

The background of the cover is a photograph of a beach. In the foreground, there is a wide expanse of wet, brown sand. To the right, gentle waves with white foam are washing onto the shore. In the middle ground, a line of buildings is visible along the beach. On the left, there is a large, multi-story building with a green roof and many windows. Further to the right, there are several smaller, lower buildings. The sky is a clear, bright blue.

Georgia Bar Journal

April 2009 Volume 14 Number 6

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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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photo by www.kristenphoto.com

by Jeffrey O. Bramlett

Status Report on a Fleeting Bar Year

The opportunity to serve as your State Bar president has been a life experience that has exceeded my every expectation. As I've trav-

eled across Georgia and met its lawyers, I have learned much about our profession and our state. I am grateful for the generous support, encouragement and hospitality lawyers across the state have extended to me.

With two months remaining in my term, it's time to give you an up-to-date progress report on the year.

Maintaining Unity of the Bar

From the outset, my chief priority has been to build and maintain the unity of our Bar. Our profession is fraught with natural tensions and divisions. Put a plaintiffs' personal injury lawyer and an in-

house counsel for a large corporation in adjacent chairs and let the discussion flow freely over appropriate tort law policy. Or convene a robust discussion between a superior court judge and an elected district attorney over whose job is more demanding and

where the salaries for these two immensely important public jobs should be set in relation to each other. The truth is that we often have our internal differences, but we remain bound together by common values as basic as the rule of law, the preservation of fair and impartial courts accessible to every person and a commitment to justice and fair play.

I have done my best to focus on the shared fundamental values that bind us together as

Georgia's lawyers have faced a variety of challenges driven by the severely troubled economic environment. In the private sector, we are attending to the needs of lawyers who are unemployed or underemployed with programs that range from Law Practice Management and the Lawyers Assistance Program to the Transition Into Law Practice Program. At the intersection of the legal profession and the public

"The commitment of our lawyers to the core values that have carried our state and nation through far more difficult circumstances is unchanging."

sector, we have had a fight on our hands in the recently completed term of the General Assembly to oppose the defunding of critical court operations, to ensure adequate resources for prosecutors and to secure adequate resources for the operation of Georgia's indigent defense system. I am proud to report that Georgia's courts and Georgia's public sector lawyers have generally stood the common ground and resisted the temptation to engage in turf battles.

Thanks to the generous support of Georgia lawyers for their voluntary Legislative and Public Education Fund, we have been able to maintain a strong legislative advocacy presence under the leadership of ACL Chair Patti Gorham and Vice-Chair Dwight Davis. Guided by the hardworking Communications/Cornerstones of FreedomSM Committee and chair, Bob Kauffman, we've taken the Cornerstones of FreedomSM public information initiative to ambitious new levels with a series of three different broadcast campaigns that directly harmonize with our legislative advocacy efforts.

"It is Written" was broadcast in November 2008, stressing the constitutional protections assuring the right to vote, thanking citizens for voting in the general election and encouraging them to go back to the polls for the runoff election that decided a vacant Court of Appeals of Georgia seat. "Blind Justice" went on the air in March 2009, with a message that enabled Georgians to contact their legislators and ask them to support adequate court funding. Through a link on the Bar's website, viewers were able to quickly send this message of support to their senators and representatives. A third broadcast campaign featuring the words and likeness of trial lawyer/president Abraham Lincoln will unfold throughout the second quarter of 2009.

We have enjoyed continued success in reaching out to the public

through local newspaper editorials and letters to the editor stressing the importance of an independent judiciary and the value of a legal profession devoted to the public and community service. Between June 2008 and March 2009, at least 100 such articles and letters have appeared in 48 different publications in all corners of the state, reaching a total circulation of nearly 2.2 million readers.

Our Law-Related Education (LRE) and "Journey Through Justice" programs are continuing to inform Georgia's young people about our court system and the legal profession. During the current year, LRE has hosted or scheduled 98 "Journey Through Justice" tours at the Bar Center involving more than 4,325 public, private and home school students from 19 Georgia counties. Additionally, LRE has conducted two teacher workshops in the Bar Center involving 50 educators from DeKalb County schools.

Another manifestation of the State Bar's commitment to unify Georgia's lawyers is embodied in the Bar's Coastal Georgia Office at 18 E. Bay St. in Savannah. The members of the Supreme Court of Georgia joined us for a well-attended housewarming celebration of the satellite office in March. We anticipate that construction will be complete and the office ready for service in June. We hope all lawyers on or near the Georgia coast will find this office helpful and convenient to them in their law practices and in their active participation in State Bar and local bar activities.

Maintaining a Lawyer Discipline System Worthy of Public Trust and Confidence

The Standing Committee on Disciplinary Rules and Procedures chaired by Edward Krugman is making progress on rules revisions that will comply with recent updates by the American Bar Association.

The Committee on International Trade in Legal Services chaired by Ben Greer is continuing to address the implications of U.S. participation in GATS and NAFTA on our State Bar's ability to preserve effective licensing of lawyers and the regulation of legal services in the public interest. The committee will hold its next meeting in May.

The American Bar Association has proposed a model rule dealing with registration of in-house counsel who are not admitted to the bar in the jurisdiction where their employer's place of business is located. I am appointing a special committee to examine this proposal and make recommendations that promote the objectives of a trustworthy lawyer discipline system and a healthy climate for economic development and the operation of sound and profitable businesses.

Following recommendations by the Lawyer Advertising Task Force, the Lawyer Advertising Judicial District Committees are now in their second year of operation. These committees, comprised of three local bar members for each of the 10 judicial districts, submit information about advertising-related concerns or complaints they receive to the Office of the General Counsel (OGC). If, after review by OGC, there appears to be a potential violation, the office generally contacts the attorney to attempt resolution without referral to the Investigative Panel. Since July 2007, OGC has reviewed approximately 85 advertising matters referred by district committee members and other attorneys. As of March 2009, the Investigative Panel had reviewed eight television and radio ads, three print ads, one website matter and two firm name matters. In six of those matters, the panel directed OGC to issue warning letters to the attorneys, advising that if corrective actions were not taken, the panel would initiate grievances. All of the attorneys agreed to

State Bar of Georgia 2009 Annual Meeting

June 18-21, 2009

Amelia Island Plantation, Amelia Island, Fla.

Early Bird Cut-off Date is May 29 • Final Cut-off Date is June 5



State Bar
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comply with the suggested corrections. OGC also fields three to five calls per week from attorneys who seek advice prior to placing ads.

In furtherance of its goal of protecting the public, the Unlicensed Practice of Law department is maintaining a registry of State Bar, District Committee and Standing Committee investigations and prosecutions that have resulted in cease and desist affidavits or court orders enjoining individuals from unlicensed practice violations. During the current Bar year, there have been two injunctions and/or consent orders, including one for criminal contempt, and 37 cease and desist affidavits.

Military/Veterans Pro Bono Initiative

Throughout this Bar year, the Military and Veterans Pro Bono Committee chaired by Charles "Buck" Ruffin has worked long and hard to systematically assess the unmet legal needs of Georgia servicemembers and veterans and to establish a panel of State Bar members who have volunteered the necessary services and undergone the training required to help meet those needs. Committee members have participated in fact-finding visits to the various military installations across the state. The committee has devoted careful and thorough consideration to program rules for client eligibility, training standards and mechanisms for matching client needs with lawyer skills.

More than 650 State Bar members have enlisted to participate in this program for servicemembers and veterans. The legal services Bar members will be making available range from civil litigation, landlord/tenant issues, criminal defense and family law to wills and estates and the prosecution of disability benefits claims. The Board of Governors received a detailed presentation on the committee's work and recommendations at the

March Board meeting and will be voting on pilot program funding for this initiative at the Annual Meeting in June.

Long-Range Planning & Bar Governance Initiative

The Long-Range Planning Committee chaired by the Hon. Lamar Sizemore Jr. has been busy throughout the year working on improving the Bar's coordination with a series of Bar-related affiliate entities that include the Georgia Bar Foundation, the Lawyers Foundation of Georgia, the Institute of Continuing Legal Education, the Commission on Continuing Lawyer Competency and the Georgia Legal Services Program. The executive directors of each affiliated entity have participated in this effort and exchanged valuable information and ideas that have helped each entity cope with the challenges presented by the adverse economic environment.

In the short term, the work of the committee has improved the Bar's ability to respond constructively to the sudden diminution of IOLTA revenue and its implications for the funding of various legal and community service delivery programs at the state and local levels. In the longer term, the committee's work will result in a set of governance best practices that promise to elevate the operation of the Bar and each affiliated entity.


A draft of governance best practices on conflicts of interest, document retention and whistleblower non-retaliation has been completed and is being fine-tuned by the committee. The recommendations will then be reviewed by the Office of the General Counsel and Executive Committee before consideration by the Board of Governors. It is my sincere hope that the work of the Long Range Planning Committee will improve coordination and cooperation among this community of related

entities who are all striving for the common purposes of defending fair and impartial courts accessible to all Georgians, preserving the rule of law and improving the administration of justice. These are, after all, the common values that unite our profession.

Aristotle's Caution

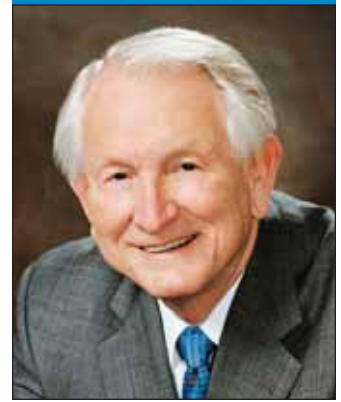
Aristotle pointed out that it is premature to pass judgment whether one's life has been a good one or a bad one until it ends. Following that caution, it is still too early to pass conclusive judgment on the successes and disappointments of this fleeting Bar year. Where we have had successes, it has largely been due to the faithful volunteer service of the handful of lawyers I have acknowledged above and the hundreds more who have devoted their time and effort toward many worthwhile Bar endeavors.

I do not know what the next two months hold in store for our Bar, but I do know this: while too many individual lawyers and their clients are suffering hardship in these troubled times, the state of our profession is strong. The commitment of our lawyers to the core values that have carried our state and nation through far more difficult circumstances is unchanging. The warmth and generosity of Georgia's lawyers is inspirational to me, and I shall never forget the expressions of support and acts of kindness that have carried me through my duties this year. For all of these reasons, I am optimistic that, working together, we and the public we serve will survive this season of adversity and come out on the other side stronger for the experience.

I hope to see you at Amelia Island in June for our Annual Meeting. 

Jeffrey O. Bramlett is the president of the State Bar of Georgia and can be reached at bramlett@bmelaw.com.

by Cliff Brashier



Room with a View:

Bar Dedicates New Satellite Office in Savannah

With all seven Supreme Court of Georgia justices, the mayor of Savannah, a large contingent of

Savannah Bar Association members and lawyers from surrounding communities in attendance, the State Bar Executive Committee officially dedicated our new Coastal Georgia Office on March 6.

While the facility itself was still a work in progress leading up to its scheduled June 1 opening, the sun-splashed afternoon gave us a delightful preview of the scenery offered by the large windows in the main meeting rooms: the bustle of tourists on the cobblestone River Street below and an expansive view of the mighty

Savannah River itself, with vessels of all sizes making their way into and out of port.

The Coastal Georgia Office will be the Bar's third, along with our headquarters in Atlanta and the South Georgia Office in Tifton. The satellite office will host

Bar meetings and serve member needs within a 125-mile radius, including the Augusta and Brunswick areas. Every lawyer in Georgia is now within a two-hour drive of a State Bar office, with the vast majority much closer than that.

As immediate Past President Gerald M. Edenfield, whose leadership was instrumental in helping the Board of Governors see the benefits of a Coastal Georgia office, said, this is

the culmination of a dream that began more than a decade ago. Once the project was approved, a steering committee was appointed, with Executive Committee member N. Harvey Weitz of Savannah as chair.

"We turned it over to Harvey and his committee, and they have done a yeoman's job," Edenfield said.

"Located at 18 E. Bay St. in the heart of the downtown commercial district, the Coastal Georgia office occupies renovated space upstairs from the original site of the historic Cotton Exchange."

Noting the sheetrock for the walls dividing the offices and meeting rooms that had yet to be installed, Edenfield quipped, "You hear a lot about transparency in government these days, and we certainly have it today!"

Located at 18 E. Bay St. in the heart of the downtown commercial district, the Coastal Georgia office occupies renovated space upstairs from the original site of the historic Cotton Exchange. With a full-time staff, office facilities, conference and training rooms, the new location will meet the needs of our members and committees throughout southeast Georgia.

