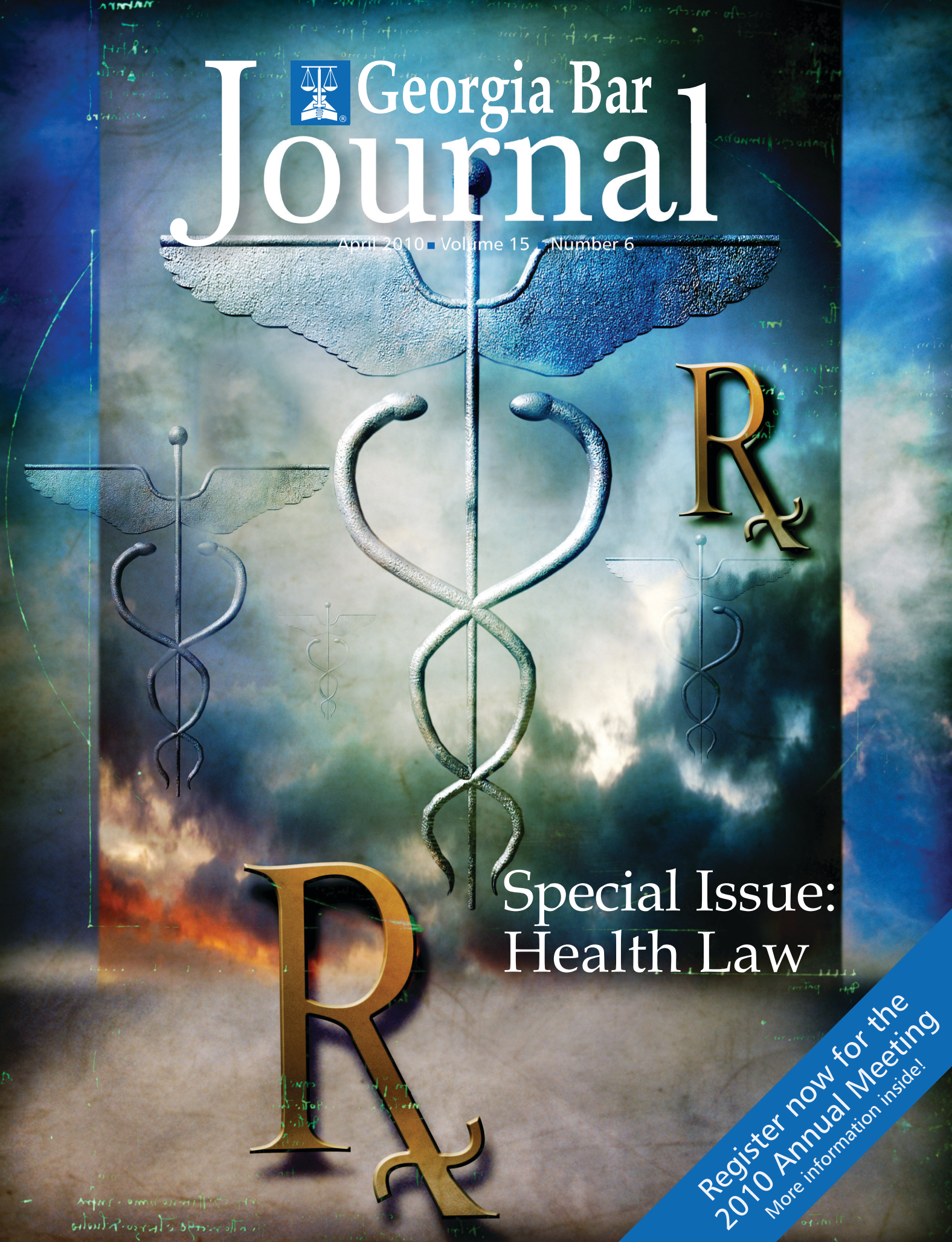
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Journal
April 2010 ■ Volume 15 ■ Number 6
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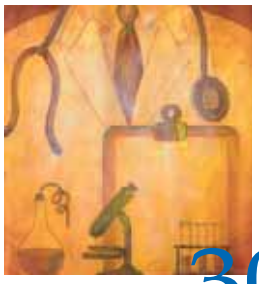

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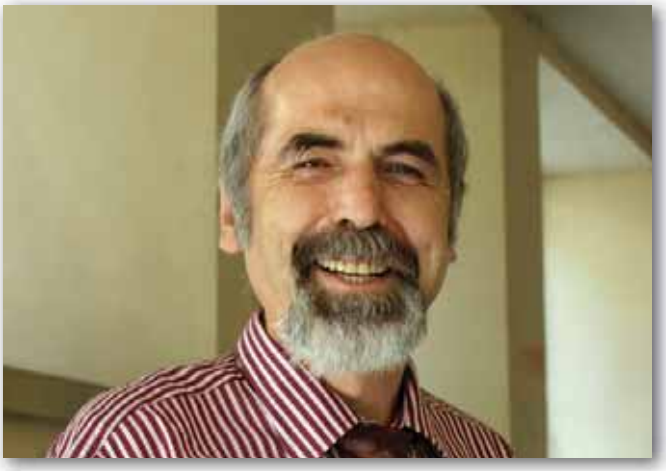
"And Justice for All" *2010 State Bar Campaign for the Georgia Legal Services Program, Inc.*

If they can't afford an attorney, where do they go for legal assistance?



Fighting Foreclosure

Mr. Farmer almost lost his home in a foreclosure, because he couldn't pay the increase in his mortgage payments. He originally paid $407 in monthly mortgage payments and lived frugally. He had no phone, no cable, no heat other than firewood, and he used well water. FEMA (Federal Emergency Management Agency) recently determined the property was in a flood zone and required flood insurance, which the mortgage company purchased at a high price. This put Mr. Farmer's monthly payments to $573, which was well over his meager income.

A GLSP lawyer negotiated with the mortgage company to rework the loan and lower the mortgage payments. Mr. Farmer was able to buy his own flood insurance at a significantly lower rate. The foreclosure sale was cancelled.

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Manuscript Submissions

The *Georgia Bar Journal* welcomes the submission of unsolicited legal manuscripts on topics of interest to the State Bar of Georgia or written by members of the State Bar of Georgia. Submissions should be 10 to 12 pages, double-spaced (including endnotes) and on letter-size paper. Citations should conform to A UNIFORM SYSTEM OF CITATION (18th ed. 2005). Please address unsolicited articles to: Donald P. Boyle Jr., State Bar of Georgia, Communications Department, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303. Authors will be notified of the Editorial Board's decision regarding publication.

The *Georgia Bar Journal* welcomes the submission of news about local and circuit bar association happenings, Bar members, law firms and topics of interest to attorneys in Georgia. Please send news releases and other information to: Sarah I. Coole, Director of Communications, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303; phone: 404-527-8791; sarahc@gabar.org.

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Introduction to Special Health Law Issue

This issue of the *Georgia Bar Journal* focuses on the law of health care and other health-related issues. Even before the enactment of the Patient Protection and Affordable Care Act last month, there already were significant statutes and regulations in effect that can impact the practice of Georgia attorneys.

In "What Every Attorney Should Know About Health Care Law," Tracy M. Field, Shannon L. Drake, Jessica Tobin Grozine and Daniel M. Formby discuss several issues that impact both litigation and business transactions that either directly or indirectly involve health care providers, health care services or government health care programs. Laws that protect medical information can limit what can be requested in discovery from medical providers. Attorneys who receive personal-injury settlement amounts may be required to reimburse Medicare payments or be personally liable. The authors explain how health care providers may be found liable under the False Claims Act, the Stark Law or the Anti-Kickback Statute.

In "Limiting Law Firm Exposure to HITECH Act Liability," H. Carol Saul discusses the recent passage of the Health Information Technology for Economic and Clinical Health (HITECH) Act, a successor to the more familiar Health Insurance Portability and Accountability Act of 1996 (HIPAA). The HITECH Act expands the universe of entities that are required to preserve and guard "Protected Health Information." This includes law firms. Georgia attorneys should take note of the HITECH Act's requirements. Saul provides recommendations on how Georgia attorneys can take concrete steps to make sure that they comply with the HITECH Act and the related federal regulations.

The recent outbreak of the H1N1 virus is the starting point for discussion of Georgia's law on dealing with health pandemics in "Is Georgia Prepared for a Health Pandemic?" by Liz Schoen and Keith Mauriello. The authors show that Georgia already has a comprehensive statutory scheme in place to deal with such outbreaks, the Georgia Emergency Management Act of 1981. Under certain circumstances, the governor may declare a state of emergency, under which the governor is empowered to carry out emergency management programs that include broad powers to mitigate and repair harms through police agencies, emergency medical services, transportation services, public utilities, victim services and other services for civilian protection. The authors point out some ambiguity in the law on whether a special session of the General Assembly would be required in the case of a pandemic influenza emergency, as opposed to another type of state emergency. The authors also discuss federal laws and regulations, including some passed in the first year of the Obama Administration, relating to H1N1. Finally, the authors give guidance to hospitals on their duties under the Emergency Medical Treatment and Active Labor Act (EMTALA) in the event of a public health emergency.

The statutes and regulations discussed in this special issue will remain timely and significant for Georgia lawyers. Any transaction or lawsuit that may involve an individual's health may trigger duties under these state and federal laws, so Georgia lawyers need to be aware of them. GBJ

Donald P. Boyle Jr. is the editor-in-chief of the *Georgia Bar Journal*. He can be reached at donboylejr@gmail.com.

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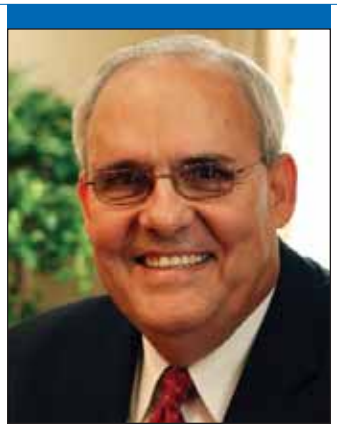

by Bryan M. Cavan

Georgia Lawyers Do Make a Difference

For too many members of the public, the only image they have of lawyers is rooted in the TV shows like L.A. Law or Ally McBeal, where the lawyers spend their workdays making hefty fees on high-profile cases, and the rest of their time at posh country clubs, trendy nightclubs or out on their yachts.

Just as I learned long ago that few, if any, of us were able to pry confessions out of witnesses in the courtroom like Perry Mason, I found these perceptions of lawyer lifestyles to be far from reality. My observations over the past 10 months since taking office have further confirmed for me that, in the vast majority of cases, my fellow lawyers fill their hours outside the courtroom and their client conferences in much more productive ways for their communities.

> "One of the greatest pleasures I have had while serving in this position is the opportunity to witness and/or receive first-hand accounts of the good work our fellow lawyers and judges are performing in their communities all around state."

One of the greatest pleasures I have had while serving in this position is the opportunity to witness and/or receive first-hand accounts of the good work our fellow lawyers and judges are performing in their communities all around state. Prime examples are the 10 recipients of the 11th annual Justice Robert Benham Awards for Community Service, which were presented at the Bar Center on Feb. 16, including:

- **Jonathan Alderman** of Macon, for his service in organizing First Choice Primary Care Inc., a medical facility that serves many uninsured persons, his leadership in the Macon Rotary Club, Goodwill Industries of Middle Georgia and the Macon-Bibb County Workforce Investment Board and his work with the Human Rights Committee of Wesley Glenn Ministries.
- **William D. "Bill" Barwick** of Atlanta, a past president of the State Bar of Georgia, for his advocacy of Everybody Wins! Atlanta, a student literacy and mentoring program, and his work with the High Museum of Art, Zoo Atlanta, Habitat for Humanity, Atlanta Botanical Gardens, Atlanta History Center, Historic

Oakland Foundation and Buckhead Baseball.

- Rockdale County State Court Judge **Nancy Nash Bills** of Conyers, for her service in helping develop a playground in the Hispanic community, her support of the Students Against Destructive Decisions organization in the local schools and her work with the Task Force Against Family Violence, the United Way and the Rotary Club, all in Rockdale County.
- **Angela M. Hinton** of Fayetteville, for her service on the Fayette County Department of Family and Children Services Board and her work with the Georgia Women Lawyers Foundation to help Promise Place, a battered women's shelter in Fayette County, as well as Leadership Fayette and the Arts Leadership League of Georgia's Leadership Council.
- **Michael D. "Mike" Hobbs Jr.** of Atlanta, for his leadership with Imagine It! The Children's Museum of Atlanta, and his service to Hammonds House Museum, Central Presbyterian Church Outreach and Advocacy Center Inc., Georgia Lawyers for the Arts and the Top Hat Soccer Club.
- **Amy J. Kolczak** of Smyrna, for her leadership as president of the Georgia Association of Women Lawyers Foundation and its support of numerous worthy causes, as well as her individual involvement with Atlanta Legal Aid's Breast Cancer Project, CHRIS Kids Inc., the Georgia chapter of the National Multiple Sclerosis Society, Families First, Project Night and the Nicholas House.
- **Charles W. Lamb Jr.** of Albany, for his work with the Albany Advocacy Resource Center, Leadership Albany, Leadership Lee, the Lee County Chamber of Commerce, the National Rehabilitation Association and the Georgia Rehabilitation Council, as well as his chairmanship of the Georgia Brain and Spinal Injury Trust Fund Commission.
- **Justin O'Dell** of Marietta, for his work with the Cobb County Chamber of Commerce, Leadership Cobb, MUST Ministries, Sweetwater Clinic, Reconnecting Families, YWCA, The Extension, the Marietta Kiwanis Club and the Cobb Community Collaborative.
- **Mark O. Shriver IV** of Woodstock, for his service as president of Optimist International, one of the largest organizations in the world serving youth, in addition to his local efforts in chairing the Optimist Club's Peachtree Junior Road Race, co-sponsored by the Atlanta Track Club for more than 2,000 children.
- **Nancy J. Whaley** of Atlanta, for her service on the Georgia Breast Cancer Coalition Fund Board of Directors and as team captain for the Susan G. Komen 3-Day 60-Mile Walk for the Cure, individually raising $10,000 toward the cause, in addition to her 23 years of service in the Air Force Reserves, where she achieved the rank of lieutenant colonel.

While we are fortunate to have these honorees to inspire us with the positive contributions they have made this year and in previous years through their volunteer efforts and community spirit, there are countless other Georgia lawyers and judges who quietly and without acclaim devote their personal time to civic organizations, nonprofit groups, youth activities, the cultural arts, faith-based initiatives and other beneficial endeavors. They are all deserving of recognition and thanks (see page 72 for additional information).

In addition to the exemplary community service being carried out by so many individual Georgia lawyers and judges, a great deal of work is also done through the collective efforts of our local and specialty bar associations. This includes support of existing community causes as well as new projects spearheaded and maintained under the auspices of the local bar association.

Here are just a few of the local bar initiatives that have been brought to my attention this year:

- The Douglas Bar Association hosted a food drive and distribution;
- The Jesup Bar Association sponsored and presented an educational scholarship;
- The Savannah Bar Association's Young Lawyers Division hosted a golf tournament, using the proceeds to make a significant contribution to the Chatham County Superior Court's guardian ad litem program;
- The Gwinnett County Minority Bar Association co-hosted a community event aimed at increasing public awareness of the criminal justice system;
- The Waycross Bar Association completed its 13th annual Community Christmas Project, providing food, clothing and toys for families in need.

A Special Thank You to Jesse H. Diner

I wish to thank Jesse H. Diner, president of The Florida Bar for attending our Executive Committee/Supreme Court Retreat, where he shared Florida's struggle for judicial funding in these tough economic times and some of his initiatives. It was a good reminder that Georgia is not alone in this economic tsunami, as we all look for hard-to-find answers. Thank you, Jesse, for sharing with us, and you are most welcome to visit with us anytime. – *Bryan M. Cavan*

Of course, there are many, many more examples.

A major component of lawyers' service to the community at large is, of course, the pro bono contributions of professional service to fellow citizens who are unable to afford the representation needed to realize the concept of equal justice. The State Bar's Pro Bono Project is aided by our partners in this effort, Georgia Legal Services Program, Atlanta LegalAid Society, Atlanta Volunteer Lawyers Foundation, Clayton County Pro Bono Project, Cobb Justice Foundation, DeKalb Volunteer Lawyers Foundation, Effingham County Victim Witness Program, Georgia Court Appointed Special Advocates, Georgia Justice Project, Gwinnett County Pro Bono Project, Pro Bono Partnership of Atlanta, Southside Legal Clinic as well as the several projects of our State Bar YLD. Additionally, there are untold numbers of local bar associations, volunteer lawyers' organizations and individual lawyers across the state who make possible the delivery of legal services to the poor in their areas.

Citizens across the state of Georgia also owe a debt of gratitude to those lawyers who make public service their full-time jobs. Indeed, all three branches of government at the local, state and federal levels benefit from the expertise and dedication of those who serve as judges, prosecutors, public defenders, law clerks, county and city attorneys and as legal counsel to any number of public-sector agencies and departments of government.

A few years ago, as an initiative of our Cornerstones of Freedom® public education program, we began a practice of recognizing Bar members for good works in their communities via a news release or letter from the State Bar president to the editor of their local newspapers. I am proud to report that between July 2009 and February 2010, there have been at least 80 such publications in newspapers in all corners of Georgia, reaching a total of nearly 2.2 million readers. When these letters are published, not only are the individual lawyers, judges or local bar associations receiving well-deserved pats on the back, it sends an important message to the public about their respective legal communities.

The message is loud and clear: Georgia lawyers are enlisted in the service not only of our clients, but of the public good as well. Now, perhaps more than ever, following the examples we have read or heard about as well as those that take place behind the scenes, we should all recommit ourselves to that principle, which will result in a personal satisfaction that comes from helping others and, at the same time, strengthen the public's perception of the legal profession and trust in the justice system. GBJ

Bryan M. Cavan is the president of the State Bar of Georgia and can be reached at bcavan@millermartin.com.

by Cliff Brashier

YLD Delivering on Commitment to Public Service

Across the state over the past 10 months, members of the State Bar of Georgia Young Lawyers Division (YLD) have been working hard to respond to YLD President Amy Howell's call to action for the 2009-10 Bar year. Each member of the YLD Executive Council was charged with developing and implementing a service project supporting this year's "Children and Families" theme in the district they represent.

"The Georgia YLD has earned many awards and an outstanding national reputation for the innovative programs, hard work and excellent service of these committees."

The challenge has been met with great success. Here are just a few examples of Georgia's young lawyers giving their time and leadership to serve others in their communities.

In Atlanta, James Clifton partnered with Sumeet Shaw and the Florida Coastal School of Law Alumni Chapter on a Children's Healthcare of Atlanta (Dunwoody) play date event in January. James also did a Casual for Charity fundraiser with his firm to raise money for the Haitian relief effort. Evan Kaine worked with Saks Fifth Avenue at Phipps Plaza on a donation drive to collect gently used clothing to benefit the Atlanta Children's Shelter in October. Rachel Krause worked on a donation drive to benefit My House.

Juanita Kuhner and Derek Littlefield participate in after-school tutoring at the Warren Holyfield Boys & Girls Club in Atlanta. Jared Brandman leads his law firm's partnership with M.L. King Middle School in Atlanta and helped coordinate participation in the school's career day. In October, Christopher Freeman worked on a toy drive for Children's Healthcare of Atlanta. Anne Kaufold-Wiggins is completing a luggage drive for Hillside Hospital in April, and DeAngelo Norris is helping support patients through Grady Hospital's Social Services Department.

Renee Little worked on a legal education program/summit for metro Atlanta teens and parents in March that focused on instructing youth how to com-

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State Bar of Georgia 2010 ANNUAL MEETING

June 17-20
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Amelia Island, FL

Opening Night

Join us for the State Bar's Opening Night Festival, an evening of magic, wonders and excitement. Enjoy a family-friendly night with VOILÀ, a spectacular variety show. This interactive experience features performances of magic and illusion, non-stop comedy, specialty acts and singing. Kids will be unable to resist the games and fun planned especially for them. (Food and drinks included.)

CLE, Sections & Alumni Events

Fulfill your CLE requirements or catch up with section members and fellow alumni at breakfasts, lunches and receptions.

Presidential Inaugural Gala

The evening begins with a reception honoring the Supreme Court of Georgia justices, followed by the awards ceremony and inauguration of S. Lester Tate III as the 48th State Bar president. After the awards and inauguration, relax and enjoy your evening in one of three themed rooms of dinner, dancing and entertainment.

Social Events

Enjoy the Opening Night Festival, the Supreme Court Reception and Presidential Inaugural Gala, along with the numerous recreational and sporting events that will be available.

Family Activities

Golf, tennis, shopping, swimming, sightseeing and other activities are offered by the resort and are available at your convenience.

Kids' and Teens' Programs

Programs designed specifically to entertain children and teens will be available.

Exhibits

Please don't forget to visit the exhibit booths at the Annual Meeting. Get your exhibitor card stamped and turned in to be entered into a drawing to win a two-night stay at Amelia Island Plantation.

municate with law enforcement officers. Ty Morrison and Tamera Woodard circulated copies of the "I Have a Dream Too" educational program to area high schools. Caroline Vann mentors an elementary school student in metro Atlanta through the Everybody Wins! Power Lunch Program.

Keisha Story and Ari Mathe are helping with the 5K Run for Recovery race in Hall and Dawson counties in May. David Van Sant is working on a book drive for Midway Elementary School in Forsyth County. Joshua Dickinson worked on the food rescue program with Second Harvest, a non-profit serving Greene and Putnam counties.

Malia Phillips-Lee is working with the Boys & Girls Club of Thomasville to establish a new club in Cairo. She also volunteers with the Miss Spirit of Georgia and Miss Southwest Georgia Scholarship Programs. Tommy Duck volunteered with the Southwest Georgia Food Bank. Hamilton Garner will provide pro bono will and power of attorney services for law enforcement, fire and emergency medical service personnel in Colquitt County this summer.

Matt Crowder raised funds to purchase two movie cameras for high schools in the Dublin area. In Clarkston, M. Khurram Baig teamed up with the Give A Lift Foundation to conduct a food drive. Through private donations and the efforts of volunteers, 40 refugee families from Somalia, Bosnia, Iraq and Afghanistan received food kits.

In Macon, Ivy Cadle, Leslie Cadle and Sarah White worked on the Bibb County Department of Family and Children Services Holiday Drive during December. Ivy also worked with the Central Georgia Council of Boy Scouts on projects concerning the local Scout properties. In February, Sarah, Ivy and Leslie all volunteered with the high school mock trial competition in Macon. Blake Sharpton is helping organize the Macon Golf for Kids Spring Tournament.

In Savannah, Ben Perkins raised money for bicycle helmets for local kids with a charity chili cook-off in January. Ben and Jacob Massee also brought in $1,600 through a fundraiser for a local family who lost a 2-year-old child in a fire. Christopher Smith volunteers with the Boys & Girls Club of Savannah.

"The call to action on community service and supporting children and families has received an enthusiastic response from the YLD membership," said Matt Crowder, YLD Executive Council member. "A wide range of initiatives has been rolled out across the state aimed at achieving this important goal."

In addition to these and many other individual acts of community service, the YLD is collectively delivering on its role as the "service arm" of the State Bar. As it does every year, the YLD sponsored the 2010 State Mock Trial Competition for Georgia high schools, the finals of which were held last month in Lawrenceville. This program furthers students' understanding of court procedures and the legal system; improves basic skills such as listening, speaking, reading and reasoning; promotes better communication and cooperation between the educational and legal communities; provides a competitive event in an academic atmosphere;

and promotes cooperation among young people of various abilities and interests.

"Amy's charge to the YLD Executive Council to develop and implement projects benefiting children and families represents clearly her vision for fulfilling the YLD's principles for service and leadership in the community," YLD Service Projects Chair Melissa Carter said. "The Executive Council members have responded enthusiastically with creative projects designed to provide direct service to children and families in need, benefit existing non-profit organizations and enhance public sector supports such as education and child protection. The impact of these successful efforts is felt statewide and in the individual lives of people who have benefited from the assistance of young lawyers."

Also, this year, YLD meetings have incorporated a service project in the communities where the meetings are held. During the Executive Committee Retreat at Lake Oconee in July, YLD members assembled tricycles, which were then donated to the Greene County Department of Family and Children Services. During the YLD Summer Meeting in Asheville, N.C., in August, Georgia young lawyers donated 100 teddy bears to patients at Mission Children's Hospital. In October, the YLD joined with the Savannah Bar Association YLD and Macon Bar Association YLD to raise and donate $1,000 in cash, toys and furniture for the children's room at the Savannah Area Family Emergency (SAFE) Shelter during Domestic Violence Awareness Month.

Currently, the YLD's Law-Related Education Committee is sponsoring a statewide essay contest for Georgia students in grades 6 through 8 on the topic of "Democracy and the American Family," again reflecting the year-long theme of supporting children and families.

"It is humbling to witness how the YLD leadership has answered the call to serve Georgia's children and families," said YLD President Amy Howell. "I am so proud to be part of such an outstanding group of lawyers, leaders and citizens."

I have listed these many examples at the obvious risk of leaving something or someone out. In fact, as impressive as it is, we know that it does not scratch the surface of all the community and pro bono done each day by many of our 40,000 members. Even if this list is not complete, and with many other projects still in progress, I wanted to give you an understanding of the incredible depth and breadth of the commitment of Georgia's young lawyers to public service. Their actions are speaking loudly across this state.

If you are eligible for membership in the Young Lawyers Division (those under age 36 or admitted to your first bar for less than five years are automatically members), I encourage you to get involved in the organization and one or more of its 26 committees that offer a wide range of opportunities for members to serve the legal profession and your community. You will make wonderful new friends, greatly enhance your career satisfaction, and bring honor to our profession. For more information, you can obtain the "How to Get Involved" brochure on our website at www.gabar.org/young_lawyers_division/. You can also join a committee on our website.

The Georgia YLD has earned many awards and an outstanding national reputation for the innovative programs, hard work and excellent service of these committees. The State Bar congratulates you and thanks you for all you are doing. Keep up the great work!

As always, your thoughts and suggestions are welcomed. My telephone numbers are 800-334-6865 (toll free), 404-527-8755 (direct dial), 404-527-8717 (fax) and 770-988-8080 (home). GBJ

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by Amy V. Howell

Truth v. Honesty

Like most mothers, my mother taught me "if you don't have anything nice to say, then don't say anything at all." Likewise, my mother also emphasized the importance of always telling the truth. In today's world, these lessons are often at odds with each other.

