciary Committee and the Senate Special Judiciary Committee on this important law.

All of these legislative initiatives will be undertaken with the overarching tenants of promoting the rule of law, maintaining the independence of the judiciary and holding high the honor and integrity of the profession of law.

In that vein, hear this: the State Bar will vigorously fight against any effort by any entity to restrict a Georgia citizen's access to the courts, or any attempt to limit the amount of justice a Georgia citizen may obtain in front of an impartial jury. We will, at all costs, defend the sacred Seventh Amendment right to a jury trial. Should there be any attempt whatsoever to undermine the Seventh Amendment right to a jury trial, we will use the full power of the State Bar to oppose such efforts. Our forefathers did not fight the Revolutionary War, and stake their fortunes and their sacred honor on the creation of this great nation for the State Bar of Georgia to stand by timidly when someone or some entity tries to take away our citizens' rights. People have fought and died for those rights and we have a sacred obligation to jealously protect them.

Law School Outreach

In addition to our legislative package, we will focus on continuing our many successful Bar initiatives and establishing relatively few new ones. We will be starting a new Law School Outreach program, which will involve Bar members visiting Georgia's five law schools in an effort to make students—especially 3Ls—aware of what the State Bar is and how the State Bar can help them embark on their professional careers.

We need for new law school graduates to know that the Bar is more than just the agency that administers their exam and then sends

them an annual bill for the privilege of practicing law. This program will let them know what the Bar does for the legal profession and the wealth of resources and opportunities—Transition Into Law Practice, Law Practice Management, Young Lawyers Division, etc.—available to them as soon-to-be Bar members.

Details of the Law School Outreach program are under development and will be announced in the near future.

Closing

Those are some of the things we'll be working on this coming year. It's going to be an exciting year for the State Bar, and I am looking forward to serving as your president. The amount of good will that you are all giving to me as I enter this year of service is extraordinary, and I promise not to squander it. I will never ask you to do anything that I wouldn't do myself. I do ask that in addition to your moral support that you jump in with us and get involved.

One of my favorite presidents, President Jed Bartlett, once said, "Decisions are made by those who show up." Wise advice. And it's the truth. Pitch in on the issues that interest you. Be a part of the process.

A Rising Tide Lifts All Boats


Those of you who know me know that if I have an outlook on life and the practice of law, it is that a rising tide lifts all boats. I strongly believe that if you reach out your hand to help lift another, you will also be rewarded. When I speak at seminars I typically share one inspirational moment with my listeners so that you might leave this place inspired with renewed vigor to reach out a hand to serve someone else.

Thank you again for your confidence, your support and most of all your dedication to the state of Georgia, the legal profession and the cause of justice. I look forward to working with my fellow

officers, the Executive Committee, Cliff Brashier and the finest Bar staff in the United States and all of you in the coming year to keep promoting the cause of justice, upholding the rule of law and protecting the rights of all citizens.

I am reminded of the movie "Friday Night Lights" about a Texas high school football team, and every time they broke huddle they yelled in unison "Clear eyes, full hearts, can't lose!"

"Clear eyes, full hearts, can't lose!" If we approach our work this year with that always in mind, we will have an amazing year together.

God bless you, God bless the great state of Georgia, and now let's get to work. 



Robin Frazer Clark is the president of the State Bar of Georgia and can be reached at robinclark@gatriallawyers.net.

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Job One: Be a Good Role Model

by Linton Johnson

Robin Frazer Clark has a number of tangible objectives for her term as president of the State Bar of Georgia. But for the second woman in the Bar's history to serve as president, one of Clark's goals is personal. It is a recurring theme when she talks about her predecessors who influenced her career and her involvement in Bar leadership. It is also the legacy she wants to leave when these 12 months have concluded.

"I want to be a good face and a good representative for the State Bar of Georgia," Clark said, "someone lawyers can be proud of, a good role model for the rest of the lawyers in the state."

Hold that thought for now. First, it's helpful to know that for this daughter of a pharmacist and professor who grew up in Sturgis, Ky., a future in the legal profession was no childhood dream. Clark's decision to become a lawyer didn't occur while she was in high school or, for that matter, her during first 3 1/2 years in college. It was not until the latter part of her senior year at Vanderbilt University that Clark's career path turned toward law school.

"I was a biology major and had decided I didn't want to go to pharmacy school, mainly because I didn't want to take another biochemistry class," she recalled. "The same year I graduated from Vanderbilt, my brother graduated from law school."

Because Vanderbilt discouraged its graduates from staying there seven years, many of her fellow biology majors would be going on to medical school elsewhere, a number of them choosing Emory University. Without even visiting the campus, Clark applied to Emory Law School, was accepted and was suddenly Atlanta-bound.

It was during her law school years that Clark mapped out her career plan as a solo plaintiff's attorney. But there would be an early detour.

"I wanted to have my own law firm and be my own boss. But Emory didn't emphasize that at all," she said. "They emphasized interviewing with big law firms, the bigger the better." She did those interviews and said she accepted an offer from a defense firm, then known as Webb, Carlock, Copeland, Semler & Stair, mainly because "I needed to get off my dad's payroll."

It was there that Robin Frazer met a co-worker named Bill Clark, now her husband of 20 years. Their marriage meant one of them would have to leave the firm, so Robin moved to Swift Currie, where she worked for a number of years and was about to become a partner, which brought her to another crossroads.

"If I had wanted to stay in a large firm, that would have been great," Clark said. "But it was just not what I wanted in my career. I wanted to have my own firm and represent people. So I left while pregnant with my

second child, without a single case, without a single file."

Clark joined up with veteran trial lawyer C. Larry Jewett, and they formed Jewett & Clark. "Larry offered me a spot, which gave me a leg up in starting my solo practice. He helped me and taught me, and I have never looked back since then," she said. She practiced with Jewett for about eight years before starting her own firm.

"Fortunately, it turned out great," Clark said. "I feel like I've got the best kind of practice. I love what I do, and there is nothing I would change about it right now."

Clark's practice is 100 percent personal injury. She represents "plaintiffs only and individuals only" in a broad range of cases, from any variety of car, motorcycle or bicycle wrecks to more complex matters like product liability, medical malpractice and road design cases.

While not knowing her exact winning percentage, "I would say I'm more successful than not. A lot of my work comes from recommendations by prior clients, their friends and family. I also get a lot of referrals from people I know not just through Bar involvement, but also through my church and my kids' schools and athletic teams, anything I do in the community."

At Jewett's insistence when they worked together, Clark joined the Georgia Trial Lawyers Association (GTLA). Shortly thereafter, she got a call from then-GTLA President Ken Canfield.

"Ken called me out of the blue to have lunch," she said. "He said my name had been given to him as someone he needed to meet. Ken is a progressive guy, and he and some other like-minded men were looking for a woman who was a good trial lawyer to bring some diversity into GTLA and grow the organization."

That involvement sprouted more friendships and continued encouragement on a statewide basis from the likes of Gene Brooks in Savannah, David Bell in Augusta,

Jay Cook in Athens, Jimmy Franklin in Statesboro and others.

"These guys totally supported me and got me involved and onto the leadership track," Clark said. In 2006, she was elected as president of GTLA, becoming the second woman to hold that office. That experience and the relationships forged by it and other service roles within the profession, as past chair of the Atlanta Bar Association's Litigation Section, a board member of the Civil Justice Foundation and treasurer of The Lawyers Club of Atlanta, provided a springboard for her entry into State Bar leadership.

Clark was appointed to the Board of Governors in 2002 by then-State Bar President Jimmy Franklin. "He's a great role model," she said. "His encouragement and that of 2006-07 President Jay Cook kept reminding me we are doing something good. This is not a cliché; every day, I feel like I'm out there protecting the rights of citizens."

One year after ascending to a seat on the Executive Committee, Clark entered and won a contested election for State Bar secretary. When she took the oath as president from Chief Justice George H. Carley on June 2, Clark was the first woman to do so since Linda A. Klein broke that barrier 15 years ago and the second in the 50-year history of the State Bar (or, for that matter, its 128-year combined history with the Georgia Bar Association).

"It's pretty special to me," she said. "No. 1, I love the State Bar of Georgia. I love lawyers, I love our state and I am proud to be representing Georgia women. It's special to be following in Linda Klein's footsteps. She is a great role model. Right now, I am reading a lot about the 40th anniversary of Title IX, and it's a reminder of how important it is for women to have role models."

Clark outlined what she would like to accomplish this year in her remarks to the Board of Governors during the Annual Meeting in Savannah (see page 30). Topping

the list is convincing the Georgia General Assembly to approve the first judicial salary increase in 13 years.

"It is an uphill battle, but if we can do that for our judges, that would be a great way to spend our effort this year," Clark said. "I would like to see the new juvenile code passed. So many people have spent so much time and effort on that. If there's something I can do as president to see that happen, I'm going to do it."

Clark is not intimidated by the competing time demands she will face as State Bar president, busy lawyer and avid golfer—not to mention the mother of two teenagers.

"I'm a pretty good juggler, which comes with the territory of a sole practitioner," she said. "Some people call it multitasking; I call it keeping balls up in the air. In a solo practice, you do have good flexibility. I don't have an hourly time sheet that I'm tied to. Hopefully, my colleagues on the other side of my cases will be understanding. So far, it's been fine . . . somehow, I'll make it work. We also have a great State Bar staff, and I will be relying on the best executive director in the United States. Cliff (Brashier) keeps me apprised of anything I need to know, when I need to know it, and that works well. And I have a great husband who helps a lot and is very understanding with my schedule."

Bill Clark is also the director of political affairs for GTLA. One might assume they spend a great deal of time talking shop across the dinner table.

"Sometimes we do, but sometimes we don't see each other a lot because we have so much going on, so we don't always spend a lot of time talking about our days," she said. "Our kids are very knowledgeable politically, so we discuss politics around the dinner table. We talk about that a lot."

Son Chaz graduated from high school last December and then traveled to Ghana, where he



Photo by Jennifer R. Mason

President Robin Frazer Clark with her family following her inauguration as the 50th president of the State Bar of Georgia.


worked in an orphanage. He is now a freshman at Georgia College & State University in Milledgeville, where he is an aspiring architect. "But," his mother said, "he would defend someone to the hilt if he believed they were being discriminated against."

Daughter Alex, a high school sophomore and accomplished basketball and soccer player, "is extremely interested in politics, and I could see her being a politician," Clark said. "Right now she says she is not going to law school. But she is very justice oriented. When there is even the most minor injustice, she gets all out of whack. She is very interested in the civil rights movement and learning more about that. Right now, her issue is gay rights and other social justice issues, so we talk a lot about that."

"My kids think it's awesome that I'm the leader of the State Bar, really because they know I love my profession, care about it deeply, want to protect it and preserve it and do what I can through this position."

For her part, Clark says, "There's no question that it's the greatest single honor of my career. I would have never imagined it in a million years. I'm very proud of it and the confidence the members of the Bar have in me. When I ran for secretary in a contested race and won, I told the Board of Governors I would never take their support for granted."

"As a sole practitioner, it's just me. By participating in the State Bar, I get to meet all kinds of neat people I never would have otherwise. I'm better off having done it. There are so many wonderful lawyers in Georgia, and I know my life is richer with the friendships I have made."

Not to mention all the good role models she has encountered along the way. 



Linton Johnson is a media consultant for the State Bar of Georgia.



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Savannah Local Named 2012 Distinguished Award Recipient

by Derrick W. Stanley

The Distinguished Service Award is the highest honor bestowed by the State Bar of Georgia for conspicuous service to the cause of jurisprudence and to the advancement of the legal profession in the state of Georgia.

During the Presidential Inaugural Dinner at the State Bar's Annual Meeting in Savannah, N. Harvey Weitz was presented with this prestigious award by 2011-12 President Ken Shigley.

Born in Savannah and educated in Georgia, Weitz earned his bachelor's degree in accounting in 1963 and his law degree in 1966 from the University of Georgia. He was admitted to the Bar in 1965, just one year after its unification.

Throughout his 47-year career, Weitz has served the legal community not only as a practitioner of law, but also as a leader within the profession. As a partner in the Savannah firm of Weiner, Shearouse, Weitz, Greenberg & Shawe, LLP, he has successfully litigated a wide variety of complex civil cases, including wrongful death, medical malpractice, trademark violations and business litigation, along with various white-collar criminal cases involving inter alia, federal antitrust, tax evasion, insurance and bank fraud. Additionally, his skills and experience as a trial attorney are in high demand as a transaction counsel, representing buyers, sellers, lenders and

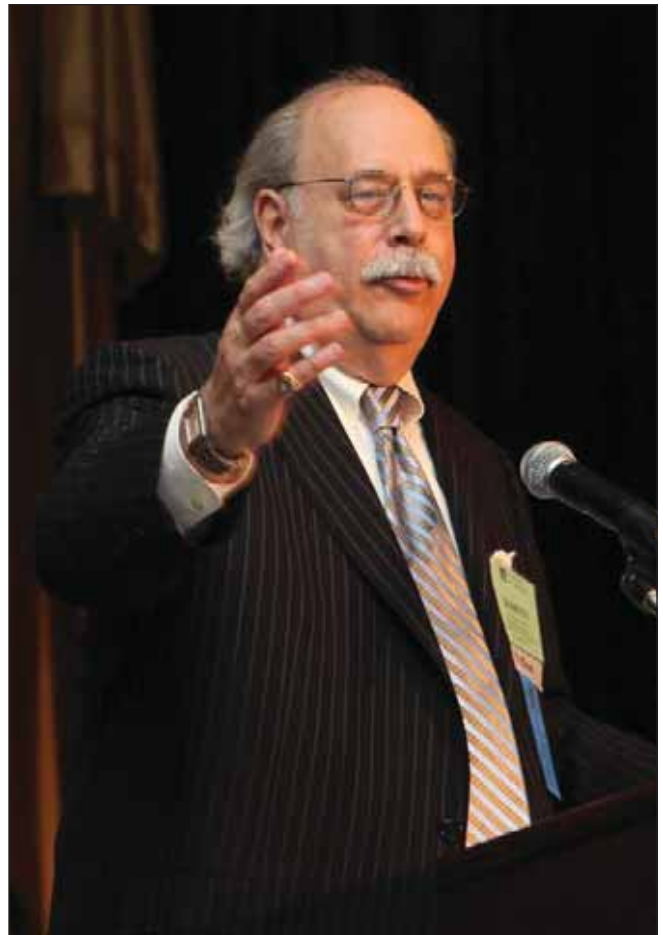


Photo by Sarah I. Coole

2012 Distinguished Service Award recipient N. Harvey Weitz addresses members and guests during the Presidential Inaugural Dinner.


borrowers as a result of his business background, superior judgment and knowledge of the law. Weitz was first elected in 1991 by his peers to the Board of Governors of the State Bar of Georgia, on which he has served faithfully for 21 years, as well as serving on the State Bar Executive Committee since 2000.

Through his service to the community, Weitz has received numerous awards including the Chief Justice Thomas O. Marshall Professionalism Award, presented by the State Bar of Georgia, and the Judge Frank Cheatham Professionalism Award, presented by the Savannah Bar Association. Weitz has earned an "AV" rating from Martindale Hubbell Law Directory, is listed in the publication *The Best Lawyers in*

America, was voted by his peers as a Georgia "Super Lawyer" in 2008, 2009 and 2010, and was named by *Georgia Trend* magazine as one of Georgia's "Legal Elite."

He has also provided beneficial service to the legal profession in Georgia as chair of the Chief Justice's Commission on Professionalism, as chair of the Commission on Continuing Lawyer Competency by appointment of the Supreme Court of Georgia, as a faculty member of the Georgia Trial Skills Clinic, as a trustee of the Lawyers Foundation of Georgia, as a fellow of the American Board of Criminal Lawyers and as a frequent lecturer on numerous topics including ethics and professionalism.

The legal community and the citizens of Georgia owe a great deal of thanks to Weitz for his tireless and selfless service to the profession, the justice system and the State Bar for almost 50 years.

The State Bar of Georgia does express its gratitude and appreciation to Weitz for his many years of devotion to the legal profession, the justice system and the people of Georgia by presenting him with the Distinguished Service Award. 



Derrick W. Stanley is the section liaison of the State Bar of Georgia and can be reached at derricks@gabar.org.

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Current Issues Relating to the Use of Georgia Court Reporters

by Hon. Richard T. Kent

Georgia attorneys utilize court reporters on a regular basis for depositions and proceedings in court. Although the selection of court reporters may appear to be routine, two issues have arisen in Georgia and other states that may pose a problem. The first issue relates to “gifting” or transferring items of value to attorneys, clients or their agents. The second, and more complicated issue, is the topic of “contracting.” Both of these issues relate directly to the need for the court reporter to remain impartial, neutral and have no interest, financial or otherwise, in any case or controversy that the court reporter is being used to report.

In our state, the Board of Court Reporting of the Judicial Council of Georgia regulates court reporters and court reporting firms pursuant to the Georgia Court Reporting Act.¹

The issue of “gifting” has been addressed in both the Georgia Board of Court Reporting’s Code of Professional Ethics and in Formal Opinion 2008-1 of the Board of Court Reporting.² Both of those sources specifically set forth that certified court reporters and Georgia court reporting firms shall “refrain from giving, directly or indirectly, any gift, incentive, reward or anything of value to attorneys, clients, or their representatives or agents, except for nominal items that do not exceed \$50 in the aggregate per recipient each year.”

Although the issue of “gifting” appears simple, it still arises as a concern for the board. The legal



community should remain aware of the \$50 annual limitation in regard to any benefit conferred by a court reporter or court reporting firm to an attorney, inclusive of their representatives and agents. The issue can arise when raffles or prize drawings have a larger than \$50 value grand prize and when small gifts are repeatedly given to attorneys or their staff. If repeated small gifts to a secretary or assistant adds up to exceed the \$50 annual limit, then a violation of the Rules exists.

Secondly, Georgia has a specific law relating to the issue of “contracting.” The contracting statute,

O.C.G.A. § 15-14-37(a), specifically prohibits a certified court reporter (including their agents) from contracting for court reporting services not related to a particular case or reporting incident with an attorney, a party to an action or a party having a financial interest in an action (including their agents). A party having a financial interest in an action can include a party's insurance company.

Essentially, a party (including an insurance company) is prohibited from entering into a contract with a court reporter (or entity with whom a court reporter has a principal and agency relationship) for court reporting services unless such contract is limited to one particular lawsuit or reporting incident.


One example of a violation of O.C.G.A. § 15-14-37(a) could involve the situation in which a large company, such as an insurance company, contracts with a large national entity for court reporting services not related to a particular case or reporting incident. The large national entity then arranges for a court reporter to cover depositions in a specific area. Such an agreement, dependent upon the facts, can be a violation of the contracting statute.