Savannah Bar Association President Michael L. Edwards made note of the significance of establishing a State Bar presence in the general vicinity of where Gen. James Oglethorpe discovered the colony of Georgia some 275 years ago.

"We are really proud of this building and excited about the potential for hosting a lot of events here," Edwards said. "Working with the State Bar, we will make sure this is a busy and active space."

Savannah Mayor Otis Johnson welcomed the Bar leaders and praised the decision to set up shop in his city, adding, "I am sure that it will make every lawyer in this region very happy."

The mayor also took the opportunity to present a token of appreciation to retiring Chief Justice Leah Sears, "a person we claim," he said.

"I can see you're almost there ... any day now," the chief justice, who was raised in Savannah, said of the Bar office's progress. "I am so very proud of this town, having watched Savannah grow and flourish. I still consider myself a Savannahian."

The work of the steering committee—Weitz, Edwards, Edenfield, Patrick T. O'Connor, Lester B. Johnson III, Walter C. Hartridge, Jeffrey R. Harris and Past President Jay Cook—was acknowledged and praised by current President Jeffrey O. Bramlett.



(Left to right) State Bar President Jeffrey O. Bramlett presents Executive Committee member N. Harvey Weitz with the official resolution for the Coastal Georgia Office.



(Left to Right) Supreme Court of Georgia Chief Justice Leah Ward Sears and Savannah Mayor Otis Johnson joined in dedicating the State Bar's new Coastal Georgia Office in Savannah.


"You've done a great job," Bramlett said. "Keep up the great work until it's finished."

Weitz closed the dedication ceremony by describing the office as being "in a period of gestation. We are not quite completely finished, but come back in June."

Noting the big annual events on Savannah's riverfront, he invited the group to come back often, "not just on St. Patrick's Day, the Fourth of July and New Year's Eve, but throughout the year."

All State Bar members are encouraged to take advantage of the new facility. No matter what

part of the state you are from, if your travels take you to or near Savannah, consider the Coastal Georgia Satellite your office away from home.

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). 

Cliff Brashier is the executive director of the State Bar of Georgia and can be reached at cliffb@gabar.org.

Photos by Sarah I. Coole



by Joshua C. Bell

Dodger Blues

The year was 1988. The Los Angeles Dodgers had an excellent team that year. After a great regular season, the Dodgers made it to the World Series where they played the powerhouse Oakland Athletics. Game 1 of this series was an epic battle with the heavily favored Athletics seemingly having captured victory in Los Angeles. That was until the injured Kirk Gibson came off the trainers' table to take a 3-2 backdoor slider from Dennis Eckersley and put it into the right field bleachers for a walk-off home run. This home run is the most famous home run in World Series history and arguably the most famous home run ever hit.

My dad, who is a life long Dodger fan, was as excited as he has ever been watching a sporting event. At least I imagine he was. I was home that day, in my room, watching television. My dad believes to this day

that I was sitting on the couch beside him watching Kirk Gibson hit that home run. My parents and I have always been close and we still are. At the time of Game 1 of the 1988 World Series, I was 17 years old and mad at my parents for something. I'm sure it was stupid. It's funny, I can't remember what I was mad at, but I can remember that my dad asked me if I wanted to watch the game and I said no.

I have watched countless games over the years with my dad, but I wish more than anything that I could go back in time and watch that famous home run with him. Some mistakes you never stop paying for. I have tried to make amends for this mistake. After all these years I have finally realized that I won't be able to do anything to make that mistake go away. It truly will stay with me the rest of my life.

I have seen in the practice of law that there are plenty of mistakes that can be made. Some mistakes are easily corrected. Some mistakes can never be corrected. The mistakes that cannot be corrected are usually the ones that only the person who made the mistake knows about. No one else may ever know about it, but the mistake will eat at you like a cancer.


Take, for instance, the lawyer who doesn't prepare for a trial or hearing. The lawyer might do an adequate job. An adequate job may mean enough to beat a malpractice claim. But inside, the lawyer knows that he didn't prepare and that might have been a contributing factor as to why the client lost his or her case. The client may have lost anyway, but the lack of preparation will always be a thought

"Be mindful that the choices that lawyers and judges face everyday can have everlasting ramifications."

that will linger in that lawyer's mind as to why the case was lost. This is a mistake that can never be corrected.

Shortcuts to success are always mistakes that you will never stop paying for. There are some of you right now reading this article who are faced with a "should I or should I not" situation. I can imagine your thought may be, "It looks so easy and no one will know." You will know and you will pay for it at some point in your life. Maybe you will pay the rest of your life. These shortcuts to success affect judges and lawyers alike. A judge should not allow himself or herself to be influenced by an attorney or a litigant outside of the courtroom. Judges and attorneys should limit situations where this could even occur. This avoids potential life-long mistakes and also wipes away the appearance of impropriety, a notion the practice of law obviously struggles with on a daily basis.

Mistakes that you never stop paying for are burdens that are not easy to carry. One mistake in my life was not watching a game with my dad. There are only a finite number of games. There certainly won't be another game like the one I missed. Part of me hopes that my dad never reads this article. The part that hopes he always keeps that image of me sitting beside him watching the ball sail over the fence. Another part of me hopes that he does read it so he can tell me it's alright. But in reality, it won't matter what he says. I'll always have to live with the mistake I made.

Be mindful that the choices that lawyers and judges face everyday can have everlasting ramifications. Don't allow yourself to make a mistake that you can never correct. Make the right decisions and you will be a better lawyer and a better person. 

Joshua C. Bell is the president of the Young Lawyers Division of the State Bar of Georgia and can be reached at joshbell@kirbokendrick.com.

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A Phoenix Rising:

Elimination of the Requirement of First-Person Reliance Under Civil RICO and Its Implications for Georgia Litigants

by Edward A. Marshall

In June 2008, the U.S. Supreme Court, in *Bridge v. Phoenix Bond & Indemnity Co.*¹ (*Phoenix Bond*), resolved a question that previously had divided the federal courts of appeal sharply: “Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the plaintiff.”² Answering the question in the negative, the Court held that a plaintiff’s inability to prove reliance on an allegedly fraudulent mailing (or wire communication)³ posed no obstacle to success on a claim brought pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO).

The decision, which breaks with nearly two decades of precedent from the U.S. Court of Appeals for the



11th Circuit, has the potential to expand markedly the use and potency of civil RICO in the Georgia courts.

An (Extremely) Abbreviated Overview of RICO

RICO originally was enacted to combat organized crime, but its scope today extends well beyond traditional conceptions of the purely criminal enterprise into more traditional business disputes. Generally speaking, the statute prohibits acquiring an interest in or operating an enterprise through a "pattern of racketeering activity."⁴ Although there are literally dozens of potential racketeering or "predicate acts,"⁵ two of the most commonly alleged forms of racketeering activity in the arena of civil litigation are mail fraud and wire fraud.

When it comes to these predicate acts, nomenclature can be deceiving. While invoking the construct of "fraud," the mail and wire fraud statutes do not criminalize fraud per se. Instead, these statutes criminalize the use of the mails or wires to effect a "*scheme or artifice to defraud*."⁶ Traditional elements of common law fraud are not, on the face of the statutes, explicitly made elements of the crimes.⁷

No matter the predicate acts alleged, however, a civil RICO defendant found liable for violating the statute faces potentially oppressive liability exposure: "Any person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor in any appropriate U.S. district court and shall recover *threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . .*"⁸ In view of the availability of treble damages and attorney's fees, the outer contours of civil RICO present a substantial concern for even legitimate businesses and associations, which increasingly find themselves facing the threat of RICO lawsuits.

Recent Supreme Court Forays Into the Requirement of Reliance Under RICO

There has been a trend in the judiciary in recent years to limit the reach of civil RICO liability because of the judiciary's concern that the statute's punitive reach has grown too expansive. The Supreme Court's decision in *Holmes v. Securities Investor Protection Corp.*⁹ is indicative of that trend. There, the Court construed "by reason of" in Section 1964(c) to incorporate common law concepts of proximate cause—requiring more than mere "but for" causation between a defendant's pattern of racketeering activity and the claimant's injury to sustain recovery.¹⁰ With that limitation, the Court rejected a claim by investors that they were entitled to recover against firms who had engaged in manipulative accounting practices, causing shares in the firms to lose value, which in turn caused the investors' brokers to go bankrupt, in turn causing the brokers to be unable to

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provide full compensation to the claimant-investors for investments in other securities. The relationship between the statutory violation and the injury was too attenuated, in the view of the Court, to sustain recovery.

That decision did not address whether RICO plaintiffs alleging mail or wire fraud must themselves have received and relied upon an allegedly fraudulent communication to demonstrate RICO liability. Although prosecutors need not demonstrate such reliance to establish a *criminal* RICO violation,¹¹ the federal circuit courts were split on whether a civil claimant must make such a showing. Despite undertaking to address this split of authority on two occasions, the Court (until *Phoenix Bond*) had been unable to resolve the question.

First, in *Bank of China v. NBM L.L.C.*,¹² the Court granted certiorari to resolve the question whether “civil RICO plaintiffs alleging mail and wire fraud as predicate acts must establish ‘reasonable reliance’ under 18 U.S.C. § 1964(c)?” Notwithstanding extensive briefing on the merits both by the litigants and amicus curiae, the petition was dismissed per the parties’ agreement.¹³

Less than two weeks after that dismissal in November 2005, the Court again took up the question concerning the role that reliance should play in the context of civil RICO claims predicated on mail fraud. In *Anza v. Ideal Steel Supply Corp.*, it granted certiorari to address “[w]hether a competitor is ‘injured in his business or property by reason of a violation’ of the Racketeer Influenced and Corrupt Organizations Act (RICO) where the alleged predicate acts of racketeering activity were mail fraud but the competitor was not the party defrauded and did not rely on the alleged fraudulent behavior.”¹⁴ Again, however, the Court failed to resolve the question. Instead, it held that competitors of a defendant who allegedly committed tax fraud could not establish proximate

causation between defendant’s pattern of racketeering activity and their diminished sales in relation to defendant, which, by virtue of its fraud, could achieve lower overhead. Central to the Court’s reasoning was that the state of New York—the government body that allegedly was deprived of the tax proceeds—was the “direct” victim of the fraud and had its own incentive to prosecute the allegedly offending business.¹⁵ Because the case was susceptible to resolution on grounds of proximate causation, the Court found it unnecessary to address directly the question of reliance.

Anza, consequently, did not provide any clear direction as to whether a RICO claimant must prove receipt and reliance of an allegedly fraudulent communication as a prerequisite to bringing suit. The Court did not, however, remain silent on the issue. The majority, in what could be seen as an inclination to incorporate reliance into the civil RICO framework, conspicuously observed that it lacked the “occasion to address the substantial question [of] whether a showing of reliance is required” to sustain such a claim.¹⁶

This none-too-subtle insinuation that traditional formulations of reliance might well enter into civil RICO cases predicated on mail fraud, however, was not joined by all members of the *Anza* Court. Justice Thomas filed a separate opinion, in which he emphasized that a “reliance” element finds no textual basis in the RICO statute. He explained:

[T]here is no language in § 1964(c) that could fairly be read to add a reliance requirement in fraud cases only. Nor is there any reason to believe that Congress would have defined “racketeering activity” to include acts indictable under the mail and wire fraud statutes, if it intended fraud-related acts to be predicate acts under RICO only when those

acts would have been actionable under the common law.¹⁷

The *Phoenix Bond* Litigation

Phoenix Bond presented the Court with the opportunity to address the reliance question that *Anza* did not answer. Cook County, Ill., sells tax liens on real property at auction. Potential purchasers state their “bids” in terms of the percentage penalty that they will require *on top* of the tax lien to satisfy the debt. Because the opportunity to foreclose on a tax lien is itself valuable, most bidders state their bids as 0 percent—that is, they require nothing more than that the debtor pay off the tax lien as a precondition to its release. Because the “floor” of bidding is set by statute at 0 percent, it is not uncommon for multiple bidders to bid 0 percent on the same property, resulting in a multi-party “tie.”