In this year's legislative session of the Georgia House of Representatives an anti-bullying bill was presented. Although the bill is straightforward in nature—it seeks to prevent and remedy bullying behavior among children at school—the debate surrounding the bill reflects the complexity of the issue. Some question whether codifying punishment for simple childish behavior is an appropriate approach. Others suggest using the bullying behavior as an opportunity to counsel both the bully and the victim. While I am the first to advocate against criminalizing youthful behavior, I readily acknowledge that the consequences for the things we say can be significant. Indeed, I still recall all the names I was called as a child.

While my parents successfully chose a first name that provided no fodder for teasing, my maiden name of "Tuckett" failed miserably in that respect. Like many of us, I was teased as a child about many things. The sting of being teased about my name, however, stands out from the everyday tribulations of being a child. Likely due to the popularity of the name "Amy," I was forever denominated "Tuckett," and the rhyming taunts connected to my identity still linger. Certainly, I am now successful and happy, but the flush I still feel today when reflecting on those name-calling days is not gone. While I am one who longs for simpler days with old fashioned values, modern science has provided evidence that childhood trauma can cause lasting harm.

> "Taking up the cause and advocating for the truth does not require us to become bullies on behalf of others."

Despite being aware of the lasting psychological harm caused by mental or emotional abuse, we have dulled ourselves into tolerating a certain degree of "acceptable" verbal abuse. In fact, cloaked in the guise of seeking "the truth," we observe political pundits berate guests on news channels, we entertain ourselves with the routine screaming matches of participants in reality television, and we relish a good "interview-by-ambush" where the private lives and struggles of pub-

lic people are laid bare on the couches of talk shows. It seems that we justify this bullying behavior in the name of seeking the truth, and we saturate ourselves in mechanisms such as Twitter and Facebook that allow us to immediately convey our thoughts about "the truth" without careful contemplation. To be sure, in big and small ways we model the abusive communication we see played out on television every day.

Just as a recent *New York Times* commentary on parenting dubbed "yelling the new spanking," the verbal bullying in which we often engage follows us into our lives not just as parents, but also as lawyers. Each year, as part of the State Bar of Georgia program on continuing legal education, we are asked to fulfill our commitment to professionalism—to take a moment and reflect on our obligations to the profession. In this reflection often comes the message of fair-dealing and professional behavior among lawyers. Between litigators, although the issues are hard-fought and we act as zealous advocates for our clients, the legal issues are not personal issues, no matter how devoted we are to the cause. Similarly, those of us who work on policy development or on financial deals, our best work comes when we take up the cause of our clients. Taking up the cause and advocating for the truth does not require us to become bullies on behalf of others.

Please don't get me wrong, the truth is important, and I am a believer in being candid in all communication, both personal and professional. Simply put, you should tell a person to their face that which you would say to others in their absence. At the same time, a commitment to open and honest communication does not mean that I spontaneously share my every thought with everyone. There are some thoughts that are better left to pass and vanish, because often, after time and contemplation, our concept of what is true evolves or changes completely. Thus, just as we caution our clients to consider the lasting implications of their written communications, i.e., the tone and substance of their e-mails before they hit "send," we should employ the same approach to the thoughts and words that we publish to each other. GBJ

Amy V. Howell is the president of the Young Lawyers Division of the State Bar of Georgia and can be reached at amyvhowell@gmail.com.

YLD TO HOLD CEREMONY FOR **GEORGIA'S RETIRING ATTORNEYS**

The YLD would like to invite any attorney celebrating his or her retirement from the practice of law to join us in a small ceremony and be recognized for distinguished service to Georgia's citizens and the Bar.

The ceremony will be held at the Bar Center in Atlanta on May 6, from 4-6 p.m. If you or someone you know retired in 2009 or plans to retire in 2010 and would like to attend the event and be recognized, **please RSVP by April 23 to Michael Geoffroy at michael@thegeoffroyfirm.com or 678-202-1290.**

The Ethics and Professionalism Committee of the Young Lawyers Division of the State Bar of Georgia invites nominations for a young lawyer who demonstrates/exemplifies professional and ethical conduct in the practice of law.

The deadline for submissions is April 23.

Download the nomination form at www.gabar.org/young_lawyers_division/.


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What Every Attorney Should Know About Health Care Law

by Tracy M. Field, Shannon L. Drake,
Jessica Tobin Grozine and Daniel M. Formby

Health care laws are increasingly relevant in both litigation and business transactions that have traditionally been viewed as "outside" the health care arena. Although it is often clear that a certain transaction or case will require careful navigation through a maze of health care laws, recent evolution and expansion of many of these laws extends their application.

The purpose of this article is to provide an overview of selected health care laws in order to assist non-health care attorneys in advising clients that may be affected by these laws. Attorneys should be particularly attuned to these issues when advising clients who are involved in litigation or business transactions that either directly or indirectly involve health care providers, health care services or government health care programs.

Health Care Law Applies to Litigation

Attorneys working with clients involved in personal injury litigation or with a need to review medical information relevant to certain legal matters are likely already aware that federal privacy laws can affect their ability to obtain such confidential information. Over the past few years, the Supreme Court of Georgia has published opinions interpreting the impact of the federal laws on state proceedings. In addition, federal legislation passed last year amended several aspects of the federal privacy laws and will impact attorneys and their practices. Finally, in considering personal injury cases in particular, new reporting obligations under the Medicare Secondary Payer laws will affect strategies for litigation and settlement.

Privacy Laws: HIPAA and HITECH and Your Clients

By now, health care providers and their counsel are well acquainted with obligations to protect patient information in accordance with the Health Insurance Portability and Accountability Act of

1996 (HIPAA),[1] as well as the Privacy and Security Rules promulgated under HIPAA.

Disputes over how to conduct discovery of patient information in view of existing Georgia laws and HIPAA regulations have led to two key Supreme Court of Georgia decisions. In 2008, the Court decided that in medical malpractice cases, the federal HIPAA Privacy Rule precludes defense counsel from informally interviewing a plaintiff's prior treating physicians.[2] The Court focused on the issue of whether defense counsel, after medical records were produced in accordance with Georgia discovery and privacy rule standards, could engage in ex parte communications with the plaintiff's treating physicians. Ultimately, the Court concluded that although the Georgia practice had been that such communications were permitted, the HIPAA Privacy Rule's more stringent protections must be satisfied. These protections include requiring an individual's authorization before his or her physicians may disclose their impressions. Thus, informal, ex parte communications that had been typical practice for defense counsel prior to HIPAA were no longer proper.

Recently, the Supreme Court of Georgia decided *Alvista Healthcare Center, Inc. v. Miller*,[3] which held that O.C.G.A. § 31-33-2(a)(2)(B) authorizes a surviving spouse to access the medical records on behalf of a deceased spouse or his estate, provided that an executor or administrator has not been appointed, without running afoul of HIPAA. The Court noted that 45 C.F.R. § 164.502(g)(4) requires a covered entity to treat an executor, administrator or other person with "authority to act on behalf of a deceased individual" under applicable state law as the personal representative of the decedent. Personal representatives, for purposes of obtaining Protected Health Information (PHI), are treated as if they were the individual patient. Although the provider asserted that HIPAA pre-empted O.C.G.A. § 31-33-2(a)(2) because a surviving spouse was not appointed through testamentary proceedings, the Court held that a surviving spouse of an intestate decedent could be a personal representative under HIPAA and obtain the decedent's PHI. The Court noted that HIPAA permits an executor, administrator or some other person authorized to act on behalf of the decedent or his estate to obtain PHI. The Court reasoned that O.C.G.A. § 31-33-2(a)(2) authorizes a surviving spouse to obtain medical records on behalf of a decedent or his estate and thus the surviving spouse is deemed to be a personal representative under HIPAA.

Although the Supreme Court of Georgia has addressed these issues in specific contexts, attorneys should ensure that both the federal HIPAA requirements and state laws are considered and satisfied in order to secure medical information regarding individuals. Moreover, as explained below, the federal privacy laws have been amended to include additional protections; thus, ongoing monitoring of the requirements is imperative.

HITECH Changes to HIPAA

In addition to important developments in Georgia case law, on Feb. 17, 2009, President Obama signed the federal stimulus package, officially known as the American Recovery and Reinvestment Act of 2009 (ARRA).[4] Importantly, a provision of ARRA, the Health Information Technology for Economic and Clinical Health Act (HITECH Act), substantially expands the reach of the HIPAA privacy laws in regulating how entities may use and disclose PHI.[5]

Previously, HIPAA regulated how "covered entities," primarily health care providers, clearinghouses and health plans, could use a patient's PHI. As part of the original Privacy Rule, the government recognized that covered entities may contract with third parties that need access to PHI to perform their services, including billing agents, accountants, attorneys and other consultants. Therefore, these entities were identified as "business associates" who would be contractually obligated by the covered entity to protect the PHI. In the event that the business associate failed to protect that information, the covered entity could terminate the relationship.

Now, under the HITECH Act, business associates are directly regulated by the government and subject to the same enforcement scheme as "covered entities."[6] Thus, clients who have access to PHI in the performance of legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation and/or financial services for covered entities will need to implement policies and procedures that establish administrative, physical and technical safeguards to protect the PHI. Just as is true for covered entities, business associates will be subject to enhanced civil and criminal penalties under HITECH. In preparing for this change, clients that are business associates should be advised to verify insurance coverage for privacy breaches, as this is clearly an area of increasing focus for individuals as well as government regulators.

Reporting Personal Injury Settlements for Medicare Beneficiaries

Attorneys working with clients to settle personal injury litigation that includes coverage for their clients' current and future health care costs should be aware that there are new reporting requirements that must be satisfied if the particular individual is a Medicare recipient—at the time of settlement, verdict, adjudication or any time thereafter. This new requirement is designed to ensure that Medicare only pays for services that are not otherwise covered, including health care services that are to be compensated from funds recovered as a result of personal injury settlements. As explained below, the law impacts plaintiffs and defendants, as well as their attorneys.

Background

In the early 1980s, Congress passed the Medicare Secondary Payer Statute (MSP) to make clear that the federal Medicare program is a secondary payer to other insurance or coverage.[7] In practical terms, the MSP law provides that, although the Centers for Medicare & Medicaid Services (CMS), the federal agency that administers the Medicare program, may initially pay a provider for performing services for Medicare beneficiaries, if it is later discovered that the patient has another source of coverage for those health care services, Medicare will recoup funds from the other source.

The law provides that CMS may "bring an action against any or all entities that are or were required or responsible . . . to make payment with respect to the same item or service . . . under a primary plan."[8] Alternatively, CMS "may recover under this clause from *any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity.*"[9]

The federal regulations implementing the MSP specify that the government can recover primary payments from "a beneficiary, provider, supplier, physician, attorney, state agency or private insurer that has received a primary payment."[10] Accordingly, *any* entity associated with a personal injury settlement—attorneys, insurance carriers, third-party administrators—virtually anyone who handles settlement proceeds and/or receives them as payment—could have MSP liability to CMS.[11]

On Dec. 1, 2009, the Department of Justice (DOJ), on behalf of the Department of Health and Human Services (HHS) and CMS commenced litigation against Monsanto Company, several of its insurers and both defense and plaintiff's counsel involved in a $300 million class action settlement. The parties to the settlement allegedly failed to reimburse Medicare for conditional payments paid by Medicare for beneficiaries who participated in the settlement and who had received Medicare-paid medical services for care related to injuries for which the settlement had been litigated.[12] While the DOJ has previously pursued similar actions against plaintiffs and their counsel to recover conditional payments, this appears to be the first instance where the federal government is seeking MSP recovery from insurance carriers and defense counsel involved in the settlement of a mass tort liability claim. Therefore, in the best interest of all the parties and attorneys involved in such settlements, the payment source should be clearly identified.

The New Reporting Requirement

Although the MSP laws have been in place for some time, CMS has had difficulties in identifying those situations where there is another payer that is responsible for the beneficiary's health care costs. Therefore, on Dec. 29, 2007, President Bush signed into law the Medicare, Medicaid and SCHIP Extension Act (MMSEA), which includes a provision amending the notice and reporting requirements under the MSP relating to workers' compensation, liability (including self-insurance) and no-fault cases.[13] Essentially, the law requires that entities report settlements involving payment for health care services for Medicare beneficiaries. CMS will then use this database as part of its claims payment process — if a Medicare beneficiary has received a reported settlement for his or her health care costs, then CMS will not reimburse the provider for the billed amounts. The provider therefore bills the beneficiary directly for the costs of those health care services.

These new reporting requirements, which are still being finalized by CMS, became effective July 1, 2009, and CMS will require claims reporting beginning Jan. 1, 2011. Importantly, under the new laws, failure to report can result in a fine of $1,000 per day, per claim, for the responsible entity—the insurer or entity responsible for the payment. Thus, to avoid MSP liability and fines, the responsible entity must ensure that CMS has the data required.

Although the MSP requirements have been in place for some time, the new MMSEA reporting standards and enforcement provisions signal enhanced focus on the issue. Therefore, attorneys working with both plaintiffs and defendants in personal injury matters should understand the impact that these requirements will have in negotiating settlements to properly satisfy CMS standards. In structuring settlements, this new requirement will have a substantial impact on the administration and payment of claims for health care costs.

What's in a Simple Contract?

Attorneys assisting health care providers in negotiating contracts for services are likely well aware of certain restrictions and regulatory issues that can arise in the health care context but are not otherwise implicated in general commercial contracts. Put simply, health care contracts are different from other business agreements. If health care contracts are not done correctly, the parties may receive something more than what they bargained for—a government investigation.

Stark Law and Anti-Kickback Statute

The Stark Law[14] and the Anti-Kickback Statute[15] are frequently implicated in health care contracting. Both laws were enacted to ensure that medical decisions are not clouded or compromised by improper financial arrangements under which health care providers are inappropriately profiting from referrals. These laws and their corresponding regulations are complex and must be evaluated in conjunction with all financial arrangements directly or indirectly involving health care providers

If health care contracts are not done correctly, the parties may receive something more than what they bargained for—a government investigation.

or health care services. Although the two laws are both designed to avoid "abuse" and overutilization, there are fundamental differences between them.

The Stark Law, also known as the physician self-referral law, is a civil statute that essentially provides that a physician may not refer a patient to an entity with which the physician has an ownership interest or other financial or compensation arrangement if payments for the services furnished are made by Medicare or Medicaid. Recent changes made to the Stark Law have extended its reach beyond individual physicians to entities with physician ownership (commonly referred to as the "stand in the shoes" provision).[16]

Importantly, there are a number of exceptions that exempt certain legitimate business arrangements from liability under the Stark Law.[17] Many of these exceptions require that the arrangement be based on fair market value and be commercially reasonable apart from referrals. Importantly, fair market value must be ascertained through a valuation analysis rather than through simple contract negotiations. The Stark Law is a strict liability law. Thus, if a prohibited arrangement does not fit within an exception, liability will be found regardless of intent.

The Anti-Kickback Statute is a civil and criminal statute that prohibits individuals or entities from knowingly or willfully offering, paying, soliciting or accepting any type of remuneration in order to induce referrals for health services that are reimbursable under any federal health care program. Much like the Stark Law, the Anti-Kickback Statute was created to ensure that medical decisions are made in the best interest of the patient and are not distorted by improper financial arrangements. Similar to the exceptions under the Stark Law, there are safe harbors to protect legitimate business arrangements. If an arrangement does not meet every element of the Anti-Kickback Statute safe harbor, however, it may nevertheless be acceptable, since violation is intent-based.[18]

The Stark Law and the Anti-Kickback Statute are implicated in the event that a physician is a party to a financial arrangement that involves a referral relationship, for instance, between hospitals and physicians, or if the physician seeks an ownership interest in a company that provides a related service, such as an MRI center. Given the complexity of the Stark Law and Anti-Kickback requirements, as well as other health care regulations designed to prevent fraud, where clients are directly or indirectly in referral relationships, attorneys structuring these arrangements must ensure that the relevant standards are satisfied.

Increasingly over the years, the government has focused its enforcement activities on other arrangements where the referral relationship may not be as readily identifiable. For instance, when a pharmaceutical company contracts with recognized physician experts to lecture at scientific meetings or to serve on company advisory boards, there are regulatory considerations that must be considered in structuring such contracts. In particular, the government is concerned that any payments for services be at "fair market value" and set in advance. Otherwise, a physician's practice of prescribing particular medications could be viewed as suspect and expose both the pharmaceutical company and the physician to significant liability.

Government Health Care Investigations

The specter of a government investigation has increased dramatically in recent years, and the focus is unlikely to abate. On Sept. 9, 2009, when President Obama addressed a joint session of Congress to present his plan for health care reform, he stated that "most of this plan can be paid for by finding savings within the existing health care system, a system that is currently full of waste and abuse."[19] In its 2007 financial crimes report, the FBI estimated that fraudulent billings to public and private health care programs account for anywhere from 3-10 percent of total health spending.[20] This would amount to anywhere from $75–$250 billion in fiscal year 2009. On Nov. 19, 2009, the Justice Department issued a press release stating that it recovered $2.4 billion in settlements and judgments in cases involving fraud against the government in fiscal year 2009.[21]

In May 2009, the government announced the creation of a new interagency group, the Health Care Fraud Prevention and Enforcement Action Team (HEAT) to combat Medicare fraud.[22] As part of HEAT, dedicated health care fraud strike forces have been established in major cities around the country.

Because of increasingly aggressive government investigations into health care arrangements, practitioners and those who contract with them must understand those laws implicated in health care contracting, including the amended False Claims Act.

The False Claims Act, as Amended by the Fraud Enforcement and Recovery Act of 2009

Originally enacted in 1863, largely as a means to fight war profi-

teering during the Civil War, the False Claims Act (FCA)[23] was little used in health care enforcement activities until amendments in 1986 expanded its scope, increased penalties and significantly incentivized private lawsuits by individuals (called "qui tam relators") on behalf of the government. Because the FCA provides for financial penalties per claim filed of up to $10,000 and treble damages, the government has used it to recover significant funds that were allegedly paid based on the presentment of a false claim for payment. Under the FCA, the government has recovered substantial funds from health care providers as well as from pharmaceutical companies for allegedly causing false claims to be presented by providers for payment when the pharmaceutical company improperly promoted unapproved uses of its products.

For example, in September 2009, Pfizer agreed to pay $2.3 billion to resolve civil and criminal liability arising from the allegedly improper promotion of certain pharmaceutical products.[24] This settlement included a payment of $1 billion to resolve allegations under the FCA that Pfizer improperly promoted certain drugs and thereby caused false claims to be submitted to government health care programs to pay for those drugs when they should not have been covered claims. In May 2009, some hospitals in Minnesota agreed to pay more than $2 million to settle allegations that they had submitted false claims when performing a medical procedure to treat certain spinal fractures.[25] The government contended that the claims submitted for payment were false claims because the procedures were done on an inpatient basis to increase Medicare billings even though the procedure could have been accomplished on an outpatient basis. As a final example, in August 2009, a hospital in Iowa paid $4.5 million to settle a government investigation where the hospital was alleged to have improperly benefited by

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paying five physicians who were employed by the hospital and referred patients to the hospital sums in excess of the fair market value of their work.[26] The government alleged that such payments violated the Stark standards.

As part of the government's focus on fraud enforcement, on May 20, 2009, President Obama signed the Fraud Enforcement and Recovery Act of 2009 (FERA).[27] FERA included significant amendments to the FCA, which have expanded the FCA's application and effectiveness as a tool to prevent health care fraud. In one of the more important amendments for purposes of this article, FERA replaced the previous intent language under the FCA with a looser requirement that the false statement be "material to" a false claim.[28] After FERA, FCA liability no longer requires a direct connection between the intent of the false statement and the government's payment of the claim—liability can attach if a party's statement has a "natural tendency to influence, or is capable of influencing" the payment of government funds. Therefore, clients who may have a more remote relationship with health care providers submitting claims for reimbursement could be subject to enforcement actions under the revised law.

Another key amendment under FERA that has caused great concern for providers and their vendors is that the intentional retention of an overpayment is a "false claim" under the law.[29] The revised FCA creates liability when a party "knowingly conceals or knowingly and improperly avoids or decreases an obligation to" pay money to the government. "Obligation" includes "an established duty, whether or not fixed, arising . . . from statute or regulation, or from the retention of any overpayment." Significantly, liability can arise once an overpayment is knowingly concealed, even in the absence of a false record or statement.

The expansion of the FCA will undoubtedly lead to its increased application to individuals and entities who deal in the health care arena, directly or indirectly, as well as government contractors. Therefore, clients who have arrangements with health care providers should be advised of these changes to ensure vigilance in their relationships and guard against allegations of FCA violations.

Finally, the government continues to assert that technical violations of other health care laws, e.g., the Stark Law or the Anti-Kickback Statute, can render a claim "false" under the FCA. There are cases finding an FCA violation where the actual claim submitted was not false but the provider falsely certified that it was in compliance with all applicable laws, including the Anti-Kickback Statute.[30] For example, if a provider obtains referrals through an improper kickback arrangement and, as required under certain health care programs, that provider has filed certifications that it has not violated the Anti-Kickback Statute, the provider can be held liable under the FCA even if the actual claim was medically necessary and was not provided at an artificially inflated price.

Conclusion

It is impossible to predict the outcome of health care reform, but, given the current health care focus, the laws and regulations governing health care arrangements will continue to expand and become increasingly complex. As a result, we will undoubtedly see increased enforcement of these laws in the coming months and years.

As noted above, attorneys and their clients continue to be affected by the ever evolving privacy and security rules under HIPAA and HITECH and should stay attuned to both Georgia and federal law to ensure ongoing compliance. In addition, attorneys involved in personal injury cases must be aware of the current requirements imposed by the MSP laws.

In the transactional arena, health care providers are generally aware of the complex web of laws that affect virtually all of their day-to-day operations and business dealings; however, expansion of these laws, such as the FCA, the Stark Law and the Anti-Kickback Statute, has resulted in these laws having a greater impact on business transactions involving non health care entities and individuals. Attorneys advising clients in transactions that directly or indirectly involve health care providers or health care services should be mindful of the considerations under this complex regulatory scheme.

While this article highlights certain issues for consideration, clearly, the area of health care law is subject to ongoing change that must be monitored for the benefit of attorneys and their clients. Where a case or transaction directly or indirectly involves health care services, a health care provider or a health care benefit, particular attention should be given to the scope and impact of federal and state health care laws and regulations. GBJ

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Endnotes

1. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996); *see* 45 C.F.R. pts. 160, 162 & 164 (2009).
2. *See* Moreland v. Austin, 284 Ga. 730, 670 S.E.2d 68 (2008).
3. No. S09G1005 (Ga. Nov. 2, 2009).
4. American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115 (2009).
5. *Id.*, Health Information Technology for Economic and Clinical Health (HITECH Act), Title XIII of Division A and Title IV of Division B of ARRA.
6. *See* 45 C.F.R. § 160.103 (2009).
7. 42 U.S.C. § 1395y (2009).
8. *Id.* § 1395y(b)(2)(B)(iii).
9. *Id.* (emphasis added).
10. 42 C.F.R. § 411.24(g) (2009).
11. *See* United States v. Harris, No. 5:08CV102, 2009 WL 891931, at *3 (N.D. W.Va. Mar. 26, 2009) (holding that plaintiff's counsel who prematurely disbursed settlement proceeds was individually liable for reimbursing Medicare because the government can recover "from *any* entity that has received payment from a primary plan," including an attorney") (citing 42 C.F.R. § 411.24(g)). A waiver of recovery may be granted where (1) a claimant is without fault and (2) recovery would either defeat the purposes of Title II or would be against equity and good conscience. 42 U.S.C. § 404(b) (2009).
12. United States v. Stricker, No. CV-09-PT-2423-E (N.D. Ala. filed Dec. 1, 2009).
13. Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA), Pub. L. No. 110-173, 121 Stat. 2492 (2007).
14. 42 U.S.C. § 1395nn (2009).
15. *Id.* § 1320a-7b(b).
16. 42 C.F.R. § 411.354(c) (2009).
17. *See generally id.* §§ 411.355(b) (in-office ancillary services exception); 411.357(a) (space lease exception); 411.357(c) (bona fide employment relationships exception); 411.357(d) (personal services exception); 411.357(e) (concerning physician recruitment).
18. *See id.* § 1001.952.
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26. Press Release, Covenant Medical Center to Pay U.S. $4.5 Million to Resolve False Claims Act Allegations (Aug. 25, 2009), available at http://www.usdoj.gov/opa/pr/2009/August/09-civ-849.html.
27. Pub. L. No. 111-21, 123 Stat. 1617 (2009).
28. The FERA change was made in response to the Supreme Court's decision in *Allison Engine Co., v. United States* ex rel. *Sanders*, 128 S. Ct. 2123 (2008), which held that 31 U.S.C. § 3729(a)(2) of the FCA required a plaintiff to prove that a defendant intended the false statement to be material to the government's decision to pay or approve the false claim.
29. *See* 31 U.S.C. § 3729(b)(3) (2009).
30. *See* United States *ex rel.* Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 238 F. Supp. 2d 258, 264 (D.D.C. 2002); United States *ex rel.* Thompson v. Columbia/HCA Health Care Corp., 20 F. Supp. 2d 1017, 1047 (S.D. Tex. 1998).

Limiting Law Firm Exposure to HITECH Act Liability:

Do You Know Where Your Client's Protected Health Information Is?

by H. Carol Saul

Lawyers and law firms, like other vendors to the American health care industry, take note: as of mid-February 2010, many of you are required to comply with large parts of the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA),[1] will be subject to governmental and client audits to verify compliance and will be subject to civil money penalties for a failure to comply. Lawyers also face substantial indemnification claims by clients whose protected health information (PHI) is lost, stolen or improperly accessed while in the lawyer's custody.

Not concerned yet? Let's consider a hypothetical situation: It is June 2010. Your firm's largest client is a hospital that is under investigation for health care fraud. The allegations relate to billing for 8,000 patients seen in the hospital's outpatient HIV clinic over a six-year period. You engage a billing consultant to review the claims and load the documents, which include patient names and HIV status, onto a flash drive without encryption. Your courier is to deliver the flash drive to the consultant but stops at Starbucks for a coffee, where his car is stolen. The package containing the flash drive is never recovered. You learn three months later that you are required to notify the hospital of the lost data.

What are the repercussions? The hospital is required to publish notice of this breach in the media and to attempt to contact each of the 8,000 patients. It is also required to notify the Department of Health and Human Services (HHS). The cost to the hospital, which includes legal fees of the competing law firm that the hospital hired to advise it and fines imposed for the hospital's noncompliance with federal breach notification requirements, is more than $1 million. The client asks your firm to reimburse it, but your firm has no insurance for the loss and looks to the courier company, which likewise has no insurance and files bankruptcy to avoid your claim. Not surprisingly, the hospital chooses another law firm. HHS begins an investigation and determines that your firm's transmittal of unencrypted PHI, coupled with the delay in notifying the hospital, constitutes willful neglect and imposes a civil money penalty of $250,000 against your firm. The press coverage causes your firm to lose its other two largest health care clients.