A violation of the contracting statute as outlined above results in not only a violation of a Georgia law, but it also affects the appear-

ance of impartiality and neutrality of the court and legal process as a whole. After all, the court reporter, as an officer of the court, has an ethical obligation to produce a true and accurate record. If the court reporter has a contractual relationship with a party in interest to a case that exists beyond the bounds of the single lawsuit or court reporting incident, then the opposing party has a legitimate reason to be concerned about the accuracy of the record.

A violation of the contracting statute has several remedies. The Board of Court Reporting may petition for equitable relief in the superior court³ and/or file a board-initiated grievance against the court reporter or court reporting firm for the imposition of fines and disciplinary actions. Any court reporting firm who violates the contracting statute can be assessed a fine up to \$5,000 per violation.⁴

An attorney using a court reporter who is violating the contracting statute may eventually face the prospect of having to overcome an objection to admission of his or her deposition at trial because of the violation of O.C.G.A. § 15-14-37(a). One possible way to avoid such a burden and dilemma is to insist upon a disclosure, both oral at the deposition and written attached to the transcript, that all court reporters or

court reporting firms receiving any compensation or benefit related to the deposition are not in violation of O.C.G.A. § 15-14-37(a). 



Hon. Richard Kent serves as the Colquitt County State Court judge and a municipal court judge. Kent has served as the Colquitt

County State Court judge since 1997 and is a member of the State Court Judges Executive Council, Municipal Court Judges Executive Council and the County and Municipal Probation Advisory Council. He has served as a superior court judge by designation, probate court judge by designation and magistrate court judge by designation. Kent received his J.D. from the University of Mississippi School of Law.

Endnotes

1. O.C.G.A. § 15-14-20 (2011) et. seq.
2. JUDICIAL COUNCIL OF GEORGIA BOARD OF COURT REPORTING, GEORGIA CERTIFIED COURT REPORTERS RESOURCE GUIDE (2011) available under "Guides & Publications" at <http://www.georgiacourts.gov/agencies/bcr/index.html>.
3. O.C.G.A. § 15-14-35 (2011).
4. O.C.G.A. § 15-14-37(g) (2011).

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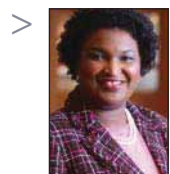
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> **Taylor English Duma LLP** litigator **Michele Stumpe** and a physician client traveled to **Africa** with the nonprofit she founded in 2009, **Children of Conservation**, with medical supplies and other donations in order to help school children, village workers and their wives, in addition to animals with medical needs. The organization is dedicated to the conservation and protection of endangered species in third world countries through education, habitat preservation and wildlife sanctuary support.



> **House Minority Leader Stacey Abrams** was selected to receive the **Feminist Women's Health Center's Trailblazing Justice Award**. The award was presented at the 'Stand Up for Reproductive Justice Annual Awards Gala' in April.

Abrams was selected to receive this award because of the role she has played in supporting positive reproductive health decisions for women in the state of Georgia. She is a fervent champion of women's health and is the first woman to lead either party in the Georgia General Assembly.



Simkins

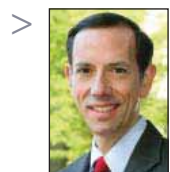


Coursey

> **Hull Barrett, PC**, announced that partner **Tara Rice Simkins** was named one of NBC Augusta 26 News' "Women to Watch" in 2012. Following her seven-year-old son's cancer diagnosis,

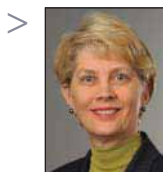
Simkins' family and friends have raised more than \$770,000 through the Press On Foundation for pediatric cancer research. They also gave \$300,000 to St. Jude's Pediatric Genome project where researchers will sequence the genome for acute myeloid leukemia in hopes of finding a cure.

Brian S. Coursey was selected into the **2012-13 Leadership Columbia County** class. Leadership Columbia County, a program of the Columbia County Chamber, is designed to expose business and community leaders to the opportunities and challenges facing our community while honing their leadership skills.



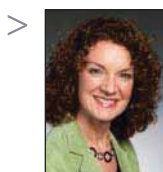
> **Robert A. Schapiro**, a leading constitutional law scholar and former clerk to U.S. Supreme Court Justice John Paul Stevens, was appointed **dean** and **Asa Griggs Candler Professor of Law** at **Emory University School of Law**, effective May 2012. A member of the Emory Law faculty since 1995, Schapiro served as interim dean during

the past academic year and previously served as associate vice provost for academic affairs of Emory University and co-director of Emory Law's Center on Federalism and Intersystemic Governance.



> **Swift, Currie, McGhee & Hiers, LLP**, announced that partner **Lynn M. Roberson** became the seventh female **president of the Atlanta Bar Association** in May. The Atlanta Bar Association is largest voluntary bar association in

Georgia. Also, in June 2012, Roberson became the first female **president of the Georgia Defense Lawyers Association**. The Georgia Defense Lawyers Association, a statewide organization of more than 675 civil defense attorneys, has been in existence for more than 40 years.



Graham



Prucino



Anderson



Segal



Walker

> **Kilpatrick Townsend & Stockton LLP** announced that partner **Jamie L. Graham** was honored by the **Georgia Chapter of the Huntington's Disease Society of America** at their "Celebration of Hope Gala" in May. The event helped fund lifesaving research to combat

Huntington's Disease. Graham was also named to the **board of directors of Georgia Bio**. Georgia Bio represents about 200 companies, universities, research institutes, medical centers, government groups and other business organizations, and serves as an advocate for the state's life sciences industry.

Partner **Diane Prucino** was selected to participate in the **2013 Class of Leadership Atlanta**. Celebrating more than 40 years of developing leaders, Leadership Atlanta is the oldest sustained community leadership program in the nation.


Associate **Yendelela Neely Anderson** was selected to participate in the **LEAD Atlanta Class of 2013**. In 2004, Leadership Atlanta founded LEAD Atlanta as an initiative for emerging leaders between the ages of 25 and 32.

Partner **Debbie Segal** was a 2012 recipient of the **H. Sol Clark Pro Bono Award**. The award honors an individual lawyer who has excelled in one or more of a variety of activities that extend legal services to the poor. Segal was recognized for her professionalism and commitment to, and support for, the delivery of pro


bono civil legal services to the poor and underserved in Georgia.

Partner **Henry Walker** received the **Ross Adams Award**. This award is given for dedication, commitment and support of the State Bar of Georgia Young Lawyers Division (YLD). Walker served as the YLD president from 1996-97.

Kilpatrick Townsend was awarded the **2012 A Business Commitment Pro Bono Award**. The award honors the business law pro bono contributions of an individual lawyer, corporate legal department or law firm to the nonprofit community and community economic development sector in Georgia. Kilpatrick Townsend was recognized for the firm's extensive services to community-based organizations through the Pro Bono Partnership of Atlanta.

>  **Rubin Lublin, LLC**, announced that **Peter Lublin** was elected **chair** of the **Real Property Law Section** of the State Bar of Georgia. Lublin has been a senior partner at Rubin Lublin, LLC, since its formation in spring 2009. Prior to co-founding the firm, Lublin spent 20 years litigating for creditors' rights in the mortgage default industry.

> **Jones Day** announced that **Kacy Romig**, an associate in the firm's business and tort litigation practice, was selected to participate in the **LEAD Atlanta Class of 2013**. Through personal and professional development and broad exposure to the community, LEAD Atlanta aims to equip young leaders early in their careers with the skills and knowledge needed to be effective leaders committed to the common good.

>  **Baker, Donelson, Bearman, Caldwell & Berkowitz, PC**, named shareholder **Nedom A. Haley** its **Atlanta Pro Bono Attorney of the Year**. Haley was recognized for his pro bono work providing tax and corporate counsel to nonprofit organizations such as the Beauty Becomes You Foundation, which provides aesthetic services for low-income seniors; the Georgia Conservancy, which seeks to protect Georgia's environment and natural resources; and Action Ministries Atlanta, which provides a variety of services for the homeless. Haley has also volunteered with the Atlanta office's Cancer Legal Initiative in partnership with Atlanta Legal Aid.


> **Pursley Lowery Meeks** announced that partner **Christian Torgrimson** is the 2012-13 **chair** of the **Eminent Domain Section** of the State Bar

of Georgia. As chair, Torgrimson will participate in discussions of eminent domain education and policy issues with the legal community, general public and with elected officials—whenever legislation relates to condemnation laws in Georgia. The 160-member Eminent Domain Section was formed in 2001.


>  Partner **Diana J. P. McKenzie**, the leader of **HunterMaclean's** information technology and outsourcing practice group, served as a **featured speaker** at the **International Federation of Computer Law Associations (IFCLA)** in Munich, Germany, in June. At IFCLA, McKenzie was part of an elite panel of international experts discussing the negotiation of IT agreements, focusing specifically on new trends in the United States. The global conference, which is held every two years, attracts high-level IT personnel worldwide. Following her conference presentation, McKenzie addressed the Munich Technology Bar Association.



Hunton & Williams LLP presented the **2012 E. Randolph Williams Pro Bono Award** to eight attorneys from the firm's Atlanta office: **Shelly K. Anderson**, **Aisha Blanchard Collins**, **T. Brian Green**, **James D. Humphries IV**, **Rhani M. Lott**, **Charlotte M. Ritz**, **Sean F. Rosario** and **Rita A. Sheffey**. Recipients of the award, named after one of the firm's founders, each contributed more than 100 hours of pro bono legal services to indigent clients and nonprofit organizations during the firm's most recent fiscal year.

>  **Philip W. Engle** of Roswell was selected as **chair** of the **North American Branch of the Chartered Institute of Arbitrators (CIArb)**, the world's leading professional membership body for arbitration and alternative dispute reso-

lution. CIArb promotes the use of ADR internationally through 12,000 professionally qualified members in more than 110 countries. The North American Branch comprises Canada, the United States, Mexico and the Cayman Islands.

>  **Jeff Lacy** published a collection of short stories entitled *Good Intentions* involving the lives of people caught up in the criminal justice machinery. The book is for sale in paperback and Kindle and Nook formats.

>  **Carlton Fields** announced that **Larry Gold**, a shareholder in the firm's Atlanta office, will serve a two-year term as the **national chair of the Jewish Council for Public Affairs (JCPA)**. The JCPA, the public affairs arm of the organized Jewish community, serves as the national coordinating and advisory body for the 14 national and 125 local agencies comprising the field of Jewish community relations.

On the Move In Atlanta

>    **Kilpatrick Townsend & Stockton LLP** announced that **J. Henry Walker IV** succeeded **Diane**

Prucino as **managing partner**. Walker has spent more than 25 years handling large complex litigation matters for clients, including class actions, technology, telecommunications, privacy, and intellectual property cases. He rejoined Kilpatrick Townsend—where he practiced as a partner until 1996—in 2007 after serving as chief litigation counsel to BellSouth Corporation. Walker's mixture of in-house and outside counsel experience provides him with a strong understanding of the challenges facing clients and in-house counsel.

William Meyer joined the firm's Atlanta office as an **associate** on the complex business litigation team and **Charles A. Pannell III** joined as an **associate** on the patent litigation team in the intellectual property department. Both were previously with King & Spalding. Meyer focuses his practice on representing clients in the pharmaceutical, trucking and oil and gas industries in nationwide product liability and personal injury litigation. Pannell focuses his practice on technology litigation and intellectual property disputes involving patents, trade secrets, trademarks

and copyrights. The firm is located at 1100 Peachtree St., Suite 2800, Atlanta, GA 30309; 404-815-6500; Fax 404-815-6555; www.kilpatricktownsend.com.



 **Locke Lord LLP** announced that **Joel Cartee** and **John Williamson** joined the firm as **partners**. Cartee brings a strong background in complex global transactions and has extensive experience in the telecommunications and technology arenas. Williamson focuses his practice on general business and consumer finance litigation. **Alisha Fikes Gibson**, **Alex Dishun** and **Adam Starr** joined the firm as **associates**. Gibson joined the firm's corporate and transactional department. Dishun focuses her practice on mortgage litigation and real estate, labor and employment, products liability and general commercial disputes. Starr handles a variety of complex cases involving consumer finance, class actions, securities, intellectual property, real estate and eminent domain, construction, business torts and contract disputes. The firm is located at 3333 Piedmont Road NE, Terminus 200, Suite 1200, Atlanta, GA 30305; 404-870-4600; Fax 404-872-5547; www.lockelord.com.

>   **Hunton & Williams LLP** announced the promotion of **David R. Yates** and **David A. Kelly** to its **partnership**. Kelly's practice focuses on intellectual property with an emphasis on client counseling and patent litigation. Yates' practice focuses on international and domestic public and private mergers and acquisitions, divestitures, investments and strategic transactions. The firm is located at 600 Peachtree St. NE, Suite 4100, Atlanta, GA 30308; 404-888-4000; Fax 404-888-4190; www.hunton.com.

>  **Seyfarth Shaw LLP** announced that **Nicole D. Bogard** joined as a **partner** in the firm's employee benefits and executive compensation department. Bogard was previously with a boutique employee benefits law firm. The firm is located at 1075 Peachtree St. NE, Suite 2500, Atlanta, GA 30309; 404-885-1500; Fax 404-892-7056; www.seyfarth.com.

>



Mason



Ransom



Sherman

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, announced the election of three new shareholders:

Erica V. Mason, Damany F. Ransom and Scott N. Sherman. Mason is a member of the firm's labor and employment practice group, where she represents companies throughout the country in complex employment litigation. Ransom is a member of the firm's product liability and mass tort practice group. Sherman is a securities and business litigation attorney who represents clients in broker-dealer/investment advisory litigation and arbitrations, and handles director and officer securities litigation matters. The firm is located at Monarch Plaza Suite 1600, 3414 Peachtree Road NE, Atlanta, GA 30326; 404-577-6000; Fax 404-221-6501; www.bakerdonelson.com.

>



McGinnis



Bishop

Warner, Bates & McGough, P.C., announced that the firm will now be known as Warner, Bates, McGough & McGinnis, following the addition of James J. McGinnis as partner. Mark

A. Bishop also joined the firm as an associate. The firm is located at 3350 Riverwood Parkway, Riverwood 100 Building, Suite 2300, Atlanta, GA 30339; 770-951-2700; 770-951-2200; www.wbmfamilylaw.com.

>

David J. Marmins joined Arnall Golden Gregory LLP as a partner. Marmins concentrates his practice in commercial, banking and real estate-related litigation. The firm is located at 171 17th St. NW, Suite 2100, Atlanta, GA 30363; 404-873-8500; Fax 404-873-8501; www.agg.com.

>



Daugherty

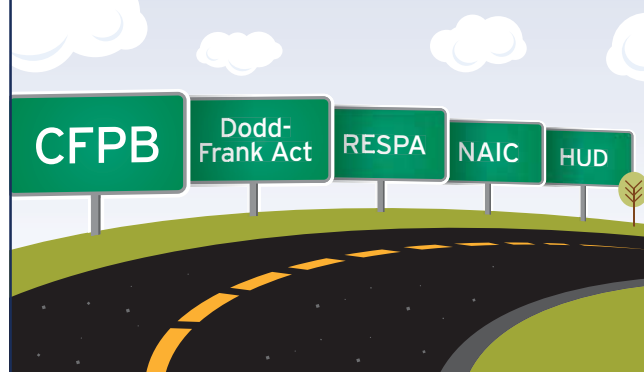


Portier

Hamilton, Westby, Antonowich & Anderson, LLC, named Andrew G. Daugherty partner and Holly J. Portier as senior associate. Daugherty practices the areas of workers'

compensation defense, commercial and civil litigation as well as subrogation. Portier's practice areas include commercial and civil litigation as well as workers' compensation liability defense and subrogation. The firm is located at 600 W. Peachtree St. NW, 17th Floor, Atlanta, GA 30308; 404-872-3500; Fax 404-872-1822; www.hwaalaw.com.

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>  **Stites & Harbison PLLC** announced that **S. Elizabeth Hall** joined the firm's Atlanta office. Hall joined the creditors' rights & bankruptcy service group, where her practice focuses primarily on representing institutional lenders and businesses in litigation related to bankruptcy, contracts, foreclosures and workouts. The firm is located at 303 Peachtree St. NE, 2800 SunTrust Plaza, Atlanta, GA 30308; 404-739-8800; Fax 404-739-8870; www.stites.com.

>  **Ed Konieczny**, formerly a partner at Smith Gambrell & Russell, announced the formation of his own business litigation practice, **Edward C. Konieczny LLC**. The firm is located at 230 Peachtree St. NW, Suite 2260, Atlanta, GA 30303; 404-380-1430; Fax 404-382-6011; www.koniecznylaw.com.


> **Barnes & Thornburg LLP** announced that **Bruce A. Douglas** joined the Atlanta office as **of counsel** in the corporate department. Douglas joined the firm from Enfinity America Corporation, a leading solar energy development and finance company based in Atlanta, where he served as general counsel and corporate secretary. The firm is located at 3475 Piedmont Road NE, Suite 1700, Atlanta, GA 30305; 404-846-1693; Fax 404-264-4033; www.btlaw.com.

>  **Ford & Harrison LLP** announced the addition of **Sara Sahni** as an **associate** in the firm's Atlanta office. Sahni concentrates her practice in the representation of employers in labor and employment matters. The firm is located at 271 17th Street NW, Suite 1900 Atlanta, GA 30363; 404-888-3800; Fax 404-888-3863; www.fordharrison.com.

> **Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**, welcomed **Eric Berezin** as a **shareholder** to the firm's Atlanta office. Berezin practices in the areas of employment law and workplace safety and health with an emphasis on litigation. The firm is located at 191 Peachtree St. NE, Suite 4800, Atlanta, GA 30303; 404-881-1300; Fax 404-870-1732; www.ogletreedeakins.com.

> **Pursley Lowery Meeks** announced that **William Ezzell** and **Elizabeth Story** joined the firm as **associates**. Ezzell joined the medical practice and commercial litigation teams. Story joined the condemnation practice team. The firm is located at 260

Peachtree St. NW, Suite 2000, Atlanta, GA 30303; 404-880-7180; Fax 404-880-7199; www.plmllp.com.


>  **Conley Griggs LLP** merged with Partin Law Firm, P.C., to form **Conley Griggs Partin LLP**. **Andy Scherffius** joined the firm as **of counsel**. He continues to represent plaintiffs in aviation, products liability and other types of litigation. The firm is located at 1380 W. Paces Ferry Road NW, Suite 2100, Atlanta, GA 30327; 404-467-1155; Fax 404-467-1166; www.conleygriggs.com.