To address this predicament, the Cook County government allocates the sale of tax liens based on the number of bids that a prospective purchaser submits *vis-à-vis* other bidders. To avoid orchestrated bidding among several affiliated entities on the same lien, which would artificially increase the probability that the lien would go to one of the affiliated entities, prospective purchasers are required, pursuant to a “Single, Simultaneous Bidder Rule,” to submit affidavits to the government that no “related entity” is also bidding on the property.¹⁸

The claimants in *Phoenix Bond*, two regular participants in the Cook County tax sales, brought suit alleging that the defendants were violating this rule by arranging for related firms to bid on liens simultaneously, and submitting false affidavits to the county denying such an arrangement. Because the bidding process employed the mails (including sending notices to debtors upon the sale of the lien), the claimants alleged that this practice constituted a pattern of mail fraud, actionable under RICO.¹⁹

The district court in *Phoenix Bond* rejected the claim on standing grounds, noting that the county treasurer was the primary victim, even though the treasurer did not suffer a loss of money or property in connection with the scheme.²⁰ The U.S. Court of Appeals for the 7th Circuit disagreed and reversed. According to the 7th Circuit, the county, which the district court had deemed the *sole* injured party, was not a victim at all. Indeed, its revenues were the same regardless of who won the tax lien auction. It had no economic motivation to crack down on related entities who collaborated on the submission of bids for the same lien. The other bidders at the auction were, financially speaking, the *only* victims of the alleged scheme.²¹

The 7th Circuit went on, moreover, expressly to reject the defendant's argument that plaintiffs' inability to show first-party reliance on any allegedly fraudulent mailing proved fatal to the RICO claim:

"The mail fraud statute," it reasoned, "defines a fraudulent *scheme*, rather than a particular false statement, as the crime. It is illegal to obtain money by a scheme that entails fraud, if the use of the mail is integral to the scheme. That's why it is unnecessary to show that the false statement was made to the victim."²²

In reaching this result, the panel acknowledged that, while its view was apparently shared by the U.S. Courts of Appeals for the 1st, 2nd and 4th Circuits, the 6th Circuit had rejected its view, as had the 11th:

Three other circuits that have considered this question agree with our conclusion that the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements. The box score is thus four circuits on one side

and two on the other; we shall adhere to the majority position. (Changing sides would not eliminate the conflict.)²³

The Debate and Its Resolution

Those courts subscribing to the view that *no* first-person reliance (or, according to some decisions, no reliance at all) need be shown by the plaintiff in a RICO suit alleging mail or wire fraud tended to predicate their holdings on the literal reading of the statute. Section 1964(c) permits mail fraud to be shown by proof that the defendant employed the mails to carry out a "scheme to defraud." It does not matter that the claimant is not also the recipient of the mailing, as long as it is injured "by reason of" that scheme.

Opponents of this view—those insisting that first-person reliance *should* be required—emphasized the policy arguments supporting such a restraint on RICO, contending that they had meandered far beyond the original legislative intent. Opponents further emphasized that the Supreme Court, both in invoking the concept of proximate cause as it relates to the "by reason of" requirement, and, later,

by looking to common law to define a RICO "conspiracy," had introduced common law concepts into RICO.²⁴ In view of that introduction, these litigants argued (and subscribing courts reasoned), there was no reason to avoid incorporating traditional formulations of fraud into the predicate acts of mail and wire fraud, at least in the civil context, as a further restriction of the "by reason of" concept.

The 11th Circuit had long adopted this latter view. Since 1991, its RICO decisions steadfastly had adhered to the position that, "when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme."²⁵ Contrary decisions by its sister circuits had not altered its course.²⁶

The Supreme Court in *Phoenix Bond*, however, unanimously rejected the 11th Circuit's position as inconsistent with the plain language of the statute:

RICO provides a private right of action . . . to any person injured in his business or property by reason of the conduct of



a qualifying enterprise's affairs through a pattern of acts indictable as mail fraud. Mail fraud, in turn, occurs whenever a person, "having devised or intending to devise any scheme or artifice to defraud," uses the mail "for the purpose of executing such scheme or artifice or attempting so to do."²⁷

So understood, the Court continued, the plaintiffs' RICO allegations were sustainable and "straightforward."²⁸ The defendants had hatched a scheme to defraud, having agreed to file knowingly false assurances of compliance with the Single, Simultaneous Bidder Rule. They exploited the mails in furtherance of this scheme by causing notices to be mailed to property owners under the county's tax lien system. These mailings—each indictable as an act of mail fraud—in the aggregate formed a "pattern of racketeering activity." By conducting the affairs of their enterprise in this way, the defendants violated Section 1962(c), and their violation deprived the plaintiffs of the opportunity to acquire valuable properties. "Accordingly," the Court concluded, "[plaintiffs] were injured in their business or property by reason of [the defendants'] violation . . . and RICO's plain terms give them a private right of action"²⁹

The Court encapsulated its holding as a refusal to encumber the RICO claim with elements found nowhere in the statute: "Congress chose to make mail fraud, not common-law fraud, the predicate act for a RICO violation."³⁰ "If the absence of . . . a requirement [of first-person reliance] leads to the undue proliferation of RICO suits, the 'correction must lie with Congress.' It is not for the judiciary to eliminate the private action in situations where Congress has provided it."³¹

The Implications

The Supreme Court's resolution of the first-person reliance issue, at first blush, may seem largely immaterial. After all, the *Phoenix*

Bond case presented a singular fact pattern, and the concept of proximate cause would seem to impose a largely coterminous restriction on the reach of civil RICO in the vast majority of cases. It would be a mistake, however, to overlook the far-reaching effects of the decision's elimination of the requirement of first-person reliance on RICO litigants.

First, proximate causation, although certainly susceptible to resolution at the pleadings stage, may at times present an intensely fact-based inquiry—one that a trial court may be reluctant to resolve without the benefit of discovery and a more robust factual record. Whether the claimant actually received and relied upon the fraudulent mailing, by contrast, oftentimes is more straightforward. Thus, a first-person reliance requirement potentially could have assisted in the earlier dismissal of RICO litigation.³² By eliminating this requirement, the Court opened the door to more protracted RICO litigation. Because discovery in civil RICO actions is remarkably broad, the Court's decision could increase the litigation burdens of any organization that finds itself in the unfortunate position of being named a RICO defendant.

Further, the elimination of a first-person reliance requirement removes previously daunting hurdles to the success of RICO class actions. Because reliance can be an extraordinarily fact-intensive and claimant-centric inquiry, the lower courts' previous insistence on proof of first-person reliance severely constrained the availability of civil RICO class actions predicated on mail and/or wire fraud.³³ By removing that obstacle, the Supreme Court decidedly increased the pressure that will be brought to bear on individuals and organizations who find themselves named as defendants in putative class actions.

What is more, the Court's decision in *Phoenix Bond* may permit RICO to find its way into commercial business disputes in ways

previously foreclosed by 11th Circuit precedent. To be sure, *Phoenix Bond* presented a unique fact pattern. Viable analogues are not impossible to envision, however, especially in the arena of competitor-on-competitor lawsuits, and the decision has the potential to bring a substantial number of false advertising, tortious interference and defamation claims into the fold of civil RICO. Consider, for example, a suit brought by pharmaceutical companies against a competitor alleging that false communications that the latter sent to physicians describing the benefits of a given drug resulted in a decrease in the claimants' market share. With the requirement of first-party reliance in place, these competitors—who never in fact received or relied upon the mailing—would have been unable to prosecute their competitor under RICO. *Phoenix Bond* eliminated that hurdle to prosecution, subjecting the competitor to an action that otherwise might be available only under the Lanham Act.³⁴ (Notably, the sole amicus curiae to file a petition for writ of certiorari in *Phoenix Bond* was McKesson Corporation—North America's largest pharmaceutical distributor.)³⁵

Likewise, *Phoenix Bond* likely will permit RICO to become a potent weapon in litigation where a business claims that its competitor employed the mails or wires to perpetuate false rumors about its business practices or affiliations. Now, without ever having relied upon such communications, the offended business could avail itself of RICO's treble damages by claiming that it had been injured through the commission of mail and wire fraud.³⁶ Seemingly ordinary defamation and tortious interference claims could sustain an ominous statutory violation.

Conclusion

By eliminating the requirement of first-party reliance as a threshold for prosecuting a civil RICO claim

predicated on mail or wire fraud, the Supreme Court has opened the door to a new "local breed" of RICO litigation. Not only will the decision permit the introduction of RICO into suits that, under prior precedent, likely would have been prosecuted only under the banner of common law tort, it will make defense of those suits considerably more costly. Coupled with the increased potential for RICO class actions and the ever-present threat of oppressive liability exposure, RICO, which has always rightly been a cause for trepidation among civil defendants, has become an even more potent threat. G



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Endnotes

1. 128 S. Ct. 2131 (2008).
2. *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 829 (2008) (granting certiorari).
3. "The substantive elements of mail fraud and wire fraud are identical." *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360 n.25 (11th Cir. 2002), *abrogated on unrelated grounds by Phoenix Bond*, 128 S. Ct. 2131. "The only difference between the two offenses is their jurisdictional basis—mail fraud requires proof of the use of the mails, while wire fraud requires proof of the use of the wires." *Sikes*, 281 F.3d at 1360 n.25 (quoting *Beck v. Prupis*, 162 F.3d 1090, 1095 & n.9 (11th Cir. 1998), *aff'd*, 529 U.S. 494 (2000)).
4. *See generally* 18 U.S.C. § 1962 (2000).
5. *Id.* § 1961.
6. *See id.* §§ 1341, 1343 (2006) (emphasis added).
7. *See Pelletier v. Zweifel*, 921 F.2d 1465, 1498-99 (11th Cir. 1991).
8. 18 U.S.C. § 1964(c) (emphasis added).
9. 503 U.S. 258 (1992).
10. *Id.* at 268-69.
11. *Pelletier*, 921 F.2d at 1498-99.
12. 545 U.S. 1138 (2005) (granting certiorari).
13. *See Bank of China v. NBM L.L.C.*, 546 U.S. 1026 (2005). Supreme Court Rule 46.1 provides that the Clerk shall enter a dismissal when the parties agree, in writing, that the case be dismissed.
14. 546 U.S. 1029 (2006) (granting certiorari).
15. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006).
16. *Id.* at 461.
17. *Id.* at 477-78 (Thomas, J., dissenting).
18. *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2135 (2008).
19. *Id.* at 2136.
20. *Id.*
21. *Id.* at 2136-37.
22. *Phoenix Bond & Indem. Co. v. Bridge*, 477 F.3d 928, 932 (7th Cir. 2007), *aff'd*, 128 S. Ct. 2131 (2008).
23. *Id.* at 932-33 (citations omitted).
24. *See Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 267-68 (1992); *see also Beck v. Prupis*, 529 U.S. 494, 501 (2000) (defining RICO conspiracy by reference to common law concepts).
25. *See Pelletier v. Zweifel*, 921 F.2d 1465, 1499-500 (11th Cir. 1991).
26. *See, e.g., Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360-61 (11th Cir. 2002), *abrogated on unrelated grounds by Phoenix Bond*, 128 S. Ct. 2131.
27. *Phoenix Bond*, 128 S. Ct. at 2138 (quoting 18 U.S.C. § 1341).
28. *Id.*
29. *Id.*
30. *Id.* at 2141.
31. *Id.* at 2145 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985)).
32. *See Mid Atlantic Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263 (4th Cir. 1994).
33. *See Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1334 (11th Cir. 2006) ("We have

held that the reliance element of a class claim presents problems of individualized proof that preclude class certification.").

34. 15 U.S.C. §§ 1051-1127 (2006).
35. In one of the first decisions to apply *Phoenix Bond*, *In re Zyprexa Products Liability Litigation*, 253 F.R.D. 69 (E.D.N.Y. 2008), the plaintiffs claimed to have overpaid for a prescription drug based on false claims of efficacy and minimal side effects made to prescribing physicians. The court, relying on *Phoenix Bond*, held that the plaintiffs' claims were viable notwithstanding the fact that the false claims were made to non-claimant doctors rather than the plaintiffs themselves. *See id.* at 190, 193. The court likewise permitted certain categories of plaintiffs to prosecute their RICO claims as a class action.
36. [S]uppose an enterprise that wants to get rid of rival businesses mails misrepresentations about them to their customers and suppliers, but not to the rivals themselves. If the rival businesses lose money as a result of the misrepresentations, it would certainly seem that they were injured in their business "by reason of" a pattern of mail fraud, even though they never received, and therefore never relied on, the fraudulent mailings.

Phoenix Bond, 128 S. Ct. at 2138; *see also Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 565 (5th Cir. 2001) (allowing RICO claimant to proceed with allegations that competitor had induced boycott of its products by making accusations that it was associated with satanic cults).