This article is a cautionary tale. It discusses the direct impact on lawyers of a recent expansion of federal pri-

vacy and security law and recommends several steps that lawyers should take now. A portion of the American Recovery and Reinvestment Act of 2009 (ARRA),[2] or the Stimulus Bill as it is commonly called, created the Health Information Technology for Economic and Clinical Health Act (HITECH Act or the Act).[3] The Act imposes expansive new requirements on lawyers who serve as business associates of their clients and receive or access their clients' protected health information.

The Historical Perspective

As with any new legislation, it is often best to start with an understanding of the law that preceded it, which in this case is the Health Insurance Portability and Accountability Act of 1996, or HIPAA. The HITECH Act does not replace HIPAA. Rather, it builds on HIPAA by providing additional security and privacy safeguards with respect to PHI.

HIPAA was a product of the 1990s. At that time, Congress responded to a need to make health information more portable, as well as to standardize the vocabulary of various electronic systems that were conducting nonstandard health care-related transactions, such as claims processing. Congress recognized a concomitant concern that the privacy and security of health information needed stronger protection than the patchwork of state laws then in place. Thus, in 1996, Congress passed HIPAA, the first comprehensive federal privacy law, and assigned to HHS the responsibility to promulgate and enforce regulations.

HIPAA's Privacy Rule, which describes the appropriate uses and disclosures of protected health information, became effective in 2001, with compliance required by April 2003.[4] HIPAA's Security Rule, which establishes the policies and best practices for securing health information, became law in 2003, with compliance required by April 2005.[5]

Until passage of the HITECH Act, HIPAA directly impacted only certain "covered entities," which included health care providers (e.g., hospitals and physicians) that submit transactions electronically; health care plans (e.g., HMOs and self-insured health plans); and health care clearinghouses (e.g., billing services and repricing companies). Covered entities were required by HIPAA to extend protections for PHI by entering into written agreements with their service providers with whom they shared PHI, which are called business associates.[6] Business associates include IT vendors, transcription providers, billing agents, accountants and attorneys.[7]

Prior to the HITECH Act, business associates were not directly subject to HIPAA. Business associates' only exposure to HIPAA was through contractual liability for breach of the business associate agreement that they signed with their covered entity customers and clients. As a consequence, it is likely that many business associates, including attorneys, took the position that the obligation to put a business associate agreement in place rested with their clients, not with them. Moreover, the little enforcement historically and the relatively low statutory penalties likely resulted in widespread failure to monitor compliance or strictly abide by the protections required by the terms of the business associate agreements.

That Was Then; This Is Now

With the passage of the HITECH Act, however, business associates are now directly liable for HIPAA/HITECH violations. If a lawyer is certain that she will never represent a HIPAA-covered entity, or never receive PHI from a covered entity client, that lawyer can stop reading now. It should be noted,

however, that attorneys in fields of law much broader than health law per se do from time to time represent covered entities. For example, PHI may be shared between a covered entity client and its litigation defense counsel, collection attorneys, employment lawyers or ERISA counsel. Attorneys who from time to time receive or access a covered entity client's PHI should keep reading.

New Security Breach Notification Requirements Effective Now

On Aug. 24, 2009, HHS published interim final regulations establishing breach notification requirements for unsecured PHI, which regulations were mandated by the HITECH Act,[8] and, following a grace period, covered entities had until Feb. 22, 2010, to revise their policies, put in place security incident response plans and training and confer with their business associates about security breach response and modify business associate agreements accordingly.

Upon discovery of a breach, and depending on the location and number of individuals impacted by the breach, the security breach regulations require that a covered entity provide different types of notification (i.e., to the affected individuals, the media and HHS) without unreasonable delay and in no circumstances later than 60 days following the discovery of the breach. The regulations specify in detail the content to be included in the breach notification.

Under HHS's security breach regulations, business associates are required to report a breach of unsecured PHI only to the associated covered entity, which is then required to provide notification to the affected individuals. In some instances, however, the business associate who caused the breach may be better positioned to gather information about the breach and provide notice to the individual(s) affected. Covered entities therefore may seek to shift the notice obligation contractually via language in the business associate agreement. At a minimum, covered entities are likely to seek to add indemnification provisions to business associate agreements so that the business associate will be required to make the covered entity whole for its losses in connection with carrying out its breach notification obligations.

Security Breach Action Items

What should a law firm do in light of the new breach reporting obligations? Step one would be to educate its personnel, including nonlawyer personnel, regarding the business associate's obligation to provide breach notification. If a briefcase containing PHI is lost but no one beyond its owner is made aware of it, the law firm cannot meet its legal obligation to notify the covered entity.

Second, law firms should re-examine and tighten their policies as to permitted use, storage and transmittal of PHI. When PHI that has been encrypted in accordance with standards approved by HHS is lost or improperly accessed, those events are not deemed to be a breach of *unsecured* PHI, so no notice would be required. HHS, on April 27, 2009, released guidance "specifying the technologies and methodologies that render [PHI] unusable, unreadable, or indecipherable to unauthorized individuals for purposes of the HHS breach notification for covered entities and their business associates."[9] As a general rule, no PHI should be transmitted by e-mail, unless it is properly encrypted before it is sent. If it is necessary to send PHI on some form of portable media (such as USB keys or hard drives) the information likewise should be properly encrypted.

Because the federal security breach notification requirements do not preempt state notice laws, covered entities and their business associates will be required to comply with both sets of law, when both are applicable. Currently, 45 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands have their own breach notification requirements. Lawyers should familiarize themselves with applicable state laws, including timeframes for response and any additional elements to be included in the notice. In some states, the burden of providing notice of breach may fall directly on the attorney.[10]

Additionally, law firms should consider procuring insurance coverage to protect themselves against losses should they experience a breach of unsecured PHI and as a result incur civil money penalties or be required to indemnify their covered entity client. Such losses can be substantial. It is likely that covered entity clients will require that their business associates, including attorneys, provide evidence of such coverage. Attorneys also should carefully review and where appropriate, narrow indemnification language in business associate agreements to foreclose indemnification for indirect, consequential or special damages, such as damages to the client's reputation flowing from a breach.

Required HIPAA Security Rule Compliance as of Feb. 17, 2010

The HITECH Act also requires lawyer-business associates to comply directly with many of the HIPAA security standards. Under the HITECH Act, effective Feb. 17, 2010, business associates are subject to each of the administrative, physical and technical safeguard requirements in the HIPAA Security Rule, as well as requirements to maintain policies, procedures and documentation of their security measures "in the same manner that such sections apply to the covered entity."[11]

Although a thorough discussion of the Security Rule standards is beyond this article's scope, attorneys should note the 18 standards, which are further sub-divided into 36 implementation specifications.

Each is labeled as (1) "required," meaning that implementation is mandatory; or (2) "addressable," meaning that business associates must consider whether adoption of each implementation specification is practical and warranted given the size and nature of their operations; if not, the entity is required to adopt an alternative measure to accomplish the standard and to document its reasoning for doing so, or to document how the standard is otherwise met.

Security Rule Compliance Action Items

What should lawyers do to meet their new Security Rule obligations under the HITECH Act? The starting point is conducting and documenting a security risk assessment to identify vulnerabilities to the security of PHI. That risk assessment should be tailored to the standards and implementation specifications in the Security Rule. A security official must be assigned responsibility for HIPAA security implementation. Written policies and procedures must be developed to establish guidelines to prevent, detect, contain and correct security violations, and all personnel must be trained on these policies and procedures. Note that ARRA requires the secretary of HHS to provide for periodic audits to determine the compliance of both covered entities and *business associates* with the HITECH Act requirements.

Amendment of Business Associate Agreements

Many law firms have already developed a form business associate agreement to use with their covered entity clients from whom they receive PHI, as has been required by the Privacy Rule since 2003. Lawyers now must decide whether to amend and renegotiate those business associate agreements that are already in place with current clients. This is because the HITECH Act provides that the additional requirements "shall be incorporated into the business associate agreement between the business associate and the covered entity."[12]

There is some debate currently regarding two possible interpretations of this HITECH Act language. The first interpretation is that the additional requirements imposed by the HITECH Act become part of the business associate agreement as *a matter of law*. The second interpretation is that covered entities and their business associates are required by the HITECH Act to amend their existing business associate agreements to include—and to include in future business associate agreements—the additional requirements imposed on covered entities and business associates by the HITECH Act. As of this writing, HHS has not taken any formal position on this issue.

Unique Issues for Lawyers as Business Associates

Reconciling aspects of HIPAA and the HITECH Act with the

unique relationship between a lawyer and his client is nebulous. Several requirements of the HITECH Act, if followed literally, could result in breaches of the attorney-client privilege and work product, or where recognized, the self-evaluative privilege. For instance, the HITECH Act requires a business associate that becomes aware of a breach by its covered entity client under some circumstances to report that breach to HHS. (Covered entities likewise are required to "rat" on their business associates.)[13] How does an attorney turn in his client without irrevocably damaging the relationship and possibly waiving a privilege?

Additionally, business associates are required to agree in their business associate agreements to make their books and records available to HHS so that HHS may determine the covered entity's compliance with HIPAA.[14] Must the lawyer then open its privileged files to HHS? Could doing so constitute a waiver of the attorney-client privilege? Lawyers should consider adding qualifying language to the business associate agreement that makes clear that no term should be construed as a waiver of any applicable privilege. We will have to leave it to the courts to determine whether privilege trumps the HIPAA/HITECH requirements, or vice versa.

The HITECH Act also can cause an uncomfortable dynamic between client and attorney as they are adverse for purposes of negotiating the terms of the business associate agreement and the allocation of risk for a security breach. Lawyers should consider including a statement in the business associate agreement, whereby the parties acknowledge that the lawyer is not representing the client in connection with such negotiations. Another awkward situation can occur when the attorney has appropriately advised the client to seek indemnification clauses in its agreements with other vendor-business associates, but declines to agree to such indemnification when it appears in the lawyer's own business associate agreement.

Applicability of Heightened Penalties and Enforcement to Business Associates

Under the HITECH Act, business associates that violate the applicable HIPAA regulations, or who violate the terms of their business associate agreements, will be subject to the same civil and criminal penalties as covered entities.[15] The HITECH Act calls for increased civil penalties and enforcement.[16] Prior to the HITECH Act, the secretary of HHS was authorized to impose a HIPAA civil money penalty ranging from $100 to $25,000 per violation, provided that the violation was not a criminal offense. As amended by the HITECH Act, however, the potential civil penalties for HIPAA violations now have real teeth.

The Act provides for tiered penalties depending on the nature of the violation. The first tier is for violations that were unknown or by exercising reasonable diligence would not have been known, and establishes a range of penalties from $100 for each violation up to $25,000 for all identical violations in a calendar year. The second tier includes violations due to reasonable cause and not willful neglect. The second tier range of penalties is from $1,000 for each violation up to $100,000 for all such violations in a calendar year. The third tier covers violations due to willful neglect if they are corrected within 30 days from knowledge of the violation. The range of penalties is from $10,000 for each violation up to $250,000 for all such violations in a calendar year. The fourth tier is for violations due to willful neglect that are not corrected. The range of penalties is from $50,000 for each violation up to $1.5 million for all such violations during a calendar year. For each tier, the maximum penalty is $1.5 million for all violations of a particular type in a calendar year.[17]

Criminal penalties also may apply to a person, including an employee or other individual who obtains or discloses PHI without authorization. The penalties indicate that an employer or other individual will not be fined more than $50,000 and/or imprisoned not more than one year, unless the offense is committed under false pretenses, in which case the fine cannot be more than $100,000 and/or imprisonment not more than five years. If the offense is committed with intent to sell, transfer or use PHI for commercial advantage, personal gain or malicious harm, then the fine cannot be more than $250,000 and/or imprisonment not more than 10 years.[18]

The HITECH Act requires that collected penalties and settlement dollars for HIPAA violations be transferred to the Office of Civil Rights to fund future enforcement initiatives.[19] This self-perpetuating funding mechanism has precedence in the government's fraud and abuse enforcement programs, where the proceeds of civil money penalties are poured back into the HHS Office of Inspector General to fund future investigations of suspected Medicare fraud and abuse.

Borrowing further from the government's fraud and abuse enforcement tactics, a portion of the civil money penalties collected for HIPAA violations will be paid to individuals harmed by the acts that constitute HIPAA offenses. Additionally, state attorneys general may commence civil actions on behalf of citizens of the state in federal district court with regard to HIPAA violations, to the extent that no federal action has been instituted by HHS with respect to the same violation. Under the state attorneys general enforcement powers, damages are relatively low—up to $100 per separate violation or a maximum of $25,000 for all violations of the identical requirement in a calendar year, plus reasonable attorneys' fees.[20]

The HITECH Act also permits the Office of Civil Rights the discretion to impose corrective action plans on violators. Additionally, the Act requires the secretary to provide for periodic audits of covered entities *and business associates* to ensure compliance with the HIPAA Privacy and Security Rules.[21]

Conclusion

Although the overarching purpose of the HITECH Act is to provide a path for the federal government to achieve its goal of establishing widespread use of electronic health records by 2014, the HITECH Act's reach extends more broadly than just health care entities and electronic health records companies. The obligations, restrictions and potential liability imposed on lawyer-business associates under the HITECH Act are significant. Lawyers should note these requirements now and undertake the substantial burden of compliance. At least lawyers can now tell their covered entity clients that they truly "feel their pain." GBJ

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Endnotes

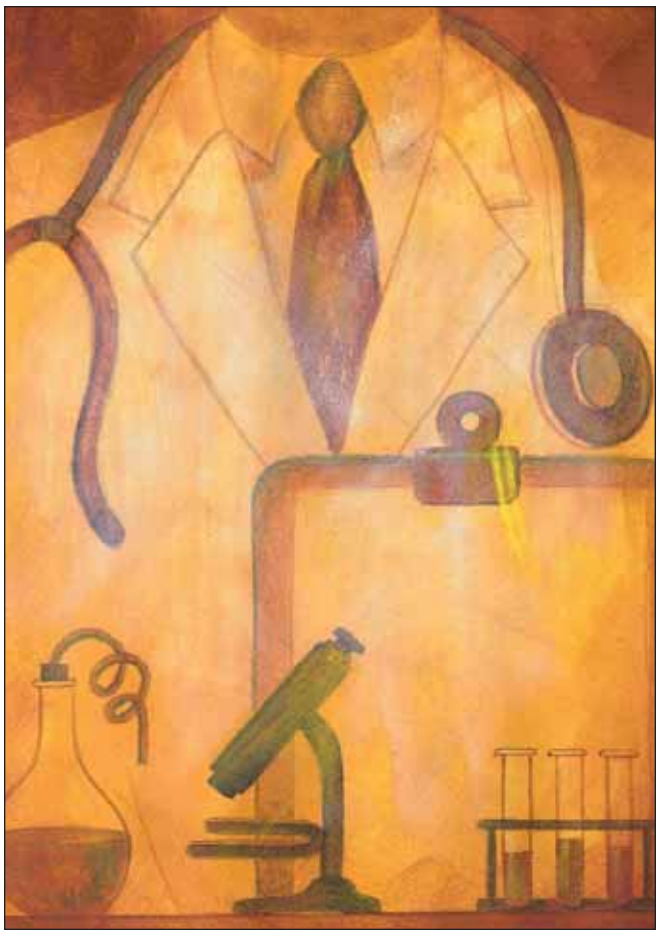
1. Pub. L. No. 104-191, 110 Stat. 1936 (1996); *see* 45 C.F.R. pts. 160, 162 & 164 (2009).
2. Pub. L. No. 111-5, 123 Stat. 115 (2009).
3. *See id.*, Title XIII of Division A , Title IV of Division B.
4. 45 C.F.R. pts. 160 & 164, subpts. A & E.
5. *Id.* pts. 160, 162 & 164. Small health plans were given an additional twelve months to comply with the Security Rule.
6. PHI or Protected Health Information means information that identifies an individual or might reasonably be used to identify an individual and relates to (1) the individual's past, present or future mental or physical health; (2) the provision of health care to the individual; or (3) the past, present or future payment for health care. 45 C.F.R. § 164.501.
7. HITECH Act, § 13400(2) (codified at 42 U.S.C. § 17921) states that "business associate" has the same meaning as found in 45 C.F.R. § 160.103. A business associate is "a person who, on behalf of a covered entity or organized healthcare arrangement, but other than in the capacity of a workforce member of such covered entity or arrangement: performs or assists in the performance of a function or activity involving the use or disclosure of individually identifiable health information … or any other function or activity regulated by HIPAA; or provides legal, actuarial, accounting, consulting, data aggregation …, management, administrative, accreditation, or financial services to or for such covered entity [or arrangement] where the provision of the services involves disclosure of individually identifiable health information from such covered entity or arrangement or from another business associate of such covered entity or arrangement to the person."
8. 74 Fed. Reg. 42,740-42,770 (Aug. 24, 2009) (to be codified at 45 C.F.R. pts. 160 & 164).
9. 74 Fed. Reg. 19,006 (Apr. 27, 2009) (to be codified at 45 C.F.R. pts. 160 & 164).
10. Georgia's current breach notice law is called the Georgia Personal Identity Protection Act of 2005 (GPIPA), and applies to personally identifiable information held by three types of entities: information brokers, data collectors and persons or businesses that maintain computerized data on behalf of an information broker or data collector. O.C.G.A. §§ 10-1-910 to -912 (2009).
11. HITECH Act § 13401(a) (codified at 42 U.S.C. § 17931(a)).
12. *Id.*
13. *Id.* § 17932(e)(3); 45 C.F.R. pt. 164.308(a)(6)(ii).
14. 45 C.F.R. pt. 164.504(e)(2)(ii)(H).
15. HITECH Act § 13401(b)-(c) (codified at 42 U.S.C. § 17931).
16. *Id.* § 13410 (codified at 42 U.S.C. § 17939).
17. *Id.* § 13410(d)(1)-(3) (codified at 42 U.S.C. § 17939).
18. 42 U.S.C. § 1320d-6.
19. HITECH Act § 13410(c).
20. *Id.* § 13410(d)(2) (codified at 42 U.S.C. § 17939).
21. *Id.* § 13411 (codified at 42 U.S.C. § 17940).

Is Georgia Prepared for a Health Pandemic?

Legal Issues Regarding Emergency Preparedness and Declaration of Emergency Health Pandemic in Georgia

by Liz Schoen and Keith Mauriello

Over the last year, concerns over global health pandemics, including the spread of the H1N1 virus, forced federal and state authorities to consider how the public could respond appropriately to prevent or, if necessary, manage outbreaks. In a perfect world, the federal and state governments, their agencies, private and public organizations, legislatures, hospitals and other health care providers and individuals would have ample time to develop concise and thorough guidance on how to address and navigate through a pandemic crisis. Unfortunately, although lessons have been learned in the wake of crises, for example with Hurricane Katrina, there remain significant practical and legal difficulties in preparing for an emergency pandemic.



Georgia is no exception. Being the home state for the Centers for Disease Control and Prevention (CDC) has offered some advantage, particularly in the area of communication, due to the proximity of CDC staff to various Georgia players. Additionally, Georgia's Commissioner of the Department of Community Health (DCH) serves as the state health officer, which has helped expedite the planning and communication process in Georgia. This advantage was demonstrated by the foresight of the then current DCH Commissioner, Dr. Rhonda Medows, M.D., who predicted in early August 2009 the spread of the H1N1 virus as soon as public and private schools began. Dr. Medows asked the Georgia Hospital Association (GHA) to develop a draft executive order for her to present to the governor in the event that he were to declare a state of emergency as contemplated under law.[1]

There are a host of legal issues to consider at both the state and federal level with regard to emergency health pandemics. This article focuses on two threshold issues: (1) the scope of the state's authority to declare a state of emergency and the processes necessary to do so; and (2) federal government efforts in waiving certain laws for providers and states during pandemic emergencies. Provided below is a summary of these issues as well as other operational concerns that health care providers may face during a declared state of emergency.

Georgia's Authority to Declare a Pandemic or Public Health Emergency

The Georgia Emergency Management Act of 1981 (the Act)[2] provides the state with certain powers in the event of an emergency situation, including a pandemic influenza or public health emergency. The Act designates the governor as the primary state official to exercise

such emergency powers, and sets forth the basic parameters that must be followed when managing an emergency event.

The Act incorporates the concepts of "pandemic influenza emergency" and "public health emergency." A pandemic influenza emergency is established when the World Health Organization declares at least a Phase 5 Pandemic Alert for influenza, or the CDC declares at least a Category 2 Pandemic Severity Index for influenza.[3] A public health emergency is broader in scope, defined as "the occurrence or imminent threat of an illness or health condition that is reasonably believed to be caused by bioterrorism or the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin and poses a high probability" of: (1) a large number of deaths; (2) serious or long-term disability for the population; or (3) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people.[4] On its face, it would seem that a pandemic influenza emergency would also be considered a public health emergency due to the broader definition, thus triggering both definitions under the Act.

If threatened by a pandemic influenza or public health emergency, in order to prevent or alleviate the damage, loss, hardship or suffering, the governor may declare a "state of emergency," which is a threat or occurrence of a disaster or emergency, in the governor's judgment, that rises to the severity and magnitude warranting extraordinary assistance by the state to assist with the efforts and available resources of the several localities and relief organizations.[5] The governor is empowered under state law to carry out emergency management programs that include broad powers to mitigate and repair harms through police agencies, emergency medical services, transportation services, public utilities, victim services and other services for civilian protection.[6] It is important to understand the scope of powers granted to the governor and his broad ability to delegate powers to various state agencies, particularly DCH, in a state of emergency for pandemic influenza or public health concerns.[7] In particular, the Act authorizes the governor to delegate to DCH the power to quarantine and vaccinate individuals during a state of emergency.[8]

Before declaring a public health-related state of emergency, the governor must call for a special session of the Georgia General Assembly for the purpose of concurring with or terminating the public health emergency.[9] What is interesting about this requirement is that it only references a public health emergency, and makes no mention of a pandemic influenza emergency. While an argument could be made that it is not necessary to call such special session for a pandemic influenza emergency, such emergency does seem to fall within the definition of a public health emergency, thus triggering a special session. During a state of emergency, the governor may exercise many emergency powers, some of which likely would be implicated during a pandemic crisis, including, but not limited to:[10]

- Suspending any regulatory statutes prescribing the procedures for conduct of state business, or orders, rules or regulations of any state agency, if strict compliance would prevent, hinder or delay necessary action in coping with the emergency or disaster;[11]
- Commandeering private property if necessary;
- Compelling a health care facility to provide services or use of facilities if such services or use are reasonable and necessary for emergency response; and
- Transferring the management and supervision of a health care facility to DCH for a limited or unlimited period of time not extending beyond the termination of the public health emergency.

In the event of a pandemic crisis, Georgia needs to be prepared to respond to the demands, and effective planning and operations would likely assist in mitigating such an emergency. Such planning and operations should be a coordinated effort of various public and private entities within the state, which could best be initiated and implemented by the DCH Commissioner. Indeed, the governor may direct DCH to coordinate all matters in responding to a public health emergency, including, among other things, the planning and execution of health emergency assessments, mitigation and response, the coordination of federal and state responses, the collaboration with government and private entities and the organization of public information activities regarding response operations.[12]

Federal Issues

The federal government has issued guidance and specific waivers to providers and states for the current H1N1 pandemic in an effort to clarify and ease some of the stringent federal regulatory restrictions to which health care providers must adhere on a daily basis as well as to carve out some exceptions applicable during a state of national emergency.[13] In addition to raising awareness and concern of the current H1N1 crisis at the national and state levels, these efforts and declarations have not only helped focus states on the issues, but, more important, seem to be the starting point to ease legal restrictions in order to ensure that adequate assistance is available.

Section 1135 Waivers

On Oct. 24, 2009, President Obama issued a proclamation, pursuant to the National Emergencies Act,[14] that the 2009 H1N1 influenza pandemic constitutes a "national emergency" and

that, if warranted, allowed for the waiver of certain statutory federal requirements for medical treatment facilities.[15] In particular, the proclamation provided the secretary of the U.S. Department of Health and Human Services (HHS) the ability under section 1135 of the Social Security Act[16] to waive or modify temporarily certain legal requirements that could otherwise limit the nation's health care system to respond to the surge of patients with the H1N1 virus. In early October 2009, HHS Secretary Kathleen Sebelius also reinstated in response to the H1N1 virus a nationwide public health emergency declaration pursuant to section 319 of the Public Health Service Act, which allowed the secretary to engage in responsive action, including making grants, entering into contracts and investigating various aspects of the disease.[17]

When the president declares an emergency or disaster under the National Emergencies Act or the Robert T. Stafford Disaster Relief and Emergency Assistance Act,[18] and the HHS secretary declares a public health emergency under section 319 of the Public Health Service Act, the HHS secretary is then authorized to take certain actions in addition to her regular authorities.[19] Specifically, under section 1135 of the Social Security Act, she may temporarily waive or modify certain requirements related to Medicare, Medicaid, State's Children Health Insurance Program (SCHIP), Emergency Medical Treatment and Active Labor Act (EMTALA) and Health Insurance Portability and Accountability Act (HIPAA). The goal of the waiver or modification is to ensure that health care items and services are sufficiently available to meet the needs of federal health care program beneficiaries in the emergency area and that health care providers delivering such services in good faith can be reimbursed and exempted from certain sanctions (absent any determination of fraud or abuse). Some examples of § 1135 waivers or modifications include, but are not limited to, conditions of participation, certification requirements for providers and sanction provisions under EMTALA and HIPAA.

The federal requirements, however, are not automatically waived, and health care providers must apply to operate under that authority when invoked by the HHS secretary. Requests are considered on a case-by-case basis, and the HHS secretary may choose to delegate the decision-making authority to the Centers for Medicare & Medicaid Services (CMS). Notably, on Oct. 27, 2009, Secretary Sebelius issued a § 1135 waiver and waived

specific provisions for health care providers unable to comply with certain federal requirements as a result of the H1N1 influenza.[20] To take advantage of the waiver, however, providers had to seek approval from CMS.

EMTALA Guidance for Hospitals in a Disaster

CMS has issued various memoranda addressing the applicability of the EMTALA statute during any disaster and the § 1135 waiver process specific for the H1N1 virus.[21] These memoranda were developed to help hospitals and their communities in a disaster that might cause a potential surge in the emergency department volume. CMS has also clarified various options that are permissible under EMTALA and reassured hospitals as well as community and public health officials of the flexibility available under EMTALA.