>  **Morris, Manning & Martin, LLP**, announced that **Carl E. Westmoreland Jr.** joined the firm as a **partner** in its real estate practice. He focuses his practice on zoning and land use issues. Westmoreland was previously with Seyfarth Shaw. The firm is located at 1600 Atlanta Financial Center, 3343 Peachtree Road NE, Atlanta, GA 30326; 404-233-7000; Fax 404-365-9532; www.mmmlaw.com.

>  **David H. Williams Jr.** was named **managing partner** of the Atlanta office of **Peck, Shaffer & Williams LLP**. Williams focuses his practice on financings for hospitals, continuing care retirement communities, university facilities and multifamily housing developments. The firm is located at 3353 Peachtree Road, Suite M20, Atlanta, GA 30326; 404-995-3850; Fax 404-995-3851; www.peckshaffer.com.

>   **Jackson Lewis LLP** announced that Atlanta partners **Edward M. Cherof** and **David L. Gordon** were elected to the firm's nine-member **Management Committee**. Cherof also serves as the coordinator for the firm's Southeast regional offices. Gordon is the managing partner of the Atlanta office. The firm is located at 1155 Peachtree St. NE, Suite 1000, Atlanta, GA 30309; 404-525-8200; Fax 404-525-1173; www.jacksonlewis.com.

In Augusta

>  **Tucker, Everitt, Long, Brewton & Lanier** welcomed **Jason W. Blanchard** to the firm. Blanchard concentrates his practice on a wide variety of civil litigation matters which include employment, business, commercial, real estate

and personal injury cases. The firm is located at 453 Greene St., Augusta, GA 30901; 706-722-0771; Fax 706-722-7028; www.augustalawoffice.com.

In Canton

>



Ball Family Law announced that **Kristine M. Fletcher** joined the firm as an **associate**. Fletcher's primary area of practice is family law. She is also a registered mediator. The firm is located at 381 E. Main St., Canton, GA 30114; 770-720-6252; Fax 770-720-6282; www.ballfamilylaw.com.

In Columbus

>

Elizabeth W. McBride joined **Page, Scrantom, Sprouse, Tucker & Ford, P.C.**, as a **partner**. She represents individuals in the areas of family law, consumer bankruptcy and civil litigation. She is also available for civil and domestic mediations. The firm is located at 1111 Bay Ave., Third Floor, Columbus, GA 31901; 706-324-0251; Fax 706-243-0417; www.columbusgalaw.com.

In Evans

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Hull Barrett, PC, announced **J. Milton Martin Jr.** joined the firm as **of counsel**. Martin represents private equity investors, property owners, operators and lenders in purchase, sale and financing transactions. The firm is located at 7004 Evans Town Center Blvd., Third Floor, Evans, GA 30809; 706-722-4481; Fax 706-650-0925; www.hullbarrett.com.

In Savannah

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HunterMaclean announced that **Heather Hammonds** joined the firm as an **associate** in the specialty litigation group. The firm is located at 200 E. Saint Julian St., Savannah, GA 31401; 912-236-0261; Fax 912-236-4936; www.huntermaclean.com.

In Valdosta

>

Justo Cabral III was appointed by Gov. Nathan Deal to be the **solicitor general** of Lowndes County. Cabral previously served as an assistant district attorney in the Southern Judicial Circuit. The Lowndes County Solicitor General's Office can be reached at P.O. Box 1349, Valdosta, GA 31603; 229-671-2410; Fax: 229-671-2593; www.pacga.org.

In Nashville, Tenn.

>

Nelson Mullins Riley & Scarborough LLP announced the opening of their Nashville office. The firm is located at 315 Deaderick St., Suite 1800, Nashville, TN 37238; 615-664-5300; Fax 615-664-5399; www.nelsonmullins.com.

In Tampa, Fla.

>



Bricklemeyer Smolker & Bolves P.A. announced that **Shannon Sheppard** was elected a **shareholder** in the firm. Sheppard practices in the area of commercial real estate. The firm is located at 500 E. Kennedy Blvd., Suite 200, Tampa, FL 33602; 813-223-3888; Fax 813-228-6422; www.bsbfirm.com.

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How to Place an Announcement in the Bench & Bar column

If you are a member of the State Bar of Georgia and you have moved, been promoted, hired an associate, taken on a partner or received a promotion or award, we would like to hear from you. Talks, speeches (unless they are of national stature), CLE presentations and political announcements are not accepted. In addition, the *Georgia Bar Journal* will not print notices of honors determined by other publications (e.g., Super Lawyers, Best Lawyers, Chambers USA, Who's Who, etc.). Notices are printed at no cost, must be submitted in writing and are subject to editing. Items are printed as space is available. News releases regarding lawyers who are not members in good standing of the State Bar of Georgia will not be printed. For more information, please contact Stephanie Wilson, 404-527-8792 or stephaniew@gabar.org.

Money for Nothing

by Paula Frederick

Explain it to me again," the FBI agent asks. "What exactly were you supposed to be doing for Mr. Spain?"

"I was the escrow agent for a deal he was putting together," you respond. "He said he was working with investors all over the country to finance a new shopping mall and he needed someone reliable to hold the money until the deal went through. He said he got my name from someone over at the local bank—I represent the bank."

"So you were hired just to put money into your escrow account?" the agent asks. "No legal work involved?"

"That's right," you admit. "Investors would wire money into the account, and I'd wire it out at Mr. Spain's direction—sometimes to him, sometimes to people and entities I'd never heard of."

"Did you notify the investors when you wired their money out?"

"No, that wasn't part of the deal. Besides, sometimes I didn't even know who the investors were! I was getting wire transfers from all over the place."

"How did you get paid?" the investigator asks.

"Spain paid me 5 percent of each disbursement."

"So, for holding and disbursing \$1 million, you would get \$50,000?"

"I know it sounds fishy. . . ." you admit.

"Yes. Particularly since Mr. Spain has disappeared with more than \$5 million of other peoples' money that you handed over to him!"

"This is a nightmare," you groan.

Criminals engaged in money laundering often target lawyers in an attempt to channel money through a lawyer trust account. These scams are increasingly sophisticated, fooling even experienced lawyers.


How can a lawyer reduce the likelihood that she will be used in a fraudulent scheme?

The most obvious precaution is to verify the identity of every potential client before undertaking representation. But how?

A lawyer who wants to evaluate the risk that a particular client is engaged in money laundering can turn to the American Bar Association for help. In 2010 the ABA adopted "Voluntary Good Practices Guidance



for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (Good Practices Guidance)." The Good Practices Guidance kicks in when a lawyer undertakes "high risk" representation as determined by the nature of the client, the nature of the legal work involved and where the business is taking place. Obviously, legal work that involves money changing hands poses the highest risk—buying/selling real estate, managing client assets, organizing contributions for creating or managing companies and creating, buying or selling business entities.

Given our training, it is particularly difficult for anyone to believe that a lawyer could be the innocent victim of financial fraud. Beware the client who offers to pay unusually high fees for little work, and educate yourself by reviewing the Good Practices Guidance for the warning signs that your services are being used in a fraud. 



Paula Frederick is the general counsel for the State Bar of Georgia and can be reached at paulaf@gabar.org.



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Discipline Summaries

April 25, 2012 through June 15, 2012

by Connie P. Henry

Voluntary Surrender/Disbarments

Nerrylle Manning-Wallace

Roswell, Ga.

Admitted to Bar in 2001

On May 7, 2012, the Supreme Court of Georgia disbarred attorney Nerrylle Manning-Wallace (State Bar No. 469702). Manning-Wallace was injured in an automobile accident in 2003 and underwent physical therapy. She filed a claim pro se against the other driver and at the 2006 trial she offered into evidence two documents she had produced previously to the other driver's insurance company. One was an "Initial Evaluation" form from the therapist and the other was an account statement from the therapist listing treatment from July 29, 2003, to Oct. 15, 2003. A representative from the therapist's office testified that they had no such documents in their records, that Manning-Wallace was not listed on the sign-in sheets for those dates, and that the statement was not a bill from their office. Respondent offered evidence she knew to be false in support of her damages in her personal injury case and knowingly made false statements of a material fact to a tribunal regarding same, and she failed to take any remedial action after making the false statements and offering the false evidence. She created or caused the false documents to be created.

Scott Michael Herrmann

Atlanta, Ga.

Admitted to Bar in 1993

On May 7, 2012, the Supreme Court of Georgia disbarred attorney Scott Michael Herrmann (State Bar No.

349345). The following facts are admitted by default: A client retained Herrmann for representation in business-related litigation. The client authorized Herrmann to settle the litigation for \$375,000. The client directed Herrmann to retain \$45,000 of the settlement funds as legal fees; to distribute \$30,000 to a third party; and to distribute the balance of \$300,000 to the client's bank as payment on a loan. Herrmann did not deliver payment to the client's bank for two months and failed to account for the \$30,000. Instead, he withdrew those funds for his own use.

A. Lee Hayes

Albany, Ga.

Admitted to Bar in 1988

On May 7, 2012, the Supreme Court of Georgia disbarred attorney A. Lee Hayes (State Bar No. 339750). The following facts are admitted by default: A client retained Hayes to file an action against her deceased husband's insurer for refusal to pay proceeds from a life insurance policy. Hayes filed the action in June 2008, although he told the client he filed it in April. The defendant filed a motion for summary judgment in March 2009. Hayes did not file a response and did not advise his client that it had been filed. The client was unable to schedule an appointment with Hayes to discuss her case and from June through September 2010 he refused to return her calls. The client finally contacted a new attorney, who learned that the motion for summary judgment had been granted in September 2010. The Court noted Hayes' lack of cooperation with the State Bar and that his refusal to communicate with

his client and the abandonment of her legal matter was prolonged and knowing.

Robert E. Bach

Powder Springs, Ga.

Admitted to Bar in 1966

On May 7, 2012, the Supreme Court of Georgia disbarred attorney Robert E. Bach (State Bar No. 030400). The following facts are admitted by default: Bach represented clients in bankruptcy cases and, in some or all, he did not file the petition, closed his office without notifying his clients, did not refund an unearned fee, abandoned the matter and failed to communicate with his clients, falsely told a client the case was proceeding on schedule, was suspended from practice in the Bankruptcy Court for the Northern District of Georgia and did not competently represent his clients in that court or properly supervise his non-lawyer staff, did not comply with Bankruptcy Court orders to pay a filing fee and to disgorge a fee and failed to appear in court. In aggravation of discipline the Court found that Bach acted willfully, dishonestly and selfishly, and that he previously received a Review Panel reprimand.

Suspensions

Charles Matthew Hutt

Atlanta, Ga.

Admitted to Bar in 2010

On May 29, 2012, the Supreme Court of Georgia suspended attorney Charles Matthew Hutt (State Bar No. 774444) for a period of 45 days nunc pro tunc to Jan. 3, 2012. Hutt filed a petition for voluntary discipline after the Supreme Court of Florida suspended him for 45 days for his violations of the Florida Rules of Professional Conduct. Approximately one month after Hutt was admitted to the Florida Bar, he began employment as a junior associate with a high-volume civil litigation firm in Florida. Hutt was assigned to work primarily on foreclosure cases, where it was his firm's customary practice to file an affidavit

of attorney fees at the summary judgment stage. The fee affidavits were usually very similar, if not identical. The purported affiant on the fee affidavits was "Attorney X," whom the firm had hired to train junior associates. Attorney X also reviewed foreclosure files on a few occasions. Hutt's employer told him that Attorney X had given the firm permission to sign his name on attorney fee affidavits in his absence. Hutt's employer also said that signing Attorney X's name on the fee affidavits was common practice in the office and that Hutt was expected to do so. Feeling pressured as both a new employee and a new attorney, Hutt signed Attorney X's name on fee affidavits on numerous occasions. Aside from the signatures, the affidavits Hutt signed were accurate.

A judge eventually recognized the signature on the fee affidavits as a forgery. The Florida Bar determined that Attorney X did not give the firm permission to sign his name on the fee affidavits in his absence.

Hutt cooperated in the resulting investigation, which led to a prosecution against Hutt's former employer. The Court found that Hutt's violations arose out of conduct encouraged by his employer; the violations occurred at a time when he was a very inexperienced lawyer; and that he has no prior disciplinary history. Hutt did not practice law in Georgia during the time he was suspended in Florida and promptly sought the imposition of reciprocal discipline.

Scott Chandler Huggins

Cumming, Ga.

Admitted to Bar in 1997

On May 7, 2012, the Supreme Court of Georgia suspended attorney Scott Chandler Huggins (State Bar No. 375445) for six months with conditions for reinstatement. Huggins admitted to the following conduct, which occurred in separate representations of five clients in crimi-

***"He who is his own lawyer
has a fool for a client."***



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nal defense matters: he failed to adequately communicate with clients, he failed to return a client's file; he did not adequately prepare for the trial of one client; he failed to preserve the appeal rights of a client; he deposited a client's funds in the account of a friend instead of in his attorney trust account; he failed to respond to the Office of General Counsel; and he twice failed to respond to the Investigative Panel.

Huggins submitted that he had no previous discipline, he has been a member of many professional organizations, has served as president of the Macon Association of Criminal Defense Lawyers and was given the Hugh Q. Wallace Award in recognition of his representation of indigent defendants. He was struggling with alcoholism and depression at the time of these matters. He has recognized his personal issues, has sought treatment, regularly attends Alcoholics Anonymous meetings and is willing to participate in any treatment program recommended by the Lawyer Assistance Program.

During this time, he experienced the death of his mother, the dissolution of his law partnership, divorce and the loss of daily contact with his children. With the exception of failing to respond to Notices of Investigation, he has been cooperative with the Bar and has great remorse.

Huggins' reinstatement is conditioned on his continued participation in weekly Alcoholics Anonymous meetings with verification of participation provided to the Bar, compliance with treatment recommended by the Lawyer Assistance Program or a mental health provider acceptable to the Bar, and his waiver of confidentiality as to treatment providers.

Michael Lawrence Terrell

Marietta, Ga.

Admitted to Bar in 2006

On May 7, 2012, the Supreme Court of Georgia suspended attorney Michael Lawrence Terrell (State Bar No. 143179) for a period

of six months. Terrell settled a portion of his client's claims without authority for \$98,250. He deposited the funds in his trust account and at various times his trust account had insufficient funds. Terrell has since paid all settlement funds to his client. Terrell asserts that he was suffering personal problems during this time; that he was inexperienced as a plaintiff's civil litigation attorney; that he made a timely and good faith effort to make restitution to his client; that he has no prior discipline; that he has good character and a good reputation; that he sought assistance from the Bar's Law Practice Management Program; and that he is deeply remorseful.

Public Reprimand

Beryl B. Farris

Atlanta, Ga.

Admitted to Bar in 1977

On May 7, 2012, the Supreme Court of Georgia accepted the petition for voluntary discipline

of attorney Beryl B. Farris (State Bar No. 255925) for a public reprimand with conditions to be met within six months. In two separate cases Farris undertook to represent clients in immigration matters. In the first case she did not act with reasonable diligence in updating her client's status with the U.S. Citizenship and Immigration Services (USCIS). She did not timely respond to USCIS requests or file proper documents on a timely basis. She did not inform her client about the status of the case, and did not appear at a hearing.

In the other case, she failed to ensure that her client understood and agreed to the scope of the work she planned to perform, did not clarify the limits on the scope of the representation she would provide and failed to explain the effect and ramifications of the expiration of her client's visa on his ability to remain and work in the United States.

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PERSONAL NEEDS



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TECHNOLOGY



INSURANCE

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If you have any questions regarding the Vendor Directory, please contact Natalie Kelly at nataliek@gabar.org or 404-527-8770.



State Bar
of Georgia

In mitigation, the special master found that Farris had no prior discipline and that she submitted numerous affidavits attesting to her good character. Farris must within six months ensure that someone from the State Bar's Law Practice Management Program visits her office and makes a full evaluation and report, and forwards it to the Bar. She must also complete five hours of continuing legal education on the subject of attorney-client relations and similar matters focusing on attorney-client communication.

Jefferson Lee Adams

Jackson, Ga.

Admitted to Bar in 2000

On May 29, 2012, the Supreme Court of Georgia accepted the petition for voluntary discipline of attorney Jefferson Lee Adams (State Bar No. 003523) for a public reprimand. In addition to the reprimand, Adams must participate in the Lawyer Assistance program and consult with the State Bar's Law Practice Management program. These disciplinary proceedings involved multiple examples of abandonment of legal matters. Adams' misconduct arose from a relatively brief period of time in 2006 when he was struggling with substance abuse.

In mitigation of discipline, the special found that Adams personally refunded the unearned fees paid by clients; he was relatively inexperienced in the practice of law at the time; he did not act with an intentionally dishonest or selfish motive; that he was acting under a physical or mental impairment caused by active alcoholism/addiction; his conduct in these cases arose from a brief period of time and was, at least partially, caused by problems associated with his addiction; and since these matters arose, Adams has undergone significant rehabilitation and is maintaining his recovery.

The special master also found in mitigation that Adams has a

good character and reputation and is committed to his recovery as evidenced by the fact that after his misconduct he voluntarily sought help from a recognized residential substance abuse facility and completed its program; he regularly attends and leads Alcoholics Anonymous (AA) meetings; he is an officer of his local AA group; he volunteers at the substance abuse facility as an alumni volunteer; he assists that facility with legal issues pro bono; he continues to actively participate in the State Bar's Lawyer Assistance Program (which includes random drug tests); and he continues his efforts to recover from alcohol and drug addiction as attested to by numerous letters in support, many of which are from attorneys associated with the Lawyer Assistance Program who have described Adams as a testament to that program.

Finally, the special master found that Adams is extremely remorseful for his conduct, and is embarrassed and disappointed by his actions.

Review Panel Reprimand

Dock H. Davis

Franklin, Ga.


Admitted to Bar in 1969

On May 29, 2012, the Supreme Court of Georgia ordered that Dock H. Davis (State Bar No. 207900) receive a Review Panel reprimand. Davis, together with an Alabama lawyer, represented an Alabama resident in a contract case filed on the client's behalf in the State Court of Gwinnett County. Because the client's profession required extensive travel, Davis had some difficulty reaching the client to review and sign documents. Before filing the case, Davis forwarded a draft of the verification of the complaint for the client's notarized signature. The client signed the verification before a notary on April 24, 2008, and faxed it to Davis, but Davis filed the complaint on April 25 with a verification that he had signed as the cli-

ent and that he had notarized. Later in the litigation, on Oct. 20, 2009, Davis again signed his client's name and notarized the signature on an affidavit submitted in response to the defendant's motion for summary judgment. Davis understood at the time he filed his version of the affidavit that the client had been to co-counsel's office in Alabama and signed the original affidavit before a notary, although he later learned that it had not been notarized until Oct. 21. Davis' verification and the affidavit were identical in substance to those actually signed by the client, and Davis asserted that he advised opposing counsel of these two incidents informally during the litigation. On Jan. 12, 2010, Davis filed with the court the true, notarized verification and the true, notarized affidavit, as signed by his client.