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The Georgia Uniform Securities Act of 2008:

An Analysis of Significant Changes to Georgia's Blue Sky Law

by Keshawn Harry and Robert D. Terry

During the 2007-08 legislative session, the Georgia General Assembly repealed the Georgia Securities Act of 1973 and passed the Georgia Uniform Securities Act of 2008 (the Georgia Uniform Securities Act).¹ Gov. Sonny Perdue signed the Georgia Uniform Securities Act on May 12, 2008.² With the enactment of this legislation, Georgia became the 15th state to adopt a securities regulation regime based on the model act that the National Conference of Commissioners on Uniform State Laws promulgated in 2002 as the Uniform Securities Act of 2002.³

The Georgia Uniform Securities Act, which becomes effective on July 1, 2009, marks a significant effort by Georgia lawmakers to modernize securities regulation in Georgia. As commentators have noted, non-uniform securities laws are often impracticable both for the regulated entities and the regulators who work in modern, globalized securities markets.⁴ State uniformity reduces the burdens of complying with two separate regulatory regimes at the federal and the state level while increasing the ability of those regimes to inte-



grate and enforce cohesive laws. Prior to Congress's enactment of the National Securities Markets Improvement Act of 1996,⁵ the dual regulatory system led, in some instances, to perceived redundancies.⁶ The National Securities Markets Improvement Act addressed this problem by exempting offerings of federal covered securities from state regulation, restricting states' abilities to impose different recordkeeping obligations and clearly bifurcating investment adviser regulation.⁷ Paradoxically, this resolution had a uniform effect on state securities law—namely, preemption—while leaving the states on their own to handle the requisite amendments to their securities acts in an often non-uniform manner.⁸ Although in 1998 the Georgia General Assembly amended the Georgia Securities Act of 1973 to achieve some level of consistency with the National Securities Markets Improvement Act, the Uniform Securities Act of 2002 and the Georgia Uniform Securities Act were purposely crafted to meet the National Securities Markets Improvement Act's mandates and objectives as well as to make other changes designed to create more consistency in state regulation of securities transactions.⁹

When the Georgia Uniform Securities Act becomes effective in July 2009, practitioners will notice that several significant changes accompany the benefits of diminished regulatory overlap and enhanced uniformity. Practitioners will find key differences, for instance, in the provisions governing registration exemptions for securities instruments and professionals, the statute of limitations for civil actions and enforcement administration.

Securities Exemptions—Article 2

Limited Offering Exemption

The Georgia Uniform Securities Act is divided into seven articles.¹⁰

Article 2 of the Act addresses registration exemptions that apply to securities and to securities transactions. Article 2 amends many of the exemptions that were available under the Georgia Securities Act of 1973. One of the most used exemptions for small companies, the limited offering exemption set forth in Section 10-5-9(13), has several noteworthy changes. This exemption is now contained in Section 10-5-11(14) in the Georgia Uniform Securities Act and differs from prior law in that the exemption no longer requires that complying issuers and non-issuers place legends on the securities instruments or that each Georgia purchaser execute a "purchase for investment" statement.¹¹ Section 10-5-11(14) keeps the prohibition against general solicitations and the 15 Georgia purchaser maximum requirement intact, but institutes a new prohibition against commissions for solicitation-related activities and a requirement that the sale and offer be "part of a single issue."¹² Although the "purchase for investment" statement is no longer required, Section 10-5-11(14) does require that the issuer or non-issuer reasonably believe that all Georgia purchasers are purchasing for investment.¹³

Based on these requirements, the popularity and utility of the limited offering exemption will likely continue to increase in Georgia. The changes to the instrument legend and executed purchaser statement requirements should especially lessen the administrative burden on issuers and non-issuers in Georgia that engage in exempt limited offerings and reduce inadvertent noncompliance by some entities. The changes will not, however, affect essential safeguards and limits (placing the burden of proof on those who assert exemptions, prohibitions against fraud, orders imposing restrictions on or revoking exemptions and well-established strict construction principles with regard to exemptions).¹⁴ In addition, those attempting to rely

on the revised exemption will likely need substantive knowledge of what constitutes a single issue because integration of two separate securities issues can destroy the limited offering exemption.¹⁵

Employee Benefit Plan Exemption

Another significant exemption change that practitioners may notice concerns securities transactions in connection with employee benefit plans. Under the Georgia Securities Act of 1973, securities transactions related to employee benefit plans are generally exempt from state registration requirements. Sections 10-5-9(7) and 10-5-9(9), for instance, exempt transactions involving securities sales related to employee pension plans, profit-sharing plans, stock bonus plans, stock purchase plans, retirement plans and stock option plans when certain requirements are met. The employee benefit plan exemption is an important exemption. The ESOP Association, which assists companies that provide stock ownership plans to their employees, estimates that in the United States 10 percent of the private sector workforce is compensated in part through employee stock ownership plans.¹⁶ Indeed, many prominent companies count thousands of participants in their employee stock ownership plans.¹⁷

Given the prevalence of stock ownership plans, practitioners advising large and small corporations will likely find the Georgia Uniform Securities Act's revisions to the registration exemption provision on stock option plans remarkable.¹⁸ Under prior law, a registration exemption was available for transactions involving stock option plans only if those plans were limited to employees of the issuer or employees of the issuer's affiliate.¹⁹ Accordingly, stock option plans that included consultants or advisers were prohibited from using Section 10-5-9(9). This limitation was an effort to be consistent with the exemp-

tion's compensatory purpose. Nevertheless, the Securities and Exchange Commission (SEC) has emphasized that securities issuances to consultants and advisers also can be for compensatory and not capital raising purposes.²⁰ Acknowledging the validity of the SEC's reasoning, the Georgia Uniform Securities Act's employee benefit plan exemption set forth in Section 10-5-11(21) now allows consultants and advisers to participate in stock option plans. This is a significant expansion of the prior exemption for corporations that regularly retain consultants and advisers. The revised exemption, however, requires that the consultants and advisers be natural persons and provide services to the issuer at the time of offering.²¹

In addition to its expansion of eligible participants in exempt stock option plans, the Georgia Uniform Securities Act also allows exemptions for employee benefit plans even if those plans require that participants pay to participate.²² Under prior law, issuers offering exempt stock option plans and stock bonus plans to their employees could not require plan participants to pay to participate.²³ In the current marketplace, corporations often have to craft creative compensation packages to recruit and retain skilled workers. The Georgia Uniform Securities Act gives those corporations further flexibility to develop sustainable and attractive equity benefit plans for their employees. As with the limited offering exemption, the Georgia Uniform Securities Act retains essential safeguards and limits.²⁴ Additionally, interests in contributory or noncontributory pension or welfare plans that are subject to the Employee Retirement Income Security Act of 1974²⁵ are not considered securities under the Georgia Uniform Securities Act.²⁶

Another notable feature of the Georgia Uniform Securities Act concerns employee pension, profit-sharing and benefit plans. Under Section 10-5-11(13)(A), sales or

offers to sell to institutional investors are exempt from the Georgia Uniform Securities Act's registration obligations. Employee pension, profit-sharing and benefit plans are deemed institutional investors when the particular plan

has total assets in excess of \$10 million or its investment decisions are made by a named fiduciary . . . that is a broker-dealer registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq., an investment adviser registered under this chapter, a depository institution, or an insurance company.²⁷

Pension, profit-sharing and benefit plans are similarly covered under the employee benefit plan exemption set forth in Section 10-5-11(21). Thus, employee pension, profit-sharing and benefit plans are exempt under two separate provisions of the Georgia Uniform Securities Act. Because Section 10-5-11(13), the institutional investor exemption, is restricted to plans that have total assets in excess of \$10 million or that have a named fiduciary making investment decisions, practitioners will likely find that Section 10-5-11(21) provides their business clients a relatively higher level of flexibility.

Professional Exemptions—Article 4

Article 4 of the Georgia Uniform Securities Act covers professionals working in the securities industry—broker-dealers,²⁸ agents,²⁹ investment advisers, investment adviser representatives and federal covered investment advisers.³⁰ The Georgia Uniform Securities Act generally requires that broker-dealers, agents, investment advisers and investment adviser repre-

sentatives be registered in Georgia or be exempt from registration before transacting business in Georgia.³¹ Generally, federal covered investment advisers (persons registered under the Investment Advisers Act of 1940),³² must meet certain notice filing requirements and pay a fee unless they do not maintain a place of business in Georgia and have only certain types and numbers of clients.³³

As with exemptions for securities, several exemptions for professionals are newly available under the Georgia Uniform Securities Act. Broker-dealers who deal solely in U.S. government securities, for example, have registration obligations under the Georgia Securities Act of 1973 but do not under the Georgia Uniform Securities Act if they are properly supervised.³⁴ Similarly, under the Georgia Uniform Securities Act, an agent who only effects transactions for exempt broker-dealers is itself exempt from registration.³⁵ Other exemptions, such as the permitted cross-border exemption, contain noteworthy modifications.

Cross-Border Exemption—Broker-Dealers

Cross-border exemptions generally allow foreign-registered broker-dealers to continue previously-initiated brokerage activities for their customers who have relocated temporarily or permanently to a state if certain circumstances are present. Cross-border exemptions are practical given the "increasingly transnational nature of securities brokerage" and the mobility of modern investors.³⁶ The cross-border exemption under the Georgia Uniform Securities Act is a permitted exemption.³⁷ The Georgia Commissioner of Securities,³⁸ accordingly, may adopt rules that exempt broker-dealers from the Act's registration mandates if those broker-dealers are registered in Canada or another foreign jurisdiction, do not maintain a place of business in Georgia, and effect securities transactions with or for

individuals meeting specified requirements (e.g., an individual from Canada or other foreign jurisdiction who is temporarily in Georgia and has a pre-existing bona fide customer relationship with a foreign-registered broker-dealer).³⁹ In contrast, the cross-border exemption currently in effect exists only as set forth in Rule 590-4-2-.19 and not by any act of the Georgia General Assembly. Indeed, the Georgia Securities Act of 1973 contains no explicit authorization like the authorization in the Georgia Uniform Securities Act for a cross-border registration exemption for foreign broker-dealers.⁴⁰ Practitioners who routinely counsel foreign brokerage professionals will probably find the Georgia General Assembly's decision to explicitly authorize a cross-border exemption a positive change to Georgia's blue sky law.⁴¹ The change not only affirms the exemption, which must be strictly construed under Georgia law, but also,

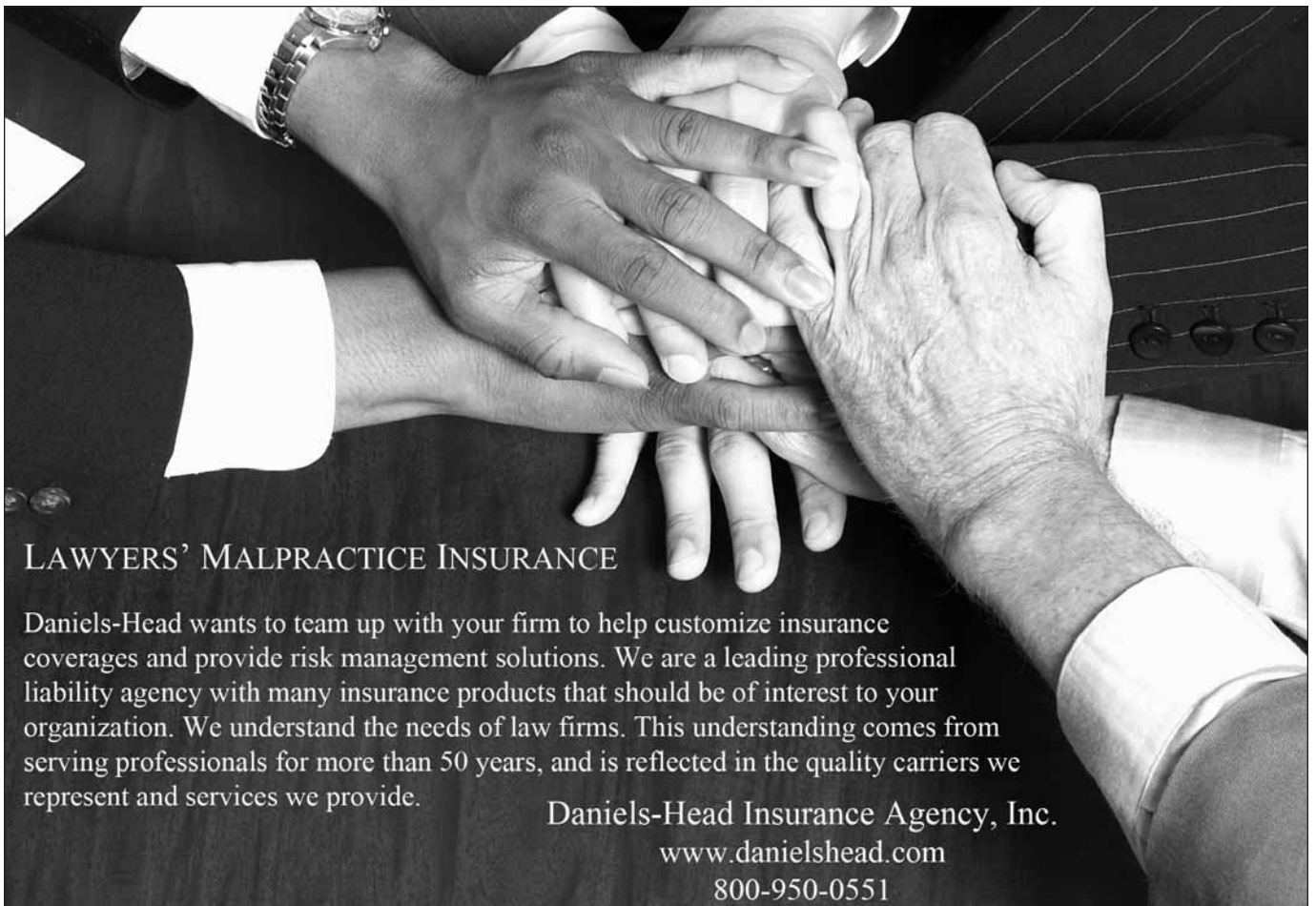
since the change is uniform, makes other uniform act states a reference for Georgia.⁴²