In general, EMTALA is a federal law requiring all Medicare-participating hospitals with dedicated emergency departments to perform for all individuals who come to their emergency departments, regardless of ability to pay, an appropriate medical screening exam (MSE) to determine whether the individual has an emergency medical condition (EMC).[22] If the hospital finds that there is no EMC, then its EMTALA obligations end. But if there is an EMC, then the hospital must treat and stabilize the patient within its capability or transfer the individual to a hospital that has the capability. A basic principle behind EMTALA is to ensure access to emergency services, and it should not be a barrier to providing care during a disaster.

There are several options for managing extraordinary emergency department surges under the existing EMTALA requirements where no waiver would be required. For instance:

- Hospitals may set up alternative screening sites on campus.
- Hospitals may set up screening at off-campus, hospital-controlled sites.
- Communities may set up screening clinics at sites not under control of a hospital.

If these options prove unmanageable, however, then the hospitals will be relegated to actions available under a § 1135 waiver, which may include, among other things, an EMTALA waiver of certain sanctions for redirecting or relocating individuals who come to a hospital's emergency departments to an alternative off-campus site for an MSE, in accordance with a state emergency or pandemic preparedness plan.

If a § 1135 waiver is invoked by the HHS secretary, it must include a waiver of EMTALA requirements, and hospitals must request to be covered under the EMTALA waiver. The duration of an EMTALA waiver in the case of a public health emergency involving pandemic infectious disease should last until the termination of the public health emergency declaration. Otherwise, the duration will be 72 hours after the hospital has activated its disaster plan for the emergency at hand.

Conclusion

Global health pandemics such as H1N1 require both the federal and state governments to work in concert in order to provide adequate and timely care. This article only touches upon threshold concerns for such emergencies. There are a whole host of other legal and practical issues just as relevant, including immunity and liability concerns, the necessity of mandatory vaccinations, altered standards of care and scope of practice, availability of health care practitioners and various employment law concerns. Indeed, at the outset of the 2010 Legislative session, the Georgia General Assembly already seems to be attempting to tackle the availability of volunteer health care practitioners during an emergency in introducing Senate Bill 315.

Although the fall 2009 outbreak of H1N1 provided many with a real-life test of readiness for a pandemic crisis, several experts believe that there will be another wave in 2010 and that we will be faced with the same issues and concerns swirling about as with the earlier outbreak. Thus, it is imperative to continue the work that was started last year to ensure that systems are in place to respond to a pandemic influenza and public health emergency. GBJ

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change of ownership and civil monetary penalty defense.

Endnotes

1. In response to Dr. Medows's request, GHA formed a panel of attorneys as its Legal Rapid Response team to review the legal standards and prepare the Draft Executive Order, which was submitted to the governor's office in September 2009. Members of the panel included the co-authors, DCH attorney Sharon Dougherty, and attorneys Michelle Williams of Alston & Bird LLP and David Winkle of Epstein Becker & Green, P.C.
2. O.C.G.A. §§ 38-3-1 to 38-3-72 (1995 & Supp. 2009).
3. *Id.* § 38-3-3(4.1) (Supp. 2009). Note that on June 11, 2009, the World Health Organization raised the global pandemic alert level to a Phase 6, its highest designation, because of the rapid spread of the H1N1 virus.
4. *Id.* § 38-3-3(6).
5. *Id.* § 38-3-3(7).
6. *Id.* § 38-3-51.
7. O.C.G.A. § 38-3-51 outlines the governor's emergency powers under the Act.
8. *See id.* § 38-3-51(i)(2). An interesting point about this statutory provision is that an order imposing a quarantine or vaccination may be appealed, and the burden of proof to demonstrate that there is a substantial risk of exposing others to imminent danger is on the state; clear and convincing evidence must be proven for vaccination, and a preponderance of the evidence must be proven for quarantine.
9. *Id.* § 38-3-51(a).
10. *Id.* § 38-3-51(c) & (d).
11. Note also that the Georgia Certificate of Need laws have a specific provision that contemplates relaxation of such rules during a state of emergency, stating:

    > Notwithstanding other provisions of this article, when the Governor has declared a state of emergency in a region of the state, existing health care facilities in the affected region may seek emergency approval from the department to make expenditures in excess of the capital expenditure threshold or to offer services that may otherwise require a certificate of need. The department shall give special expedited consideration to such requests and may authorize such requests for good cause. Once the state of emergency has been lifted, any services offered by an affected health care facility under this subsection shall cease to be offered until such time as the health care facility that received the emergency authorization has requested and received a certificate of need. For purposes of this subsection, "good cause" means that authorization of the request shall directly resolve a situation posing an immediate threat to the health and safety of the public. The department shall establish, by rule, procedures whereby requirements for the process of review and issuance of a certificate of need may be modified and expedited as a result of emergency situations.

    Id. § 31-6-43(k) (2009).
12. *Id.* § 38-3-51(i)(1) (Supp. 2009).
13. For H1N1, in anticipation of concerns about this virus and in response to questions, the federal government has implemented a few helpful websites, http://www.cms.hhs.gov/H1N1/ and http://www.flu.gov, to offer informational products to the general public. Some additional resources that are helpful in navigating this matter in general are: 1) American Health Lawyers Publication: Community Pan-Flu Preparedness: A Checklist of Key Legal Issues for Healthcare Providers; 2) Indiana State Department of Health: Draft Altered Standards of Care Guidance with an Emphasis on Pandemic Influenza; 3) Utah Department of Health: Utah Pandemic Influenza Hospital and ICU Triage; and 4) State of Colorado Department of Public Health and Environment: September 2009 Guidance for Alterations in the Healthcare System During a Moderate to Severe Influenza Pandemic.
14. *See* 50 U.S.C. §§ 1601-1651 (2003).
15. *See* Office of the Press Secretary, The White House, *Declaration of a National Emergency With Respect to the 2009 H1N1 Influenza Pandemic*, (Oct. 24, 2009), http://www.whitehouse.gov/the-press-office/declaration-a-national-emergency-with-respect-2009-h1n1-influenza-pandemic-0; *see also* U.S. Dept of HHS, *President Obama Signs Emergency Declaration for H1N1 Flu* (Oct. 24, 2009), http://www.flu.gov/professional/federal/h1n1emergency10242009.html.
16. *See* 42 U.S.C. § 1320b-5 (Supp. 2009).
17. *See id.* § 247d (2003).
18. *See id.* §§ 5121-5207 (2003 & Supp. 2009).
19. *See id.* § 1320b-5(a) & (g)(1) (Supp. 2009); *see also* Emily McCormick, *Frequently Asked Questions about Federal Public Health Emergency Law* (Sept. 2009), http://www2a.cdc.gov/PHLP/docs/FAQs%20Fed%20PHE%20laws%20101409.pdf; Craig A. Conway, *H1N1 Now a "National Emergency": Examining Portions of Federal Public Health Emergency Law*, Health Law & Policy Institute, University of Houston Law Center, Health Law Perspectives (Nov. 2009), http://law.uh.edu/healthlaw/perspectives/2009/(CC)%20PHSA.pdf.
20. *See* U.S. Dep't of HHS, Waiver or Modification of Requirements Under § 1135 of the Social Security Act (Oct. 27, 2009), http://www.flu.gov/professional/federal/h1n1_1135waiver_10272009.html.
21. CMS Letter to State Survey Agency Directors, Emergency Medical Treatment and Labor Act (EMTALA) Requirements and Options for Hospitals in a Disaster, Ref: S&C-09-52 (Aug. 14, 2009); CMS Letter to State Survey Agency Directors, Emergency Medical Treatment and Labor Act (EMTALA) Regulation Changes and H1N1 Pandemic Flu and EMTALA Waivers, Ref: S&C-10-05-EMTALA (Nov. 6, 2009); *see also* CMS Letter to State Survey Agency Directors, 2009-H1N1 Influenza Presidential Emergency Declaration and U.S. Department of Health and Human Services § 1135 Waiver Authorization, Ref: S&C-10-06-ALL (Nov. 6, 2009).
22. *See* 42 U.S.C. § 1395dd (Supp. 2009); 42 C.F.R. § 489.24 (2009); CMS State Operations Manual (Pub. 100-07), Appendix V: Interpretive Guidelines and Responsibilities of Medicare Participating Hospitals in Emergency Cases (May 29, 2009).

Duty and Friendship:

Judge John Sammons Bell and Judge Anthony A. Alaimo

by David E. Hudson

John Sammons Bell was a native Georgian; his father was a baptist pastor. He attended Richmond Academy in Augusta and Mercer University. His family had been in the state for several generations and one of his ancestors was a Confederate veteran.

Anthony A. Alaimo was born in Sicily and immigrated with his family to Jamestown, N.Y. He was raised and educated in New York and Ohio.

In World War II, Maj. Bell led a battalion of soldiers and was injured at the Battle of New Georgia in the Solomon Islands in the Pacific. American air power was diverted to meet a threat from an approaching Japanese fleet. With no air cover of their own, the American ground forces were at the mercy of Japanese aircraft. Bell remembered the planes, taking cover and seeing the bomb tear his radioman apart. The same bomb gravely injured Bell. The rest of his life his handshake showed the missing fingers, and scars marked his arm and side.

In 1943, Lt. Alaimo piloted his B-26 bomber on a raid against German-occupied Holland. Every plane in the attack was shot down. Alaimo was shot through the shoulder and leg but was able to ditch his burning aircraft in the North Sea. He was the only one of the crew who survived. Alaimo was captured by the Germans, treated in a hospital and then made a prisoner of war. At the Stalg Luft III POW Camp, he helped the tunnelers who broke out in the Great Escape. But before the breakout occurred, he was transferred with other Americans to an adjacent compound in the camp. He tried unsuccessfully to escape two more times before he finally succeeded. He made his way from Germany to Northern Italy, then to Switzerland, and then home to America.

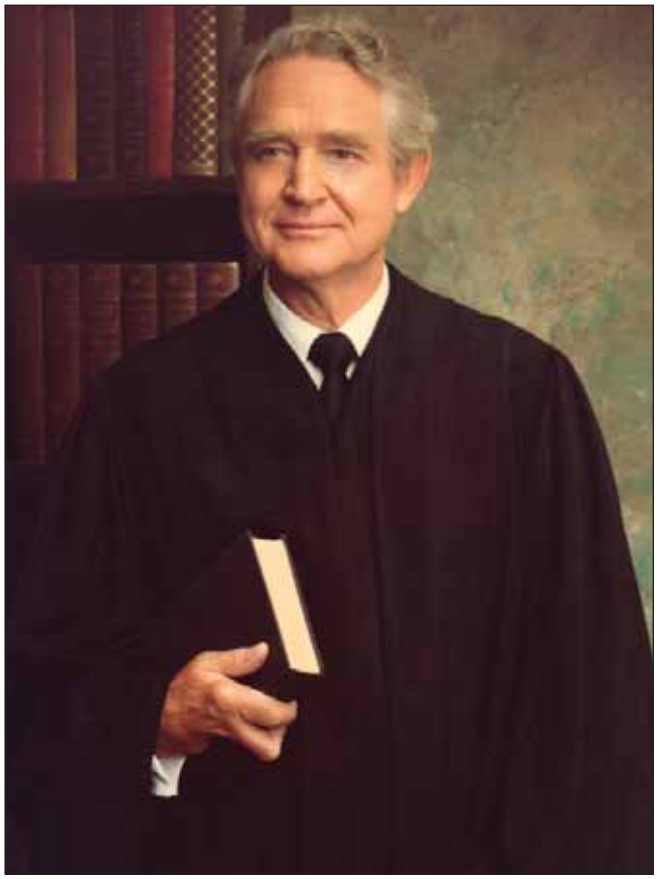

Photo from the Court of Appeals of Georgia

Hon. John Sammons Bell

Both Bell and Alaimo entered Emory University School of Law after the war in 1945. They were Purple Heart heroes, one the courtly native Georgian, and the other a skinny, black-haired Italian-American yankee.

Bell went on to become twice-chairman of the Democratic Party of Georgia, and was appointed to the

Court of Appeals of Georgia where he served for two decades, serving as chief judge for nine of those years.

Alaimo practiced law in Atlanta and eventually made his way to Brunswick where he established a successful plaintiff's practice and became involved in community affairs. He led the rebirth of the Republican party in southeast Georgia and was the first republican elected to county office in Glynn County since Reconstruction. He later became legal counsel to the Georgia Republican Party.

Some 20 years after Bell and Alaimo graduated from law school, President Nixon nominated Alaimo to be a U.S. District Judge for the Southern District of Georgia. A handful of lawyers in the region opposed his nomination and gave unsatisfactory reports about him to the American Bar Association (ABA) evaluation team. The confirmation process came to a halt and Alaimo waited in uncertainty.

When Bell, now Hon. John Sammons Bell of the Court of Appeals of Georgia, and Hon. Griffin B. Bell (a Kennedy democrat then serving as a judge on the 5th U.S. Circuit Court of Appeals) heard of this, they knew a great injustice was about to take place. Together they contacted E. Smythe Gambrell of the Gambrell Russell firm in Atlanta who was a former president of the ABA. They persuaded Gambrell to intercede with the ABA and seek a re-evaluation of Alaimo.

The ABA agreed and appointed prominent lawyer Albert Jenner of the Chicago firm of Jenner & Block to undertake the new evaluation. Jenner came to Georgia during 1971 and investigated Alaimo both with lawyers in Atlanta and in southeast Georgia. Jenner and the ABA found Alaimo to be exceptionally well-qualified. As a result, the president's nomination was confirmed by the U.S. Senate and Alaimo became District Judge Anthony Alaimo in 1972. At his investiture, the person he asked to administer the oath was not a federal office holder, but his friend from law school, Hon. John Sammons Bell.

Thirty-five years later, Bell was living in a retirement home in Amelia Island, Fla. Alaimo and other judges and lawyers from the Southern District of Georgia were at a meeting at Amelia Island and invited Bell to the Friday night dinner. Bell, now in his 90s, was driven to the dinner by his daughter. He struggled from the car and started making his way across the parking lot using a walker. Alaimo, now 87 and recovering from hip surgery, saw him coming and shuffled as fast as he could to meet his friend. There they embraced and were heard to say to each other "I love you, Tony," and "I love you, John."

Photo provided by Bobby Haven of the *Brunswick News*

Hon. Anthony A. Alaimo

Bell died in 2006 and Alaimo in December 2009. These were noble and heroic men. They devoted their lives to their country and to the service of justice. Though they came from different backgrounds and held different political allegiances, being loyal to a friend and doing what was right always came first. GBJ

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19th Annual Georgia Bar Media and Judiciary Conference

by Stephanie J. Wilson

On Feb. 27, lawyers, judges, decision makers and media professionals gathered at the State Bar of Georgia for the 19th annual Georgia Bar Media and Judiciary Conference. Each year, this ICLE event focuses on emerging First Amendment issues and their influence on the law. Everyone from the legal and media fields is invited for a full day of panel discussions dealing with the latest topics impacting the First Amendment.

The day began with the first session, "Managing Cases for the Public: New and Old Pressures and Practices Affecting Access to the Courts," led by moderator Richard Belcher, WSB-TV. Panelists included the Hon. J. Owen Forrester, judge, U.S. District Court, Northern District of Georgia; the Hon. David E. Nahmias, justice, Supreme Court of Georgia; James N. Hatten, clerk, U.S. District Court, Northern District of Georgia; and Robin McDonald, *Fulton County Daily Report*.

A few federal judges around the country, notably Judge Forrester, are pushing back against the proliferation of sealed court filings. Meanwhile, national security issues are testing the openness of criminal proceedings. This panel discussed the state of sealed court filings in Georgia. Hatten noted that the increase in the number of protective orders requested coincided with the ability to e-file. McDonald shared

Photos by Stephanie J. Wilson

CNN's Richard Griffiths served as interlocutor for the panel "Terror and the Courts: A Case Study."

(Left to right) Georgia Speaker of the House David Ralston and Judge Melvin Westmoreland during the "Georgia's Judicial System and the Recession" panel.

her concern that "the burden is now being placed in the hands of the media to litigate to get records unsealed." Most disconcerting is that no national standard exists for destroying electronic records.

The second session, "Where News Comes From," moderated by Hyde Post, vice president–media strategy, News Distribution Network, took a look at the changing face of journalism and the implications for the courts. The panelists included Don Plummer, public information officer, Fulton County Superior Court; Jim Walls, editor, Atlanta Unfiltered; Lila King, senior producer, CNN iReport; and Maryann Mrowca, chief of bureau, Alabama-Georgia-North Carolina-South Carolina, The Associated Press.

Disrupted by the Internet and hobbled by the recession, the economics of news gathering have changed almost as dramatically as how news reaches consumers. Since 2001, about 150,000 or one-third of all jobs in newspaper publishing have disappeared. More alarmingly, since December 2008, 14 newspapers have filed for bankruptcy protection.

After a short break, interlocutor Richard Griffiths, editorial director, CNN, launched the Fred-friendly session "Terror and the Courts: A Case Study." Griffiths spun a fictitious tale involving explosives hidden in beer kegs at the Georgia capitol and conspirators who fled the country but were captured. After being tortured and offering confessions on video, the conspirators waved extradition and were flown to the United States on an unmarked FBI plane.

As the pieces of the story were slowly disclosed by Griffiths, each panelist offered their reaction to details in their area of expertise. The Hon. William S. Duffey, judge, U.S. District Court, Northern District of Georgia; Mike Brooks, HLN and "In Session" Law Enforcement Analyst, CNN; Jack Martin, Martin Bros., P.C.; Robert McBurney, assistant U.S. attorney, Northern District of Georgia; and Kevin Sack, national reporter, *New York Times,* served as panelists.

Vinnie Politan and Ryan Smith, hosts, and Beth Karas and Jean Casarez, correspondents for "In Session," CNN, appeared as speakers for the luncheon program, "Order in the Court: The View from Behind the Lens." "In Session" (formerly Court TV) has given "gavel to gavel" coverage of more than 1,000 cases. By placing cameras in unobtrusive locations within the courtroom and having seasoned equipment operators, their main goal is to show the public at large what happens during a trial.

Although some judges feel that cameras in the courtroom create chaos, veteran courtroom journalist and former prosecutor Politan argued that prohibiting cameras in the courtroom "does not kill the story or stop the chaos." Chaos only increases when the public, who cannot view the case on TV, congregates outside the courthouse. He cited examples such as the trials of Michael Jackson, Scott Peterson and Martha Stewart. Politan was quick to point out that of all the cases "In Session" has covered, no verdict has ever been overturned because of cameras in the courtroom.

The next panel presentation, moderated by Nwandi Lawson, co-anchor of Georgia Public Broadcasting's "Lawmakers," was titled "Georgia's Judicial System and the Recession: Challenges and Issues." Serving on this distin-

Chief Justice Carol Hunstein served as a panelist for "Georgia's Judicial System and the Recession."

(Left to right) Gubernatorial candidates Thurbert Baker and Nathan Deal answered questions during "An Open Forum with the Next Governor of Georgia."

guished panel were the Hon. Carol W. Hunstein, chief justice, Supreme Court of Georgia; the Hon. Melvin K. Westmoreland, president, Council of Superior Court Judges; Rep. David E. Ralston (R-Blue Ridge), speaker, Georgia House of Representatives; Sen. John J. Wiles (R-Marietta), Georgia State Senate; and Bryan M. Cavan, president, State Bar of Georgia.

The effects of the down economy can be felt all over the state, but the situation in Georgia's courts grows more dire with each passing day. Some of our courts, such as those in Hall County and the Court of Appeals of Georgia, have begun observing one furlough day each month. The judiciary operates on less than 1 percent of the state's total budget but has been called upon by the governor and Legislature to make multiple cuts. When describing the courts' efforts to make the mandated cuts to an already barebones budget, Chief Justice Hunstein stated that, "We are no longer looking for nickels in the couch cushions; we are looking for pennies."

Next on the agenda was a panel discussion with the four candidates for Georgia attorney general: Ken Hodges, Baudino Law Group; Sam Olens, Ezor & Olens, P.C.; Rob Teilhet, Rogers Strimban & Teilhet; and Max Wood, U.S. Attorney's Office, Middle District of Georgia. The role of attorney general has always been pivotal in the enforcement of Georgia's open government laws. What will the future hold under Thurbert Baker's successor? Hollie Manheimer, executive director, Georgia First Amendment Foundation, and Michael Smith, chief attorney, Clayton County, shared moderating duties.

The final panel of the day was "An Open Forum with the Next Governor of Georgia," moderated by Ed Bean, editor-in-chief, *Fulton County Daily Report.* Gubernatorial candidates Thurbert Baker, Roy Barnes, Nathan Deal, John Oxendine, DuBose Porter and David Poythress were on hand to field questions both from Bean and the audience. The candidates shared their wisdom, humor, thoughts and platforms on a variety of topics including education, transportation, water, unemployment, the budget, open records request compliance, economic development and tort reform, among others. This panel proved an exciting and informative way to wrap up a fantastic day.

The Georgia First Amendment Foundation typically holds the Charles L. Weltner Freedom of Information Banquet in conjunction with the conference. The Weltner award honors the Georgian who has done the most for freedom of information. It is named for the former chief justice of the Supreme Court of Georgia who championed freedom of information and ethics in state government. This year the banquet and award presentation will be held at a later date.

For more information about past, present or future Bar Media and Judiciary Conferences, please visit www.gfaf.org/BarMediaConference.htm. GBJ

Stephanie J. Wilson is the administrative assistant in the Bar's communications department and a contributing writer for the *Georgia Bar Journal*.

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Kudos

> **Cantor Colburn LLP** was recognized in *IP Law & Business's* annual survey of **"Who Protects Innovation in America?"** The December 2009/January 2010 issue identified law firms that protect intellectual property for the country's top companies. *IP Law & Business* ranked Cantor Colburn LLP as tied for second out of 30 law firms with most mentions in "Patent Prosecution" and tied for fourth out of 36 firms in "Most Mentions Overall" on its list, "Where the Top Companies Turn."

The firm was ranked **13th** in ***Intellectual Property Today's*** annual list of **"Top Patent Firms."** This is the third consecutive year that Cantor Colburn was ranked among the country's top 20 firms for patents issued.

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Kadaba


Perez


Holmes


Greene


Richardson

Kilpatrick Stockton announced that **Wab Kadaba** was named a **2009 Leading Law Firm Rainmaker** by *Diversity & The Bar*. Kadaba was one of 14 attorneys across the nation to receive this prestigious honor. The rainmakers were chosen from a pool of nominees suggested by leading firms from across the country. Each of the selected attorneys maintains a regular book of business that reaches or exceeds $2 million a year.

Associate **Adria Perez** was elected **president** of the board of directors for **ToolBank USA**. ToolBank is leading the national movement to equip nonprofits and their volunteers with the tools to more effectively create change.

Partner **Brenda Holmes** was elected to serve as **president** of the board of directors for **Women in Technology (WIT)**. Partner **Jamie L. Greene** serves as past president. WIT's mission is to develop and promote women for success in technology in Georgia.

Partner **Susan Richardson** was selected to serve on the board of directors of the **Institute for Georgia Environmental Leadership (IGEL)**. IGEL is a leadership program dedicated to building and sustaining a diverse network of environmentally educated leaders who will help resolve Georgia's environmental challenges.

> **Alston & Bird LLP** announced that it was named as one of ***Fortune's*** **"100 Best Companies to Work For"** in 2010. This year marks the 11th consecutive year Alston & Bird has made the list—a legal industry first. Alston & Bird was named to the *Fortune* list based on its commitment to providing the highest quality client service, serving the communities in which it operates across the country and promoting a work environment that reflects the very culture that has been inculcated throughout the firm for more than a century.

>

Burr & Forman LLP announced that Atlanta partner **Chip Collins** was sworn in as a **Sandy Springs City Council member** in January 2010. Elected in November 2009, Collins represents District 3 on the council for a four-year term. Sandy Springs is the third largest city in metro Atlanta and home to multiple *Fortune* 1000 companies, and it was recently ranked by *Forbes* as one of America's "Top 25 Towns to Live Well."

>


Klein


Sherman

Linda A. Klein, managing shareholder of **Baker, Donelson, Bearman, Caldwell & Berkowitz, PC's**, Atlanta office, was nominated as the **2010 chair** of the **American Bar Association (ABA)'s House of Delegates** during the ABA's 2010 Midyear Meeting in Orlando, Fla. She will assume her post for a two-year term at the conclusion of the 2010 ABA Annual Meeting in San Francisco in August. The chair of the ABA House is the second-highest office in the association. The ABA's House of Delegates is the policy-making body of the association and is comprised of 555 members. Klein also received the **Outstanding State Chair Award** from the fellows of the American Bar Foundation at its 54th annual Awards Reception and Banquet in February.

Scott N. Sherman, of counsel in the firm's Atlanta office, was appointed to the **board of directors** of the **Anti-Defamation League (ADL)'s Southeastern Region**. He previously served on the Legislative Affairs Committee. The ADL fights anti-Semitism and bigotry though information, education, legislation and advocacy.

Baker Donelson was ranked 77th on *Fortune's* 13th annual **"100 Best Companies to Work For"** list.

> **Smith, Currie & Hancock LLP** announced that partner **Charles Surasky** received the **2009 Associate of the Year Award** from the **National Utility Contractors Association** in January at the Utility Construction EXPO '10. The award is pre-

sented annually to an associate member who has made a significant contribution on the national level to the industry and the association.

Pepperdine University School of Law **Prof. Tom Stipanowich** received an award from the **International Institute for Conflict Prevention & Resolution** in January. His article, "Arbitration: The 'New Litigation,'" and "Arbitration and Choice: Taking Charge of the 'New Litigation,'" were jointly named best professional article for 2009. This marks the second time Stipanowich has received the award, which is among the most prestigious writing awards in the field of dispute resolution.

Fisher & Phillips LLP announced that **Sarah Hawk**, chair of the firm's global immigration practice group, was listed in ***Who's Who Legal 2010***, which recognizes attorneys internationally for their law practices. Hawk was selected as being among 410 of the world's leading corporate immigration lawyers. *Who's Who Legal* identifies the foremost legal practitioners in 31 areas of business law. The publication features more than 10,000 of the world's leading private practice lawyers in more than 100 countries.

Matthew J. Calvert, a partner in the litigation and intellectual property practice in the Atlanta office of **Hunton & Williams LLP**, has been appointed **board president** of **Atlanta Legal Aid Society, Inc**. Founded in 1924, Atlanta Legal Aid Society, Inc., is the primary provider of legal services to low-income people in Fulton, DeKalb, Gwinnett, Clayton and Cobb counties.

Coleman Talley LLP announced the appointment of partner **Wendy S. Butler** to the **State Road & Tollway Authority** (SRTA) by the Office of Georgia Speaker of the House of Representatives. SRTA is best known as the organization that operates Georgia's toll roads.