The special master noted in mitigation the absence of a selfish motive, Davis' lack of a prior disciplinary history, and his effort to correct his misrepresentation before the court by filing the originals. The special master further noted that Davis committed the violations in an attempt to meet deadlines for his client and believed that he had his client's tacit permission to sign and notarize the documents in question.

Interim Suspensions

Under State Bar Disciplinary Rule 4-204.3(d), a lawyer who receives a Notice of Investigation and fails to file an adequate response with the Investigative Panel may be suspended from the practice of law until an adequate response is filed. Since April 25, 2012, no lawyers have been suspended for violating this Rule. No lawyer has been reinstated. 



Connie P. Henry is the clerk of the State Disciplinary Board and can be reached at connieh@gabar.org.

Basic Apps and Tips for Mobile Devices in Your Law Practice

by Natalie R. Kelly

With everyone carrying smartphones and tablets, we are often asked for “must-have” apps and best practices for using these mobile tools. Below is an overview of some of the better tablet and smartphone apps, along with some tips to help make your use of these devices more effective.

Basic Apps

GoodReader

This is truly a “must-have” when it comes to an iPad app. This \$4.99 PDF reading app allows users to open all sorts of documents on the iPad (not just PDF files). The app can get downloads from local servers, as well as top online document storage services like Google Docs, DropBox and SugarSync. Once documents are loaded into the app, you can read, annotate and bookmark them for further use. You can even use the displayed documents as teleprompters or presentation aids.

TrialPad

Speaking of presenting, if you are looking to use a tablet in the courtroom, the general consensus is that at this time, only the iPad has a robust enough app to help you. That app (at least for now) is the \$89.99 TrialPad for the iPad. Using PDF management and annotation tools and interactive presentation capabilities, this app is top-of-the-line in terms of trial presentation.

SwiftKey 3

SwiftKey is a \$1.99, award-winning Android app designed to make typing on Android devices easier. This app learns your writing style and using its arti-



ficial intelligence, creates touchpad layouts that make sense for the way you type. (Themes can be applied in the background, too.) The app suggests or “intelligently guesses” what you are about to type with amazing accuracy.

Blackberry Messenger App

This top free app for Blackberry devices allows users to instantly stay in touch via messaging, and also allows them to share device information like contacts, pictures, locations and voice notes.

Handyscan

This top Windows Mobile app turns your Windows Mobile phone into a scanner. You can scan anything (even with settings options you can change) and then send the document as a JPG or PDF formatted file. Advanced emailing and document handling is available via the \$2.99 full version.

Basic Tips

If you are just getting ready to put down your “dumb” phone for a smartphone or tablet, you might benefit from a review of the basics for the various operating systems, key devices/units and where to buy apps. The major vendors by operating systems are listed in the table.

Get a good grasp on the basic pre-loaded apps on your mobile devices. Every device will generally have a calendaring and note taking app preloaded for your use. You can better get used to the device by taking a few minutes (or hours) learning to navigate these core apps. With time, you will soon learn how to determine if a native app is better, or you need a more advanced app to be more productive.

Search for productivity and business apps in the various app shopping stores to make devices more useful and fit the business needs of your practice. You can also go to app directories like GreatApps (www.greatapps.com) to check out reviews and find more useful apps.

Use mobile cleaning cloths to keep touch screens clear of smudges and germs. A great brand to try is MOBILE CLOTH. You can even get a promotional set of these cloths in multiple sizes to jazz up your firm’s marketing at www.mobilecloth.com.

To take “tablets for lawyers” to a whole new level, try giving out preset tablet devices to clients. You can set these devices so that they help clients get up-to-date case information (deadlines, meeting and hearing dates) and stay in contact with the firm (preset contact lists). You can also control content interac-

Key Devices/ Units (Phones & Tablets)	Company	Operating System	Where to Purchase Apps
iPad, iPhone, iPod Touch, AppleTV	Apple	iOS	App Store
HTC One X, Samsung Galaxy S, Asus Transformer, Samsung Galaxy Tab, Sony Tablet S	Google	Android	Google Play
Nokia Lumia, Samsung Focus, Windows 8 Tablet (in production)	Microsoft	Windows Mobile	Windows Phone Marketplace
Blackberry Bold, Blackberry Torch, Blackberry Curve, Blackberry PlayBook	Research in Motion	Blackberry OS	Blackberry App World

Consumer Pamphlet Series

The State Bar of Georgia’s Consumer Pamphlet Series is available at cost to Bar members, non-Bar members and organizations. Pamphlets are priced cost plus tax and shipping. Questions? Call 404-527-8792.

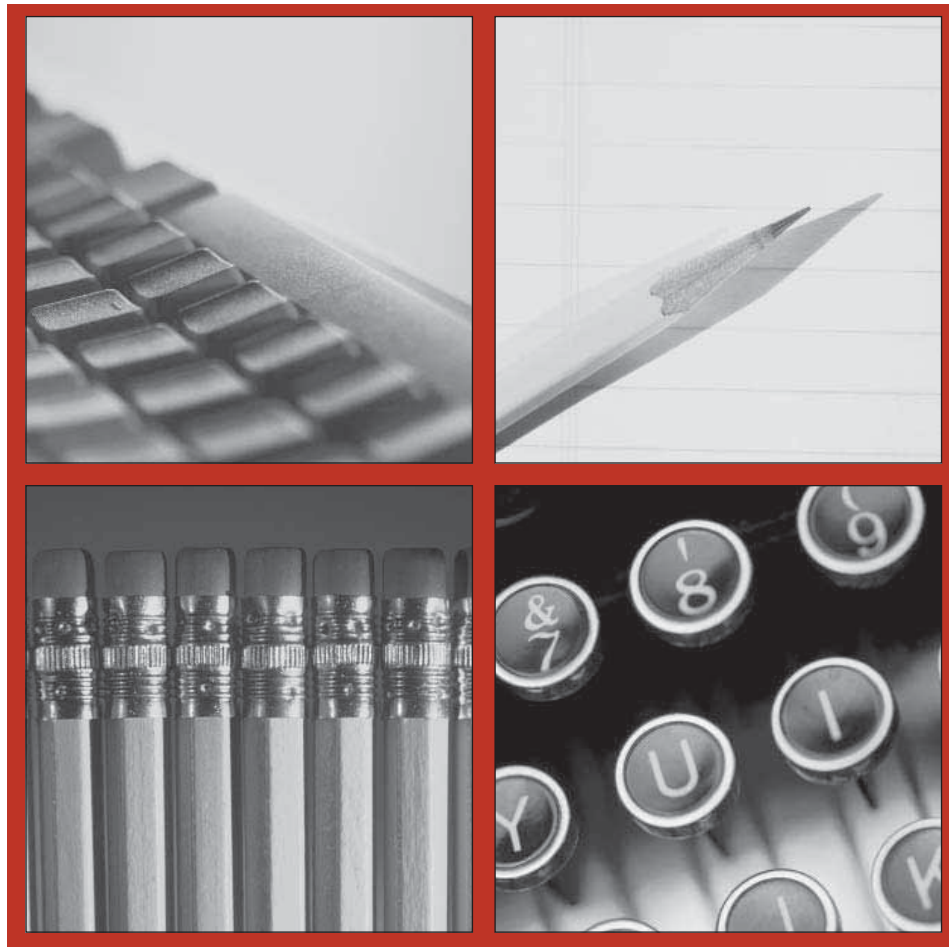


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■ Buying a Home ■ Divorce ■ How to Be a Good Witness ■ How
to Choose a Lawyer ■ Juror’s Manual ■ Lawyers and Legal Fees ■
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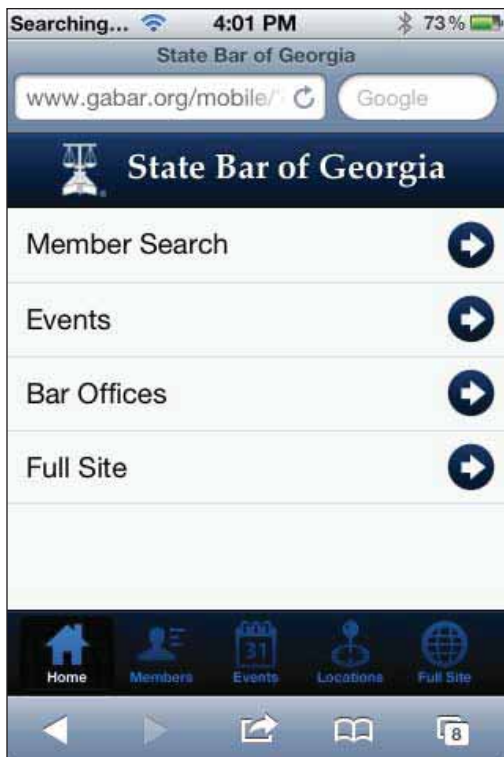
EARN CLE CREDIT

The Editorial Board of the Georgia Bar Journal is in regular need of scholarly legal articles to print in the Journal.

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If you have additional questions, you may call 404-527-8791.

*Not all submitted articles are deemed appropriate for the Journal.
The Editorial Board will review all submissions and decide on publication.



State Bar of Georgia mobile site as viewed on a smartphone.



State Bar of Georgia full site.

tion via extranet functionality on your website (clients log in to your website with a password to see their case information) and invoke remote swiping to clear out the device when the case is over or if there is a problem or concern with their use.

Tom Mighell's books *iPad in One Hour for Lawyers* and *iPad Apps in One Hour for Lawyers* are must reads if you have an iPad. We agree on many of the needed iPad apps and tips for lawyers, and he relays some good basic navigation tips in his books as well.


When using apps on mobile devices, you are often confronted with "pop-ups" that want you to purchase something else or upgrade to the next level of the app you are using. You can prevent these "pop ups," called "in-app" purchase notifications, via settings on iOS devices and via apps on Android devices. For iOS devices, you turn off "In-App Purchases" under Settings/General/Restrictions, and for Android units you can use apps like Seal Lite (free) and Seal (\$2.62) to force password input to open up app purchase areas. Look for simi-

lar settings and apps on Windows Mobile and Blackberry units.

Get a quote on setting up a mobile site for your firm. A mobile version of your website will make more expansive websites appear more effectively on the smaller screens of mobile devices. You can also set up a neat layout for getting to the heart of information in your practice. See the difference between the mobile site versus the full State Bar site above.

Mobile devices are just that, mobile. So with their ability to move around, you should make sure you are strict about keeping these devices secured with passwords and turning on settings for location services like "Find My Phone." You should even set up a firm policy for securing all mobile technology.

Keep in mind that lists of apps, as well as devices, will be ever-changing. So you will need to keep an eye out for the latest and greatest from your specific providers. We are planning to help you keep up with some of the latest and coolest apps. Check out the new App of the Day segment on

the Law Practice Management Program's part of the State Bar's website at www.gabar.org/committeesprogramssections/programs/lpm/ or <http://tinyurl.com/6qjoxpq>. Remember, you can always suggest tips and apps to us, too. 



Natalie R. Kelly is the director of the State Bar of Georgia's Law Practice Management Program and can be reached at nataliek@gabar.org.



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Sections Recognized for Service to the Profession

by Derrick W. Stanley



The State Bar honors outstanding sections of the State Bar each year for their members' dedication and service to their areas of law practice and for devoting significant hours of volunteer effort to the profession. The Section of the Year Award is given to the section that goes above and beyond advancing the goodwill of the profession. Awards of Achievement are given to sections whose members diligently strive to advance the cause of the section.

Chaired by A. Shane Nichols of Alston & Bird, the Intellectual Property Law Section was named the Section of the Year of the State Bar of Georgia. The section was recognized during the plenary session of the State Bar's Annual Meeting on June 1 in Savannah.

The Family Law Section, chaired by Randall M. Kessler of Kessler & Solomiany, received the Section Award of Achievement, also presented during the Annual Meeting.

The Intellectual Property Law Section completed many CLE programs and projects including:

- overhauling the section's long-outdated bylaws to more closely align them with both the section's current operation and the State Bar of Georgia's Model Bylaws;

- reorganizing the section's committee structure;
- collaborating with the Atlanta Chamber of Commerce and the mayor's office to advocate for the location of a new U.S. Patent and Trademark Office in Atlanta;
- sponsoring 40 hours of CLE programming;
- hosting a contingent of administrative law judges and officials from the U.S. Patent and Trademark Office to speak on newly enacted legislation, the America Invents Act; and
- organizing charitable giving and working directly with the U.S. Patent and Trademark Office to form an officially sanctioned patent prosecution pro bono program in Atlanta.


Likewise, the Family Law Section completed many important tasks including:

- enhancing the *Family Law Review* by adding more substance to the articles and creating a whole new look;
- conducting Georgia's first Same Sex Issues program which drew an audience beyond the capacity of the room;
- planning a diversity divorce program which will be cosponsored by GABWA and other bar groups to increase diversity education in family law;



(Left to right) Family Law Section member Sean Ditzel accepts the Section Award of Achievement on behalf of Chair Randall M. Kessler from 2011-12 President Ken Shigley during the plenary session at the Annual Meeting in Savannah, Ga.

- awarding scholarships to deserving section members so they could attend the Family Law Institute;
- establishing new committees such as the diversity committee; the outside Atlanta committee; and the social media/technology committee in an effort to increase member involvement around the state; and
- assisting as needed at the Legislature on family law legislation.

The aforementioned items and events are but a small sample of the work being done by sections, providing strong proof of the value of the sections to the Bar and the community. 



Derrick W. Stanley is the section liaison for the State Bar of Georgia and can be reached at derrick@gabar.org.

Thanks to the following Sections for helping GLSP fund the Economic Impact Study for legal services programs in Georgia. The study will be coordinated through the State Bar of Georgia Access to Justice Committee.

Bankruptcy Law, Dispute Resolution, Environmental Law, Family Law, Health Law, Intellectual Property Law, Labor & Employment Law, Product Liability Law, School & College Law, Technology Law and Tort & Insurance Practice

Fastcase Innovations

by Sheila Baldwin

Fastcase has released several new features and applications in the past months and all of them are free for State Bar of Georgia members. In the April issue, we covered Mobile Sync, which allows full integration of mobile apps with the desktop version of Fastcase with iPhones and iPads. Now, members with Android-operated devices will enjoy the convenience afforded by Mobile Sync with the release of the Android App. Fastcase has also released their Advance Sheets formatted in e-books, enabling attorneys to carry bookshelves of information on a small device or drive.

App for Androids

With the release of a mobile version (1.0) for the Android operating system for smartphones and tablet computers, Android users can smartly research cases and statutes as easily as their Apple using peers. Like the iPhone app, the Android app allows users to run

case law searches by keyword or case name; restricted by jurisdiction and date; and refined by results cited generally or within, as well as by relevance and number of results (see fig. 1). Search for statutes by keyword or citation, narrowing by jurisdiction and number of results. Once in a case, a variety of arrow keys and functions allows one to maneuver through the case to search “within the case” for key words. Finally, click on the “save” button to save your search not only on the device that is being used at the moment but also on your other devices if mobile sync is activated (see fig. 2).

For more information and for links to download the app at Google Play, visit www.fastcase.com/android/.

For those of you who may just be beginning to explore the world of apps, the Law Practice Management Resource Library has two easy-to-read books available for checkout that can provide you with a wealth of knowledge: *iPad Apps in One Hour for Lawyers* and *iPad in One Hour for Lawyers*. Please contact Kim Henry at 404-527-8772 or kimh@gabar.org if you'd like to borrow a copy.

Advance Sheets

Fastcase has moved slightly out of their normal environment of online legal research with the launching of their electronically published Advance Sheets free to Georgia attorneys (see fig. 3). These are a series of eBooks available for use on the iPad, Kindle, Android and Nook devices. The website announces, “Fastcase Advance Sheets give lawyers a first look at judicial opinions from around the country in e-Book format, replacing printed

law books. Advance sheets will be issued monthly for state and federal courts, including judicial opinions from courts of appeal and supreme courts."

The digital books promise to be more comprehensive than traditional advance sheets, because they include all decided cases, even "unpublished" opinions, which are precedential in many courts, and often contain persuasive authority. Because the Fastcase collection is in e-Book format, it will work on most e-readers enabling text that can be highlighted, copied, shared, annotated and, of course, mobile so you can always have them available. The pages are word searchable and contain summaries highlighting the issues in each case.


Although the Advance Sheets were not available for viewing at publication date, the following are comments from a few knowledgeable experts:

- Robert Ambrogi, Lawsites Blog—"All worked as promised and were cleanly formatted."
- 3 Geeks and a Law Blog—"They have a nice clean look and feel about them."
- Sean Doherty, Law Technology News, reports that, "after the free advance sheets, Fastcase will publish e-book case reporters with official pagination and links to their online research database."

For further information on this product visit www.fastcase.com/ebooks/.

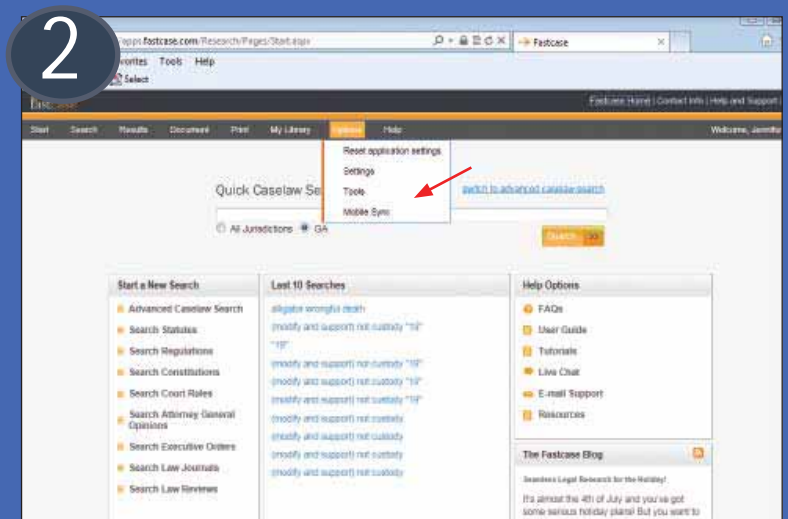
Training Opportunities

Check the calendar on the State Bar website, www.gabar.org, to view the schedule for live Fastcase training at the State Bar. Online training is offered by Fastcase with three options in webinar format hosted by a Fastcase attorney: Introduction to Fastcase, Boolean (Keyword Search for Lawyers) and Fastcase Research Tips (In Depth). CLE credit is available for these trainings. Paralegals or staff members are welcome to attend.

As always, contact me at sheilab@gabar.org or 404-526-8618 for Fastcase help. 



Sheila Baldwin is the member benefits coordinator of the State Bar of Georgia and can be reached at sheilab@gabar.org.