National De Minimis Standard—Investment Advisers

The National Securities Markets Improvement Act, as mentioned previously, bifurcated investment adviser regulation between the federal and state regulatory regimes.⁴³ In sum, investment advisers with assets under management of \$25,000,000 or more or that advise registered investment companies are subject to the SEC's registration authority exclusively. Investment advisers that do not meet these standards are subject to the registration authority of each state where they do business unless they meet the national de minimis standard.⁴⁴ The national de minimis standard under the National Securities Markets Improvement Act provides as follows:

No law of any state or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser shall require an investment adviser to register with the securities commissioner of the state (or any agency or officer performing like functions) or to comply with such law (other than any provision thereof prohibiting fraudulent conduct) if the investment adviser—(1) does not have a place of business located within the state; and (2) during the preceding 12-month period, has had fewer than six clients who are residents of that state.⁴⁵

The standard, therefore, exempts an investment adviser from a state's registration requirements if the investment adviser does not maintain a place of business in the state and if the investment adviser had fewer than six resident clients during the preceding 12 months.



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The Georgia Uniform Securities Act includes the national de minimis standard exemption in Section 10-5-32(b)(2) and thus mirrors the National Securities Markets Improvement Act.⁴⁶ The Georgia Securities Act of 1973, on the other hand, does not explicitly include the national de minimis standard exemption. The Georgia Securities Act of 1973 instead exempts investment advisers transacting business within or from Georgia that had fewer than six Georgia clients in the preceding 12 months regardless of the investment adviser's place of business.⁴⁷ The only scenario in which this difference creates dissimilar registration mandates is where the investment adviser maintains a place of business in Georgia but has fewer than six resident clients. In this situation, the investment adviser would have no registration obligation under the Georgia Securities Act of 1973 but would be required to register under the Georgia Uniform Securities Act unless the investment adviser is exempt under a separate provision. This difference is permissible because the National Securities Markets Improvement Act is a preemptive act and thus has no effect on state securities laws that are more lenient than federal secu-

rities laws. In any event, the Georgia Uniform Securities Act ends the looser de minimis exemption requirement in Section 10-5-3(b)(2) of the Georgia Securities Act of 1973. Georgia's revised de minimis exemption for investment advisers will exempt investment advisers only in situations where the National Securities Markets Improvement Act also does so.

Fraud and Liabilities— Article 5

Article 5 of the Georgia Uniform Securities Act contains two significant provisions that differ from both the Georgia Securities Act of 1973 and the Uniform Securities Act of 2002.

Statute of Limitations

Under Section 10-5-14(d) of the Georgia Securities Act of 1973, the statute of limitations for all civil disputes regarding securities transactions is "two years from the date of the contract for sale or sale, if there is no contract for sale."⁴⁸ A plaintiff filing suit under the Georgia Securities Act of 1973, consequently, must initiate the action within a two-year period that does not vary depending on the type of claim at issue. In contrast, Section 509(j) of the Uniform Securities Act of 2002 contains a one-year statute of limitations for registration-related claims and a two-year statute of limitations for fraud-related claims with a five-year statute of repose (two years after discovery or five years after the violation). Section 10-5-58(j) of the Georgia Uniform Securities Act is modeled after Section 509(j) of the Uniform Securities Act of 2002 but differs from Section 509(j) by extending the statute of limitations for registration-related claims to two years. Section 10-5-58(j) differs from Section 10-5-14(d) of the Georgia Securities Act of 1973 by including a statute of repose for fraud-related claims and changing the events that trigger the start of the limitations period.⁴⁹

Defamation Liability

The issue of employer liability for defamatory statements in records that regulatory entities require be posted to the Central Registration Depository, a depository system operated by the Financial Industry Regulatory Authority, has lately been a topic of growing interest among securities firms and professionals. A widely discussed recent opinion of the Court of Appeals of New York, for example, concluded that an employer that made certain statements on an employee's termination notice filed with the National Association of Securities Dealers (now the Financial Industry Regulatory Authority) enjoyed absolute immunity from defamation liability.⁵⁰ In contrast to the absolute immunity approach, the Uniform Securities Act of 2002 provides in Section 507 that the entity filing the record is immune to defamation claims unless the filing entity knew or should have known that the statement was false or acted recklessly regarding the statement's truth or falsity. The Georgia Uniform Securities Act similarly provides for limited immunity in this situation but does not contain the "should have known" objective standard.⁵¹ In contrast, the Georgia Securities Act of 1973 is completely silent on the subject of defamation liability for statements posted to the Central Registration Depository. Allowing filing entities only limited immunity against defamation claims encourages these entities to confirm the truth and validity of the statements that they post to the Central Registration Depository.

Administration— Article 6

In addition to the changes that the new legislation makes regarding exemptions for instruments and professionals and the clarifications in Article 5, the Georgia Uniform Securities Act also makes several changes to blue sky law administration.

Offers in Georgia

Sections 10-5-79(c) and (d) of the Georgia Uniform Securities Act clarify when an offer to sell or to purchase is made and accepted in Georgia. These clarifications significantly modernize Georgia blue sky law by creating an analytical framework for the difficult jurisdictional questions that electronic commerce sometimes produces. As the Georgia Uniform Securities Act provides, an offer is made in Georgia, whether or not either party is present in Georgia, if the offer “[o]riginates from within” Georgia or the offeror successfully directs the offer to a place in Georgia.⁵² An offer is accepted in Georgia, whether or not either party is present in Georgia, if the acceptance “[i]s communicated to the offeror in this state and the offeree reasonably believes the offeror to be present in this state and the acceptance is received at the place in this state to which it is directed” and the acceptance has not already been communicated to the offeror outside of Georgia.⁵³ These clarifications are not in the Georgia Securities Act of 1973, although identical provisions are currently effective pursuant to Rule 590-4-1-.01(19)(a)-(b).

Service of Process

Under prior law, the Georgia Commissioner of Securities was obligated to serve respondents with a notice of opportunity for hearing.⁵⁴ The Commissioner, in some instances, was obligated to send the respondent a notice of opportunity for hearing before entering the order.⁵⁵ The Commissioner’s power to issue a cease and desist order under the Georgia Securities Act of 1973, for example, was “[s]ubject to notice and opportunity for hearing.”⁵⁶ The Georgia Uniform Securities Act adopts a different approach. It instead provides that a cease and desist order issued by the Commissioner is “effective on the date

of issuance.”⁵⁷ The Georgia Uniform Securities Act of 2008 further provides as follows:

Upon issuance of the order, the Commissioner shall promptly serve each person subject to the order with a copy of the order and a notice that the order has been entered. The order must include a statement whether the Commissioner will seek a civil penalty or costs of the investigation, a statement of the reasons for the order, and notice that, within 30 days after receipt of a request in a record from the person, the matter will be scheduled for a hearing. If a person subject to the order does not request a hearing and none is ordered by the Commissioner within 30 days after the date of service of the order, the order becomes final as to that person by operation of law. If a hearing is requested or ordered, the Commissioner, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend it until final determination.⁵⁸

A cease and desist order, consequently, is effective before the

respondent receives the notice of opportunity for hearing and is final 30 days after the respondent receives notice unless that person requests a hearing. A related provision, Section 10-5-80(b), appoints the Georgia Commissioner of Securities as the agent for service of process for any person who engages in prohibited conduct in noncriminal actions or proceedings. Service is not effective, though, until:


(1) The plaintiff, which may be the Commissioner, promptly sends notice of the service and a copy of the process, return receipt requested, to the defendant or respondent at the address set forth in the consent to service of process or, if a consent to service of process has not been filed, at the last known address or takes other reasonable steps to give notice; and

(2) The plaintiff files an affidavit of compliance with this subsection in the action or proceeding on or before the return day of the process, if any, or within the time that the court, or the Commissioner in a proceeding before the Commissioner, allows.⁵⁹



This represents a significant change in how Georgia blue sky law addresses service of process in administrative cease and desist actions by providing a means for the Commissioner's staff to proceed in situations where the respondent is purposely absent or actively avoiding service.

Conclusion

With all of these changes, the Georgia General Assembly has significantly updated state securities regulation in Georgia. The changes concerning exempt securities and professionals are critical to reducing the burdens on issuers and professionals who are legitimate and necessary actors in modern securities markets. The fraud and liability changes clarify important topics to practitioners, and the administrative changes allow the Commissioner to effectively address improper conduct in Georgia's securities marketplace. 



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Endnotes

1. S.B. 358, 2007-2008 Legis. Sess. (Ga. 2008), available at http://www.legis.ga.gov/legis/2007_08/sum/sb358.htm (last visited on Feb. 18, 2009).
2. *Id.*
3. See Richard B. Smith, *A New*

Uniform Securities Act, WALL ST. LAW., Feb. 2003, at 8.

4. JOEL SELIGMAN, *THE NEW UNIFORM SECURITIES ACT* xxi-xxiii (2003). Professor Seligman served as the Reporter for the revisions that resulted in the Uniform Securities Act of 2002.
5. Pub. L. No. 104-290, 110 Stat. 3,416 (1996) (codified as amended in scattered sections of 15 U.S.C.).
6. Smith, *supra* note 3. President William J. Clinton, upon signing the National Securities Markets Improvement Act into law, remarked that it was "the most significant overhaul of the securities regulatory structure in decades." President William J. Clinton, Statement on Signing the National Securities Markets Improvement Act of 1996 (Oct. 11, 1996) (available at http://findarticles.com/p/articles/mi_m2889/is_n41_v32/ai_18920481).
7. 15 U.S.C. § 77r(a) (2000).
8. Although 37 jurisdictions adopted the Uniform Securities Act of 1956, each state has naturally developed its own solutions to various securities issues. See SELIGMAN, *supra* note 4, at xxii.
9. SELIGMAN, *supra* note 4.
10. Professor Seligman describes the articles in the Uniform Securities Act of 2002 as follows: "1. General Provisions; 2. Exemptions from Registration of Securities; 3. Registration of Securities and Notice Filing of Federal Covered Securities; 4. Broker-Dealers, Agents, Investment Advisers, Investment Adviser Representatives, and Federal Covered Investment Advisers; 5. Fraud and Liabilities; 6. Administration and Judicial Review; 7. Transition." SELIGMAN, *supra* note 4, at xxiii. The Georgia General Assembly chose not to adopt the Uniform Securities Act of 2002 code section numbering scheme, which the National Conference of Commissioners on Uniform State Laws uses in its model legislation including the Uniform Commercial Code. The Georgia General Assembly instead used a code section numbering scheme that is similar to the one that it used in the Georgia Securities Act of 1973. The Georgia Uniform Securities Act is otherwise structured and organized similarly to the Uniform Securities Act of 2002.
11. O.C.G.A. § 10-5-11(14) (Supp. 2008).
12. *Id.* Under the Uniform Securities Act of 2002, the limited offering exemption is available for offerings limited to 25 in-state purchasers.
13. *Id.*
14. See, e.g., *id.* §§ 10-5-13(a), 10-5-50, 10-5-52; *Blau v. Redmond*, 143 Ga. App. 897, 902, 240 S.E.2d 273, 277 (1977).
15. SELIGMAN, *supra* note 4, at 52; see also JAMES D. COX ET AL., *SECURITIES REGULATION: CASES AND MATERIALS* 429 (2d ed. 1997) (analyzing offering integration under federal securities laws).
16. ESOP Statistics: Industry Statistics, available at http://www.esopassociation.org/media/media_statistics.asp (last visited on Feb. 18, 2009).
17. ESOP Statistics: Top ESOPs, available at http://www.esopassociation.org/media/media_topen.asp (last visited on Feb. 18, 2009).
18. A stock option is a derivative instrument (i.e., its value depends on the price of an underlying instrument) that gives its owner the right to buy (call option) or sell (put option) a security at a predetermined price and date. COX, *supra* note 15, at 1080.
19. O.C.G.A. § 10-5-9(9)(C) (2000). The exemption also prohibited employees from paying any consideration other than services to participate in the stock option plan.
20. Compensatory Benefit Plans and Contracts, 1933 Act Release No. 33-6768 (Apr. 14, 1988).
21. O.C.G.A. § 10-5-11(21)(C) (Supp. 2008). As Professor Seligman notes, the Section 10-5-11(21) exemption is partly modeled on Securities and Exchange Commission Rule 701(c), and compliance with Rule 701 constitutes compliance with Section 10-5-11(21). SELIGMAN, *supra* note 4, at 55.
22. O.C.G.A. § 10-5-11(21) (Supp. 2008).
23. *Id.* §§ 10-5-9(9)(A), (C) (2000).
24. See, e.g., *id.* §§ 10-5-13(a), 10-5-50, 10-5-52 (Supp. 2008); *Blau v. Redmond*, 143 Ga. App. 897, 902, 240 S.E.2d 273, 277 (1977).