G. Lee Garrett, a litigation partner in the Atlanta office of **Jones Day**, was named a **"Client Service All Star"** by the BTI Consulting Group. Only 165 lawyers nationwide were given this recognition in the 2010 "BTI Client Service All-Star Team for Law Firms" report.

Miles Patrick Hurley, founder of **Hurley Elder Care Law** in Atlanta, received his **elder law attorney certification** from the National Elder Law Foundation. Hurley is one of only seven certified elder law attorneys in Georgia and one of fewer than 400 nationwide.

Cooper

Bramlett

The Atlanta Bar Association presented its annual **Leadership Awards** to the **Hon. Clarence Cooper**, U.S. District Court, and State Bar of Georgia Past President **Jeffrey O. Bramlett**, Bondurant, Mixson & Elmore, LLP. The awards are presented to Atlanta Bar Association members who inspire by their example, challenge by their deeds and remind others of their debt to the profession and their community.

On the Move

In Atlanta

Bell

Downs

Edwards

Martin

Warnock

Ford & Harrison LLP announced that **Lilia R. Bell** and **Tiffany D. Downs** were named **partner**. Bell focuses her practice on airline labor and employment issues. Downs focuses her practice on employee benefits.

Heath H. Edwards, Matthew Blake Martin and **Henry F. Warnock** joined the firm as **associates**. Edwards' practice centers on employment litigation. Martin concentrates his practice on representing management in labor and employment matters. Warnock concentrates his practice on representing companies in all areas of employment law. The office is located at 271 17th St. NW, Suite 1900, Atlanta, GA 30363; 404-888-3800; Fax 404-888-3863; www.fordharrison.com.

Miller & Martin PLLC announced that **Christopher E. Parker** joined the firm as a **member**. Parker's practice focuses on the representation and counseling of companies in matters pertaining to the workplace and the protection of their intellectual property and trade secrets.

Associates **Michael Kohler** and **Timothy M. Silvis** were advanced to **member** status. Kohler practices general litigation, focusing in the areas of commercial, consumer and employment litigation, product liability, insurance coverage and professional malpractice. Silvis is a member of the firm's corporate department. The firm is located at 1170 Peachtree St. NE, Suite 800, Atlanta, GA 30309; 404-962-6100; Fax 404-962-6300; www.millermartin.com.


Causey


Dosh


Oliver


Lowther

Morris, Manning & Martin, LLP, welcomed four attorneys to its law practice. **Of counsel Linnie W. Causey** joined the firm as a member of the real estate development, residential real estate and energy and infrastructure finance practices. **Associate Kristi A. Dosh** joined the firm's commercial lending and real estate development practices. **Of counsel Shannan Freeman Oliver** and **associate Patrick L. Lowther** joined the firm's litigation practice. The office is located at 1600 Atlanta Financial Center, 3343 Peachtree Road NE, Atlanta, GA 30326; 404-233-7000; Fax 404-365-9532; www.mmmlaw.com.


DuBose


Atkins

David & Rosetti, LLP, elected **Chuck E. DuBose** as a **partner** and welcomed **Alissa C. Atkins** as an **associate**. The firm represents employers, insurers and third party administrators in workers' compensation matters throughout Georgia. The firm is located at 229 Peachtree St., Suite 950, Atlanta, GA 30303; 404-446-4488; Fax 404-446-4499; www.davidandrosetti.com.

Bondurant, Mixson & Elmore, LLP, elected **Nicole G. Iannarone** and **Lisa R. Strauss** as **partners** with the firm. In addition to general business litigation, Iannarone's practice includes a focus on professional liability concerning attorneys and accountants. Strauss' practice focuses on representing corporations and individuals in business disputes. The firm is located at 1201 W. Peachtree St. NW, Suite 3900, Atlanta, GA 30309; 404-881-4100; Fax 404-881-4111; www.bmelaw.com.

McKenna Long & Aldridge LLP announced that **Sam Choy** joined the firm as a **partner**. Choy focuses his practice on counseling employers on virtually every aspect of retirement and welfare plan design, implementation, administration and termination, as well as executive compensation and equity incentives. The firm is located at 303 Peachtree St. NE, Suite 5300, Atlanta, GA 30308; 404-527-4000; Fax 404-527-4198; www.mckennalong.com.

Duane Morris LLP announced that **William Barwick** joined the firm as a **partner** in its trial practice group. Barwick joins the firm from Sutherland. The firm is located at 1180 W. Peachtree St. NW, Suite 700, Atlanta, GA; 404-253-6900; Fax 404-253-6901; www.duanemorris.com.

Ragsdale, Beals, Seigler, Patterson & Gray, LLP, announced that **Robert A. Bartlett** joined the firm as **partner**. Previously with McKenna, Long & Aldridge, LLP, Bartlett specializes in complex corporate reorganizations and bankruptcies, commercial litigation and related non-litigation matters. The office is located at 2400 International Tower, 229 Peachtree St. NE, Atlanta, GA 30303; 404-588-0500; Fax 404-523-6714; www.rbspg.com.

Autry, Horton & Cole, LLP, announced that **Cada T. Kilgore** joined the firm as **of counsel**. Kilgore, previously a partner with Paul Hastings and Sutherland, practices in the areas of energy law, business and commercial law and electric cooperative financing and organization. The firm is located at 3330 Cumberland Blvd., Suite 925, Atlanta, GA 30339; 770-270-6974; Fax 770-270-6970; www.ahclaw.com.

Coleman Talley LLP announced **Keith A. Jernigan** as **partner** in the firm. Jernigan practices in the areas of commercial lending, commercial real estate development, corporate law and master planned community development. The firm is located at 7000 Central Parkway NE, Suite 1150, Atlanta, GA 30328; 770-698-9556; Fax 770-698-9729; www.colemantalley.com.

Darren R. Hojnacki and **K. Julie Hojnacki** announced the opening of **Hojnacki & Hojnacki, LLC**. The firm's practice focuses on representing clients in consumer bankruptcy, bankruptcy alternatives and misde-

meanors. The firm is located at 201 17th St., Suite 300, Atlanta, GA 30363; 678-538-6447; Fax 678-538-6501; www.hojnackilaw.com.

Nall & Miller, LLP announced that **Leena K. Sidhu** joined the firm as an **associate**. Sidhu's practice concentrates in the areas of health care law and product liability. The firm is located at 235 Peachtree St. NE, Suite 1500, Atlanta, GA 30303; 404-522-2200; Fax 404-522-2208; www.nallmiller.com.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, announced that **Rodney G. Moore** joined the firm as a **shareholder** and a member of the business litigation department. Moore, whose practice focuses on labor and employment and business litigation, was the president of the National Bar Association from 2008 to 2009. The office is located at 3414 Peachtree Road NE, Suite 1600, Atlanta, GA 30326; 404-577-6000; 404-221-6501; www.bakerdonelson.com.

Baldwin

Jones

Burr & Forman LLP announced **Brad A. Baldwin** and **Kwende B. Jones** as **partners** in the firm. Baldwin is a member of the creditors' rights and bankruptcy practice groups. Jones is a member of the financial services and commercial litigation practice groups. The office is located at 171 17th St. NW, Suite 1100, Atlanta, GA 30363; 404-815-3000; Fax 404-817-3244; www.burr.com.

The Cochran Firm announced that **Hezekiah Sistrunk Jr.** was made a **shareholder** and **equity partner**. His practice focuses on litigation of complex matters, contracts, physician and hospital liability, products liability, commercial and corporate disputes and catastrophic personal injury. The firm is located at 27 Peachtree St., Atlanta, GA 30303; 404-222-9922; Fax 404-222-0170; www.cochranfirm.com.

In Augusta

Raymond G. Chadwick announced the opening of **Chadwick Mediation Services, LLC**. Chadwick is a member of the executive committee of the Dispute Resolution Section of the State Bar of Georgia and registered with the Georgia Office of Dispute Resolution as a mediator and arbitrator. He provides mediation and arbitration services statewide in disputes of all types. The office is located at 699 Broad St., Suite 1400, Augusta, GA 30903; 706-823-4250; Fax 706-828-4459; www.chadwickmediation.com.

In Dunwoody

Whalen Kuller, former associate in Jones Day's Atlanta office, announced the opening of **Kuller Law Group, LLC**, a transactional law firm focusing on assisting small- and medium-sized businesses located in the greater Atlanta metropolitan area. The firm is located at 5588 Chamblee Dunwoody Road #165, Dunwoody, GA 30338; 770-837-2619; www.kuller-law.com.

In Macon

Green

Kennedy

Anderson

Horkan

McMullen

Nichols

Senn

James, Bates, Pope & Spivey, LLP, announced **Thomas M. Green** and **John Flanders Kennedy** as **partners** and **Scott Eric Anderson, William P. Horkan, Ian McMullen, John Brown Nichols** and **Marty K. Senn** as **associates**. Green practices in the areas of real estate, eminent domain, foreclosures of real and personal property and title litigation. Kennedy concentrates his practice in the areas of receivership law, business and commercial law, tort litigation, general civil litigation and trial practice, business advice and railroad defense. Anderson practices in the areas of appellate, eminent domain and commercial, business and general litigation. Horkan practices in the areas of insurance, business and commercial litigation, employment, construction and corporate. McMullen practices in the areas of real estate, banking, business and public and affordable housing. Nichols practices in the area of litigation and insurance. Senn practices in the areas of insurance, business and commercial litigation, employment, construction and corporate. The firm is located at 231 Riverside Drive, Macon, GA 31201; 478-742-4280; Fax 478-742-8720; jbpslaw.com.


Clark


Smith

John Christopher Clark and **Michael Morgan Smith** established the **Clark & Smith Law Firm LLC**. Their practice focuses on personal injury. The office is located at 3402 Vineville Ave., Suite A, Macon, GA 31204; 478-254-5040; Fax 478-254-5041; www.clarksmithlaw.com.

L. Robert Lovett and **Matthew M. Myers**, formerly of Lovett, Cowart & Ayerbe, LLC, announced the formation of **Lovett & Myers, LLC**. The firm focuses its practice of general litigation in the areas of administrative, business and commercial, environmental, health care, land use and zoning, personal injury and wills, trusts and estates. The firm is located at 530 Forest Hill Road, Suite A, Macon, GA 31210; 478-476-4500; Fax 478-476-9090; www.lovettandmyers.com.

In Marietta

The family law firm of **Stearns-Montgomery & Associates** announced that **Ryan Proctor** was named **partner**, and that the firm name changed to **Stearns-Montgomery & Proctor**. Proctor practices in the areas of family law and criminal law. The office is located at 291 Alexander St., Marietta, GA 30060; 678-905-8492; Fax 770-426-1809; www.stearns-law.com.

In Savannah

Peter D. Muller joined **Goodman McGuffey Lindsey & Johnson LLP** as the **managing partner** of the firm's new Savannah office. The firm, which specializes in defense litigation, is based in Atlanta and also has an office in Orlando, Fla. The new office is located at 530 Stephenson Ave., Suite 300, Savannah, GA 31405; 912-355-6433; Fax 912-355-6434; www.gmlj.com.

In Miami Lakes, Fla.

Matthew C. Kotzen announced the relocation of **Marinello & Kotzen, PA**. The firm represents clients throughout Florida in construction and general liability matters. The firm's new office is located at 14361 Commerce Way, Suite 304, Miami Lakes, FL 33016; 305-821-5554; Fax 305-821-5054; www.makslaw.com.

In Spartanburg, S.C.

Ford & Harrison LLP announced that **Matthew J. Gilley** was named **partner**. Gilley focuses his practice on discrimination and harassment litigation, litigation and advice related to restrictive covenants and protection of proprietary information and on wage and hour matters. The office is located at 100 Dunbar St., Suite 300, Spartanburg, SC 29306; 864-699-1100; Fax 864-699-1101; www.fordharrison.com.

Potential Client on Line One

by Paula Frederick

"There's a woman on line one who wants to talk to you about a divorce," your assistant tells you. "I've got all her intake information."

"How can I help you?" you ask as you answer the telephone.

"I need your help!" the caller exclaims. "My husband is cheating and I've had enough! I've had a private investigator tailing him for a month. I've started moving money out of our joint account so he can't cut me off when he finds out I'm on to him. Sammy has no idea what he's in for."

"Sammy's your husband, I take it?" you ask with a sinking feeling. "What's your name?"

"Linda Karpman. It *was* Linda Brentwood, but I refuse to use that weasel's name any more! My husband is…"

"Sammy Brentwood," you finish the sentence for her. "Ma'am, I can't help *you*—I represent *him*."

You leave Ms. Karpman sputtering as you hang up the telephone. "How did that happen?" you ask your assistant. "I thought you said you'd done a conflicts check!"

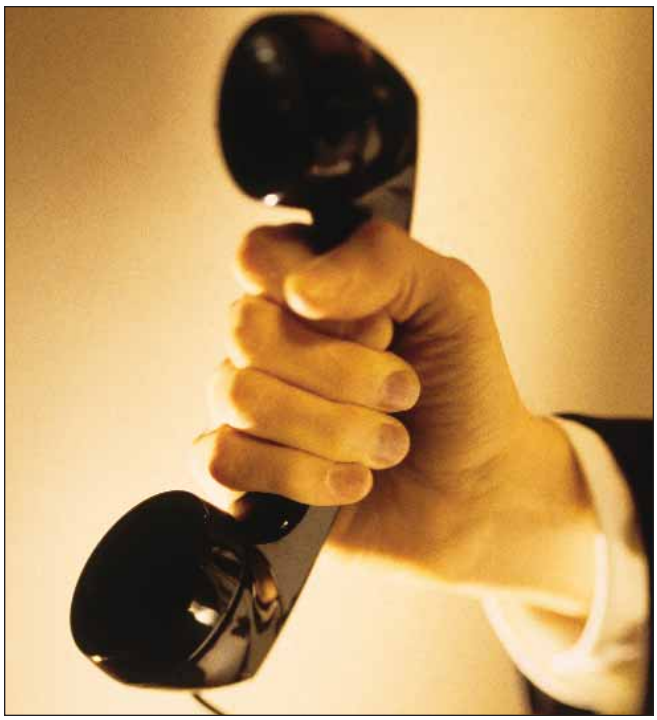
"I goofed," your assistant admits, checking her computer entries. "She told me her name was Karpman, and her husband's name was Samuel. I put Samuel Karpman into the system as the potential adverse party, so Sammy Brentwood didn't come up."

"Now what?" you ask. "I really want to keep Sammy as a client, but Linda will probably have a fit! I guess I'll call the Ethics Helpline."

A quick call to the helpline leaves you shaking your head in disgust. "Just as I suspected—I have to withdraw from representing Sammy!" you exclaim. "It was only a two minute phone call, but Linda gave me confidential information that I'm not allowed to reveal. Now I can't represent Sammy because his interests are adverse to hers in the same case."

"Can't you continue to represent Sammy if Linda says it's OK?" your assistant asks hopefully. "Maybe she'll waive the conflict."

"The Bar says that won't work in this case," you explain. "Since I can't tell Linda what Sammy has told me and vice versa, I can't give either of them enough



information to make an informed decision about waiver. Besides, if I can't use what I learned from Linda to help Sammy, it's just as well that I get out now—it would be hard not to tell him everything."

A lawyer owes a duty of confidentiality to a potential client who in good faith seeks help with a legal matter. In this case you had in place a system that should have worked—your assistant gathered essential, but very limited, information from the prospective client and ran a conflicts check before your interview.

Some lawyers warn potential clients not to divulge confidential information during a consultation, and thus seek an advance waiver of confidentiality. As with many ethics issues, the effectiveness of such a waiver would depend upon the circumstances. GBJ

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

(Dec. 12, 2009 through Feb. 19, 2010)

by Connie P. Henry

Voluntary Surrender/Disbarments

Steven E. Zagoria
Marietta, Ga.
Admitted to Bar in 1979

On Jan. 25, 2010, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline for Disbarment of Steven E. Zagoria (State Bar No. 784212). While employed with a law firm, Zagoria forged the signature of one of the firm's principals on checks payable to the firm for attorney's fees and deposited the checks in his personal account. The total sum stolen was $343,639.54, and Zagoria used these funds to pay his mortgage, credit card bills and college tuition. He also gave some of the funds to his wife for the purchase of a second home.

Although Zagoria entered into a consent agreement for complete restitution to resolve the firm's civil action against him, there were no indications of mitigating circumstances. In aggravation, the record shows that Zagoria previously received a Review Panel reprimand.

Howard Geoffrey Slade
Fayetteville, Ga.
Admitted to Bar in 1973

The Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of Howard Geoffrey Slade (State Bar No. 651150) on Feb. 1, 2010. Slade received $80,000 on behalf of a client in a personal injury matter, but he failed to deposit the funds in his trust account, give the funds to the client or otherwise account for them.

In another matter he received $238,000 from a client, but he did not deposit the funds in his trust account. When the client cancelled the transaction and sought return of the funds, Slade wrote her a check that was returned for insufficient funds. He did not deliver the funds to the client or otherwise account for them.

Trent Edward Wright
Cumming, Ga.
Admitted to Bar in 2000

The Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of Trent Edward Wright (State Bar No. 685977) on Feb. 1, 2010. While acting as closing attorney for a number of loans, Wright prepared documentation falsely showing that the loans were secured by a first lien position in property owned by the borrower, when he knew that the borrower did not have clear title and that the lenders were not receiving a first lien position security interest. He also issued false title insurance opinions and policies in connection with these loans.

Sabrina Kaye Bozeman
Decatur, Ga.
Admitted to Bar in 1990

On Feb. 8, 2010, the Supreme Court of Georgia disbarred Attorney Sabrina K. Bozeman (State Bar No. 073565). Bozeman was served by publication but failed to file a Notice of Rejection of the Notice of Discipline. The following facts are admitted by her default.

A client retained Bozeman in October 2007 to represent her in a personal injury case. In February 2008 Bozeman settled the case, signed the client's name to the settlement check without authority and failed to notify the client that she had received the settlement funds. Bozeman then commingled the settlement funds with her personal funds; converted the money to her own use; and failed to pay the third-party medical care providers. Bozeman failed to return numerous calls from the client. Bozeman falsely represented to the Office of the General Counsel that she delivered the settlement proceeds to the client in March 2008.

Suspensions

Marcus L. Vickers
Ellenwood, Ga.
Admitted to Bar in 2001

The Supreme Court of Georgia accepted the Petition for Voluntary Discipline of Marcus L. Vickers (State Bar No. 727392) on Jan. 25, 2010, and ordered that he be suspended from the practice of law pending the outcome of an appeal of his criminal convictions. On Aug. 21, 2009, Vickers was convicted of three felonies in the U.S.

District Court of the Northern District of Georgia, Atlanta Division.

Patrick Joseph Smith
Rockville, Md.
Admitted to Bar in 1978

On Feb. 1, 2010, the Supreme Court of Georgia ordered that Patrick J. Smith (State Bar No. 662146) be suspended from the practice of law in Georgia for six months. This reciprocal disciplinary action arose out of Smith's six-month suspension in the state of Maryland for falsely representing to a state's witness in a criminal prosecution that he was a police officer.

Benjamin Lanier Bagwell
Gainesville, Ga.
Admitted to Bar in 1992

On Feb. 8, 2010, the Supreme Court of Georgia accepted the petition for voluntary discipline of Benjamin Lanier Bagwell (State Bar No. 031480) and ordered that he be suspended from the practice of law in Georgia for two years with conditions for reinstatement. Chief Justice Hunstein dissented from the majority's opinion.

Five clients filed grievances against Bagwell. In his representation of these clients he failed to communicate with them and he failed to pursue the legal matters entrusted to him. As a result of his misconduct, three of the clients had adverse rulings entered against them. Bagwell offered in migration that he acknowledged the consequences of his misconduct; that he demonstrated a cooperative attitude toward disciplinary proceedings; and that he was laboring under impairments. Bagwell has been diagnosed with bipolar disorder, attention deficit hyperactivity disorder, major depressive disorder and generalized anxiety disorder, and has undergone inpatient psychiatric evaluation. Additionally, he has been under mental and emotional strain as a result of marital difficulties. Bagwell refunded retainers to his clients and in one instance voluntarily paid a client $12,000 in an effort to make the client whole. In aggravation of discipline, in 2007 Bagwell received a Formal Letter of Admonition.

Bagwell's reinstatement to the Bar is conditioned upon certification of his fitness to practice law.

Review Panel Reprimands

Sylvia Ann Martin
Atlanta, Ga.
Admitted to Bar in 1988

On Jan. 25, 2010, the Supreme Court of Georgia accepted the petition for voluntary discipline of Sylvia Ann Martin (State Bar No. 006660), and ordered that she be administered a Review Panel reprimand. Martin allowed her operating account to be used even though legal services were not provided.

The grievance initiating this action was filed by Martin's husband's former business partner. In September 2008 Martin's husband used his business American Express (AMEX) card to obtain a cash advance from the business. Martin had a merchant account with AMEX that allowed her to accept payment from AMEX cardholders. If she made a transaction with an AMEX cardholder, then the cardholder's AMEX account was debited and the funds were credited into Martin's business operating account. Martin's husband had the cash advance he took from his AMEX business account deposited through Martin's AMEX merchant account into her attorney operating account. Civil litigation currently is pending between the partners regarding disposition of the funds as well as other business assets.

In mitigation of discipline the Court noted that Martin has been a member of the State Bar since 1988 and has no prior disciplinary history; she made full and free disclosure and displayed a cooperative attitude toward these proceedings; and she has good moral character and reputation in the community.

The Court noted that while Martin showed poor judgment, it appeared to be an isolated incident and no client funds or matters were involved.

Stanley J. Kakol Jr.
Atlanta, Ga.
Admitted to Bar in 1985

The Supreme Court of Georgia accepted the Petition for Voluntary Discipline of Stanley J. Kakol Jr. (State Bar No. 406060) on Feb. 1, 2010, and ordered that he receive a Review Panel reprimand with conditions. Kakol represented a client in a pending Chapter 13 bankruptcy proceeding that originally was filed by another attorney. The Chapter 13 plan was confirmed by the Bankruptcy Court but the client fell behind on her payments and the court granted relief from the automatic stay for the mortgage company to foreclose on the client's home. Kakol agreed to help the client avoid foreclosure and accepted $1,000 from the client on the condition that he would return it in full if he was not able to prevent the foreclosure. Kakol did not have an escrow account at that time (he generally accepted filing fees in cash and delivered the funds to the court), so he gave the $1,000 to a friend employed in another law office to hold; Kakol did not reclaim the funds for his personal use. During the bankruptcy proceedings the Chapter 13 Trustee asked Kakol if he had accepted a fee to represent the client and he disclosed the $1,000; he believes he told the Trustee they were being held "in escrow" but the Trustee stated that Kakol said the funds were in "an escrow account." Kakol filed an entry of appearance on the client's behalf in the bankruptcy case and an emergency motion to reimpose the automatic stay. He also filed amended schedules and a proposed modification to the Chapter 13 plan. The court granted the motion to reimpose the stay but, finding that Kakol did not file a statement under Rule 2016 (b) with

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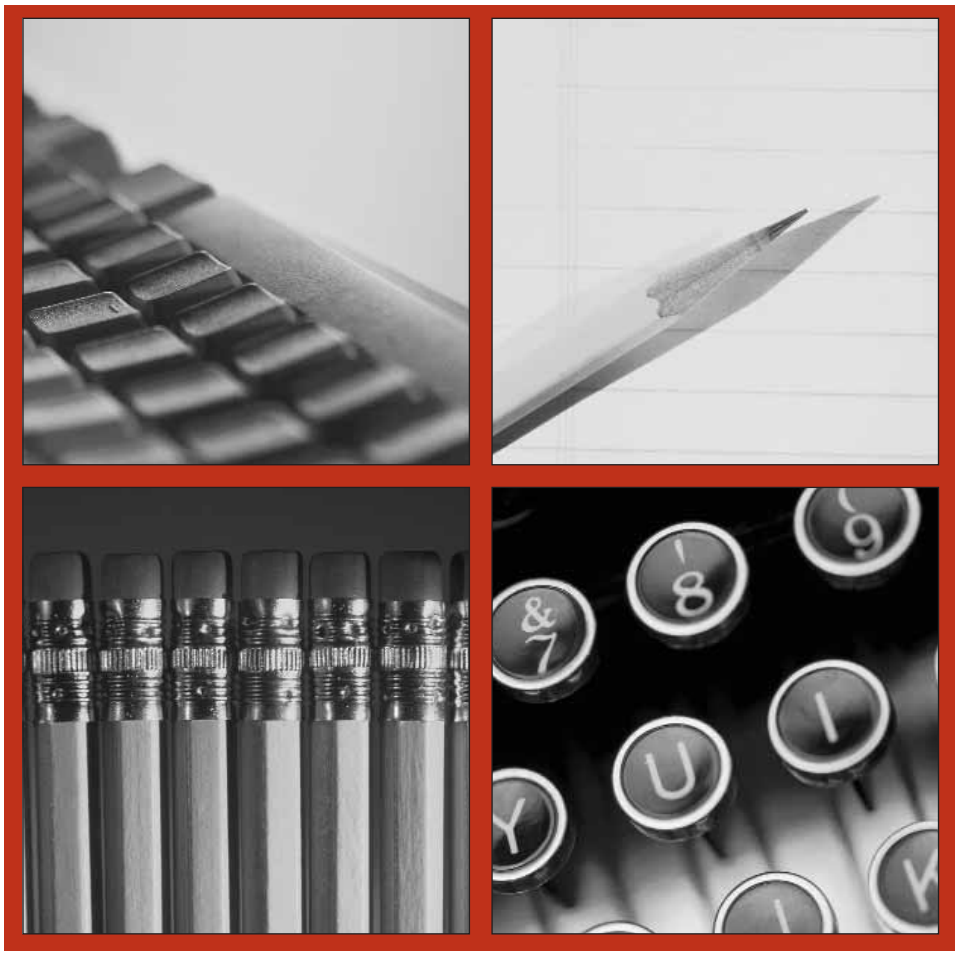

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The Editorial Board will review all submissions and decide on publication.

respect to the $1,000, ordered Kakol to refund the money to the client, which he did. The court also limited Kakol to filing no more than two new bankruptcy cases per month for 18 months; ordered him to complete a specified number of hours of continuing legal education on consumer bankruptcy law, ethics and professionalism, and to submit a report upon completion; and directed him to consult with the State Bar to obtain assistance with practice management issues. Kakol complied with the court's directives.