Fastcase training classes are offered four times a month at the State Bar of Georgia in Atlanta. Training is available at other locations and in various formats and will be listed at on the Calendar at www.gabar.org. Please call 404-526-8618 to request onsite classes for local and specialty bar associations.

Improving Legal Writing—Quantifiably

by Jennifer Murphy Romig

An enduring challenge for writers is the difficulty of looking at a draft, especially your own, and seeing what really is there. One method for judging writing objectively is to measure it using readability statistics such as the “Flesch Reading Ease” score and the “Flesch Kincaid Grade Level.”¹ As their names indicate, these statistics help to quantify the ease of reading and the grade level of a piece of writing. Taking readability statistics into account is valuable because legal writing that is easier to read is more comprehensible² and may also be perceived by readers as more persuasive,³ more prestigious⁴ and just more likeable⁵ than less-readable alternatives.

Readability statistics are free and easy-to-use because they are built right into most word processors, including Microsoft Word⁶ and Word Perfect.⁷ Free web pages will also generate readability statistics for short passages of text⁸ and websites.⁹ The graphic on page 65 is a sample readability report on this column produced by Microsoft Word 2010.

Under the Readability heading, this report lists several metrics about the text. The two classic readability scores



can be found at the bottom of the report: the Flesch Reading Ease score and Flesch-Kincaid Grade Level score.¹⁰ These two statistics use the same factors—primarily sentence length and proportion of multisyllabic words—but different formulas for balancing them.¹¹

With the Flesch Reading Ease score, writing is easier to read when this number is higher. Legal writing con-

Readability Statistics	
Counts	
Words	1322
Characters	6880
Paragraphs	22
Sentences	58
Averages	
Sentences per Paragraph	3.4
Words per Sentence	21.5
Characters per Word	5.1
Readability	
Passive Sentences	12%
Flesch Reading Ease	38.9
Flesch-Kincaid Grade Level	12.9
OK	

sultant and author Ross Guberman recommends striving for a Reading Ease score in the 30s for writing to lawyers and judges, and a Reading Ease score in the 40s for writing to clients.¹² In other words, writing to non-lawyers should be easier to read than writing to other lawyers and judges.

The other statistic available in Microsoft Word's report is the Flesch-Kincaid Grade Level score. As its name indicates, this score approximates the grade level of a piece of text. Writing is easier to read when this number is lower. The *New York Times* is written at approximately an eighth-grade level.¹³ U.S. Supreme Court Justice Roberts' majority opinion in *FCC v. AT&T*¹⁴ has a Grade Level score of 13.4. (This opinion was among the writing recognized by *The Green Bag Almanac and Reader* as "Exemplary Legal Writing" for 2011.¹⁵)

An obvious initial objection to trying to improve readability statistics for legal writing is that using short and simple words does not one a service when those words

are not accurate. Sometimes legal words cannot be simplified with shorter synonyms; if a lawyer needs to describe a "usufruct," no other word will do. Lawyers should not over-simplify their message so much that it is not accurate.

But much legal writing can and should be streamlined with shorter sentences and simpler word choice. The neat thing about readability statistics is that they often tend to improve alongside adherence to classic editing advice and proper grammar and punctuation.¹⁶

For example, one astoundingly common¹⁷ problem afflicting legal writing (and writing generally) is the comma splice. This is a particular type of run-on sentence characterized by two independent clauses joined only by a comma.¹⁸ Here is one example in the legal context:

The court ruled that mandamus was the proper remedy, therefore it remanded the case.

This sentence earns a favorable Reading Ease score of 53.6 and

Grade Level score of 9.2. While the sentence is easy to read, it is not grammatically correct due to the comma splice. Adding a semicolon after "remedy" not only makes the sentence grammatically proper, but also enhances its readability statistics. The revised sentence has an improved Reading Ease score of 60.7 and a Grade Level score of 6.5. This improvement comes about because both readability formulas take into account sentence delimiters, which include periods, exclamation points, colons and semicolons.¹⁹ The lack of appropriate sentence delimiters in a comma splice is the crux of the problem and is reflected by the improved readability statistics for the grammatically correct version.

While the comma splice is an issue of proper grammar and punctuation, other classic edits may be viewed as more stylistic and therefore not essential to readability. Yet in many cases, classic edits correlate with improved readability statistics as well.

One classic edit is to reduce excessive verbiage, sometimes referred to as throat-clearing²⁰:

It has been commonly held that a plaintiff in a misrepresentation case has a choice of remedies: to affirm the contract and seek damages or to rescind the contract and sue in tort.

This sentence has a decent readability score: 47.7 for Reading Ease and 14.8 for Grade Level. But the first part of the sentence could be omitted to bring out the main idea much earlier:

A plaintiff in a misrepresentation case has a choice of remedies: to affirm the contract and seek damages or to rescind the contract and sue in tort.

This sentence has slightly higher readability, with a score of 50.9, and a slightly lower grade level at 12.8. Of course the concept of what is commonly held may not actually be throat clearing; the writer

may in fact want to emphasize that idea. But readability statistics help reveal the tradeoff of using that type of language.

Another valuable edit for any writing with citations is to remove the citations from the regular sentences and put them at the end of each sentence or in footnotes.²¹ Here are two versions of the same information, one with the citation in the sentence and one with it moved outside:

In *Yeomans v. Commissioner*, the Tax Court established three criteria for the cost of clothing to be deductible as an ordinary and necessary business expense: (1) The clothing is required or essential in the taxpayer's employment, (2) the clothing is not suitable for general or personal wear, and (3) the clothing is not so worn.

The Tax Court has established three criteria for the cost of clothing to be deductible as an ordinary and necessary busi-

ness expense: (1) The clothing is required or essential in the taxpayer's employment, (2) the clothing is not suitable for general or personal wear, and (3) the clothing is not so worn. *Yeomans v. Commissioner*, 30 T.C. 757, 768 (1958).

The first version sentence does not seem unreadable but clocks in at an atrocious 7.9 for Reading Ease and 24.8 for Grade Level. Moving the case name out of the sentence improves its Reading Ease score to 14.1 and its Grade Level very slightly down to 24.2. Note also that the first version includes just the case name, not the numerical citation that follows it. Including the full citation within the sentence rendered Microsoft Word incapable of even computing readability statistics. This result is consistent with the classic editing advice to remove citations, especially full citations, to improve readability.

Readability statistics do not always improve alongside classic

edits. For example, cutting unnecessary words can shorten a sentence (thus improving readability) but also increase the percentage of multisyllabic words (thus diminishing readability). Also, the formulas behind readability statistics do not take into account the occasional need to break rules for strategic reasons or to connect a sentence with other sentences around it.²² Readability statistics also appear insensitive to the order of ideas in the sentence, which can make a major impact on the sentence's clarity and persuasive impact. Readability statistics' quantitative nature makes them unable to adjust for such discretionary decisions.²³

Yet readability statistics do provide a free, fresh and concrete tool for taking an objective look at a piece of writing. For individual writers, these statistics may be best saved for the end of the writing process, providing a holistic look at a nearly final draft or targeting a particular portion that still seems just awkward. For law-

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yers as editors, readability statistics could help show that edits are not merely stylistic choices²⁴ but quantifiable improvements. And for any lawyer writing to the all-important client audience, more readable legal writing may help lawyers influence their clients to like them (even) more. ^(CB)

The author is grateful to Emory Law student Dominick Capotosto for his research assistance on this column and also thanks Anne Rector, Timothy Terrell and Bard Brockman for their feedback on the column.



Jennifer Murphy Romig is the special guest columnist for this installment of *Writing Matters*. She teaches Legal Writing, Research and Advocacy at Emory Law School and works with lawyers as a legal writing consultant and coach.

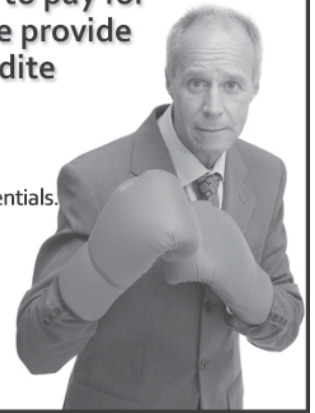
Endnotes

1. There are other readability statistics, such as the Gunning-Fog Index, but this column focuses on the statistics available through Microsoft Word.
2. Lance N. Long and William F. Christensen, *Does the Readability of Your Brief Affect Your Chance of Winning an Appeal*, 12 J. APP. PRAC. & PROCESS 145, 153 (2011).
3. See, e.g., Julie Baker, *And the Winner Is: How the Principles of Cognitive Science Resolve the Plain Language Debate*, 80 U.M.K.C. L. REV. 287, 299, 301-302 (2012).
4. See, e.g., *id.* at 303.
5. See, e.g., *id.* at 299. The converse is that readers do not like messages that make them feel confused or unintelligent.
6. Instructions for Microsoft Word and Microsoft Outlook can be found at <http://office.microsoft.com/en-us/word-help/test-your-document-s-readability-HP010148506.aspx#BM1> (last visited June 11, 2012). Microsoft Word for Mac's Grade Level statistics are capped at 12.0. On PCs, Microsoft Word 2007 and later will report Grade Level statistics up to "grade" 17.0 as was originally intended. See Norman Otto Stockmeyer, *Using Microsoft*

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Word's Readability Program, 88 Mich. B.J. 46, 46 (2009), available at <http://www.michbar.org/journal/pdf/pdf4article1467.pdf>.

7. Instructions for Word Perfect can be found at http://www.orau.gov/cdcynergy/erc/content/activeinformation/resources/INSTR_Word%20Perfect_Readability.pdf (last visited June 11, 2012).
 8. E.g., Dave Child, *Added Bytes*, <http://www.Readability-Score.com>, <http://www.readability-score.com> (last visited June 11, 2012).
 9. See Juicy Studio, *Readability Test*, <http://juicystudio.com/services/readability.php> (last visited June 11, 2012).
 10. The first item listed in Microsoft Word's report is the percentage of passive sentences. While this is not technically a readability statistic, overuse of passive verbs is a well-known issue that may interfere with readability.
 11. See generally Brian Scott, *Readability Formulas*, <http://www.readabilityformulas.com> (last visited June 11, 2012) (explaining the algorithms behind various readability statistics); Long & Christensen, *supra* n. 2, at 150-151.
 12. Ross Guberman, *Can Computers Help You Write Better?*, *Legal Writing Pro*, <http://www.legalwritingpro.com/articles/C07-computer-tools.php> (last visited May 21, 2012).
 13. The main URL for the *New York Times* home page, <http://www.nytimes.com> (last visited June 4, 2012), scored a Grade Level of 8.02 on <http://juicystudio.com/services/readability.php>.
 14. 562 U.S. ___, 131 S. Ct. 1177 (2011).
 15. *Green Bag Almanac & Reader*, available at http://www.greenbag.org/green_bag_press/
- almanacs/almanacs.html (last visited June 4, 2012).
16. See generally Richard C. Wydick, *Plain English for Lawyers* (5th ed. 2005).
 17. Ben Yagoda, *The Most Comma Mistakes*, <http://www.nytimes.com> (May 21, 2012), <http://opinionator.blogs.nytimes.com/2012/05/21/the-most-comma-mistakes/>.
 18. Some experts find it permissible to join short independent clauses using only commas to achieve an artful effect such as in the statement "We came, we saw, we conquered." See James Lindgren, *Style Matters: A Review Essay on Legal Writing*, 92 YALE L.J. 161, 182 (1982). This column assumes most comma splices found in current professional writing are not the result of an attempt at artfulness.
 19. Scott, *supra* n. 11, <http://www.readabilityformulas.com/flesch-reading-ease-readability-formula.php> (June 8, 2012).
 20. See Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 224 (5th ed. 2010).
 21. See, e.g., *id.* at 196. Whether citations belong after sentences or in footnotes is a debate not even Bryan Garner & Justice Antonin Scalia can resolve. Bryan A. Garner & Antonin J. Scalia, *Making Your Case: The Art of Persuading Judges* 132-135 (2008).
 22. See, e.g., Edwards, *supra* n. 20, at 223, 348.
 23. For a thorough critique of readability statistics, see Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26 QUINNIPIAC L. REV. 147 (2007).
 24. Steven V. Armstrong & Timothy P. Terrell, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* 330 (3d ed. 2008).

America the Beautiful—Confirming Our Liberty in Law

by Avarita L. Hanson

*America! America! God shed his grace on thee,
And crown thy good with brotherhood
From sea to shining sea!*

*America! America! God mend thine every flaw,
Confirm thy soul in self-control,
Thy liberty in law!¹*


These words from *America the Beautiful*, our national patriotic song, gave me inspirational thoughts about professionalism when I sang along with the crowd at a high school graduation this spring. The crowd was filled with anxious graduates and proud and smiling well-wishers.

The commencement address was given by an attorney who is an alumnus of the school, Mark Chandler, senior vice president, general counsel and secretary of Cisco Systems Inc. Chandler expanded on three messages: first, that you should take every chance you get to explore the world beyond the United States; second, that you should embrace technology even when you think you know everything you need; and third, you should trust people who believe in you. He closed with an inspiring message to the graduates. “My wish for you is that you will always have enough of that spirit in you to not resist it, but to embrace it when the winds of fortune fill your sails and offer you passage to distant shores; to stay at least even with the next generation instead of thinking that everything new is folly; and let others give you courage to do new things.”²

Chandler’s message is not only appropriate for new high school graduates and newly minted lawyers. It is also fitting for all of us in today’s legal profession. Exploring the world beyond our borders enriches our lives and deepens our ability to understand the law and the people we serve. Embracing technology is a fact of life for all lawyers who need to know how to use it competently and effectively—from everyday communi-



cating to mandatory court e-filing. Finally, cross-generational interacting allows us to allow others to enable and encourage us to be effective today and into tomorrow.

Professionalism is more than ethics. It is doing the right thing in the right way. To be competent professionals, we in the legal profession must continue to challenge ourselves beyond borders—geographic, age groups, friends and family, the local community and with the use of technology. Go forward, my colleagues. Borrowing from the words of *America the Beautiful*, “let’s crown our good with brotherhood,” self-control and confirm our liberty in law. 



Avarita L. Hanson is the executive director of the Chief Justice’s Commission on Professionalism and can be reached at ahanson@cjcpga.org.

Endnotes

1. Katharine Lee Bates, *America the Beautiful* (1904), revised 1913.
2. Mark Chandler ‘74, Belmont Hill School (June 4, 2012), available at: <http://www.belmonthill.org/podium/default.aspx?t=204&nid=646767&bl=/default.aspx>.



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In Memoriam

In Memoriam honors those members of the State Bar of Georgia who have passed away. As we reflect upon the memory of these members, we are mindful of the contributions they made to the Bar in our state. Each generation of lawyers is indebted to the one that precedes it. Each of us is the recipient of the benefits of the learning, dedication, zeal and standard of professional responsibility that those who have gone before us have contributed to the practice of law. We are saddened that they are no longer in our midst, but privileged to have known them and to have shared their friendship over the years.

William P. Bailey

Calhoun, Ga.
University of Georgia School
of Law (1971)
Admitted 1971
Died April 2012

Gilbert A. Banks Jr.

Forsyth, Ga.
University of Georgia School
of Law (1963)
Admitted 1968
Died May 2012

Robert E. Barker

Savannah, Ga.
Admitted 1952
Died July 2012

Rochelle Jean Bozman

Atlanta, Ga.
Georgia State University College
of Law (1998)
Admitted 1998
Died November 2011

Richard T. Bridges

Thomaston, Ga.
Mercer University Walter F.
George School of Law (1960)
Admitted 1958
Died November 2011

Regina Ann Bronson

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Emory University School of Law
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Admitted 1987
Died June 2012

Stanley Wright Case

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Georgia State University College
of Law (1997)
Admitted 1997
Died November 2011

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Atlanta, Ga.
Woodrow Wilson College of Law
(1973)
Admitted 1973
Died August 2011

Aaron Cohn

Columbus, Ga.
University of Georgia School
of Law (1938)
Admitted 1938
Died July 2012

JoAnn D. Collins

Decatur, Ga.
Atlanta's John Marshall Law
School (1992)
Admitted 1992
Died April 2012

Gordon David Coplein

Dunwoody, Ga.
New York University School
of Law (1959)
Admitted 1997
Died May 2012

Eugene A. Deal

Smyrna, Ga.
Woodrow Wilson College of Law
(1964)
Admitted 1965
Died June 2012

Randall Keith Dunn

Athens, Ga.
West Virginia University College
of Law (1977)
Admitted 1991
Died July 2012

Rose Eugenie Goff

Atlanta, Ga.
Georgia State University College
of Law (1990)
Admitted 1990
Died January 2012

Michael S. Green

Royston, Ga.
Atlanta's John Marshall Law
School (1986)
Admitted 1987
Died May 2012

William C. Haddon

Marietta, Ga.
Emory University School of Law
(1962)
Admitted 1962
Died July 2012

Peter E. Hall

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Emory University School of Law
(1978)
Admitted 1978
Died February 2012

R. Joseph Hammill

Brunswick, Ga.
Atlanta's John Marshall Law
School (1993)
Admitted 1993
Died June 2012

Fred B. Hand Jr.

Pelham, Ga.
University of Georgia School
of Law (1959)
Admitted 1958
Died June 2012

Many Benefited From His Devotion to the Law



George R. "Rob" Reinhardt Jr., past president of the State Bar of Georgia.

Rob Reinhardt, 2004-05 president of the State Bar of Georgia, died June 27, 2012, at his home in Tifton.

A lifelong resident of Tifton, he was born March 1, 1954, a son of Bob Reinhardt (1980-81 president of the State Bar of Georgia) and Mary John Reinhardt. He was a product of the Tift County Public Schools, graduating as Valedictorian and STAR Student of Tift County High School.

He graduated magna cum laude from the University of Georgia, where he was a member of the Young Alumni Council, the Kappa Sigma fraternity, the Blue Key Honor Society and Sphinx Club. He was later inducted into the Gridiron Secret Society.

He earned his law degree from the University of Virginia Law School and returned to Tifton to practice law with his father at the firm of Reinhardt, Whitley, Summerlin and Pittman.

A true leader in the legal profession, Rob served for six years on the State Bar of Georgia Disciplinary Board, including two years as chairman, and as an active member of the Chief Justice's Commission on Professionalism, the Institute of Continuing Legal Education Board of Trustees, the Lawyers Foundation of Georgia, the Tifton Judicial Circuit Bar Association and the Bank Counsel Section of the Georgia Bankers Association.

When he was installed as State Bar president, he took the oath of office from his father, and added, "Daddy, I'll do the best I can."

During his term in office, he served with distinction and oversaw completion of the new Bar Center Headquarters in downtown Atlanta, which is now widely considered the finest such facility in the nation.