25. 29 U.S.C. §§ 1001-1461 (2000).
26. O.C.G.A. § 10-5-2(31)(C) (Supp. 2008).
27. *Id.* § 10-5-2(13)(F).
28. The Georgia Uniform Securities Act provides that a broker-dealer is "a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account." *Id.* § 10-5-2(3). As Professor Cox explains, a broker effects transactions for the account of others, and a dealer effects transactions for its own account. Firms in the business are referred to as broker-dealers because most securities firms act as brokers and dealers. COX, *supra* note 15, at 1082.
29. O.C.G.A. § 10-5-2(1) (Supp. 2008). Instead of the term "salesperson," which the Georgia Securities Act of 1973 uses, the Georgia Uniform Securities Act uses the term "agent."
30. *See id.* §§ 10-5-30, 10-5-31, 10-5-32, 10-5-33, 10-5-34.
31. *Id.* §§ 10-5-30(a), 10-5-31(a), 10-5-32(a), 10-5-33(a).
32. *Id.* § 10-5-2(8).
33. *Id.* § 10-5-34(a), (b), (c).
34. *Id.* § 10-5-30(b)(2). Although securities issued by the United States were exempt under Section 10-5-8(1) of the Georgia Securities Act of 1973, Section 10-5-3(a) of that Act still required the professionals involved in transacting those securities to be registered.
35. *Id.* § 10-5-31(b)(2).
36. SELIGMAN, *supra* note 4, at 86.
37. O.C.G.A. § 10-5-30(d) (Supp. 2008).
38. The Georgia Uniform Securities Act grants administrative powers to the Secretary of State and designates the Secretary of State as Commissioner of Securities. *Id.* § 10-5-70(a).
39. *Id.* § 10-5-30(d).
40. Rule 590-4-2-.19 of the Rules of Office of Georgia Secretary of State.
41. Because the cross-border exemption under the Georgia Uniform Securities Act is a permitted exemption, practitioners will need to consult the revised Rules of Office of Secretary of State to confirm the effectiveness of the cross-border exemption when the Georgia Uniform Securities Act becomes effective on July 1, 2009.
42. *See* Blau v. Redmond, 143 Ga. App. 897, 902, 240 S.E.2d 273, 277 (1977).
43. 15 U.S.C. § 80b-3a(a), (b) (2000).
44. *Id.*
45. *Id.* § 80b-18a(d).
46. Careful readers will note that both the Uniform Securities Act of 2002 and the Georgia Uniform Securities Act use the phrase "not more than five clients" rather than "fewer than 6 clients," which is the phrase that the drafters used in the National Securities Markets Improvement Act. The phrasing change is non-substantive and appears to be a stylistic or grammatical preference on behalf of the National Conference of Commissioners on Uniform State Laws.
47. O.C.G.A. § 10-5-3(a), (b)(2) (2000).
48. *Id.* § 10-5-14(d).
49. *Compare id. with id.* § 10-5-58(j) (Supp. 2008).
50. Rosenberg v. MetLife, Inc., 866 N.E.2d 439, 444-45 (N.Y. 2007).
51. O.C.G.A. § 10-5-56 (Supp. 2008).
52. *Id.* § 10-5-79(c).
53. *Id.* § 10-5-79(d).
54. *Id.* § 10-5-16(a), (b) (2000).
55. *Id.*
56. *Id.* § 10-5-13(a)(1)(A).
57. *Id.* § 10-5-73(b) (Supp. 2008).
58. *Id.*
59. *Id.* § 10-5-80(c).



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A Woman of Many Firsts

by Stephanie J. Wilson

On Tuesday, Jan. 6, the Hon. M. Yvette Miller was sworn in as the chief judge of the Court of Appeals of Georgia. She was first appointed to the Court in 1999 by Gov. Roy Barnes and has since been re-elected for two six-year terms. Court of Appeals colleague Presiding Judge Gary B. Andrews administered the oath of office at the Capitol before an audience packed with members of the judiciary, state officials, attorneys, family and friends. Miller is the first African-American woman to hold this position. In fact, she is a woman of many firsts.

One of her earliest firsts was as an African-American student in the seventh grade at Walter P. Jones School in her hometown of Macon. Miller's mother—a teacher—was chosen to select the best and brightest African-American students to populate the white schools when Bibb County began integrating in the mid-to-late 1970s. She followed her mother to Walter P. Jones where they were the only two African-Americans at the school.

Miller decided at an early age, probably seven- or eight-years-old, that she wanted to study law and become a lawyer. Some of her experiences growing up in Macon helped her to arrive at this decision and she knew she wanted to make a difference and help people. The practice of law was Miller's way to reach out to her community.

Later, Miller joined the Fulton County District Attorney's Office as one of its first female prosecutors. She was also co-owner, general manager and general counsel of the first minority-owned Ford Lincoln-



Photo provided by First Class, Inc.

The Hon. M. Yvette Miller was sworn in as chief judge of the Court of Appeals of Georgia in January.

Mercury automobile dealership in Jesup—one of the first of its kind in the state. While at the dealership, she developed a private legal practice and became the first female attorney to practice in Jesup and throughout the Brunswick Judicial Circuit.

Then in 1992, Gov. Zell Miller appointed her as the director and judge of the Appellate Division of the State Board of Workers' Compensation, making her the first woman, the first African-American and the youngest person to ever hold that position. At the time, she had

actually applied for a Superior Court judgeship. Due to the governor's previous career as a history professor, she claims that it was likely his great love of history that would cause him to want to make history with her appointment.

Miller described being the first at these things as interesting and historic. "I guess I'm always mindful that the most important thing about being first is to be your best and to do a very good job so that you will not be the first person to be the last. I wanted to do a good job as the first woman, the first African-American and the youngest person so that [the governor] could bring younger people, African-Americans and women behind me into those positions. When you are first, you want to make certain that others behind you will have those opportunities because of you. You never want them to not be asked because of something that you did."

When asked what has been the most difficult obstacle getting where she is today, Miller said, "Probably being a woman just simply because we know that the legal profession is such a man's world. I'm of the generation where it's just a little bit harder, but I think that I've certainly tried to turn every would-be obstacle into an asset. I have tried to take my lemons and turn them into lemonade. If you have a really positive attitude about life, I think things end up working out for the best. I would say that my career has turned out that way also."

The past 10 years of Miller's career have been spent as a judge on the Court of Appeals of Georgia. One of her most memorable cases was one that involved a new aggravated battery statute. She had the privilege of defining the statute and making it applicable to the facts in the case. "I had to interpret the statute. It made me feel really good because it was the dismemberment statute, and I was able to interpret the statute as including the dismemberment of a woman's tooth. If your boyfriend

knocks out your tooth, that constitutes aggravated battery. I'm very proud because I think that single-handedly aided the cause of domestic violence in Georgia and made it safer for women."

Miller has many goals for the Court of Appeals during her tenure as chief judge. "I really want to continue to make this a very collegial court. You know, when you don't have a lot of money, the one thing you can do is get together and keep those lines of communication open. I am a big fan of former Supreme Court Justice Sandra Day O'Connor, and she said 'as appellate judges, we have to go along to get along.' I really take that as being 'no man is an island.' When you're an appellate judge, we aid the process of the work by getting to know each other better and spending time together."


"My other big initiative is to maintain the integrity of the court and not have any further significant budget cuts. So far, so good on that. I'm also trying to raise the filing fee from \$80 to \$300 because we have one of the lowest filing fees in the nation for appellate costs." Although filing fees would be higher, Miller hopes to pass the money back to the lawyers in savings by beginning an e-filing initiative. "We can end up lowering the costs for lawyers in that they will be able to stay in their respective cities and towns throughout the state and be able to press 'send' instead of having to come to Atlanta."

Miller continued, "I want to be able on my watch to start some level of e-filing because we need to bring this court into the 21st century. It's really sad that we have not been able to do that due to budget problems. We haven't had the funds to upgrade the docket so it will interface with the e-filing system."

This woman of many firsts has spent the majority of her life breaking down barriers created by race and gender. Efforts to improve diversity have had a great impact

on her life—both personally and professionally. Miller describes the importance of diversity in the legal profession as being more for the public at large. "It enhances the public's trust and confidence of the system, of the legal profession and of the judiciary to see people who look like them—to see African-Americans, to see women—in the profession, on the bench and in roles of significance. I think then they are much more willing to accept the rulings and the decisions that are made because they feel that all types of people have had input in the outcome."

Though her newest appointment as chief judge has kept her schedule going at a feverish pace, Miller still finds time to participate in numerous professional, civic and social organizations. She finds these activities important because "when you're part of the judiciary—especially on the appellate court—it's very easy to get isolated and aloof and that's just not who I am as a person. I'm a people person and I also think it's important to stay close to the community and to the lawyers. These are the people that I'm here to serve."

Miller recently spoke to a group of beginning lawyers at the State Bar of Georgia's Transition Into Law Practice Program. Engagements such as this give her the chance to share some of the wisdom she has gained during her incredible career. The one thought that she would share with current and future lawyers? "It's important to maintain your reputation. In order to do that you're going to have to establish yourself as someone who is honest and trustworthy. There is no substitute for a good reputation." 



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

2008 Annual Review of Case Law Developments

Georgia Corporate and Business Organization Law

by Thomas S. Richey

This article surveys case law developments dealing with corporate and business organization law issues that were handed down by the Georgia state and federal courts during 2008. Only a few of the decisions concern important matters of first impression. Some illustrate and confirm settled points of law. Others are instructive for the types of claims and defenses that are asserted in business organization transactions, internal disputes and governance and how the courts are addressing them.

In general, the article is organized first by entity type—corporations, limited liability companies, partnerships and joint ventures. The article then covers areas in which the decisions concern transactional issues that apply to all forms of business organizations, decide litigation issues characteristic of business organization litigation or involve professional liability claims in the business context, and in this part of the article, the cases are catalogued by subject

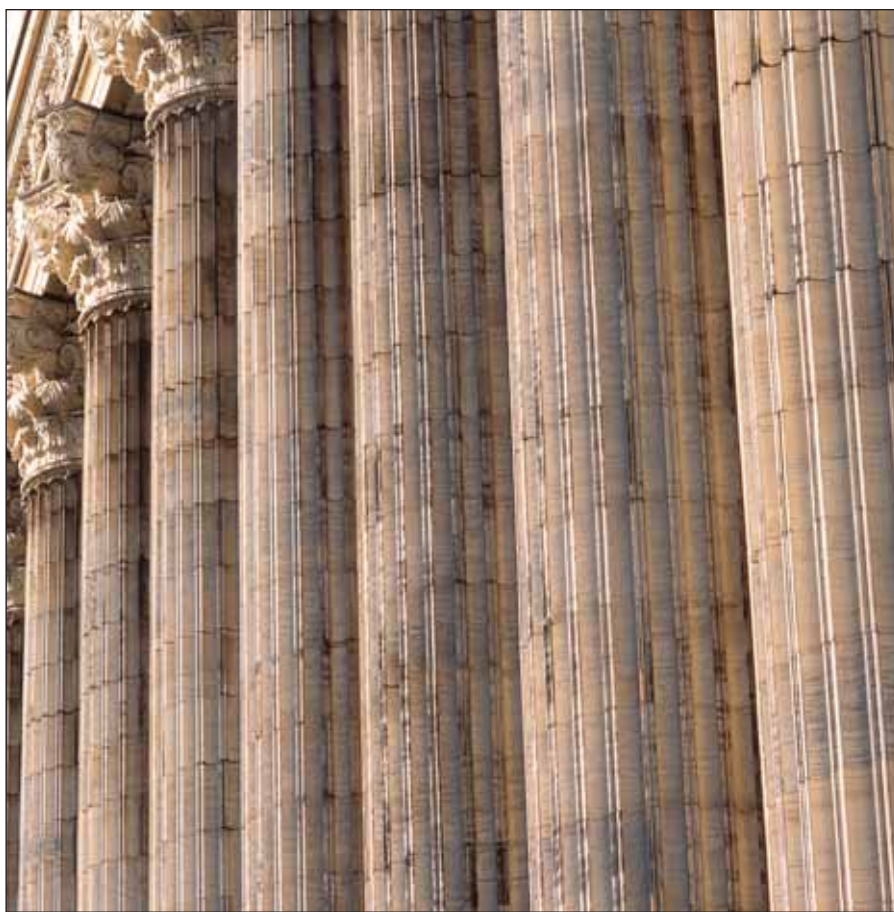


matter. Following is a brief summary of these developments.