Kakol has closed his solo practice and now works as an associate in a consumer bankruptcy law firm where he does not have responsibility for caseload management, filing of documents or advocacy in court. Kakol voluntarily sought counseling from a licensed psychologist to assist him with focus and organizational skills and has continued that counseling. In aggravation of discipline the court found that Kakol had prior discipline in the form of a 1984 public reprimand, a three-year suspension in 1998, and a letter of admonition in 2007. In mitigation of discipline, however, the court found that Kakol's prior discipline did not involve trust fund issues; there was no selfish motive on Kakol's part with respect to the matter at issue here as Kakol merely was attempting to assist a client in a precarious legal situation and gave a moneyback guarantee; the client did not file a grievance; there was no allegation of misappropriated funds; and Kakol returned the money. The court also noted that Kakol was cooperative with disciplinary authorities; that he sought and implemented interim rehabilitation; that he voluntarily moved to an associate position; and that he was subjected to penalties and sanctions by the Bankruptcy Court, whose requirements he fulfilled.

Besides receiving a Review Panel reprimand, Kakol must comply with the following conditions: (1) he will remain in his present employment with the Sandberg Law Firm LLC for at least 24 months following the Court's order, where his practice will be limited to meeting and interviewing new clients, researching legal issues and consulting with clients and attorneys on various strategies that might be used in seeking debt relief, but not signing and filing pleadings, appearing at hearings or handling financial issues for the law practice; and these restrictions will apply if Kakol leaves his current firm and works for any other law practice during the 24-month period; (2) for a period of 24 months following entry of the Court's order Kakol will continue treatment with Dr. James A. Howard (or another board-certified psychiatrist or licensed psychologist) on at least a monthly basis, and will place himself under the jurisdiction of the State Bar's Lawyer's Assistance Program (LAP) for evaluation and monitoring within 120 days of the Court's order, will waive confidentiality, and during the two-year period will submit reports from his treating psychiatrist or psychologist to the Office of the General Counsel and LAP every six months certifying that he remains mentally fit to practice law, and will follow any additional recommendations that the LAP deems appropriate; and (3) if, upon the State Bar's motion, it is shown that Kakol has failed to comply with any of the foregoing conditions, he will voluntarily surrender his license and no longer will be entitled to practice law in the state of Georgia.

Gary Gilbert Guichard
Denver, Co.
Admitted to Bar in 1993

The Supreme Court of Georgia accepted the Petition for Voluntary Discipline of Gary Gilbert Guichard (State Bar No. 315107) on Feb. 1, 2010, and ordered that he receive a Review Panel reprimand. During Guichard's employment with the Metro Conflict Defender's Office he represented three indigent clients. He did not adequately explain matters to the clients, did not reasonably keep them informed and did not comply with their reasonable requests for information.

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 Dec. 12, 2009, six lawyers have been suspended for violating this Rule and none have been reinstated.

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

Slaying Paper Dragons in Your Law Practice:

Document Management for Today's Practitioner

by Natalie R. Kelly

This article previously appeared in the June 2001, Vol. 6, No. 6 issue of the Georgia Bar Journal. *It is reprinted here with updated notes for 2010 as a part of the Law Practice Management Program's 15th Anniversary.*

Sometimes it seems that paper gets the best of us. Y2K has come and you were probably thinking that by this time lawyers would be working from sleek, silver workspaces via voice-activated systems and paper would be nowhere in sight. Well, we all know how untrue that is. Now we can only wonder what things might be like when Y3K rolls around. Well, regardless of what shows up in our personal crystal balls, we have to realize that if it has anything at all to do with a law practice, paper will undoubtedly be involved.

So exactly how do we deal with all of this paper? Where do we store it? How can we find it? What if we really do want it to disappear from our workspaces and have a paperless office? How can we slay these paper dragons in our law offices? Below I have outlined some concepts and provided some tips that

might arm you with the lance and armor you need to get started.

Document Creation

Mommy, where do documents come from? When your firm first creates a document, it probably does so using either Corel WordPerfect or Microsoft Word. Sometimes documents are not simply word processing files though. They may also be spreadsheets, video clips, scanned images, voice files, etc. Regardless of its format, a document created on the PC (or Mac) can be saved and then the document's creator or another person can retrieve the document from its saved location. This is usually where the problem begins for most firms. A document can't be found. It can't be located in the physical file (office) or on the computer. Losing the entire file is a whole other article.

Saving Documents

Let's examine the saving of documents as computer files. Start by asking, "Where should documents be saved and under what file names?" Here are some tips on saving documents:

- Have everyone save documents to the proper place on your computer network.
- If documents are saved to local hard drives in your office and not to your network, make sure that those who need access to the documents are aware of their locations, can open the documents, and if required, be able to make changes to the documents
- Make documents read-only files if you need to protect them from unwanted changes (Use Save and Save As options in both Word and WordPerfect or use Publish to PDF (portable document format) in WordPerfect)
- Strictly adhere to your firm's file naming conventions (What do you mean your firm doesn't have any conventions? Okay, see the next item.)
- Create a mandatory file naming convention for the firm
- Add the filename to the bottom of each document (Often firms place the filename in small font on the document or include it as a footer.) (Note: Make the footer invisible or leave it off entirely if you do not want to divulge any confidential computer setups, file generation information or file locations on your network.)
- Use long file names (We are no longer stuck with the old eight-three setup (xxxxxxxx.xxx) anymore so make the names as descriptive as possible, i.e. john doe divorce complaint 12 31 00.wpd or john doe complaint.doc) (Note: Do not use periods or slashes throughout the file name, i.e. use "12-31-00" or just "12 31 00", but not "12.31.00" as computers can get hung up on the period and look for an application extension to follow immediately. This can also create some problems for some backup systems.)

- Complete document summaries—under the File/Properties—for every document you create (This useful feature is available in most applications, not just word processors.)
- Use the Windows file and folder structure effectively (A sample setup might include making a folder for each practice area in which you work and a subfolder within the practice area folder for each client. All documents created on behalf of that client would then be saved to the client's subfolder.)
- Use WordPerfect's Index Manager and Word's Advanced Find features to quickly locate documents
- Attach documents to existing matters/cases/files in your practice/case management software programs

Scanning Documents

Some documents are generated outside of the firm. So how do those documents get saved? How are they indexed within our internal document management systems? This is where scanning and OCR (optical character recognition) comes into the process of document management. A good scanner and software that includes OCR will allow you to save external documents internally as images that can then be treated as if you had created the document in house. Good scanners are available from Visioneer and Hewlett Packard. (Fujitsu (Scansnap) and other national name brands are also good and lead the market these days.) Caere's (now Nuance) OmniPage and Visioneer's scanning software is also very reliable and compatible with word processors and case managers. (Note: Nuance's PaperPort product is now a leading system for OCR functionality and is built into many newer scanners.)

Some firms have projects for scanning that would expend all of its resources and still not get the job done, so they turn to outsourcing for the answer. Several national vendors like IKON, Quorum Lanier, Ricoh and Bowne, provide the scanning, indexing and even storage of documents for law firms. Along with the national vendors, you can also find online services that will serve as an offsite repository for your documents. Nowadays, electronic Bates numbering and bar coding can be found, too. The following are some Bates numbering products and sites: VisionShape, www.visionshape.com; Image Access, www.imageaccess.com; XibiTag, www.xibitag.com. Outsourcing services can differ from vendor to vendor, so shop wisely before signing up for the outsourcing of your document management projects.

Retrieving Documents

Retrieval is the next major process for documents. After the document has been saved and is needed again, it must be retrieved. So what is involved with finding and retrieving documents? Mainly, there is the process of locating documents via a profiling and indexing process or document management software system. In these systems, each document is profiled (document summary information including descriptive keywords and identifiers is generated) and then indexed. A full text searchable database is sometimes created from this information. Today's litigation support software will sometimes have some of these features built in as well.

Some of the most popular document management programs currently on the market are Worldox, GroupWise (not as widely used now), iManage (now Interwoven), and PC Docs (now OpenText). These programs are not all designed alike or suited for all firms. They have different hardware requirements and even different feature sets, so be sure to consult with our program or other certified technology consultants before purchasing any of these systems. If you are in need of an immediate solution and need to begin your search now, visit http://marketcenter.findlaw.com/software.html for a listing of the current online legal and general document management products and vendors. You can also find downloadable programs to manage documents. One to check out is called Wilbur, and it can be downloaded for free (at the time of this article) from www.redtree.com. X1, Google Desktop Search and Copernic are also good options these days.

Staying Organized

If you are still a little shy about technology or outsourcing services and prefer to deal with actual paper, remember that organization is key. Use indexes just like the document management software systems do. Prepare an index for all of the documents you create (even within client files) and use them to track where you have saved documents. Also, for litigation practices make use of good filing notebooks. A company called Bindertek has some interesting products to check out, including sample files for organizing and managing litigation file documents. See www.bindertek.com.

The "paperless" law office will probably only exist in fairy tales as my friend and noted legal technologist, Ross Kodner, suggests with his revised concept, the "PaperLESS™ Office." (See his materials on the topic, now located at www.microlaw.com/cle-downloads.html.) Paper is simply a necessary dragon for law firms. To slay the paper dragons, you simply have to continually implement and use proper document management solutions. If you need help with choosing the proper solution, contact our program at 404-527-8770. GBJ

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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Speaker Spotlight—Excellent Presenters Abound in South Georgia

by Bonne D. Cella

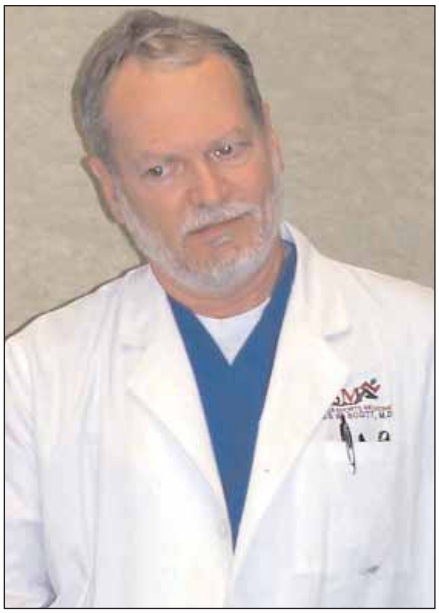
Attorneys in South Georgia enjoy a wide variety of informative opportunities as evidenced by a variety of topics presented by a variety of speakers. A dean, professor, judge and doctor have presented programs to Bar members in the area. Recent programs included a reception, a CLE opportunity, a seminar and a first person account of Haiti days after the devastating earthquake.

Dean Rebecca White, University of Georgia School of Law, was the speaker at a reception in Tifton for UGA Law School Alumni. John Carlton Jr. of Moultrie, Al Corriere of Albany, and Bob Reinhardt and Greg Sowell of Tifton hosted the event celebrating 150 years of leadership at UGA. White proudly told alumni the U.S. Supreme Court has chosen UGA School of Law interns for four of the last five years and the law school will continue to compete for the best and brightest students. Sowell, president of the University of Georgia Law School Association, encouraged alumni to give to the Georgia Law School Fund.

The Dougherty Bar Association hosted "Georgia Evidence" with Paul S. Milich, professor of law and

Photos by Bonne D. Cella

Hon. R. Rucker Smith, superior court judge in Americus, during his session at the Southwest Georgia Public Defender Seminar in Tifton.



Tifton Orthopedic Surgeon Dr. James "Jim" Scott speaks to members of the Tifton Judicial Circuit Bar about his recent trip to Haiti.

(Left to right) Scotty G. Mann, Director of Development, UGA School of Law; Dean Rebecca White, UGA School of Law, and alumni Al Corriere and Gregory Sowell, president, University of Georgia School of Law Association, during the reception for UGA School of Law alumni in Tifton.

director of the litigation program, Georgia State University College of Law. The three-hour CLE was well attended by Dougherty Bar members and attorneys from nearby circuits. Milich addressed topics including: privileges and work product and impeachment and cross-examination. Dougherty Bar President Gail Pursel is diligent in anticipating the needs of her members and delivering the opportunities for successful programming.

The Hon. R. Rucker Smith, superior court judge in Americus, was a guest speaker at the Southwest Georgia Public Defender Seminar in Tifton. Smith offered participants "Ten Tips on Dealing With Your Judge." After the program, Smith made the following observation, "Smaller regionalized continuing education programs like this one in Tifton improve local camaraderie, while conserving the participants' travel time and maximizing use of the taxpayer's dollar."

Tifton Orthopedic Surgeon, Dr. James "Jim" Scott was guest speaker for the Tifton Judicial Circuit Bar. Scott, a friend to the local bar, holds several patents in orthopedics and is considered an expert in sports medicine. He is also a humanitarian. Having just returned from Haiti, he told the group: "I was most proud to be an American on this trip." Local Tifton businesses donated 1,800 pounds of medical supplies and in a matter of days after the disaster, Scott and longtime friend, orthopedic nurse Paula Spicer were in Haiti. "I just decided to go—I did not think too much about it," he said of the dangerous journey.

"Our U.S. Army knows how to go camping and believe me it was good to see them over there—with no functioning government, crime and chaos are rampant. There are so many lost and hurt people—children that can't find parents—parents that can't find children. America has sent so many supplies but you can't find what you need in all of the disorder. Another sad problem is the animals—they are suffering, too."

Scott and Spicer were sent on a Black Hawk Army helicopter to Gonaives to help many victims waiting for medical attention. They were greeted by U.N. troops that were called in before the disaster due to the unrest and gang activity in the area. At this camp, Scott was paired with a French anesthesiologist and although they did not speak the same language, they were still able to communicate effectively.

One of the most difficult aspects for Scott was knowing he could save a limb if there were time for additional surgeries on a patient. If more than one procedure was called for, the decision had to be amputation. He noted that an untold amount of prosthetics are needed in Haiti. "It was hell," he said of the experience, but when asked if he would ever go back, he said, "Yes, I would go back—there is so much need." He realized the demand for all professions to participate in pro bono activities where they are needed most.

When Dougherty Bar President Gail Pursel heard about Scott's presentation to the Tifton circuit bar, she contacted him and volunteered to go back with him to Haiti. Pursel, who has been on mission trips before, is the kind of person Scott was talking about when he spoke about being proud to be an American.

The South Georgia Office of the State Bar of Georgia is available to help your bar association with speakers and programs. GBJ

Bonne D. Cella is the office administrator at the State Bar of Georgia's South Georgia Office in Tifton and can be reached at bonnec@gabar.org.

Section-Sponsored Events Now Feature Online Registration

by Derrick W. Stanley

One feature that has been requested by section members over the past few years is the ability to register for events online and to pay with a credit card. Thanks to the implementation of a new database, the State Bar of Georgia is pleased to announce that online registration will now be the norm for section sponsored events. To attend these events, you will no longer have to go through the process of requesting a check and then mailing it to the Bar with a form. You can simply log in to the State Bar website, click a few buttons and use your credit card to register for the event.

The process is outlined below and assumes that you have already logged in to the website. If you have not, visit www.gabar.org for instructions to do so. Section members will receive an e-mail with a link to the meetings page; however, that link is not required to register for the meeting. Simply go to https://www.members.gabar.org/Core/Events/Events.aspx to see a list of events and register for an upcoming section meeting (see fig. 1).

Select the event you would like to attend by clicking the orange arrow next to it (see fig. 1).

Once you have selected the event, a description will appear on the screen. If this is the event you would like to attend, click the register button. The system will require you to log in if you have not already done so.

On the next screen, you will need to verify your information and click the "Next" button (see fig. 2). Please note that changes made on this page will not update your information in the database. If this information is incorrect, please click on the "My Account" button in the upper right hand corner of the website to update your member record (see fig. 2).

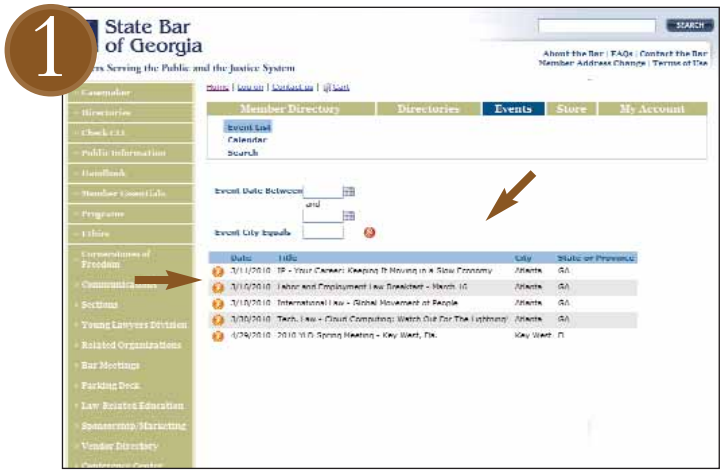
After clicking the "Next" button, you will need to select the number of tickets you need (see fig. 3). The nonmember rate is for those who are not a member of the section.

The next screen is simply a summary of what has been registered for and the amount that will be charged. By clicking the "Next" button, you will be taken to the credit card payment screen (see fig. 4). After entering your information and clicking the "Next" button, you will be taken to a confirmation screen. You will also be provided with a receipt by e-mail.

By registering online for events, you can guarantee your spot and have an immediate record of your transaction. Of course you will still be able to submit your registration by mailing the registration form and check to the address listed on the bottom of the registration form.

As always, should you require assistance in registering for a meeting or have questions that are not covered in this article, please visit www.gabar.org/sections or contact Derrick Stanley at 404-524-8774 or derricks@gabar.org. GBJ

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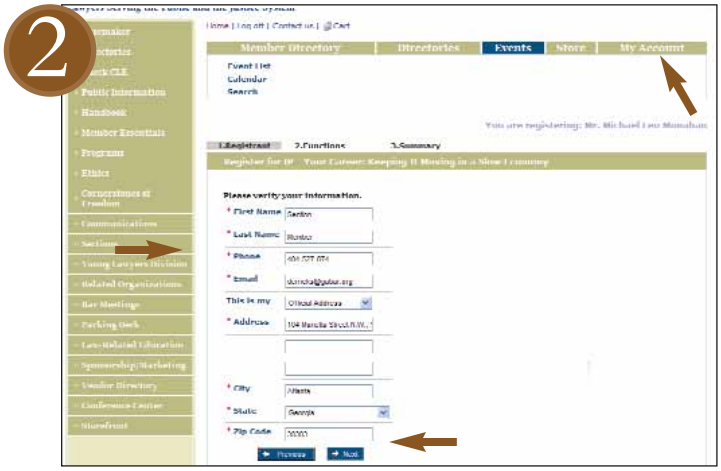
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CASEMAKERdigest:

The Latest Addition to Casemaker

by Sheila M. Baldwin

CASEMAKERdigest is the newest service provided to help lawyers keep abreast of recent developments in Georgia Caselaw. Cases are summarized as soon as they are made available and separated into several categories for ease of searching. This upgraded feature is available to all of our members.

You may wonder how accurate and reliable this feature is. According to Casemaker developers, "Our information comes directly from the courts. These cases are then reviewed, summarized and categorized by our team of attorneys in a thorough and timely fashion. We stand by the accuracy and reliability of our content 100 percent."

Cases are summarized and posted within two days of receiving them from the court. Occasionally a delay can occur between processing a case and the posting of that case. When this occurs, a summary, if available, will be posted so that attorneys will know that the case will be arriving on the site shortly.

Cases from the previous week are displayed by default so that the site is populated with data when you arrive, even at the beginning of the week. As cases are processed they are added to the current week. These can be accessed by choosing "Current Week" from the left-hand column or by RSS feed (see fig. 1).

By selecting any of the terms displayed on the right-hand column of the site, results are instantly refined to return only those cases which match the chosen terms (see fig. 2). Additional terms can be selected from the categories or entered via the search window to further hone your results.

CASEMAKERdigest allows you to save your searches via both RSS feeds and bookmarking. RSS feeds provide a constant flow of up-to-date information on cases which conform to the saved criteria. Bookmarks save a snapshot of the results of a specific search request. The "Save" feature allows the user to output the results of a specific search to an RSS feed. RSS feeds can be read using any RSS reader, such as a web browser, a desktop application or mobile-device (see fig. 3).

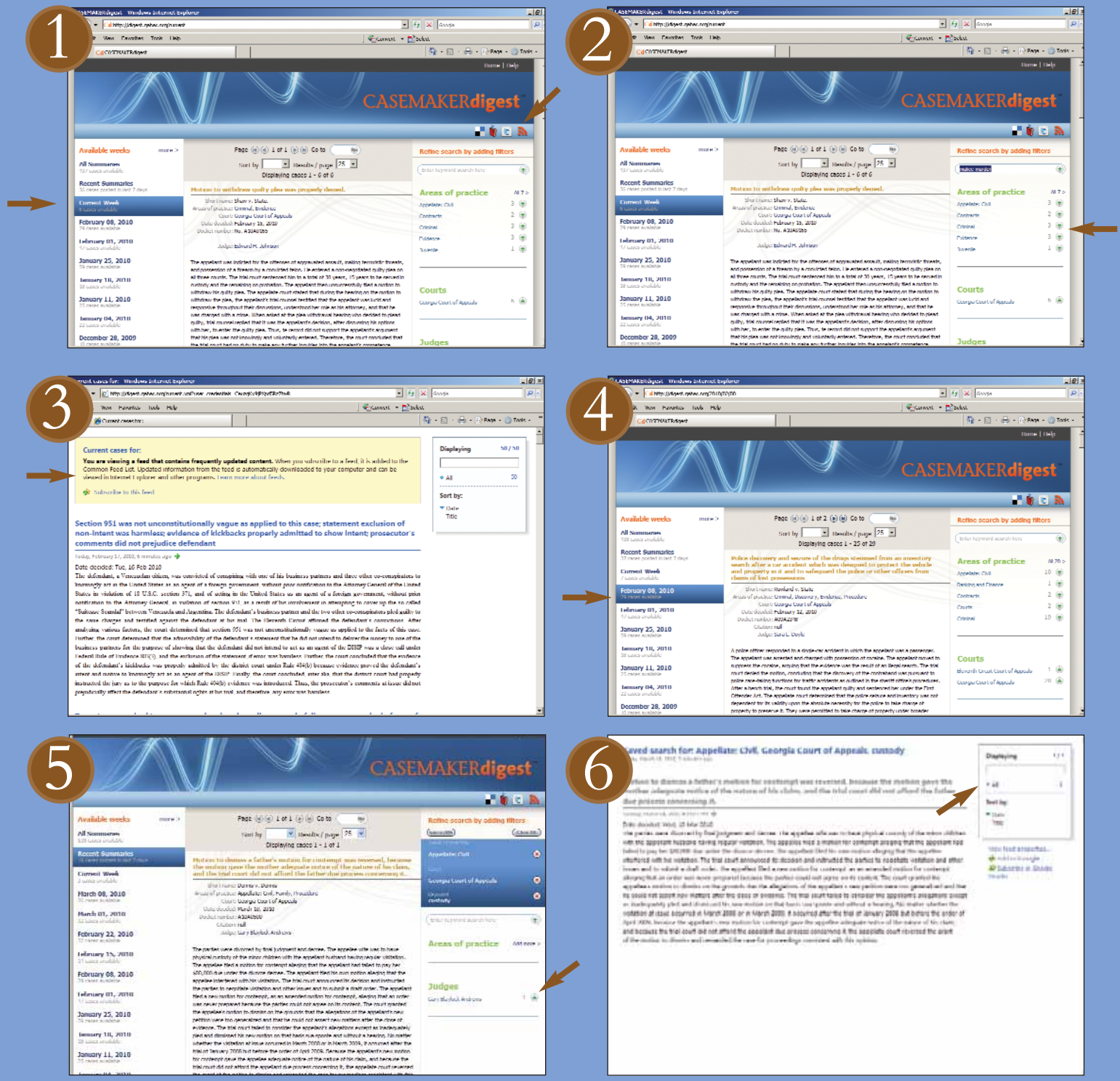
Currently, CASEMAKERdigest only searches over the selected week to give you the fastest access possible (see fig. 4). If you wish to see your search applied to the entire archive, simply save that search as an RSS feed. This will allow you to see all cases from the archives which meet those search criteria, while keeping you up-to-date on any new developments under the specified parameters.

CASEMAKERdigest allows you to add filters in several ways. You can type in a search filter using the provided box. You can select from any of the guided categories (Areas of Practice, Court or Judges) by clicking on the button next to those terms (see fig. 5). Additionally, any terms underlined in blue can be added as filters by clicking on them. To remove an unwanted filter, click the button next to the term you wish to remove from your search.

Subscribing to RSS feeds gives the user access to a constant feed of the 50 most current cases published on the site (see fig. 6). Unlike the "save search" option, these results are not filtered and each case will be sent to the feed as soon as it is added. This allows the user to stay up-to-date on all developments in Georgia Caselaw.

If you have any Casemaker questions, please call 404-526-8618 or e-mail sheilab@gabar.org. GBJ

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



We offer Casemaker training classes four times a month. Upcoming training classes can always be found on the State Bar of Georgia's website, www.gabar.org, under the News and Events section. Onsite Casemaker training can also be requested by local and specialty bar associations.

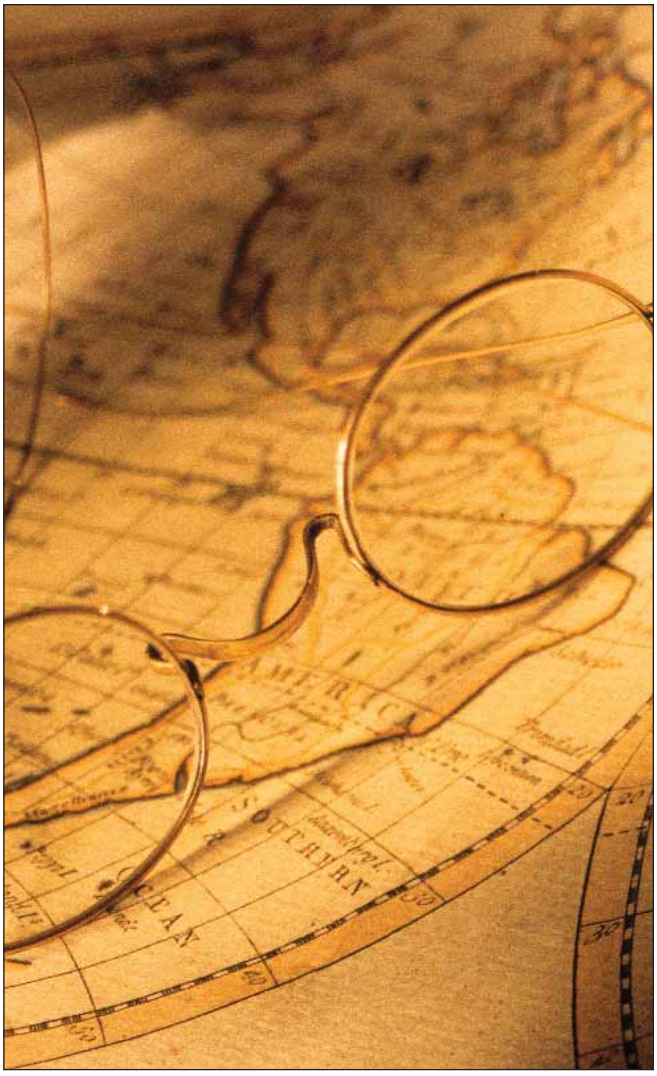
Writing Matters:

Sounds Like Greek to Me

by Karen J. Sneddon and David Hricik

The English language is a mongrel combination of Germanic, Celtic, Anglo-Saxon, French, Greek and Latin words. It became so during the journey from Old English to Middle English to Modern English. For example, these words came from French: contract, crime, proposal, schedule, terms, conditions, policy, alias, action, appeal, claim, complaint, defendant, evidence, indictment, plaintiff, plea, sue, summon and quash.[1] The word "law" came from Old Norse.[2] "Other times, French and Old English components combined to form a new word: French gentle (gentil) and the Germanic man formed gentleman."[3]

This means that the English language is one ugly mutt. As a result, English often has two, three or more words that mean the same thing, but which originate from different languages. The evolution, of course, continues as new words are created and others adopted from foreign languages every day. Spanish is obviously having an enormous influence today, and who knows what the future holds.[4]



This affects legal writers in two ways: we often use two words when one will do—often one Anglo-Saxon word and the other either French or Latin in origin—and we use a longer word when a shorter, often Anglo-Saxon one, will often do just fine. But the French or Latin words sound "fancier" or more educated.[5] Although these problems permeate our language, legal writers in particular infuse their writing with unnecessary duplication and length—which is not helpful. This installment addresses those problems.