The Reinhardt family, Rob, Susan, Sam, Elizabeth and George.

On Jan. 15, 2005, Rob presided over the Dedication Ceremony for the Bar Center, which featured a keynote address by U.S. Supreme Court Justice Anthony Kennedy. It was an event Rob described as a "signal honor and grand occasion, marking the end of the historic pilgrimage of this magnificent facility from concept to reality."

He was known throughout the state for his extraordinary knowledge, quick wit, infectious optimism, genuine love of people, humility and pursuit of excellence as a lawyer. The people of Tift County, the legal profession, the judicial system and the great state of Georgia have all benefited from his devotion to the law and his passion for justice.

He is survived by his wife, Susan Langstaff Reinhardt, and their three children; George (Ashley), Elizabeth and Sam; his mother, Mary John Rodgers Reinhardt and his two brothers, John (Kathy) and Bill (Lisa) Reinhardt.

Memorial services were held at First United Methodist Church of Tifton on June 30, 2012.

Pallbearers were Rob's nieces and nephews. Honorary pallbearers were past presidents of the State Bar of Georgia and the State Bar administrative staff; the South Georgia Bank directors; the Searchers Sunday School class and his law firm.

Memorial gifts may be made to the Tift County Foundation for Educational Excellence, P. O. Box 714, Tifton, GA 31793; the Tift Regional Hospital Foundation, P. O. Box 747, Tifton, GA 31793; or the First United Methodist Church in Tifton, 107 West 12th Street, Tifton, GA 31794.

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Admitted 1961
Died May 2012

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University of Virginia School
of Law (1978)
Admitted 1978
Died June 2012

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Jasper, Ga.
University of Georgia School
of Law (1959)
Admitted 1958
Died January 2012

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Atlanta's John Marshall Law
School (1961)
Admitted 1962
Died June 2012

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Atlanta, Ga.
Emory University School of Law
(1950)
Admitted 1951
Died June 2012

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West River, Md.
University of Virginia School
of Law (1995)
Admitted 1995
Died April 2012

William C. Moore
Columbus, Ga.
Mercer University Walter F.
George School of Law (1966)
Admitted 1965
Died January 2012

Robert Ashley Nephew
Atlanta, Ga.
University of Tennessee College
of Law (1986)
Admitted 1989
Died May 2012

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Lawrenceville, Ga.
University of Georgia School
of Law (2005)
Admitted 2005
Died June 2012

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Tifton, Ga.
University of Virginia School
of Law (1978)
Admitted 1979
Died June 2012

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Atlanta, Ga.
University of Virginia School
of Law (1971)
Admitted 1971
Died May 2012

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Arlington, Va.
Stetson University College of Law
(1968)
Admitted 1969
Died April 2012

Judson H. Simmons
Atlanta, Ga.
University of Georgia School
of Law (1972)
Admitted 1973
Died May 2012

Sidney O. Smith Jr.
Atlanta, Ga.
University of Georgia School
of Law (1949)
Admitted 1948
Died July 2012

Malberry Smith Jr.
Savannah, Ga.
Columbia Law School (1938)
Admitted 1939
Died June 2012

Gail Duffie Stebbins
Augusta, Ga.
University of South Carolina
School of Law (1978)
Admitted 1978
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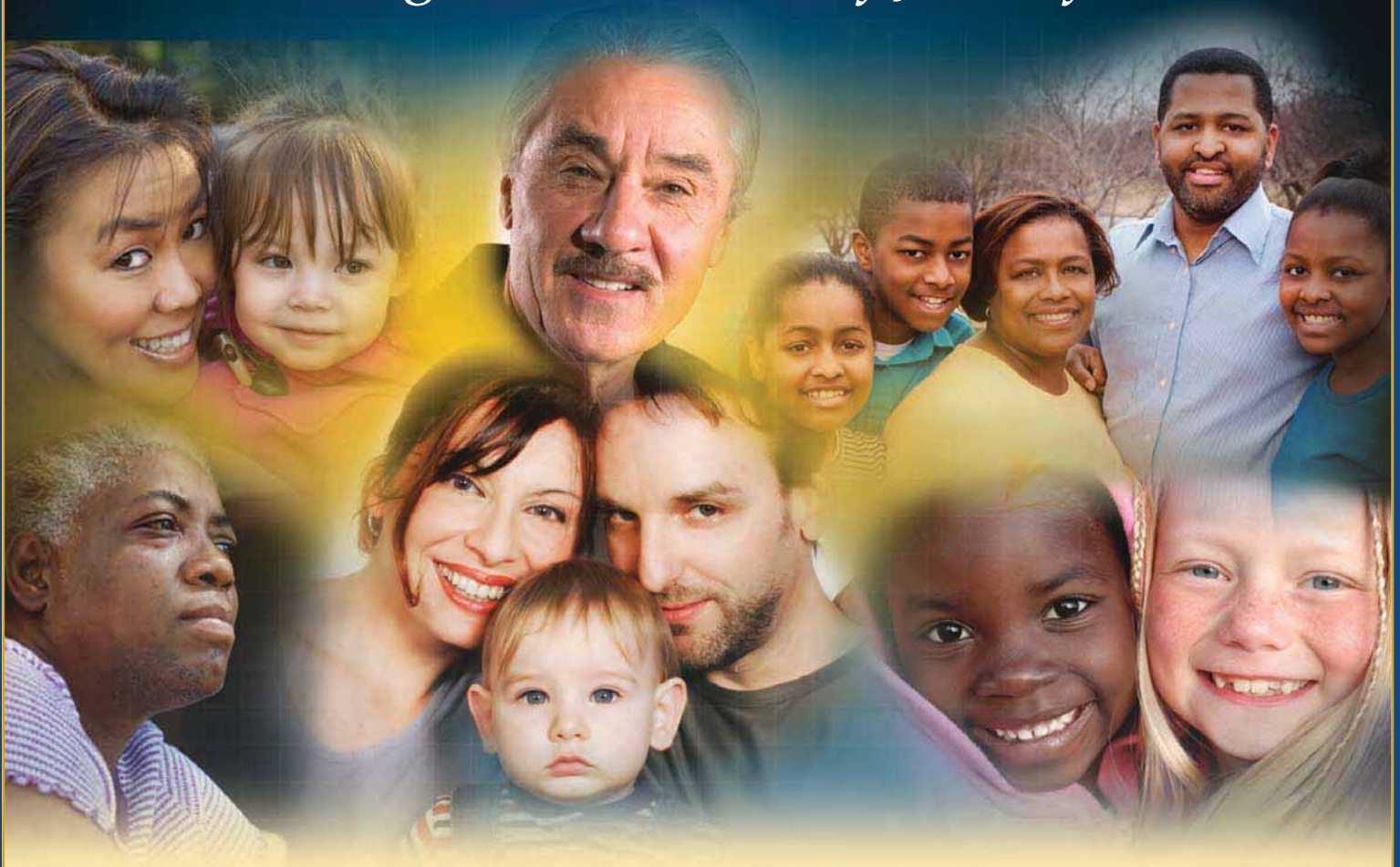
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Atlanta, Ga.
See www.iclega.org for location
9 CLE
- OCT 12** ICLE
Premises Liability
Atlanta, Ga.
See www.iclega.org for location
6 CLE

- OCT 17** ICLE
Intellectual Property Boot Camp
Atlanta, Ga.
See www.iclega.org for location
3 CLE
- OCT 18** ICLE
Tractor Trailer Collision Cases
Atlanta, Ga.
See www.iclega.org for location
6 CLE
- OCT 18** ICLE
Beginning Lawyers Video Replay
Atlanta, Ga.
See www.iclega.org for location
6 CLE
- OCT 19** ICLE
How to Take Control of Your Practice
Atlanta, Ga.
See www.iclega.org for location
3 CLE
- OCT 19** ICLE
Advanced Health Care Law
Atlanta, Ga.
See www.iclega.org for location
6 CLE
- OCT 19** ICLE
Family Law
Augusta, Ga.
See www.iclega.org for location
6 CLE
- OCT 25** ICLE
GABWA Family Law
Atlanta, Ga.
See www.iclega.org for location
6 CLE

Note: To verify a course that you do not see listed, please call the CLE Department at 404-527-8710. Also, ICLE seminars only list total CLE hours. For a breakdown, call 800-422-0893.

need help?

**Lawyer
Assistance
Program
Confidential
Hotline
800-327-9631**

Lawyers Recovery Meetings: The Lawyer Assistance Program holds meetings every Tuesday night from 7 p.m. to 9 p.m. For further information about the Lawyers Recovery Meeting please call the Confidential Hotline at 800-327-9631.

The Lawyer Assistance Program (LAP) provides free, confidential assistance to Bar members whose personal problems may be interfering with their ability to practice law. Such problems include stress, chemical dependency, family problems, and mental or emotional impairment. Through the LAP's 24-hour, 7-day-a-week confidential hotline number, Bar members are offered up to three clinical assessment and support sessions, per year, with a counselor during a 12-month period. All professionals are certified and licensed mental health providers and are able to respond to a wide range of issues. Clinical assessment and support sessions include the following:

- Thorough in-person interview with the attorney, family member(s) or other qualified person;
- Complete assessment of problem areas;
- Collection of supporting information from family members, friends and the LAP Committee, when necessary; and
- Verbal and written recommendations regarding counseling/treatment to the person receiving treatment.

2012-13 Lawyer Assistance Committee

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**denotes non-attorney*

Notice of Withdrawal of Formal Advisory Opinion No. 86-1

Withdrawal of Formal Advisory Opinion No. 86-1

Members of the State Bar of Georgia are hereby NOTIFIED that on June 25, 2012, the Supreme Court of Georgia issued an order withdrawing Formal Advisory Opinion No. 86-1. Formal Advisory Opinion No. 86-1 addresses whether a lawyer may serve as both a state legislator and part-time solicitor.

The State Bar of Georgia filed a petition for withdrawal in the Supreme Court of Georgia on July 14, 2010. The Court treated the petition as a petition for discretionary review under Rule 4-403(d), and granted the petition in an order dated November

7, 2011. The State Bar posted a link to the Supreme Court's November 7, 2011, order on the State Bar's website, which directed the State Bar and other interested parties to address whether Formal Advisory Opinion No. 86-1 was in conflict with certain Georgia laws and Rules of Professional Conduct, and should be withdrawn. The State Bar of Georgia filed a brief in support of withdrawing Formal Advisory Opinion No. 86-1 on November 28, 2011. No other parties filed briefs in this matter.

A copy of the Supreme Court's order withdrawing Formal Advisory Opinion No. 86-1 can be found at www.gabar.org.

First Publication of Proposed Formal Advisory Opinion No. 10-R2

Pursuant to Rule 4-403(c) of the Rules and Regulations of the State Bar of Georgia, the Formal Advisory Opinion Board has made a preliminary determination that the following proposed opinion should be issued. State Bar members are invited to file comments to this proposed opinion with the Formal Advisory Opinion Board at the following address:

State Bar of Georgia
104 Marietta St. NW
Suite 100
Atlanta, Georgia 30303
Attention: John J. Shiptenko

An original and one (1) copy of any comment to the proposed opinion must be filed with the Formal Advisory Opinion Board by September 17, 2012, in order for the comment to be considered by the Board. Any comment to a proposed opinion should make reference to the request number of the proposed opinion. Any comment submitted to the Board pursuant to Rule 4-403(c) is for the Board's internal use in assessing proposed opinions and shall not be released unless the comment has been submitted to the Supreme Court of Georgia in compliance with Bar Rule 4-403(d). After consideration of comments, the Formal Advisory Opinion Board will make a final determination of whether the opinion should be issued. If the Formal Advisory Opinion Board determines that an opin-

ion should be issued, final drafts of the opinion will be published, and the opinion will be filed with the Supreme Court of Georgia.

PROPOSED FORMAL ADVISORY OPINION NO. 10-R2

QUESTIONS PRESENTED:

1. Does an attorney who participates in the closing of a real estate transaction in Georgia in the limited role of a witness to the execution of documents conveying title become responsible as a supervising attorney for the direction and supervision of the performance of all of the other series of events through which land is conveyed where no other Georgia attorney performs or supervises the performance of such tasks?

2. Does an attorney who participates in the closing of a real estate transaction in Georgia in the limited role of a witness to the execution of documents conveying title thereby aid and abet the unauthorized practice of law where none of the other series of events through which land is conveyed, and which constitute the practice of law in Georgia, are performed by attorneys licensed to practice in Georgia?

3. Does an attorney who participates in the closing of a real estate transaction in Georgia in the limited

role of a witness to the execution of documents conveying title receive any funds delivered at the closing that must be deposited into an IOLTA account maintained by the attorney or another attorney licensed to practice in Georgia?

SUMMARY ANSWER:

An attorney who participates in the closing of a real estate transaction in Georgia in a limited role, such as overseeing the execution of instruments of conveyance and the transmittal of documents to third parties for recordation and delivery, becomes responsible as a supervising attorney for the supervision of the performance of all parts of the transaction which constitute the practice of law in Georgia, where the remaining parts of the series of events required for the conveyance of title to real property, and which constitute the practice of law in Georgia, are not performed by or under the direction and supervision of another attorney licensed in Georgia. The attorney's limited participation without supervising the performance of the remaining parts of the transaction constitutes aiding and abetting the unauthorized practice of law. An attorney who receives any monetary instruments or funds at closing may not deliver such instruments or funds to a third party who is not a Georgia attorney. The attorney must either deposit such funds into an IOLTA account maintained by the attorney or ensure that the funds are deposited into another Georgia attorney's IOLTA account.

OPINION:

Introduction

The determination of the questions presented and addressed in this opinion involves a consideration of several disciplinary rules, prior opinions of this Board and the Standing Committee on the Unlicensed Practice of Law, legislation addressing the definition of the practice of law in Georgia in the context of real estate conveyancing, and relevant decisions of the Georgia Supreme Court. While there is no scarcity of sources of information available to provide guidance to attorneys and others seeking direction as to proper conduct in this area, no comprehensive opinion exists that provides definitive answers to the questions posed and guidance as to what parts of the whole continuum of tasks that must (or should) be completed to initiate, conduct and conclude a real estate transaction involving the conveyance of title in Georgia constitute the practice of law. While the *de novo* determination of that issue is clearly beyond the purview of this Board, to the extent that the activities constituting the practice of law in this area have already been identified piecemeal by the Supreme Court, a comprehensive statement of what is and is not the practice of law

in this area is appropriate, and must of necessity be addressed in this opinion.

The Existing Landscape: Disciplinary Rules, Prior Advisory Opinions, Legislation and Precedents

Relevant Disciplinary Rules

The issues raised by the questions posed and addressed in this opinion require consideration of several of the Georgia Rules of Professional Conduct. Rule 5.3(b),(c) makes an attorney responsible for the supervision and conduct of nonlawyers associated with the attorney and requires the attorney to make reasonable efforts to ensure the nonlawyer's conduct is compatible with the professional obligations of the attorney. Rule 5.5(a) prohibits an attorney from practicing law in a jurisdiction in violation of the laws regulating the practice of law in that jurisdiction, and from assisting another in doing so. While this rule does not prohibit an attorney from using nonlawyers to assist in the performance of legal tasks, as long as the attorney supervises the work delegated and retains responsibility for the work, it does prohibit an attorney from aiding and abetting the unauthorized practice of law by nonlawyers, where the attorney does not supervise and assume responsibility for such work otherwise appropriately delegated.

Rule 8.4(a) prohibits an attorney from engaging in professional conduct involving deceit or misrepresentation, and a violation of this rule could arise from a "witness only" closing lawyer's implicit representation that the attorney has overseen the entire closing process when in fact that is not the case. Finally, Rule 1.15(II) requires an attorney who "receives money...in any...fiduciary capacity" to deposit such funds into an IOLTA account and administer these funds from that account only.¹

Prior Opinions, Legislation and Precedents

Several prior opinions of this Board and the Standing Committee on the Unlicensed Practice of Law ("UPL") provide guidance in this matter. In Formal Advisory Opinion No. 86-5, issued by the Supreme Court on May 12, 1989,² the court considered whether an attorney may delegate to a nonlawyer the "closing" of a residential real estate transaction. After noting that O.C.G.A. § 15-19-50 defines the "practice of law" to include "conveyancing", "the giving of legal advice," and "any action taken for others in any matter connected with the law," the court concluded that the "closing" of a real estate transaction constitutes the practice of law. The court went on to adopt a very expansive definition of a "closing," to include "the entire series of events through which title to the land is conveyed from one party to another party...". The court then opined that to avoid running afoul of the prohibition against



Let CAP Lend a Helping Hand!

What is the Consumer Assistance Program?

The State Bar's Consumer Assistance Program (CAP) helps people with questions or problems with Georgia lawyers. When someone contacts the State Bar with a problem or complaint, a member of the Consumer Assistance Program staff responds to the inquiry and attempts to identify the problem. Most problems can be resolved by providing information or referrals, calling the lawyer, or suggesting various ways of dealing with the dispute. A grievance form is sent out when serious unethical conduct may be involved.

Does CAP assist attorneys as well as consumers?

Yes. CAP helps lawyers by providing courtesy calls, faxes or letters when dissatisfied clients contact the program.

Most problems with clients can be prevented by returning calls promptly, keeping clients informed about the status of their cases, explaining billing practices, meeting deadlines, and managing a caseload efficiently.

What doesn't CAP do?

CAP deals with problems that can be solved without resorting to the disciplinary procedures of the State Bar, that is, filing a grievance. CAP does not get involved when someone alleges serious unethical conduct. CAP cannot give legal advice, but can provide referrals that meet the consumer's need utilizing its extensive lists of government agencies, referral services and nonprofit organizations.

Are CAP calls confidential?

Everything CAP deals with is confidential, except:

1. Where the information clearly shows that the lawyer has misappropriated funds, engaged in criminal conduct, or intends to engage in criminal conduct in the future;
2. Where the caller files a grievance and the lawyer involved wants CAP to share some information with the Office of the General Counsel; or
3. A court compels the production of the information.

The purpose of the confidentiality rule is to encourage open communication and resolve conflicts informally.

Call the State Bar's Consumer Assistance Program
at 404-527-8759 or 800-334-6865 or visit www.gabar.org/cap.

aiding a nonlawyer in the unauthorized practice of law, an attorney delegating activities which ordinarily comprise the practice of law to a nonlawyer must maintain a direct relationship with the client, supervise and direct the work delegated, and "assume complete ultimate professional responsibility for the work product," citing State Bar Advisory Opinion 21. The opinion concludes that:

[I]t would be ethically improper for a lawyer to aid nonlawyers to "close" real estate transactions. This does not mean that certain tasks cannot be delegated to nonlawyers, subject to the type of supervision and control outlined in State Bar Advisory Opinion No. 21. The lawyer cannot, however, delegate to a non-lawyer the responsibility to "close" the real estate transaction without the participation of an attorney.