Corporations

Two decisions in 2008 dealt with shareholder agreements. Neither decision, however, addressed the Georgia Business Corporation Code provisions concerning shareholders agreements, O.C.G.A. § 14-2-732. The Court of Appeals of Georgia in *Levy v. Reiner*, 290 Ga. App. 471, 659 S.E.2d 848 (2008), held it axiomatic that a corporation must be a party to a shareholders contract in order to be bound by it, a statement that would not be true for a shareholders agreement meeting the requirements of § 14-2-732. In other rulings, *Levy* held that the plaintiff could not pursue direct claims for breach of fiduciary duty based on the close corporation exception to derivative actions under *Thomas v. Dickson*, 250 Ga. 772, 301 S.E.2d 49 (1983), because not all shareholders were parties or adequately represented. The plaintiff could not sue derivatively, either, because his breach of fiduciary duty claims related to the value of his stock, he had dissented from a sale of the corporation's assets and was pursuing an appraisal remedy, and that remedy was exclusive. The court in *Simpson v. Pendergast*, 290 Ga. App. 293, 659 S.E.2d 716 (2008), addressed a mirror image buy-sell agreement under which one shareholder specifies the terms and the others must elect whether to buy or sell. The court held a shareholder liable who refused to respond to such an offer because he considered that certain of the specified terms violated the agreement, but the court reversed summary judgment for specific performance because the proposed terms would affect the corporation and might not be fair.

Planning Technologies, Inc. v. Korman, 290 Ga. App. 715, 660 S.E.2d 39 (2008), dealt with judicial review of corporate decisions entrusted to the discretion of the board of directors in the context of a determination of stock option vest-



ing. The court held that where the language does not clearly grant the board unbridled discretion, its decision is subject to review for whether it was made in good faith and in the exercise of honest judgment.

In *Hilb, Rogal & Hamilton Co. of Atlanta, Inc. v. Holley*, 295 Ga. App. 54, 670 S.E.2d 874 (2008), in a restrictive covenant context, the court held that a corporate employee who has authority to bind the corporation owes fiduciary duties to the corporation and can thus be held liable for diverting business from it while still employed.

The Court of Appeals of Georgia decided three nonprofit corporation cases in 2008: (1) *Madonna v. Satilla Health Services, Inc.*, 290 Ga. App. 148, 658 S.E.2d 858 (2008), in which a hospital's bylaws concerning physicians' practice privileges took precedence over a conflicting contract granting exclusive practice rights to a single physician group; (2) *The Phoenix of Peachtree Condominium Association Inc. v. Phoenix on Peachtree LLC*, 294 Ga.

App. 447, 669 S.E.2d 229 (2008), in which the court held a condominium association that filed suit in violation of a provision of its declaration barring suits on behalf of members, lacked standing to sue despite a later curative amendment to its bylaws and declaration; and (3) *Parkridge Condominium Association, Inc. v. Callais*, 290 Ga. App. 875, 660 S.E.2d 736 (2008), in which the court ruled that the trial court's findings of a member's proper purpose and the association's absence of good faith must be upheld unless clearly erroneous, but reversed on the amount of attorney's fees awarded, holding that O.C.G.A. § 14-3-1604(c) requires a corporation to pay only the fees "incurred to obtain the order" for inspection and copying of records.

Limited Liability Companies

The Court of Appeals of Georgia handed down five decisions in 2008 concerning the rights and duties of limited liabil-

ity companies, their managers and members to each other. In *Old National Villages, LLC, v. Lenox Pines, LLC*, 290 Ga. App. 517, 659 S.E.2d 891 (2008), the court, in a situation rife with conflicts of interest, held that an LLC general manager, authorized by the operating agreement to make all decisions on the LLC's behalf, can consent to a judgment against the LLC without notice to or approval from the sole member of the LLC. By contrast, in *Internal Medicine Alliance, LLC v. Budell*, 290 Ga. App. 231, 659 S.E.2d 668 (2008), the court found that an LLC's managing member owed duties of "utmost good faith and loyalty" to the other member and violated her duty of care and acted in bad faith when she failed to collect his receivables. That standard of conduct applies in the absence of a modification permitted under O.C.G.A. § 14-11-305(4)(A). *ULQ, LLC v. Meder*, 293 Ga. App. 176, 666 S.E.2d 713 (2008), applied the requirement of good faith in the exercise of discretionary authority to an LLC's decision to remove an officer and require the repurchase of his membership interest. The court also held that the LLC could not be held liable for its manager's breach of fiduciary duty and that non-managing members do not owe a fiduciary duty to either the LLC or to other members. In *Fielbon Development Co. v. Colony Bank of Houston County*, 290 Ga. App. 847, 660 S.E.2d 801 (2008), the court interpreted the language of O.C.G.A. § 14-11-301(c), that a limited liability company is not liable for acts of a member that are "not apparently for the carrying on in the usual way the business or affairs" and held that the LLC was liable for the notes signed by one of its managers, notwithstanding his misappropriation of some of the loan proceeds. *Gardner v. Marcum*, 292 Ga. App. 369, 665 S.E.2d 336 (2008), dealt with a dispute over an investment in a recording project that was paid to an LLC, where the parties

disagreed on whether an investment was a loan or an equity investment and where no rate of interest had been agreed on. The Court held that there was no meeting of the minds, that the LLC was required to return the funds, but that, under O.C.G.A. § 14-11-3303(a), the individual LLC members were not liable for the LLC's obligations, solely by reason of being members.

In *Georgia Rehabilitation Center, Inc. v. Newnan Hospital*, 283 Ga. 335, 658 S.E.2d 737 (2008), the Supreme Court of Georgia refused to compel arbitration of an independent claim for judicial dissolution under O.C.G.A. § 14-11-603, where the operating agreement required arbitration of claims related to the operating agreement or its breach and provided limited rights to dissolve the company under conditions inapplicable to the circumstances at hand. The Court also affirmed the appointment of a receiver.

In *IH Riverdale, LLC v. McChesney Capital Partners, LLC*, 292 Ga. App. 841, 666 S.E.2d 8 (2008), upheld the validity of an amendment to an operating agreement, adopted by majority vote, that abolished payment of a special fee to the plaintiff. The court rejected the plaintiff's argument that the amendment was a major decision requiring unanimous consent.

Partnerships

No partnership decisions of note came to our attention during 2008.

Joint Ventures

In *American Association of Cab Companies, Inc. v. Parham*, 291 Ga. App. 33, 661 S.E.2d 161 (2008), in a personal injury case involving an uninsured cab, the Court of Appeals of Georgia, *en banc*, held there to be sufficient evidence of joint control over the cab to constitute a joint venture. A defense verdict on RICO claims was reversed for improper instructions on burden of proof. Defendants' arguments on proximate cause under RICO were reject-

ed, the court finding a causal nexus between the lack of insurance and the plaintiff's ability to collect on his personal injury claim.

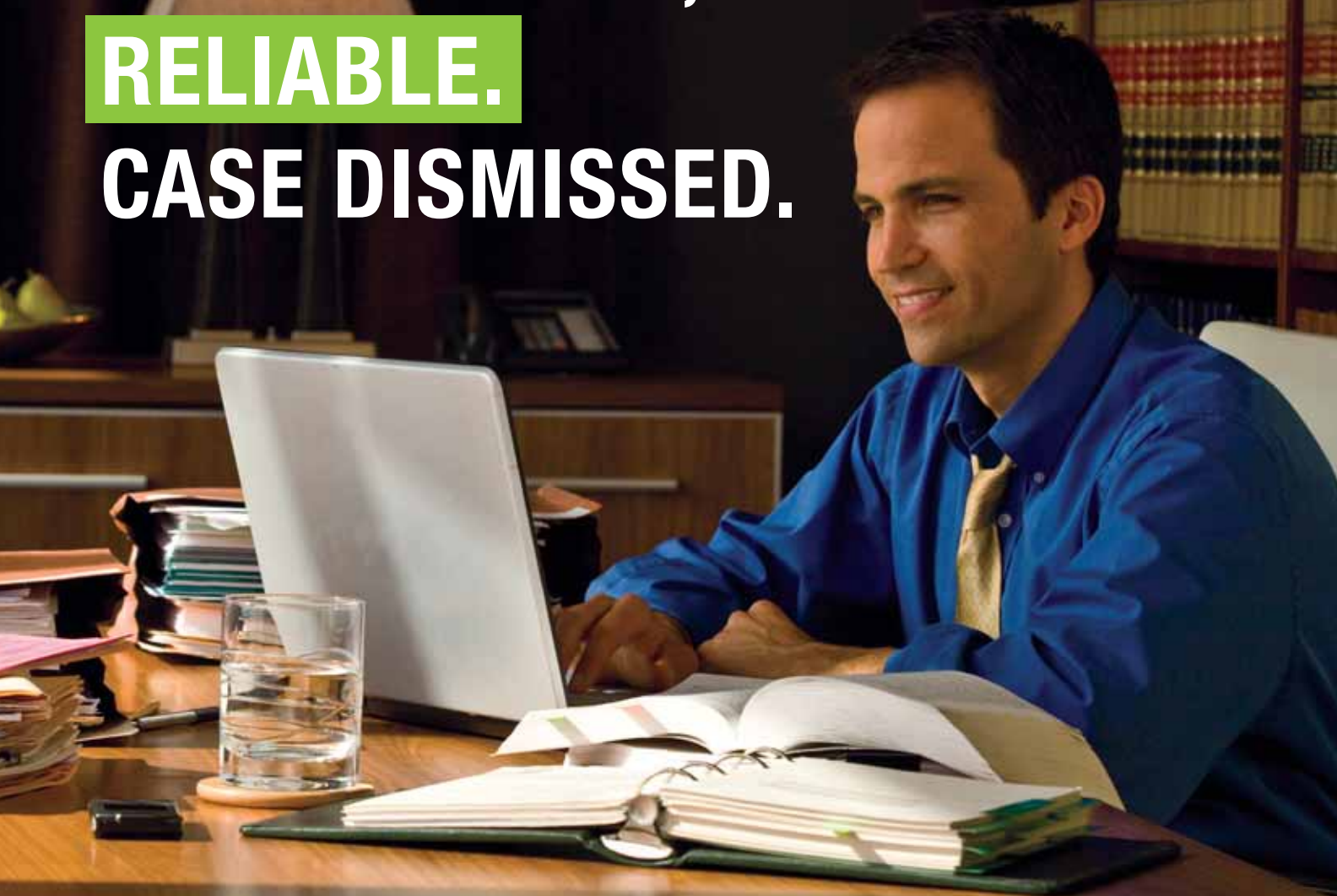
Business Law Issues

Georgia courts decided four cases involving asset sales, each illustrating a different issue likely to arise in that setting and each resolved on the basis of the provisions of the asset purchase agreement or related agreements and/or who was party to the agreements. *Wilkie v. 36747, LLC*, 294 Ga. App. 179, 669 S.E. 2d 155 (2008), enforced provisions of an Asset Purchase Agreement specifying what obligations the purchaser had assumed; *Ahmed v. CUA Autofinder, LLC*, 387 B.R. 906 (Bkrtcy. M.D. Ga. 2008), dealt with entitlement to escrowed funds, where the purchaser's principal made a payment required from the company, but failed to document the contribution and where the company went into bankruptcy and the trustee claimed the funds; *Kilroy v. Alpharetta Fitness, Inc.*, 2008 WL 5049966 (Ga. App. Dec. 1, 2008), found fraud claims viable where there was evidence of breaches of representation and warranties in the asset purchase agreement; *Accurate Printers, Inc. v. Stark*, 2008 WL 5049960 (Ga. App., Nov. 26, 2008), enforced an anti-assignment clause where an individual had purchased the assets and his corporation attempted to enforce the asset purchase agreement's non-competition provision.