Use One Word, Not Two

As English began to grow in the courts of England and replace French and Latin, lawyers were afraid to drop the French and Latin out of fear that "some of the highly specialized meanings of the legal vocabulary would be lost."[6] Some of this no doubt made sense, because using synonyms derived from the different languages would help if the reader only knew one of the languages.[7] But the practice persisted long after French and Latin were gone from the English countryside.[8]

Although French and Latin are gone even from England, U.S. lawyers still live with this fear today. Legal writing still often contains pairs of redundant words. For example, "cease and desist." No lawyer would ever send simply a "cease" letter to a trademark infringer, even though the lawyer would be satisfied if the accused infringer ceased what it was doing. Similarly, we say that contracts are "null and void" when certainly a void contract is a nullity. Yet, these redundant pairings permeate legal writing.

One word will often—not always, but often—do. But which one?

Use the Anglo-Saxon Word, not the Usually Longer French or Latin Derivative

Often, there is an English word derived from French or Latin that is synonymous with an English word of Anglo-Saxon origin, but is longer, more abstract or both. *See, good* and *take* are Anglo-Saxon derivatives, and mean in many contexts the same thing as their non-Anglo-Saxon counterparts, *perceive, benevolent* and *appropriate*.[9] Sometimes there are three words of different origins.[10]

"As a (very rough) general rule, words derived from the Germanic ancestors of English are shorter, more concrete and more direct, whereas their Latinate counterparts are longer, more abstract and are regarded as more elegant or educated."[11] Yet, in an effort to appear smart, lawyers will often use the Latin or French derivative, rather than its Anglo-Saxon counterpart. As George Orwell wrote over half a century ago:

> Bad writers, and especially scientific, political and sociological writers, are nearly always haunted by the notion that Latin or Greek words are grander than Saxon ones, and unnecessary

Common Redundant Pairings

appropriate and proper
all and sundry
any and all
bind and obligate
cancel, annul, and set aside
deem and consider
due and payable
final and complete
free and clear
indemnify and hold harmless
name, constitute, and appoint
new and novel
ordered, adjudged, and decreed
power and authority
right, interest, and title
total and entire
true and correct

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 issue, 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 problems 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.

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**denotes non-attorney*

words like *expedite, ameliorate, predict, extraneous, deracinated, clandestine, subaqueous* and hundreds of others constantly gain ground from their Anglo-Saxon opposite numbers…[12]

Obfuscation should be abjured. You should also try to be clear. Because lawyers generally are striving to convey complex information efficiently and effectively, big words do not help.[13] In fact, they hinder. So, for instance, using just the Anglo-Saxon derived word "sell" is better than using "bargain" or "convey."

English is a dynamic, rich language that offers lots of options. Recognizing the origins of the language can help a writer be deliberate in their choice of words. GBJ

Karen J. Sneddon is an assistant professor at Mercer Law School and teaches in the Legal Writing Program.

David Hricik is an associate professor at Mercer Law School who has written several books and more than a dozen articles. The Legal Writing Program at Mercer Law School has consistently been ranked as one of the nation's Top Legal Writing Programs by *U.S. News & World Report*.

Endnotes

1. *See* Adil Bouharaoui, *Some Lexical Features of English Legal Language, available at* http://www.translationdirectory.com/articles/article1763.php; John F. Rohe, *The Arrows in Our Quiver,* 79 MICH. B.J. 842 (July 2000).
2. DAVID MELLINKOFF, LANGUAGE OF THE LAW 34 (1963). *See also* FREDERICK A. PHILBRICK, LANGUAGE AND THE LAW: THE SEMANTICS OF FORENSIC ENGLISH (1949).
3. http://www.translationdirectory.com/article991.htm
4. In the film *Bladerunner,* the author envisions a language that is, to us, an odd-sounding mixture of Chinese, Spanish, English and probably other dialects. In some ways, this is already true.
5. Arguably, it can be traced back to 1362, when England adopted a statute requiring that pleadings be written in English, not Latin or French. *See* http://www.languageandlaw.org/TEXTSTATS/PLEADING.HTM.
6. Stephen Wilbers, *Does anybody know why lawyers write the way they do?, available at* http://www.wilbers.com/LegalWriting.htm
7. *See generally* Zechariah Chaffee, Jr. *The Disorderly Conduct of Words,* 41 COLUM. L. REV. 381, 382 (1941).
8. For further discussion, see BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 192-93 (2d ed. 2006); MARK PAINTER, THE LEGAL WRITER: 40 RULES FOR THE ART OF LEGAL WRITING 87-89 (2005); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS (5th ed. 2005).
9. http://www.pairofsachs.net/literature/pdfs/Linguistics_Paper.pdf.
10. "There are many sets of triplet synonyms from Anglo-Saxon/Latin/Greek and also Anglo-Saxon/Norman French/Latin-Greek like cool-calm-collected and foretell-predict-prophesy." http://dictionary1.classic.reference.com/features/wordtraveler30.html
11. *M. Birch, Anglo-Saxon and Latinate Words, available at* http://www.translationdirectory.com/article991.htm. This recommendation dates at least to the seventeenth century when "John Dryden was already advocating a shift toward a middle style, a more 'natural,' less Latinate style in both vocabulary and syntax." DONA J. HICKEY, DEVELOPING A WRITTEN VOICE 128 (1993).
12. George Orwell, *Politics and the English Language* (1946).
13. JOSEPH M. WILLIAMS, STYLE: LESSONS IN CLARITY AND GRACE 8 (9th ed. 2007) ("[S]ome writers plump up their prose to impress those who think complicated sentences indicate deep thinking."). Professor Williams goes on to write, "when we want to hide the fact that we don't know what we're talking about, we typically throw up a tangle of abstract words in long, complex sentences."

Honoring Outstanding Community and Public Service

by Avarita L. Hanson

The State Bar of Georgia and the Chief Justice's Commission on Professionalism (CJCP) presented the 11th annual Justice Robert Benham Awards for Community Service on Feb. 16 at the Bar Center. Since 1998, these awards have been presented to honor lawyers and judges in Georgia who have made significant contributions to their communities and demonstrate the positive contributions of members of the State Bar of Georgia beyond their legal or official work.

The auditorium at the Bar Center was filled with relatives, friends and colleagues from around the state. The 10 honorees received their awards from Chief Justice Carol Hunstein, Justice Robert Benham, State Bar President Bryan M. Cavan, Patrise Perkins-Hooker, committee chair and Avarita Hanson, executive director of the CJCP. A special charge to the honorees on the significance of community and public service was given by keynote speaker, Bill Liss, financial, consumer and legal editor for Atlanta's WXIA-TV and selection committee member (remarks reprinted on page 73). Many thanks to YLD President Amy Howell and the following members of the Young Lawyers Division's Community Service Committee for their assistance during the evening of the awards presentation: Shatorree Bates, Shiriki Cavitt,

Photos by Derrick W. Stanley

Melissa Davey, Nicole Leet, Sumeet Shah and April Williams. We also acknowledge the assistance of the staff of the Chief Justice's Commission on Professionalism: Terie Latala, assistant director, Nneka Harris-Daniel, administrative assistant and Sharon

Obialo, intern. As they munched and mingled after the presentations, honorees, presenters and guests enjoyed the sounds of Elevate the Quest, a jazz collective whose purpose is to elevate the quest for life through music.

Awards were presented to the following eight attorneys and two judges from judicial districts across the state.

Judicial District 2

Charles W. Lamb Jr., the Lamb Law Firm, P.C., Albany, is an active member of the National Rehabilitation Association and was a member of the American Bar Association's Commission on Mental and Physical Disability Law from 2002-05 and the National Spinal Cord Injury Association. He currently serves as a member of the Georgia Rehabilitation Council and as chairman of the Georgia Brain and Spinal Injury Trust Fund Commission. Lamb is a member of the board of the Albany Advocacy Resource Center, Leadership Albany, Leadership Lee and Lee County Chamber of Commerce. He served as a member of the Albany Area Chamber of Commerce, Southwest Georgia Therapeutic Riding Center and a Partner in Excellence with the Lee Primary School "Bee A Champ" Spelling Bee Sponsor. After graduating from the University of Georgia School of Law in 1998, Lamb returned to southwest Georgia and worked in the state court system and with a local law firm before opening his own practice in 2005, focusing on helping those who have suffered serious personal injuries.

Judicial District 3

Jonathan A. Alderman, partner, Anderson, Walker & Reichert, LLP, Macon, organized, served as president and is now the chairman of the board of First Choice Primary Care, Inc. He brought success to this medical facility that now serves a broad patient base, including many uninsured persons. He is a board member of Macon's Rotary Club, serving as

William J. "Bill" Liss, Financial, Consumer and Legal Editor for WXIA-TV, Atlanta

(reprinted remarks from the 11th annual Justice Robert Benham Awards for Community Service)

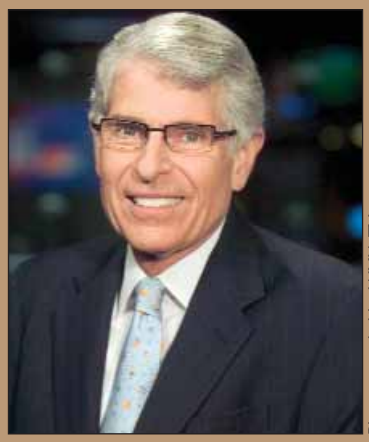

Photo provided by WXIA-TV

I am flattered to be asked to speak for a brief moment about community service—something we have been doing rather publicly on television for a decade or more—with an audience clearly aware that an attorney is behind the effort (my identity as an attorney has been clearly stated on-air). When it comes to community service, the reality is that it's not billable, but the good news is that it will be the most rewarding thing you will do outside a courtroom or away from a negotiating table. It is a mandate for every lawyer to have as part of his or her resume.

As professionals—as lawyers—we are looked up to as leaders. As an example, using the word "lawyer" in my television work in dealing with community issues sends out a strong message that resonates with the audience. I am a journalist, yes, but I am also an attorney. The words "lawyer" or "attorney" carry a badge of respect. They carry a badge of perceived influence and knowledge. This gives a much added edge in serving our community, pro bono, openly and with an added authority.

The Bar, for example, sponsors The Great Day of Service, Law Day and a number of law-related programs in schools to foster legal education—mentoring students, chairing mock trials and bringing law closer to the reality of the audience. But, the Great Day of Service and Law Day are single events—meaningful and important in their own rights—but just the tip of the iceberg. The key to lawyer-community volunteer success is longevity: getting programs started and keeping them going on a regular and continuing basis, so the audience—the community—knows this is a true long-term commitment.

Take, for example, Judge Jackson Bedford of Fulton County Superior Court and former president of the Atlanta Bar Association. He wakes before dawn on Christmas morning (every year for decades), dresses as a convincing Santa Claus, then goes to each of Metro Atlanta's three children's hospitals to visit every patient (some 400), before joining me at Atlanta Hartsfield-Jackson International Airport at the USO to bid farewell to troops deploying for Iraq and Afghanistan. Below his tunic and out of sight are the medals he was awarded for service as a naval officer in Vietnam.

Take, for example, the law firms in Atlanta that encourage pro bono activity and give lawyers the time to do it. Take, for example, the number of nominations we get every year for the prestigious Justice Robert Benham Community Service Awards. The information they contain is the highest tribute anyone can give to long-term community involvement and action. It shows a commitment that continues day-in and day-out for years.

We, as lawyers—as professionals, have an obligation not only to recognize what the State Bar says are ethical and professional dilemmas and to prioritize values and implement judgments, but equally we must serve our communities. That does not necessarily mean building houses, mowing lawns, painting furniture or preparing food on holidays, but it does mean offering yourself as a highly respected professional on a regular basis as a volunteer, expecting nothing in return. Your sense of pride in yourself will speak volumes for what you do, whether it's mentoring, giving legal aid where none is otherwise available, or perhaps doing the physical chores that are also so important. Your being there and doing something for the community is what it's all about.

At the Community Service Awards program, you hear how your colleagues at the Bar have recognized the importance of community service and how they have committed themselves to take the practice of law and commitment to the community to a higher level. They have and will continue to serve their communities as we all should, expecting nothing in return—except the enormous satisfaction that comes from giving back.

These awards recognize the commitment of Georgia lawyers to volunteerism, encourage all lawyers to become involved in community service, improve the quality of lawyers' lives through the satisfaction they derive from helping others and raise the public image of lawyers.

president in 2006-07. Presently, he serves as a member and secre-tary of the Macon-Bibb County Workforce Investment Board, volunteers with the Human Rights Committee of Wesley Glen Ministries and has served on the board and as president of Goodwill Industries of Middle Georgia, Inc., and its subsidiary, Good Vocations, Inc., providing work opportunities and training to disabled workers. A deacon and trustee of First Baptist Church of Christ, he has taught Sunday school for the last 15 years, driven the church bus for 20 years, sings in the choir and currently serves on the stewardship committee, the planned giving and internet/electronic giving subcommittees and as the church's pro bono attorney. He was named the Macon Bar Association's "Lawyer of the Year" for 2009.

Judicial District 4

Hon. Nancy Nash Bills, judge, State Court, Rockdale Judicial Circuit, Conyers, played a major role in helping plan, dedicate and open a playground in Rockdale's Hispanic community. She supported the Rockdale County Public School's Students Against Destructive Decisions Chapter, championed a drug-free community for the youths, proved instrumental in creating a website with crisis information for people seeking help, served school lunches, passed out water bottles to students and attended many meetings to help oversee policymaking and implementation of programs. Bills chairs the Rockdale County Task Force Against Family Violence, is the past board chair and leadership donor of United Way of Rockdale County Advisory Board and a member of the DeKalb Technical College Law Enforcement Academy advisory board and the Truancy Reduction Protocol committee. An active member of Rockdale County Rotary Club, she has served on many of its committees, serving as president in 2007-08. A member of Crosspoint Christian Church, she serves in its kitchen ministry and was its nursery director and middle school leader.

Judicial District 5

William "Bill" Barwick, partner, Duane Morris LLP, Atlanta, is a member of the board of directors of Everybody Wins! Atlanta, a nationally recognized literacy and mentoring organization. Ten years ago he brought the program to his former law firm and convinced them to provide financial support and to urge its lawyers and staff to volunteer as mentors. Due to his efforts, Sutherland mentors have read aloud to hundreds of students first at Lakewood Elementary, then Mary Bethune Elementary schools. His decade-long involvement in the program encouraged Sutherland lawyers in the Washington and New York offices to join this important effort which improves student learning and book drives. Atlanta community institutions that have benefited greatly from his service include the High Museum of Art, Zoo Atlanta, Habitat for Humanity, Atlanta Botanical Gardens, Atlanta History Center and the Historic Oakland Foundation. He is a member of First United Methodist Church of Atlanta and Buckhead Baseball.

Michael "Mike" D. Hobbs Jr., partner, Troutman Sanders LLP, Atlanta, currently serves on the board and as general counsel for Imagine It! The Children's Museum of Atlanta. He serves on the board of trustees for the Hammonds House Museum, as a pro bono volunteer with Georgia Lawyers for the Arts, on the boards of the Central Presbyterian Church Outreach and Advocacy Center, Inc., while serving as an elder in his home church, Trinity Presbyterian. From 1996 to 2002, he served on the board and as chair of the Trinity Early Learning Center. Hobbs coaches soccer and is the pro bono attorney for the Top Hat Soccer Club. He was a member for eight years of the Carl E. Sanders Buckhead YMCA board of directors and served as a judge from 1996 to 2004 for the Saul Lefkowitz Moot Court Tournament.

Amy J. Kolczak, partner, Owen, Gleaton, Egan, Jones & Sweeney, LLP, Atlanta, serves as president of the Georgia Association for Women Lawyers Foundation and oversees and assists in all its activities and projects, including its scholarship program for women law students in Georgia as well as partnerships with The Giving Tree, Inc., Visions Anew Institute, Eating Disorders Information Network, GOAL, Inc., Perkerson Playground Project, National High School Mock Trial, Brain Tumor Foundation for Children, Sexual Assault Center of Northwest Georgia, Cool Girls, Inc., and Decatur Preservation Alliance, among others. Kolczak has also been involved with the Atlanta Legal Aid's Breast Cancer Project, CHRIS Kids, Inc., Georgia Chapter

of the National Multiple Sclerosis Society, Families First, Project Night and Nicholas House. She spearheads all of her firm's community service activitis. She is a member of the St. Thomas Catholic Church in Smyrna.

Lt. Col. (Ret.) Nancy J. Whaley, Office of Nancy J. Whaley, Standing Chapter 13 Trustee, Atlanta, is an effective advocate and leader for the betterment of those afflicted with cancer, their families and friends. Diagnosed with cancer at age 38, Whaley became involved with the Young Survival Coalition (YSC) and just three years after her diagnosis, she became an officer of its Atlanta Chapter and chaired the YSC's first Atlanta fundraiser, a fashion show and cocktail reception called "BUSTIQUE." She has served on the board for the Georgia Breast Cancer Coalition Fund since 2005 and is currently its nominating committee chair. She also assists with the Georgia Legislative Breakfast and provides pro bono legal services. Most recently, she was team captain for the Susan G. Komen 3-Day. A past president of the Georgia Association for Women Lawyers, she currently serves on its advisory board. She is a past chair of the community service committee for the State Bar of Georgia Young Lawyers Division. She has been a member of the Junior League of Atlanta and Delta Zeta Sorority.

Judicial District 6

Angela M. Hinton, senior assistant attorney, City of Atlanta Law Department, Fayetteville, was appointed to the Fayette County DFACS Board in 2006 and elected as its vice chair in 2009. To support the women in Promise Place, Fayette county's battered women's shelter, she initiated a professional clothing drive to provide suitable outfits for reentry into the workplace through the Georgia Association for Women Lawyers Foundation. Before relocating to Fayetteville, Hinton practiced in Savannah and served as the liaison to the Savannah-Chatham County Domestic Violence Task Force. She also worked as a life skills instructor with the Magdelene Women and Children's Program at Union Mission and with the Martin de Pones Society working to uplift children in poverty. She joined the boards of the Savannah Union Mission, serving from 1997-2002, and the Community Healthcare Center for the unemployed and underemployed.

Judicial District 7

Justin B. O'Dell, partner, Cauthorn, Nohr & O'Dell, Marietta, has been a member of Cobb Chamber of Commerce since 2004. He was in the Leadership Cobb Class of 2006-07, served on its public safety committee and the 2008 social services committee. Active with the Marietta Kiwanis Club, he

(Left to right) Angel M. Hinton, Hon. Nancy Nash Bills, Justin B. O'Dell, William "Bill" D. Barwick, Jonathan A. Alderman, Amy J. Kolczak, Michael "Mike" D. Hobbs Jr., President Bryan M. Cavan, Chief Justice Carol W. Hunstein, Nancy J. Whaley and Mark O. Shriver IV (not pictured, Charles W. Lamb Jr.).

has worked to inform members of needs of the county's underprivileged and earn their support for worthy projects. He serves as the director of the Cobb Community Collaborative, for which he chairs its business advisory council, and as director for Cobb Housing, Inc., for which he serves on its marketing, bylaws and finance committees. A founding member and pro bono attorney, he spearheads his firm's support for Reconnecting Families, the official nonprofit organization that supports the Cobb County Juvenile Drug Court and Cobb County Family Dependency Treatment Court. A member of and Sunday school teacher at First Baptist Church of Marietta, O'Dell serves wherever he sees a need, including collecting diapers for children in the homeless shelters on Cobb County Diaper Day, raising funds for cancer research at the at the Swordsmen's Ball and serving food to residents at The Extension, Cobb County's homeless shelter.

Judicial District 9

Mark O. Shriver IV, partner, Shriver & Gordon, P.C., Woodstock, has made extraordinarily positive contributions on behalf of children, not just in Woodstock or Cherokee county, but throughout Georgia and the world. He currently serves as president of Optimist International, one of the largest organizations in the world serving youths. More than 5,000 Georgia children are benefitting from Optimist Club projects because of his efforts to start at least seven new clubs. A lifelong and avid marathon runner, Shriver chairs his Optimist Club's Peachtree Junior Road Race. He has served at every level of the Optimist Club—internationally as vice president of the board of directors and on various committees, statewide as a distinguished district governor and locally as the club president for three different clubs.

These deserving Bar members have served a wide range of community organizations, government-sponsored activities and humanitarian efforts. Their fields of service include: youth athletics and mentoring programs, literacy programs, social and support services, church and religious activities, politics, conservation and the environment, promotion and support for legal aid programs, community development, health, education, sports, recreation and the arts. A short video biography of each recipient is available on the State Bar's website: http://www.gabar.org/news/11th_annual_justice_robert_benham_awards/.

These awards recognize the commitment of Georgia lawyers to volunteerism, encourage all lawyers to become involved in community service, improve the quality of lawyers' lives through the satisfaction they derive from helping others and raise the public image of lawyers. Members of the Bar, public and representatives of organizations that the judges and attorneys serve are invited to nominate lawyers and judges each fall for these awards. Interested persons can contact Nneka Harris-Daniel at nneka@cjcpga.org for further information.

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

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In Memoriam

The Lawyers Foundation of Georgia Inc. sponsors activities to promote charitable, scientific and educational purposes for the public, law students and lawyers. Memorial contributions may be sent to the Lawyers Foundation of Georgia Inc., 104 Marietta St. NW, Suite 630, Atlanta, GA 30303, stating in whose memory they are made. The Foundation will notify the family of the deceased of the gift and the name of the donor. Contributions are tax deductible.

John Richard Collins
Atlanta, Ga.
Duke University School of Law (2006)
Admitted 2006
Died December 2009

Milton Morgan Ferrell Jr.
Miami, Fla.
Mercer University Walter F. George School of Law (1975)
Admitted 1975
Died November 2008

Charles Jacob Greenisen
Atlanta, Ga.
University of Georgia School of Law (1985)
Admitted 1985
Died January 2010

George Brock Haley Jr.
Atlanta, Ga.
Harvard Law School (1951)
Admitted 1951
Died January 2010

Stephen P. Harrison
McDonough, Ga.
Woodrow Wilson School of Law (1977)
Admitted 1977
Died February 2010

George L. Howell
Atlanta, Ga.
Howard University School of Law (1968)
Admitted 1969
Died February 2010

James Louis Jordan
College Park, Ga.
University of Illinois College of Law (1961)
Admitted 1961
Died January 2010

Robert B. Langstaff
Albany, Ga.
University of Georgia School of Law (1955)
Admitted 1955
Died February 2010

Gilbert Michael Malm
Atlanta, Ga.
Emory University School of Law (1989)
Admitted 1989
Died August 2009

Ben J. Miller
Thomaston, Ga.
University of Georgia School of Law (1965)
Admitted 1964
Died December 2009

Fred Willard Minter
Decatur, Ga.
Atlanta Law School (1949)
Admitted 1949
Died November 2009

Richard P. Murphy
Augusta, Ga.
University of Michigan Law School (1980)
Admitted 1993
Died January 2010

John L. O'Connor
Tucker, Ga.
Woodrow Wilson School of Law (1960)
Admitted 1977
Died October 2008

Richard Dawson Phillips
Ludowici, Ga.
University of Georgia School of Law (1963)
Admitted 1962
Died February 2010

Jerrell Paul Rosenbluth
Atlanta, Ga.
University of Michigan Law School (1966)
Admitted 1966
Died November 2009

John H. Ruffin Jr.
Atlanta, Ga.
Howard University School of Law (1960)
Admitted 1961
Died January 2010

G. William Speer
Atlanta, Ga.
Duke University School of Law (1965)
Admitted 1965
Died November 2009

James Hargrove Wilson Jr.
Atlanta, Ga.
Harvard Law School (1947)
Admitted 1947
Died April 2009

Mary Young-Cummings
Albany, Ga.
Howard University School of Law
Admitted 1972
Died January 2010

The **Hon. John H. Ruffin Jr.** was born in December 1934 in Waynesboro, Ga., to John H. Ruffin Sr. and the late Anna Louise Davis Ruffin. He died in January 2010. In 1953, he graduated from Waynesboro High and Industrial School. He received degrees from Morehouse College and Howard University School of Law in Washington, D.C. He was admitted to the State Bar of Georgia in July 1961.

A child born on the heels of the Great Depression, he was taught that Christian principles, academic excellence, hard work and thrift were to be valued. With much support and encouragement Ruffin excelled in school. He learned early of his African-American heritage and of the plight of equality for the poor and undereducated, personally experiencing the sting and humiliation of injustice. At an early age, he joined Thankful Baptist Church in Waynesboro, becoming involved in activities including Sunday school, Junior Missionary, Baptist Training Union and choir. He could be depended upon to assume leadership roles.

Growing up, time spent with Ruffin was never boring. He had the innate ability to use humor, wit and intellect to confound his young relatives, friends and even adults. Though he had strong convictions and enjoyed good debate, he came to realize the need to be flexible and willing to hear and consider diverse points of view. Throughout his life, Ruffin's sense of humor, attention to detail and "calling the shots" as he saw them without excuses were constantly evident. He lived life with purpose bolstered by hope, girded with determination, a strong work ethic and a steadfast desire to foster and build a better community.