See also, Formal Advisory Opinion No. 00-3, issued by the Supreme Court on February 11, 2000, holding that an attorney must be physically present at the closing of a transaction and may not supervise a nonlawyer officiating at the closing telephonically.

Formal Advisory Opinion No. 04-1 was approved, with comments, by the Supreme Court on February 13, 2006, after the grant of a petition for discretionary review by the State Bar. In Re Formal Advisory Opinion No. 04-1, 280 Ga. 227 (2006). That opinion instructs that the closing of a real estate transaction in the State of Georgia (as broadly defined by the Supreme Court in Formal Advisory Opinion No. 86-5) constitutes the practice of law, and that when a nonlawyer conducts a closing without the supervision of an attorney, the nonlawyer is engaged in the unauthorized practice of law. Similarly, where an attorney "participates in but does not supervise" the closing, the nonlawyer is still engaged in the unauthorized practice of law, and the participating attorney assisting the nonlawyer does so in violation of Rule 5.5(a). Where an attorney supervises the closing, the attorney is a fiduciary with respect to the closing proceeds, and any funds received "by the lawyer or persons or entities supervised by the lawyer" must be administered in accord with Rule 1.15(II).

In adopting Formal Advisory Opinion No. 04-1, the court held:

[A] lawyer directing the closing of a real estate transaction holds money which belongs to another (either a client or a third-party) as an incident to that practice, and must keep that money in an IOLTA account. ... Under no circumstances may the closing proceeds be comingled with funds belonging to the lawyer, the law office, or any entity other than as explicitly provided in [Rule 1.15(II)]....

The closing of a real estate transaction in this state constitutes the practice of law, and, if performed by someone other than a duly licensed Georgia attorney, results in the prohibited unauthorized practice of law. [Citation omitted]. The attorney participating in the closing is a fiduciary with respect to the closing proceeds, which must be handled in accordance with the trust account and IOLTA provisions in Rule 1.15(II).

In Re Formal Advisory Opinion No. 04-1, 280 Ga. 227, 228 (2006).

In UPL Advisory Opinion No. 2003-2, approved by the Supreme Court on November 10, 2003, the Standing Committee on the Unlicensed Practice of Law considered whether the preparation and execution of any instrument conveying title is the unlicensed practice of law if someone other than a Georgia attorney prepares or facilitates the execution of the instrument. The Committee concluded that the preparation of any document conveying title, whether a warranty deed, quitclaim deed, or deed to secure debt, is the practice of law in Georgia. The execution of such an instrument, "because it is an integral part of the real estate process, is also the practice of law." In reaching this conclusion, the Committee considered O.C.G.A. § 15-19-50 defining the practice of law. The Committee also considered certain limited statutory exceptions permitting title insurance companies to prepare papers to be executed in connection with the issuance of title insurance, the preparation of abstracts of title by nonlawyers, and the performance of legal tasks by nonlawyers where an attorney maintains full professional and direct responsibility for the services received. See e.g., O.C.G.A. § 15-19-52, § 15-19-53, § 15-19-54. The Committee concluded that these exemptions were inapplicable where an instrument of conveyance was prepared by a nonlawyer for the use of a third-party, and no attorney oversaw the preparation and ultimate execution of the instrument.

This opinion was designed to deal with nonlawyer "witness only" closing agents, otherwise described in the opinion as "notary closers" and "signing agents." The opinion stands for the proposition that both the preparation of instruments of conveyance and overseeing the execution of these instruments constitute the practice of law. Clearly, where these activities are performed by a Georgia lawyer, that by itself does not raise a disciplinary issue. However, a disciplinary issue does arise where a Georgia lawyer does not oversee the "entire series of events" that constitutes a closing. As the Committee stated, "a Georgia lawyer who conducts a witness only closing does not, of course, engage in the unlicensed practice of law. There may well exist, however, professional liability or disciplinary concerns that fall outside the scope of this opinion." It could be argued that the existence of this

opinion is what has caused a proliferation of “witness only” lawyer closings.

In a separate advisory opinion, the Committee has also concluded that the preparation of any lien is the practice of law, and may not be performed by a nonlawyer. UPL Advisory Opinion No. 2004-1 (August 6, 2004).

As noted above, several Georgia statutes addressing the practice of law are relevant to a determination of the issues presented. O.C.G.A. § 15-19-50 defines activities which constitute the practice of law, as discussed previously. Certain exemptions for particular activities and parties are set forth in O.C.G.A. §§ 15-19-52 through 15-19-54. O.C.G.A. § 15-19-51 makes it illegal for a non-lawyer to engage in activities constituting the practice of law. While the Supreme Court has ultimate authority to regulate and define what constitutes the practice of law, the court has indicated that these statutes continue to aid the court with regard to defining the practice of law in Georgia. In *Re UPL Advisory Opinion 2003-2*, 277 Ga. 472, 474 (2003). See also *In Re UPL Advisory Opinion 2002-1*, 277 Ga. 521, 522 (2004).

On April 5, 2012 the Georgia General Assembly passed Senate Bill 365, which included amendments to O.C.G.A. § 44-14-13, the Georgia “Good Funds” Act. Ga. Laws 2012, p. _____, § 15 (Act 744, May 2, 2012). As originally introduced, S.B. 365 contained numerous provisions requiring that the closing of residential real estate transactions be handled by Georgia attorneys, and sought to define the practice of law to include all aspects of the closing of residential real estate transactions. This bill was supported by the requester of this opinion. As passed, the Act amended the “Good Funds” Act to provide that only a lender or an active member of the State Bar of Georgia can serve as the settlement agent responsible for conducting the settlement and disbursement of the proceeds of any purchase money loan or refinance loan secured by residential real property within the state of Georgia containing not more than four units. This Act further provided that any person or entity acting as the settlement agent who is neither the lender nor an active member of the State Bar of Georgia is guilty of a misdemeanor. This legislation was signed by the governor on May 2, 2012, and becomes effective July 1, 2012. Thereafter, any funds representing the proceeds from a loan for the acquisition of residential real property, or the refinancing thereof, must either be disbursed by the lender or through an IOLTA account maintained by a Georgia attorney, and third-party closing agents who handle the loan proceeds would be guilty of a misdemeanor.

Discussion

From an analysis of the above authority, it is clear that under the expansive definition of what consti-

tutes the closing of a real estate transaction in Georgia adopted by the Supreme Court, all of the “series of events” that are involved in initiating, conducting, and concluding the process by which title to real property is conveyed in Georgia constitutes the practice of law. While the Supreme Court has not explicitly enumerated what all of those events are, it is apparent that, at a minimum, they include: (i) rendering an opinion as to title and the resolution of any defects in marketable title; (ii) preparation of deeds of conveyance, including warranty deeds, quitclaim deeds, deeds to secure debt, and mortgage deeds; (iii) overseeing and participating in the execution of instruments conveying title; (iv) supervising the recordation of documents conveying title; and (v) collecting and disbursing funds exchanged in connection with the closing of the transaction. When an attorney touches any part of this process, the attorney assumes responsibility for performing or supervising the performance of all other parts of the process, as a supervising attorney, unless those tasks are performed by or under the supervision of another attorney licensed to practice in Georgia. Rule 5.3. If an attorney participates in the process in a limited role, such as attending and overseeing the execution of deeds of conveyance at a “witness only” closing, and any of the remaining parts of the process are not performed by or under the direction and supervision of another Georgia attorney, the “witness only” attorney aids those performing the remaining tasks in the unauthorized practice of law, in violation of Rule 5.5(a). Further, under Rule 1.15(II), an attorney attending the physical closing of a transaction, even in the limited role of overseeing the execution of instruments conveying title, “receives” any funds exchanged or disbursed at the closing in a fiduciary capacity, and must deposit and administer all funds in an IOLTA account maintained by the attorney or another Georgia attorney, or otherwise in accord with the rule. Such funds include all sums paid or received by the parties to the transaction at the closing. In summary, the answer to all three questions addressed in this opinion is yes.

CONCLUSION:

In furtherance of the long-established principle that the public interest is best served by ensuring that all aspects of the process by which title to real property in Georgia is conveyed are conducted by or under the direct supervision of a Georgia attorney, the Supreme Court has repeatedly indicated, implicitly and explicitly, that all phases of a real estate transaction constitute the practice of law. The determination of what constitutes the practice of law is inherently and exclusively within the domain of the Supreme Court. The court has adopted an expansive view of what is the practice of law in this area. All attorneys in Georgia, including this Board, are bound by that determination.

This opinion merely recognizes what the court has repeatedly indicated: all of the continuum of activities that are part of the process by which real estate transactions are closed and land is conveyed constitute the practice of law in Georgia. By enumerating those tasks, this Board seeks only to make explicit that which is already inherent and implicit in the pronouncements of the court defining the practice of law in this area.

Endnotes

1. This rule applies where the closing proceeds are nominal in amount or are to be held for a short period, as is typically the case. However, where the funds are not nominal in amount and are to be held for a longer period, they must be placed in an interest bearing escrow account

- with interest payable to the client. Rule 1.15(II)(c); In Re Formal Advisory Opinion 04-1, 280 Ga. 227, 228 (2006).
2. Prior to 1986, advisory opinions were drafted and issued by the State (Bar) Disciplinary Board, and were not reviewed or issued by the Supreme Court. In 1986, the State Disciplinary Board was divided into three parts, the Investigative Panel, the Review Panel, and the Formal Advisory Opinion Board. Since 1986, advisory opinions have been drafted and promulgated by the Formal Advisory Opinion Board. From 1986 through 2002, every Formal Advisory Opinion issued by this Board went to the Supreme Court for review and either modification, rejection, or approval. Since 2002, opinions issued by this Board are only reviewed by the Supreme Court on a petition for discretionary review or *sua sponte*.

Notice of Withdrawal of Formal Advisory Opinion

Withdrawal of Formal Advisory Opinion No. 05-1

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has WITHDRAWN Formal Advisory Opinion No. 05-1 effective July 12, 2012.

Following the adoption of the Georgia Rules of Professional Conduct in 2001, to ensure State Bar members continued to have accurate ethical guidance, the Formal Advisory Opinion Board drafted Formal Advisory Opinion No. 05-1 as the replacement for Formal Advisory Opinion No. 87-6. Formal Advisory Opinion No. 05-1 applied the newly adopted Georgia Rule of Professional Conduct 4.2 in answering the same question presented in Formal Advisory Opinion No. 87-6.

Formal Advisory Opinion No. 05-1 appeared in the August 2008 issue of the *Georgia Bar Journal* for 2nd publication and was filed with the Supreme Court of Georgia on August 15, 2008. On August 29, 2008, the State Bar of Georgia filed a petition for discretionary review with the Supreme Court of Georgia asking the Court to approve Formal Advisory Opinion No. 05-1

as the replacement for Formal Advisory Opinion No. 87-6.

On November 3, 2011, the Supreme Court of Georgia issued an order amending Georgia Rule of Professional Conduct 4.2. On July 10, 2012, before the Supreme Court granted review of Formal Advisory Opinion No. 05-1, the State Bar of Georgia filed a motion to withdraw consideration of Formal Advisory Opinion No. 05-1 asserting that the November 2011 amendment to Georgia Rule of Professional Conduct 4.2 made the redrafting of Formal Advisory Opinion No. 87-6 unnecessary. A headnote has been added to Formal Advisory Opinion No. 87-6 directing Bar members to Rule 4.2.

In an order dated July 12, 2012, the Supreme Court of Georgia concluded the withdrawal of the petition for discretionary review is appropriate and granted the State Bar's petition for withdrawal.

Accordingly, the Formal Advisory Opinion Bar hereby withdraws Formal Advisory Opinion No. 05-1. Formal Advisory Opinion No. 87-6 remains binding on all members of the State Bar of Georgia.

The State Bar of Georgia Handbook
is available online
at www.gabar.org/barrules/.

Notice of Motion to Amend the Rules and Regulations of the State Bar of Georgia

No earlier than thirty days after the publication of this Notice, the State Bar of Georgia will file a Motion to Amend the Rules and Regulations for the Organization and Government of the State Bar of Georgia pursuant to Part V, Chapter 1 of said Rules, *2011-2012 State Bar of Georgia Directory and Handbook*, p. H-6 (hereinafter referred to as "*Handbook*").

I hereby certify that the following is the verbatim text of the proposed amendments as approved by the Board of Governors of the State Bar of Georgia. Any member of the State Bar of Georgia who desires to object to these proposed amendments to the Rules is reminded that he or she may only do so in the manner provided by Rule 5-102, *Handbook*, p. H-6.

This Statement and the following verbatim text are intended to comply with the notice requirements of Rule 5-101, *Handbook*, p. H-6.

Cliff Brashier
Executive Director
State Bar of Georgia

IN THE SUPREME COURT STATE OF GEORGIA

IN RE: STATE BAR OF GEORGIA Rules and Regulations for its Organization and Government

MOTION TO AMEND 2012-2

MOTION TO AMEND THE RULES AND REGULATIONS OF THE STATE BAR OF GEORGIA

COMES NOW, the State Bar of Georgia, pursuant to the authorization and direction of its Board of Governors at its annual meeting on June 2, 2012, and upon the recommendation of its Executive Committee, and presents to this Court its Motion to Amend the Rules and Regulations of the State Bar of Georgia as set forth in an Order of this Court dated December 6, 1963 (219 Ga. 873), as amended by subsequent Orders, and published at *2011-2012 State Bar of Georgia Directory and Handbook*, pp. 1-H, et seq., The State Bar respectfully moves that a new Rule 4-228 regarding receiverships be added to the Rules of the State Bar of Georgia and that Rule 7.2 and Rule 7.3 of the Georgia Rules of Professional Conduct be amended in the following respects:

I.

Proposed New Rule 4-228 Regarding Receiverships To Be Inserted in Part IV, Chapter 2 of the Rules of the State Bar of Georgia

Rule 4-228 Receiverships

(a) Definitions

(1) Absent Attorney – a member of the State Bar of Georgia (or a foreign or domestic lawyer authorized to practice law in Georgia) who shall have disappeared, died, become disbarred, disciplined or incarcerated, or become so impaired as to be unable to properly represent his or her clients or as to pose a substantial threat of harm to his or her clients or the public as to justify appointment of a Receiver hereunder by the Supreme Court of Georgia.

(b) Appointment of Receiver

(1) Upon a final determination by the Supreme Court of Georgia, on a petition filed by the State Bar of Georgia, that an attorney has become an Absent Attorney, and that no partner, associate or other appropriate representative is available to notify his or her clients of this fact, the Supreme Court may order that a member or members of the State Bar of Georgia be appointed as Receiver to take charge of the Absent Attorney's files and records. Such Receiver shall review the files, notify the Absent Attorney's clients and take such steps as seem indicated to protect the interests of the clients and the public. A motion for reconsideration may be taken from the issuance or denial of such protective order by the respondent, his or her partners, associates or legal representatives or by the State Bar of Georgia.

(2) If the Receiver should encounter, or anticipate, situations or issues not covered by the Order of appointment, including but not limited to, those concerning proper procedure and scope of authority, the Receiver may petition the Supreme Court or its designee for such further order or orders as may be necessary or appropriate to address the situation or issue so encountered or anticipated.

(3) The receiver shall be entitled to release to each client the papers, money or other property to which

the client is entitled. Before releasing the property, the Receiver may require a receipt from the client for the property.

(c) Applicability of Attorney-Client Rules

(1) Confidentiality - The Receiver shall not be permitted to disclose any information contained in the files and records in his or her care without the consent of the client to whom such file or record relates, except as clearly necessary to carry out the order of the Supreme Court or, upon application, by order of the Supreme Court.

(2) Attorney/Client Relationship; Privilege - The Receiver relationship standing alone does not create an attorney/client relationship between the Receiver and the clients of the Absent Attorney. However, the attorney-client privilege shall apply to communications by or between the Receiver and the clients of the Absent Attorney to the same extent as it would have applied to communications by or to the Absent Attorney.

(d) Trust Account

(1) If after appointment the Receiver should determine that the Absent Attorney maintained one or more trust accounts and that there are no provisions extant which would allow the clients, or other appropriate entities, to receive from the accounts the funds to which they are entitled, the Receiver may petition the Supreme Court or its designee for an order extending the scope of the Receivership to include the management of the said trust account or accounts. In the event the scope of the Receivership is extended to include the management of the trust account or accounts the Receiver shall file quarterly with the Supreme Court or its designee a report showing the activity in and status of said accounts.

(2) Service on a bank or financial institution of a copy of the order extending the scope of the Receivership to include management of the trust account or accounts shall operate as a modification of any agreement of deposit among such bank or financial institution, the Absent Attorney and any other party to the account so as to make the Receiver a necessary signatory on any trust account maintained by the Absent Attorney with such bank or financial institution. The Supreme Court or its designee, on application by the Receiver may order that the Receiver shall be sole signatory on any such account to the extent necessary for the purposes of these rules and may direct the disposition and distribution of client and other funds.

(3) In determining ownership of funds in the trust accounts, including by subrogation or indemnification, the Receiver should act as a reasonably prudent lawyer maintaining a client trust account. The Receiver may (1) rely on a certification of ownership issued by an auditor employed by the Receiver; or (2) interplead any funds of questionable ownership into the appropriate Superior Court; or (3) proceed under the terms of the Disposition of Unclaimed Property Act (O.G.C.A. §§44-12-190 *et seq.*) If the Absent Attorney's trust account does not contain sufficient funds to meet known client balances, the Receiver may disburse funds on a pro rata basis.

(e) Payment of Expenses of Receiver

(1) The Receiver shall be entitled to reimbursement for actual and reasonable costs incurred by the Receiver for expenses, including, but not limited to, (i) the actual and reasonable costs associated with the employment of accountants, auditors and bookkeepers as necessary to determine the source and ownership of funds held in the Absent Attorney's trust account, and (ii) reasonable costs of secretarial, postage, bond premiums, and moving and storage expenses associated with carrying out the Receiver's duties. Application for allowance of costs and expenses shall be made by affidavit to the Supreme Court, or its designee, who may determine the amount of the reimbursement. The application shall be accompanied by an accounting in a form and substance acceptable to the Supreme Court or its designee. The amount of reimbursement as determined by the Supreme Court or its designee shall be paid to the Receiver by the State Bar of Georgia. The State Bar of Georgia may seek from a court of competent jurisdiction a judgment against the Absent Attorney or his or her estate in an amount equal to the amount paid by the State Bar of Georgia to the Receiver. The amount of reimbursement as determined by the Supreme Court or its designee shall be considered as prima facie evidence of the fairness of the amount and the burden of proof shall shift to the Absent Attorney or his or her estate to prove otherwise.

(2) The provision of paragraph 1 above shall apply to all Receivers serving on the effective date of this Rule and thereafter.