His crusade for justice on behalf of children is legendary. His mentoring, advising and teaching contributed to the development of countless legal minds. As a young attorney, he met Judith Fennell, a Spelman College graduate from Bath, S.C. After a whirlwind courtship, they were married in 1967 and made their home in Augusta. To this union, their son, Brinkley, was born. Ruffin and his family became loyal members of Tabernacle Baptist Church in Augusta. Ruffin never sought the limelight or recognition, but he graciously and gratefully appreciated the many well deserved honors accorded him.

He was appointed a superior court judge of the Augusta Judicial Circuit in 1986 by Gov. Joe Frank Harris. In addition to being the first African-American superior court judge for the Augusta Judicial Circuit, Ruffin was also the first African-American member of the Augusta Bar Association. He was elected without opposition in 1988 and continued to serve as superior court judge until his appointment to the Court of Appeals of Georgia.

He became the 62nd judge of the Court of Appeals of Georgia when he was administered the oath of office by Gov. Zell Miller in August 1994 after 33 years of practicing law. As chief judge in 2005-06, Ruffin became the first African-American to hold that position. During his tenure as chief judge, he spearheaded the court's Centennial Year Celebration in 2006. In addition to his membership in the State Bar of Georgia, he was admitted to the Supreme Court of Georgia, U.S. Supreme Court, 11th Circuit U.S. Court of Appeals and U.S. District Courts for the Southern and Middle Districts of Georgia.

Ruffin had many professional, civic and religious affiliations. Some of these included: Council of Superior Court Judges of Georgia; Council of Juvenile Court Judges of Georgia; 10th Judicial Administrative District; chairman, Board of Trustees, Institute of Continuing Judicial Education; Georgia Commission on Gender Bias; Court Reform Committee, Governor's Conference on Justice in Georgia; Georgia Association of Criminal Defense Lawyers; Georgia Advisory Council to the Legal Services Program; Judicial Nominating Commission; Georgia Conference of Black Lawyers, Inc.; State Bar Judicial Compensation Committee; American Judicature Society; National Bar Association; American Bar Association; Augusta Bar Association; and the Atlanta Bar Association. He also lectured at professional seminars and at the National Judicial College, Reno, Nev.

The Court of Appeals of Georgia honored Ruffin in September 2008 with a ceremony for the unveiling of his portrait. Ruffin's portrait hangs in the Court of Appeals courtroom. Waynesboro, his hometown, has also hung his portrait in its courtroom. While serving on the Court of Appeals, Ruffin established a residence in Atlanta. He made many friends and attended Friendship Baptist Church. Since his retirement from the Court of Appeals, he remained active, volunteering in community and civic projects and as an instructor at his alma mater, Morehouse College. GBJ

April-June

APR 8
NBI, Inc.
Advanced Family Law
Atlanta, Ga.
6.7 CLE Hours

APR 8
Stewart Title Guaranty Company
Georgia Probate and Title Insurance
Roswell, Ga.
1 CLE Hours

APR 9
ICLE
LLCs and LLPs
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

APR 15
ICLE
Child Welfare Attorney Training (Tentative)
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

APR 15
ICLE
Employment Rights Law
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

APR 16
ICLE
Special Needs Trusts
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

APR 16
ICLE
Corporate Internal Investigation
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

APR 20
Lorman Education Services
Affordable Housing
Atlanta, Ga.
6 CLE Hours

APR 20-21
Ali-Aba
Arbitration Fundamentals and Best Practices for New AAA Arbitrators
Atlanta, Ga.
13.3 CLE Hours

APR 21
ICLE
Sports Law Update
Atlanta, Ga.
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APR 23
ICLE
Nuts & Bolts of Business Law
Atlanta, Ga.
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APR 23
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Business Immigration Law
Atlanta, Ga.
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APR 29
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6 CLE Hours

APR 30
ICLE
Foreign Corrupt Practices Act
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAY 5
Lorman Education Services
Commercial and Real Estate Loan Documents
Atlanta, Ga.
6 CLE Hours

MAY 5
NBI, Inc.
Bankruptcy – Law and Litigation
Atlanta, Ga.
6 CLE Hours

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MAY 6-8
ICLE
Real Property Law Institute
Destin, Fla.
See www.iclega.org for location
12 CLE Hours

MAY 7
ICLE
Dispute Resolution
Augusta, Ga.
See www.iclega.org for location
6 CLE Hours

MAY 7
ICLE
Federal Criminal Practice
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAY 7
ICLE
Animal Cruelty Cases
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAY 10
NBI, Inc.
Managing Construction Project Risk
Atlanta, Ga.
6 CLE Hours

MAY 11
ICLE
Group Mentoring
Atlanta, Ga.
See www.iclega.org for location
3 CLE Hours

MAY 14
ICLE
Employment Law
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAY 14
ICLE
Georgia DUI Law Update
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAY 26
NBI, Inc.
Estate Planning Basics
Atlanta, Ga.
5 CLE Hours

MAY 27
NBI, Inc.
Estate Planning Basics
Savannah, Ga.
5 CLE Hours

MAY 27-29
ICLE
Family Law Institute
Destin, Fla.
See www.iclega.org for location
12 CLE Hours

JUN 10
ICLE
Elder Law Training (Tentative)
Macon, Ga.
See www.iclega.org for location
6 CLE Hours

JUN 18-20
ICLE
Child Welfare Attorney
Trial Techniques Training
Emory University School of Law
Atlanta, Ga.
(Contact cwtrialtechniques@gmail.com
for appliction and scholarship info.)
12 CLE Hours

JUN 24-27
ICLE
Georgia Trial Skills Clinic
Athens, Ga.
See www.iclega.org for location
24 CLE Hours

JUN 25-26
ICLE
Southeastern Admiralty Law Institute
Charleston, SC
See www.iclega.org for location
9 CLE Hours

See page 12 for Annual Meeting CLE opportunities.

First Publication of Proposed Formal Advisory Opinion No. 08-R5

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 Street, 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 May 15, 2010, 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 opinion 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. 08-R5

QUESTION PRESENTED:

Ethical Considerations Bearing on Decision of Lawyer to Enter into Flat Fixed Fee Contract to Provide Legal Services.

OPINION:

Contracts to render legal services for a fixed fee are implicitly allowed by Georgia Rule of Professional Conduct (Ga. R.P.C.) 1.5 (a)(8) so long as the fee is reasonable. It is commonplace that criminal defense lawyers may provide legal services in return for a fixed fee. Lawyers engaged in civil practice also use fixed-fee contracts. A lawyer might, for example, properly charge a fixed fee to draft a will, handle a divorce, or bring a civil action. In these instances the client engaging the lawyer's services is known and the scope of the particular engagement overall can be foreseen and taken into account when the fee for services is mutually agreed. The principal ethical considerations guiding the agreement are that the lawyer must be competent to handle the matter (Ga. R.P.C. 1.1) and the fee charged must be reasonable and not excessive. See Ga. R.P.C. 1.5(a).

Analysis suggests that the ethical considerations that bear on the decision of a lawyer to enter into a fixed fee contract to provide legal services can grow more complex and nuanced as the specific context changes. What if, for example, the amount of legal services to be provided is indeterminate and cannot be forecast with certainty at the outset? Or that someone else is compensating the lawyer for the services to be provided to the lawyer's client? It is useful to consider such variations along a spectrum starting from the relatively simple case of a fixed fee paid by the client who will receive the legal representation for a contemplated, particular piece of legal work (e.g., drafting a will; defending a criminal prosecution) to appreciate the growing ethical complexity as the circumstances change.

1. A Sophisticated User of Legal Services Offers to Retain a Lawyer or Law Firm to Provide It With an Indeterminate Amount of Legal Services of a Particular Type for an Agreed Upon Fixed Fee.

In today's economic climate experienced users of legal services are increasingly looking for ways to curb the costs of their legal services and to reduce the uncertainty of these costs. Fixed fee contracts for legal services that promise both certainty and the reduction of costs can be an attractive alternative to an hourly-rate fee arrangement. A lawyer contemplating entering into a contract to furnish an unknown and indeterminate amount of legal services to such a client for a fixed fee should bear in mind that the fee set must be reasonable (Ga. R.P.C. 1.5(a)) and that the lawyer will be obligated to provide competent, diligent representation even if the amount of legal services required ultimately makes the arrangement less profitable than initially contemplated. The lawyer must accept and factor in that possibility when negotiating the fixed fee.

This situation differs from the standard case of a fixed-fee for an identified piece of legal work only because the amount of legal work that will be required

is indeterminate and thus it is harder to predict the time and effort that may be required. Even though the difficulty or amount of work that may be required under such an arrangement will likely be harder to forecast at the outset, such arrangements can benefit both the client and the lawyer. The client, by agreeing to give, for example, all of its work of a particular type to a particular lawyer or law firm will presumably be able to get a discount and reduce its costs for legal services; the lawyer or law firm accepting the engagement can be assured of a steady and predictable stream of revenue during the term of the engagement.

There are, moreover, structural features in this arrangement that tend to harmonize the interests of the client and the lawyer. A lawyer or law firm contemplating such a fixed fee agreement will presumably be able to consult historical data of the client and its own experiences in handling similar matters in the past to arrive at an appropriate fee to charge. And the client who is paying for the legal services has a direct financial interest in their quality. The client will be the one harmed if the quality of legal services provided are inadequate. The client in these circumstances normally is in position to monitor the quality of the legal services it is receiving. It has every incentive not to reduce its expenditures for legal services below the level necessary to receive satisfactory representation in return. Accordingly, such fixed-fee contracts for an indeterminate amount of legal services to be rendered to the client compensating the lawyer for such services are allowable so long as the fee set complies with Ga. R.P.C. 1.5(a) and the lawyer fulfills his or her obligation to provide competent representation (Ga. R.P.C. 1.1) in a diligent manner (Ga. R.P.C. 1.3), even if the work becomes less profitable than anticipated.

2. A Third-Party Offers to Retain a Lawyer or Law Firm to Handle an Indeterminate Amount of Legal Work of a Particular Type for a Fixed Fee for Those the Third-Party Payor is Contractually Obligated to Defend and Indemnity Who Will Be the Clients of the Lawyer or Law Firm.

This situation differs from the last because the third-party paying for the legal services is doing so for another who is the client of the lawyer. An example of this situation is where a liability insurer offers a lawyer or law firm a flat fee to defend all of its insureds in motor vehicle accident cases in a certain geographic area. Like the last situation, there is the problem of the indeterminacy of the amount of legal work that may be required for the fixed fee; and, in addition, there is the new factor that the lawyer will be accepting compensation for representing the client from one other than the client.

Several state bar association ethics committees have addressed the issue of whether a lawyer or law firm may enter into a contract with a liability insurer in which the lawyer or law firm agrees to handle all or some portion of the insurer's defense work for a fixed flat fee. With the exception of one state, Kentucky,[1] all the other state bar associations' ethics opinions have determined that such arrangements are not *per se* prohibited by their ethics rules and have allowed lawyers to enter into such arrangements, with certain caveats.[2] It should be noted that all of the arrangements

approved involved a *flat fee per case*, rather than a set fee regardless of the number of cases.

Although the significance of this fact was not directly discussed in the opinions, it does tend to reduce the risks arising from uncertainty and indeterminacy. Even though some cases may be more complex and time-consuming than the norm, others will be less so. While the lawyer will be obligated under the contract to handle each matter for the same fixed fee, the risk of a far greater volume of cases than projected is significantly reduced by a fixed fee per case arrangement. The lawyer or law firm can afford to increase staff to handle the work load, and under the law of large numbers, a larger pool of cases will tend to even out the average cost per case.

In analyzing the ethical concerns implicated by lawyers entering into fixed-fee contracts with liability insurers to represent their insureds, several state bar association ethics opinions have warned of the danger presented if the fixed fee does not provide adequate compensation. An arrangement that seriously undercompensates the lawyer could threaten to compromise the lawyer's ability to meet his or her professional obligations as a competent and zealous advocate and adversely affect the lawyer's independent professional judgment on behalf of each client.

As Ohio Supreme Court Board of Commissioners Opinion 97-7 (December 5, 1997) explains it:

> If a liability insurer pays an attorney or law firm a fixed flat fee which is insufficient in regards to the time and effort spent on the defense work, there is a risk that the attorney's interest in the matter and his or her professional judgment on behalf of the insured may be compromised by the insufficient compensation paid by the insurer. An attorney or law firm cannot enter into such an agreement.

The same point was echoed in Florida Bar Ethics Opinion 98-2 (June 18, 1998) in which the Florida board determined that such flat fixed-fee contracts are not prohibited under the Florida Rules but cautioned that the lawyer "may not enter into a set fee agreement in which the set fee is so low as to impair her independent professional judgment or cause her to limit the representation of the insured."

In addition to the Georgia Rules referenced above, a Georgia lawyer considering entering into such an agreement should bear in mind Ga. R.P.C. 1.8(f) and 5.4(c) as well as Ga. R.P.C. 1.7(a) and its Comment [6].

Rule 1.8(f) cautious that "A lawyer shall not accept compensation for representing a client from one other than the client unless. . . (2) there is not interference with the lawyer's independence of professional judgment or with the client-lawyer relationship. . .[3]

Ga. R.P.C. 1.7(a) provides that:

> A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as provided in (b) [which allows client consent to cure conflicts in certain circumstances].

Ga. R.P.C. 1.7(c) makes it clear, however, that client consent to cure a conflict of interest is "not permissible if the representation . . . (3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients."

When a lawyer agrees to handle an unknown and indeterminable amount of work for a fixed fee, inadequate compensation and work overload may result. In turn, such effects could not only short-change competent and diligent representation of clients but generate a conflict between the lawyer's own personal and economic interests in earning a livelihood and maintaining the practice and effectively and competently representing the assigned clients. See Comment [6] to Rule 1.7: "The lawyer's personal or economic interests should not be permitted to have an adverse effect on representation of a client."

As other state bar ethics opinions have concluded, this situation does not lend itself to hard and fast categorical answers. Nothing in the Georgia Rules of Professional Conduct would forbid such a fee agreement per se. But "it is clear that a lawyer may not accept a fixed fee arrangement if that will induce the lawyer to curtail providing competent and diligent representation of proper scope and exercising independent professional judgment." Michigan Bar Ethics Opinion RI-343 (January 25, 2008). Whether the acceptance of a fixed fee for an indeterminate amount of legal work poses an unacceptable risk that it will cause a violation of the lawyer's obligation to his or her clients cannot be answered in the abstract. It requires a judgment of the lawyer in the particular situation.

A structural factor tends to militate against an outsized risk of compromising the ability of the lawyer to provide an acceptable quality of legal representation in these circumstances just as it did in the last. The indemnity obligation means the insurer must bear the judgment-related financial risk up to the policy limits. Hence, "the duty to indemnity encourages insurers to defend prudently."[4] A liability insurer helps itself – not just its insured – by spending wisely on the defense of cases if it is liable for the judgment on a covered claim. Coupled with the lawyer's own professional obligation to provide competent representation in each case, this

factor lessens the danger that the fixed fee will be set at so low a rate as to compromise appropriate representation of insureds by lawyers retained for this purpose by the insurer.

3. A Third-Party Offers to Retain a Lawyer or Law Firm to Provide an Indeterminate Amount of Legal Work for an Indeterminate Number of Clients Where the Third-Party Paying for the Legal Service Has an Obligation to Furnish the Assistance of Counsel to Those Who Will Be Clients of the Lawyer But Does Not Have a Direct Stake in the Outcome of Any Representation.

A situation where a third party that will not be harmed directly itself by the result of the lawyer's representation is compensating the lawyer with a fixed fee to provide an indeterminate amount of legal services to the clients of the lawyer may present an unacceptable risk that the workload and compensation will compromise the competent and diligent representation of those clients. Examples might be a legal aid society that contracts with an outside lawyer to handle all civil cases of a particular type for a set fee for low-income or indigent clients or a governmental or private entity that contracts with independent contractor lawyers to provide legal representation to certain indigent criminal defendants.

In contrast to the earlier sets of circumstances, several structural factors that might ameliorate the danger of the arrangement resulting in an unmanageable work load and inadequate compensation that could compromise the legal representation are absent in this situation. First, and most obviously, there is a disconnection between the adequacy of the legal service rendered and an impact on the one paying for the legal representation. The one paying for the legal services is neither the client itself nor one obligated to indemnify the client and who therefore bears a judgment-related risk. While the third-party payor is in a position to monitor the adequacy of the legal representation it provides through the lawyers it engages and has an interest in assuring effective representation, it does not bear the same risk of inadequate representation as the client itself in situation No. 1 or the liability insurer in situation No. 2.

Second, and perhaps less obviously, this last situation is fraught with even greater risk from indeterminacy if there is no ceiling set on the number of cases that can be assigned and there is no provision for adjusting the agreed-upon compensation if the volume of cases turns out to far exceed what was contemplated. Sheer workload can compromise the quality of legal services whatever the arrangement for compensation. But, where the payment is set at a fixed annual fee rather than on a fixed fee per case basis, the ability of the lawyer to staff up to handle a greater-than-expected volume with increased revenue is removed.

Accordingly, as compared to the other examples, the risk that inadequate compensation and case overload may eventually compromise the adequacy of the legal representation is heightened in these circumstances. A lawyer entering into such a contract must assess carefully the likelihood that such an arrangement in actual operation, if not on its face, will pose significant risks of non-compliance with Ga. Rules of Professional Conduct 1.1, 1.3, 1.5, 1.8(f) and 1.7.

In this regard, a fee arrangement that is so seriously inadequate that it systematically threatens to undermine the ability of the lawyer to deliver competent legal services is not a reasonable fee. Ga. R.P.C. 1.5 Comment [3] warns that:

> An agreement may not be made, the terms of which might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required. . . .

And Comment [1] to Ga. R.P.C. 1.3 reminds that "A lawyer's work load should be controlled so that each matter can be handled adequately."

A failure to assess realistically at the outset the volume of cases and the adequacy of the compensation and to make an informed judgment about the lawyer's ability to render competent and diligent representation to the clients under the agreement could also result in prohibited conflicts of interest under Ga. R. P.C. 1.7(a). If an un-capped caseload forces a lawyer to underserve some clients by limiting preparation[5] and advocacy in order to handle adequately the representation of other clients or the fixed fee systematically confronts the lawyer with choosing between the lawyer's own economic interests and the adequate representation of clients a conflict of interest is present. Ga. R. P. C. 1.7 (c) makes it clear that a conflict that renders it "reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the effected clients" cannot be undertaken or continued, even with client consent.

It is not possible in the abstract to say categorically whether any particular agreement by a lawyer to provide legal services in this third situation violates the Georgia Rules of Professional Conduct. However, arrangements that obligate lawyers to handle an unknown and indeterminate number of cases without any ceiling on case volume or any off-setting increase in compensation due to the case volume carry very significant risks that competent and diligent representation of clients may be compromised and that the lawyer's own interests or duties to another client will adversely affect

the representation. Lawyers contemplating entering into such arrangements need to give utmost attention to these concerns and exercise a most considered judgment about the likelihood that the contractual obligations that they will be accepting can be satisfied in a manner fully consistent with the Georgia Rules of Professional Conduct. A lawyer faced with a representation that will result in the violation of the Georgia Rules of Professional Conduct must decline or terminate it, Ga. R. P. C. 1.16(a)(1)[6], unless ordered by a court to continue.[7]

Endnotes

1. Kentucky Bar Association Ethics Opinion KBA E – 368 (July 1994). This opinion prohibiting *per se* lawyers from entering into set flat fee contracts to do all of a liability insurer's defense work was adopted by the Kentucky Supreme Court in American Insurance Association v. Kentucky Bar Association, 917 S.W.2d 568 (Ky. 1996). The result and rationale are strongly criticized by Charles Silver, Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle Over the Law Governing Insurance Defense Lawyers, *4 Conn. Ins. L. J. 205* (1997-98).
2. Florida Bar Ethics Opinion 98-2 (June 18, 1998) (An attorney may accept a set fee per case from an insurance company to defend all of the insurer's third party insurance defense work unless the attorney concludes that her independent professional judgment will be affected by the agreement); Iowa Supreme Court Board of Professional Ethics and Conduct Ethics Opinion 86-13 (February 11, 1987) (agreement to provide specific professional services for a fixed fee is not improper where service is inherently capable of being stated and circumscribed and any additional professional services that become necessary will be compensated at attorney's regular hourly rate.); Michigan Bar Ethics Opinion RI-343 (January 25, 2008) (Not a violation of the Rules of Professional Conduct for a lawyer to contract with an insurance company to represent its insureds on a fixed fee basis, so long as the arrangement does not adversely affect the lawyer's independent professional judgment and the lawyer represents the insured with competence and diligence.); New Hampshire Bar Association Formal Ethics Opinion 1990-91|5 (Fixed fee for insurance defense work is not *per se* prohibited; but attorney, no matter what the fee arrangement, is duty bound to act with diligence.); Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 97-7 (December 5, 1997) (Fixed fee agreement to do all of liability insurer's defense work must provide reasonable and adequate compensation. The set fee must not be so inadequate that it compromises the attorney's professional obligations as a competent and zealous advocate); Oregon State Bar Formal Ethics Opinion No. 2005-98 (Lawyer may enter flat fee per case contract to represent insureds but this does not limit, in any way lawyer's obligations to each client to render competent and diligent representation. "Lawyer owes same duty to 'flat fee' clients that lawyer would own to any other client." "Lawyers may not accept a fee so low as to compel the conclusion that insurer was seeking to shirk its duties to insureds and to enlist lawyer's assistance in doing so."); Wisconsin State Bar Ethics Opinion E-83-15 (Fixed fee for each case of insurance defense is permissible; attorney reminded of duty to represent a client both competently and zealously.)
3. Rule 5.4(c) similarly commands that: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."
4. Silver, note 1 at 236.
5. Ga. R. P. C. 1.1 requires that a lawyer "provide competent representation to a client." Comment [5] spells out the thoroughness and preparation that a lawyer must put forth, noting that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. **It also includes adequate preparation.** (emphasis added).
6. *See* ABA Formal Opinion 06-441 (May 2006) titled "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation," suggesting that if a caseload becomes too burdensome for a lawyer to handle competently and ethically the lawyer "must decline to accept new cases rather than withdraw from existing cases if the acceptance of a new case will result in her workload becoming excessive."
7. ". . . When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Ga. R. P. C. 1.16(c).

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

Pursuant to 28 U.S.C. ' 2071(b), notice and opportunity for comment is hereby given of proposed amendments to the Rules of the U.S. Court of Appeals for the Eleventh Circuit.

A copy of the proposed amendments may be obtained on and after April 1, 2010, 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. NW, Atlanta, Georgia 30303 [phone: 404-335-6100]. Comments on the proposed amendments may be submitted in writing to the Clerk at the above address by April 30, 2010.

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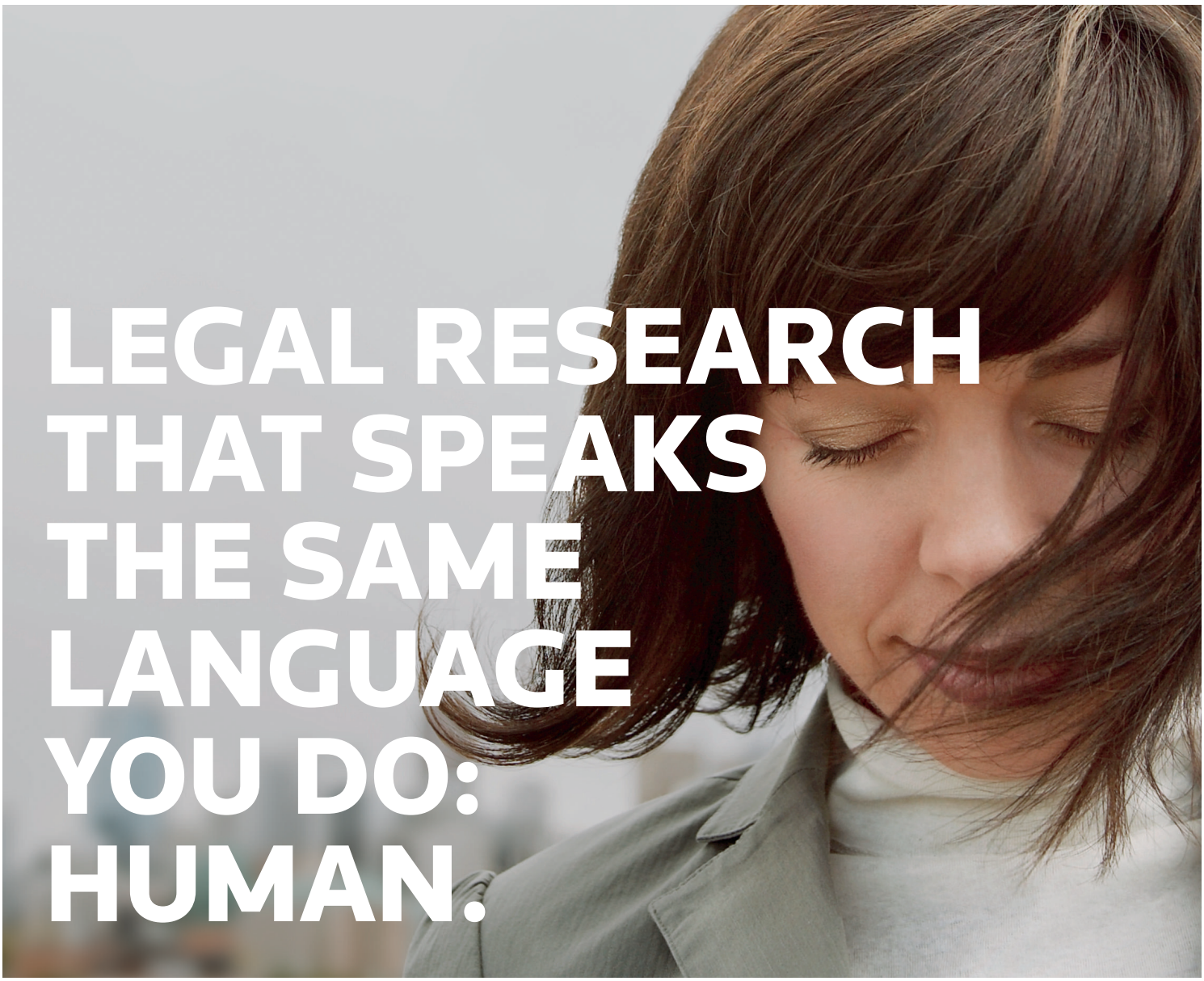

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