(f) Receiver-Client Relationship

(1) With full disclosure and the informed consent, as defined in Bar Rule 1.0 (h), of any client of the Absent Attorney, the Receiver may, but need not, accept employment to complete any legal matter. Any written consent by the client shall include an acknowledgment that the client is not obligated to use the Receiver.

(g) Unclaimed Files

(1) If upon completion of the Receivership there are files belonging to the clients of the Absent Attorney that have not been claimed, the Receiver shall deliver them to the State Bar of Georgia. The State Bar of Georgia shall store the files for six years, after which time the State Bar of Georgia may exercise its discretion in maintaining or destroying the files.

(2) If the Receiver determines that an unclaimed file contains a Last Will and Testament, the Receiver may, but shall not be required to do so, file said Last Will and Testament in the office of the Probate Court in such county as to the Receiver may seem appropriate.

(h) Professional Liability Insurance

(1) Only attorneys who maintain errors and omissions insurance which includes coverage for conduct as a Receiver may be appointed to the position of Receiver.

(i) Requirement of Bond

(1) The Supreme Court or its designee may require the receiver to post bond conditioned upon the faithful performance of his or her duties.

(j) Immunity

(1) Any person serving as a Receiver under these rules shall be immune from suit for any conduct undertaken in good faith in the course of his or her official duties.

(2) The immunity granted in paragraph 1 above shall not apply if the Receiver is employed by a client of the Absent Attorney to continue the representation.

(k) Service

(1) Service under this rule may be perfected under Bar Rule 4-203.1.

II.

Proposed Amendments to Part IV, Chapter 1, Georgia Rules of Professional Conduct, Rule 7.2

It is proposed that Rule 7.2 of the Georgia Rules of Professional Conduct regarding advertising be amended by inserting the sections underlined as follows:

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through:

- (1) public media, such as a telephone directory, legal directory, newspaper or other periodical;
- (2) outdoor advertising;
- (3) radio or television;
- (4) written, electronic or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) *Prominent disclosures.* Any advertisement for legal services directed to potential clients in Georgia, or intended to solicit employment for delivery of any legal services in Georgia, must include prominent disclosure, clearly legible and capable of being read by the average person, if written, and clearly intelligible by an average person, if spoken aloud, of the following:

(1) *Disclosure of identity and physical location of attorney.* Any advertisement shall include the name, physical location and telephone number of each lawyer or law firm who paid for the advertisement and who takes full personal responsibility for the advertisement. In disclosing the physical location the responsible lawyer shall state the full address of the location of the principal bona fide office of each lawyer who is prominently identified pursuant to this paragraph. For the purposes of this rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm from which the lawyer or law firm furnishes legal services on a regular and continuing basis. In the absence of a bona fide physical office, the lawyer shall prominently disclose the full address listed with the State Bar of Georgia or other Bar to which the lawyer is admitted. A lawyer who uses a referral service shall ensure that the service discloses the location of the lawyer's bona fide office, or the registered bar address, when a referral is made.

(2) *Disclosure of referral practice.* If the lawyer or law firm will refer the majority of callers to other attorneys, that fact must be disclosed and the lawyer or law firm must comply with the provisions of Rule 7.3(c) regarding referral services.

(3) *Disclosure of spokespersons and portrayals.* Any advertisement that includes a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, portrayal of a client by a non-client, or any paid testimonial or endorsement, shall include prominent disclosure of the use of a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer or of a client by a non-client.

(4) Disclosures regarding fees. A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service.

(5) Appearance of legal notices or pleadings. Any advertisement that includes any representation that resembles a legal pleading, notice, contract or other legal document shall include prominent disclosure that the document is an advertisement rather than a legal document.

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising

by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[4] Neither this Rule nor Rule 7.3: Direct Contact with Prospective Clients prohibits communications authorized by law, such as notice to members of a class in class action litigation.



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[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule.

If the proposed amendments to Rule 7.2 of the Georgia Rules of Professional Conduct are adopted, the new Rule 7.2 would read as follows:

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through:

- (1) public media, such as a telephone directory, legal directory, newspaper or other periodical;
- (2) outdoor advertising;
- (3) radio or television;
- (4) written, electronic or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) *Prominent disclosures.* Any advertisement for legal services directed to potential clients in Georgia, or intended to solicit employment for delivery of any legal services in Georgia, must include prominent disclosure, clearly legible and capable of being read by the average person, if written, and clearly intelligible by an average person, if spoken aloud, of the following:

- (1) *Disclosure of identity and physical location of attorney.* Any advertisement shall include the name, physical location and telephone number of each lawyer or law firm who paid for the advertisement and who takes full personal responsibility for the advertisement. In disclosing the physical location the responsible lawyer shall state the full address of the location of the principal bona fide office of each lawyer who is prominently identified pursuant to this paragraph. For the purposes of this rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm from which the lawyer or law firm furnishes legal services on a regular and continuing basis. In the absence of a bona fide physical office, the lawyer shall prominently disclose the full address listed with the State Bar of Georgia or other Bar to which the lawyer is admitted. A lawyer who uses a referral service shall ensure that the service discloses the location of the lawyer's bona fide office, or the registered bar address, when a referral is made.

(2) *Disclosure of referral practice.* If the lawyer or law firm will refer the majority of callers to other attorneys, that fact must be disclosed and the lawyer or law firm must comply with the provisions of Rule 7.3(c) regarding referral services.

(3) *Disclosure of spokespersons and portrayals.* Any advertisement that includes a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, portrayal of a client by a non-client, or any paid testimonial or endorsement, shall include prominent disclosure of the use of a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer or of a client by a non-client.

(4) *Disclosures regarding fees.* A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service.

(5) *Appearance of legal notices or pleadings.* Any advertisement that includes any representation that resembles a legal pleading, notice, contract or other legal document shall include prominent disclosure that the document is an advertisement rather than a legal document.

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their

consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against “undignified” advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[4] Neither this Rule nor Rule 7.3: Direct Contact with Prospective Clients prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule.

III.

Proposed Amendments to Part IV, Chapter 1, Georgia Rules of Professional Conduct, Rule 7.3

It is proposed that Rule 7.3 of the Georgia Rules of Professional Conduct regarding Direct Contact with Prospective Clients be amended by deleting the struck-through sections and inserting the sections underlined as follows:

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the lawyer’s firm, lawyer’s partner, associate, or any other lawyer affiliated with the lawyer or the lawyer’s firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

- (1) it has been made known to the lawyer that a person does not desire to receive communications from the lawyer;
- (2) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;

(3) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to ~~the mailing of~~ sending the communication; ~~or~~

(4) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or

(5) the written communication concerns a domestic relations matter, is addressed to the defendant in such matter, and is sent before the lawyer has confirmed that the defendant has been served with process. Service shall be confirmed by consulting the docket of the court to determine whether service has been perfected.

(b) Written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment shall be plainly marked “Advertisement” on the face of the envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.

(c) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer’s employment by a client, or as a reward for having made a recommendation resulting in the lawyer’s employment by a client; except that the lawyer may pay for public communications permitted by Rule 7.1 and except as follows:

(1) A lawyer may pay the usual and reasonable fees or dues charged by a bona fide lawyer referral service operated by an organization authorized by law and qualified to do business in this state; provided, however, such organization has filed with the State Disciplinary Board, at least annually, a report showing its terms, its subscription charges, agreements with counsel, the number of lawyers participating, and the names and addresses of lawyers participating in the service;

(2) A lawyer may pay the usual and reasonable fees or dues charged by a bar-operated non-profit lawyer referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:

- (i) the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public ser-

vice legal programs, and government, consumer or other agencies who can provide the assistance the clients need. Such organization shall file annually with the State Disciplinary Board a report showing its rules and regulations, its subscription charges, agreements with counsel, the number of lawyers participating and the names and addresses of the lawyers participating in the service;

(ii) the sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;

(iii) The combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and,

(iv) A lawyer who is a member of the qualified lawyer referral service must maintain in force a policy of errors and omissions insurance in an amount no less than \$100,000 per occurrence and \$300,000 in the aggregate.

(3) A lawyer may pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer's services, the lawyer's partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;

(4) A lawyer may pay the usual and reasonable fees charged by a lay public relations or marketing organization provided the activities of such organization on behalf of the lawyer are otherwise in accordance with these Rules.

(5) A lawyer may pay for a law practice in accordance with Rule 1.17: ~~Sale of Law Practice.~~

(d) A lawyer shall not solicit professional employment as a private practitioner for the lawyer, a partner or associate through direct personal contact or through live telephone contact, with a non-lawyer who has not sought advice regarding employment of a lawyer.

(e) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization prohibited under Rules 7.3(c)(1), 7.3(c)(2) or 7.3(d): ~~Direct Contact with Prospective Clients.~~

The maximum penalty for a violation of this Rule is disbarment.

Comment

Direct Personal Contact

[1] There is a potential for abuse inherent in solicitation through direct personal contact by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

[2] The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. The potential for abuse inherent in solicitation of prospective clients through personal contact justifies its prohibition, particularly since the direct written contact permitted under paragraph (b) of this Rule offers an alternative means of communicating necessary information to those who may be in need of legal services. Also included in the prohibited types of personal contact are direct personal contact through an intermediary and live contact by telephone.

Direct ~~Mail~~ Written Solicitation

[3] Subject to the requirements of Rule 7.1: ~~Communications Concerning a Lawyer's Services~~ and paragraphs (b) and (c) of this Rule 7.3: ~~Direct Contact with Prospective Clients~~, promotional communication by a lawyer through direct written contact is generally permissible. The public's need to receive information concerning their legal rights and the availability of legal services has been consistently recognized as a basis for permitting direct written communication since this type of communication may often be the best and most effective means of informing. So long as this stream of information flows cleanly, it will be permitted to flow freely.

[4] Certain narrowly-drawn restrictions on this type of communication are justified by a substantial state interests ~~such as an interest~~ in facilitating the public's intelligent selection of counsel ~~or preventing domestic violence~~, including the restrictions of sub-paragraphs (a)(3), & (4) ~~& (5)~~, which ~~proscribe direct mailings~~ limit sending written communications to persons such as an injured and hospitalized accident victim or the bereaved family of a deceased.

[5] In order to make it clear that the communication is commercial in nature, paragraph (b) requires inclusion of an appropriate affirmative “advertisement” disclaimer. Again, the traditional exception for contact with close friends, relatives and former clients is recognized and permits elimination of the disclaimer in direct written contact with these persons.

[6] This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[7] A lawyer is allowed to pay for communications permitted by these Rules, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer’s services. Thus, a legal aid agency, a prepaid legal services plan or prepaid legal insurance organization may pay to advertise legal services provided under its auspices. ~~Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs, provided the programs are in compliance with the registration requirements of sub-paragraph (c)(1) or (c)(2) of this Rule 7.3: Direct Contact with Prospective Clients and the communications and practices of the organization are not deceptive or misleading.~~

[8] A lawyer may pay the usual charges of a legal service plan or a lawyer referral service, provided the referral service is in compliance with the registration requirements of subparagraph (c)(1) or (c)(2) of this Rule 7.3. A legal service plan is a prepaid or group legal service plan or similar delivery system, set up in compliance with subparagraph (c)(3) of this Rule 7.3, that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation. The use by a referral service of a selection process which selects lawyers as the result of a competitive process benefitting the referral service is inconsistent with the representation that the referral service is unbiased. An example of a competitive process would be one in which lawyers bid for referrals and the referral is made by the referral service based upon the outcome of the bidding process. The use of such a competitive process is inherently misleading and lawyers must avoid accepting referrals from a referral service using such a process.

[9] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer’s professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts by a lawyer referral service that would violate Rule 7.3.

[8 10] A lawyer may not indirectly engage in promotional activities through a lay public relations or marketing firm if such activities would be prohibited by these Rules if engaged in directly by the lawyer.

If the proposed amendments to Rule 7.3 of the Georgia Rules of Professional Conduct are adopted, the new Rule 7.3 would read as follows:

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the lawyer’s firm, lawyer’s partner, associate, or any other lawyer affiliated with the lawyer or the lawyer’s firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

- (1) it has been made known to the lawyer that a person does not desire to receive communications from the lawyer;
- (2) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;
- (3) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to sending the communication;
- (4) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or

(5) the written communication concerns a domestic relations matter, is addressed to the defendant in such matter, and is sent before the lawyer has confirmed that the defendant has been served with process. Service shall be confirmed by consulting the docket of the court to determine whether service has been perfected.

(b) Written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment shall be plainly marked "Advertisement" on the face of the envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.

(c) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client; except that the lawyer may pay for public communications permitted by Rule 7.1 and except as follows:

(1) A lawyer may pay the usual and reasonable fees or dues charged by a bona fide lawyer referral service operated by an organization authorized by law and qualified to do business in this state; provided, however, such organization has filed with the State Disciplinary Board, at least annually, a report showing its terms, its subscription charges, agreements with counsel, the number of lawyers participating, and the names and addresses of lawyers participating in the service;

(2) A lawyer may pay the usual and reasonable fees or dues charged by a bar-operated non-profit lawyer

referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:

(i) the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need. Such organization shall file annually with the State Disciplinary Board a report showing its rules and regulations, its subscription charges, agreements with counsel, the number of lawyers participating and the names and addresses of the lawyers participating in the service;

(ii) the sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;

(iii) the combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and,

(iv) a lawyer who is a member of the qualified lawyer referral service must maintain in force a policy of errors and omissions insurance in an amount no less than \$100,000 per occurrence and \$300,000 in the aggregate.

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(3) A lawyer may pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer's services, the lawyer's partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;

(4) A lawyer may pay the usual and reasonable fees charged by a lay public relations or marketing organization provided the activities of such organization on behalf of the lawyer are otherwise in accordance with these Rules.

(5) A lawyer may pay for a law practice in accordance with Rule 1.17.

(d) A lawyer shall not solicit professional employment as a private practitioner for the lawyer, a partner or associate through direct personal contact or through live telephone contact, with a non-lawyer who has not sought advice regarding employment of a lawyer.

(e) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization prohibited under Rules 7.3(c)(1), 7.3(c)(2) or 7.3(d).

The maximum penalty for a violation of this Rule is disbarment.

Comment

Direct Personal Contact

[1] There is a potential for abuse inherent in solicitation through direct personal contact by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

[2] The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. The potential for abuse inherent in solicitation of prospective clients through personal contact justifies its prohibition, particularly since the direct written contact permitted under paragraph (b) of



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this Rule offers an alternative means of communicating necessary information to those who may be in need of legal services. Also included in the prohibited types of personal contact are direct personal contact through an intermediary and live contact by telephone.

Direct Written Solicitation

[3] Subject to the requirements of Rule 7.1 and paragraphs (b) and (c) of this Rule 7.3, promotional communication by a lawyer through direct written contact is generally permissible. The public's need to receive information concerning their legal rights and the availability of legal services has been consistently recognized as a basis for permitting direct written communication since this type of communication may often be the best and most effective means of informing. So long as this stream of information flows cleanly, it will be permitted to flow freely.

[4] Certain narrowly-drawn restrictions on this type of communication are justified by a substantial state interests such as an interest in facilitating the public's intelligent selection of counsel or preventing domestic violence, including the restrictions of sub-paragraphs (a)(3), & (4) & (5), which limit sending written communications to persons such as an injured and hospitalized accident victim or the bereaved family of a deceased.

[5] In order to make it clear that the communication is commercial in nature, paragraph (b) requires inclusion of an appropriate affirmative "advertisement" disclaimer. Again, the traditional exception for contact with close friends, relatives and former clients is recognized and permits elimination of the disclaimer in direct written contact with these persons.

[6] This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[7] A lawyer is allowed to pay for communications permitted by these Rules, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency, a prepaid legal services plan or prepaid legal insurance organization may pay to advertise legal services provided under its auspices.

[8] A lawyer may pay the usual charges of a legal service plan or a lawyer referral service, provided the referral service is in compliance with the registration requirements of subparagraph (c)(1) or (c)(2) of this Rule 7.3. A legal service plan is a prepaid or group

legal service plan or similar delivery system, set up in compliance with subparagraph (c)(3) of this Rule 7.3, that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation. The use by a referral service of a selection process which selects lawyers as the result of a competitive process benefitting the referral service is inconsistent with the representation that the referral service is unbiased. An example of a competitive process would be one in which lawyers bid for referrals and the referral is made by the referral service based upon the outcome of the bidding process. The use of such a competitive process is inherently misleading and lawyers must avoid accepting referrals from a referral service using such a process.

[9] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts by a lawyer referral service that would violate Rule 7.3.

[10] A lawyer may not indirectly engage in promotional activities through a lay public relations or marketing firm if such activities would be prohibited by these Rules if engaged in directly by the lawyer.

SO MOVED, this _____ day of _____, 2012.

Counsel for the State Bar of Georgia

Robert E. McCormack
Deputy General Counsel
State Bar No. 485375

OFFICE OF THE GENERAL COUNSEL
State Bar of Georgia
104 Marietta Street, NW, Suite 100
Atlanta, Georgia 30303
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Notice of and Opportunity for Comment on Amendments to Addendums Six and Seven, and a New Addendum Nine, of the Rules of the Judicial Council and/or the U.S. Court of Appeals for the Eleventh Circuit

Pursuant to 28 U.S.C. §§ 2071(b) and 332(d)(1), notice and opportunity for comment is hereby given of proposed amendments to Addendum Six, "Rules and Regulations of the Judicial Council and the United States Court of Appeals for the Eleventh Circuit for the Selection of Nominees, the Appointment of Bankruptcy Judges, and the Reappointment of Bankruptcy Judges," and Addendum Seven, "Regulations of the United States Court of Appeals for the Eleventh Circuit for the Selection and Appointment or the Reappointment of Federal Public Defenders," and a new Addendum Nine, "Regulations of the United States Court of Appeals for

the Eleventh Circuit for the Selection and Appointment or the Reappointment of Bankruptcy Administrators."

A copy of the proposed new or amended Addendums may be obtained on and after August 1, 2012, from the court's website at www.ca11.uscourts.gov. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., N.W., Atlanta, Georgia 30303 [phone: 404-335-6100]. Comments may be submitted in writing to the Clerk at the above street address by August 31, 2012.

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About the Clearinghouse

The Sign up for the Committee to Promote Inclusion in the Profession is committed to promoting equal participation of minorities and women in the legal profession. The Speaker

Clearinghouse is designed specifically for, and contains detailed

information about, minority and women lawyers who would like to be considered as faculty members in continuing legal education programs and provided with other speaking opportunities.

For more information and to sign up, visit www.gabar.org. To search the Speaker Clearinghouse, which provides contact information and information on the legal experience of minority and women lawyers participating in the program, visit www.gabar.org.



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