Deljoo v. Suntrust Mortgage, Inc., 2008 WL 5174307 (Ga. App. Dec. 11, 2008), applied a rarely cited provision outside the Georgia Business Corporation Code, O.C.G.A. § 14-5-7, regarding the validity of corporate conveyances of real estate.

In *Dudley v. Wachovia Bank*, 290 Ga. App. 220, 659 S.E.2d 658 (2008), the Court of Appeals addressed disputed stock transfers with signature guarantees under Article 8 of the Uniform Commercial Code, deciding, in a matter of first impression in Georgia, that a signa-

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ture guarantor is not liable to a stock owner under O.C.G.A. § 11-8-306, but enforcing the issuers' strict liability under § 11-8-404.

Litigation Issues

White v. Shamrock Building Systems, Inc., 294 Ga. App. 340, 669 S.E.2d 168 (2008), rejected a contractor's claims of aiding and abetting breaches of fiduciary duty, conspiracy and tortious interference with business relations as to a diverted business opportunity, based in part on allegations that the alleged third party aider and abettor "should have known" or failed to "investigate" the relationship between the contractor and his former employee before dealing with him.

In *Peery v. CSB Behavioral Health Systems*, 2008 WL 4425364 (S.D. Ga. Sept. 30, 2008), the court held that the applicable statute of limitations for breach of fiduciary duty claims is determined by the nature of the conduct underlying alleged fiduciary breach.

In *Fulp v. Holt*, 284 Ga. 751, 670 S.E.2d 785 (2008), and *Treu v. Humanism Investment, Inc.*, 284 Ga. 657, 670 S.E.2d 409 (2008), the Supreme Court of Georgia upheld the trial court's discretion in deciding whether to appoint a receiver, affirming in *Fulp* the appointment of a receiver for a dissolved law firm and in *Treu*, the denial of a receivership where a court-appointed auditor had adequately sorted out the shareholders' interests in an investment corporation. *Sampson v. Haywire Ventures, Inc.*, 293 Ga. App. 779, 668 S.E.2d 286 (2008), addressed the requirements for an accounting, holding that the plaintiff must be likely to obtain some recovery to warrant some recovery.

In *Hampton Island Founders, LLC v. Liberty Capital, LLC*, 283 Ga. 289, 658 S.E.2d 619 (2008), the Supreme Court of Georgia reversed a temporary injunction prohibiting any effort to contest the voting rights of investors attempting to seize control of an LLC, oust its management and dismiss a lawsuit against a joint venture partner. The purpose of a

temporary injunction should be to preserve the status quo, not to change it. The Court also held that the trial court erred in permitting the investors to intervene in the litigation, since their purpose in doing so was not to participate, but rather to dismiss the litigation.

The Court of Appeals of Georgia in *Stephens v. McGarrity*, 290 Ga. App. 755, 660 S.E.2d 770 (2008), reversed the trial court's approval of a derivative action settlement under O.C.G.A. § 14-2-745 providing that most of the settlement funds would be paid out to the individual derivative plaintiff with the balance to be paid to senior management as bonuses. The court found that despite the arms' length character of the negotiations, given the danger of collusion, the settlement was not entitled to a presumption of fairness and a review of its terms showed that the settlement was not in the corporation's best interest.

Three decisions addressed alter ego liability or piercing the corporate veil. In *Pazur v. Belcher*, 290 Ga. App. 703, 659 S.E.2d 804 (2008), the Court of Appeals of Georgia held that sole ownership of a corporation, using a corporation for one's own ends, loans to or from the corporation or the forgiveness of such loans do not, without more, support piercing the corporate veil; it requires a disregard of the corporate entity, making it a mere instrumentality for transaction of personal affairs, and such a unity of interest and ownership that separateness of entity and owners ceases to exist. In an unpublished 11th Circuit Court of Appeals decision, *BP Products North America, Inc. v. Southeast Energy Group, Inc.*, 282 Fed. Appx. 776 (11th Cir. 2008), the court reversed a summary judgment piercing the corporate veil, because despite a disregard of the corporate form, there was an issue of fact whether the corporation had been used to defeat justice, perpetrate a fraud or evade liability. *Bruce v. PharmaCentra, LLC*, 2008 WL 1902090 (N.D. Ga. April 25, 2008), held that a plaintiff's

alter-ego allegations as to an affiliate of her employer estopped her from claiming that she was not required to arbitrate her claims against both entities.

In *Barnette v. Coastal Hematology & Oncology, P.C.*, 294 Ga. App. 733, 670 S.E.2d 217 (2008), the Court of Appeals ruled on malicious prosecution claims arising from the prosecution of personnel accused of misappropriating company funds, holding that a presumption of probable cause based on police officers' affidavits averring independent judgment in recommending prosecution does not apply where the complainant knowingly makes false statements to the arresting officer, as the plaintiffs had alleged.

In two decisions, *In re Sutton*, 2008 WL 4527761 (Bankr. M.D. Ga. Oct. 2, 2008), a corporate officer and in *In re Wheelus*, 2008 WL 372470 (Bankr. M.D. Ga. Feb. 11, 2008), two former managers of an LLC were found not to be "fiduciaries" within the meaning of 11 U.S.C. § 523(a)(4) and thus the claims against them for breach of fiduciary duty could not be determined to be non-dischargeable.

Three of 2008's decisions concerned service of process on corporations. *Vibratech, Inc. v. Frost*, 291 Ga. App. 133, 661 S.E.2d 185 (2008), held that, unlike the resignation of a corporate officer or director, the resignation of an agent for service of process is not effective until filed with the Secretary of State. In *Brock Built City Neighborhoods, LLC v. Century Fire Protection, LLC*, 2008 WL 4740396 (Ga. App., Oct. 30, 2008), the court held that service by publication on an LLC is not authorized until after the plaintiff has attempted service directly on the company. *Holmes & Company of Orlando v. Carlisle*, 289 Ga. App. 619, 658 S.E.2d 185 (2008), upheld service on a bank branch manager who was supervisor of a corporation's registered agent, even though the corporation did not conduct any business at the bank and neither the bank nor the branch manager was authorized to accept service on the corporation's behalf.

QOS Network Ltd. v. Warburg Pincus & Co., 294 Ga. App. 528, 669 S.E.2d 536 (2008), involves a lengthy analysis and application of the principles of *res judicata* and collateral estoppel as to a corporation based on the results of litigation against its controlling shareholders and officers.


Professional Liability

The Court of Appeals of Georgia decided two merger and acquisition accountant liability cases in 2008. In *Atlanto Holdings, LLC v. BDO Seidman, LLP*, 290 Ga. App. 665, 660 S.E.2d 463 (2008), a 15-year old dispute, it reversed an award of damages because the trial court erred in admitting evidence of a resale of the business many years after the disputed acquisition and a reclassification of acquisition debt as equity. In a nursing home company acquisition case, *PricewaterhouseCoopers, LLP v. Bassett*, 293 Ga. App. 274, 666 S.E.2d 721 (2008), the court upheld a negligent misrepresentation jury verdict, ruling on issues of reasonable reliance and due diligence by the trustee of children's trusts into which stock obtained in the acquisition was transferred.

Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008), is a defamation case illustrating the risk an auditor takes in reporting to an audit client adverse information concerning one of the client's employees and refusing to give its opinion on the financial statements if the employee remained in an accounting or financial reporting role. The Court of Appeals held that, given the auditor's independence, its reporting the information to its client constituted a publication and auditor's privilege to report such information is a qualified one, hence allegations of malice sufficient to survive a motion to dismiss.

In *Smith v. Morris, Manning & Martin, LLP*, 293 Ga. App. 153, 666 S.E.2d 683 (2008), the Court of Appeals held that written waivers that a law firm obtained from two clients, although valid with regard to the matters identified, were ineffective to protect it from claims when its representation of one client

in dealings with the other exceeded the scope of the waivers.

In *re Friedman's Inc.*, 385 B.R. 381 (S.D. Ga. 2008), vacated in part on reconsideration by *In re Friedman's Inc.*, 394 B.R. 623 (S.D. Ga. 2008) is a lengthy decision on motions to dismiss a bankruptcy trustee's action against officers, directors, investment bankers and outside counsel who represented the company and a committee of independent directors. Among other rulings, the court held that piercing the corporate veil requires insolvency under Georgia law, that Georgia law recognizes claims for aiding and abetting fraud, and that claims for legal malpractice can be based on the alleged failure of counsel to disclose adverse information to independent directors regarding interested party transactions. 



Thomas S. Richey concentrates his practice in securities, banking and corporate litigation at Bryan Cave Powell Goldstein. He is the founder of Georgia ICLE's Annual Business Organization Litigation Seminar, now in its 14th year, and serves on the State Bar's Corporate Code Revision Committee. Richey has also published annual surveys of Georgia corporate and business organization case law developments for 2005-07, copies of which are available on request to trichey@bryancave.com.

For an extended discussion of each of these cases, please download the document at the following link: <http://www.bryancave.com/2008-GA-Survey>.

This article is not intended as legal advice for any specific person or circumstance, but rather a general treatment of the topics discussed. The views and opinions expressed in this article are those of the author only and not Bryan Cave Powell Goldstein. The author would like to acknowledge and thank Ann Ferebee, Vjollca Prroni and Brooke Obie for their valuable assistance with this article.

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18th Annual Georgia Bar Media & Judiciary Conference

by Stephanie J. Wilson

On Feb. 29, legal and media professionals from across the state gathered at the State Bar of Georgia headquarters in Atlanta for the 18th Annual Georgia Bar Media & Judiciary Conference. Each year, this ICLE event focuses on emerging First Amendment issues and their influence on the law. Everyone from judges and lawyers to journalists are invited for a full day of panel discussions and small group sessions dealing with the latest topics impacting the First Amendment.

The day began with the first session, "Open Government in Georgia: A Report Card," led by moderator Hollie Manheimer, executive director of the Georgia First Amendment Foundation. Panelists included Dr. Josh Azriel, Department of Communications, Kennesaw State University; Prof. James E. "Jay" Black, Journalism & Media Studies, Mercer University; Carolyn Carlson, Kennesaw State University; Stefan Ritter, Georgia Department of Law; and Sheila Tefft, director, Journalism Program, Emory University. The panel presented the methodology and



Photos by Stephanie J. Wilson

Conference attendees pictured during the breakout session of "When Guilt is Not So Much the Issue: Notes from the Nichols Case."

results of an extensive survey conducted by a coordinated team of college students representing eight different Georgia colleges and universities.

The survey consisted of students making open records requests at various local and county law

enforcement agencies and universities in an effort to foster student respect for open government and to test the agencies' compliance. After each encounter, the students reported their results to a website where the data was collected and analyzed. Overall, 65 percent of the agencies in the study were in compliance.

The second session, "The Atlanta Gold Standard: Lessons for the 21st Century from a Singular High Profile Trial of the 20th," provided unexpected laughs all around. Mark Winne, WSB-TV, proved to be a highly entertaining moderator. The distinguished panel included the Hon. Willis B. Hunt Jr., U.S. District Court, Northern District of Georgia; Craig Gillen, Gillen Withers & Lake; Arthur W. Leach, attorney; Bill Rankin, *Atlanta Journal-Constitution*; and Don Samuel, Garland, Samuel & Loeb, P.C. These key participants discussed one of the highest profile

and provocative Atlanta trials of the 90s in a most frank and amusing way.

After a short break, the Fred-friendly session "Nano News: Journalism Now and in the Future," was underway. CNN's Editorial Director Richard Griffiths ably served as interlocutor to panelists Thomas M. Clyde, Dow Lohnes PLLC; Grayson Daughters, CEO, Waysouth Media; Steven Holmes, executive director for Standards and Practices, CNN; and Scott Shamp, director, New Media Institute, University of Georgia. The panel discussed the effects of modern news delivery platforms such as Twitter and Facebook on the mainstream media. A live Twitter demonstration was held in which the audience was invited to participate.

The luncheon program, "Georgia & Judicial Elections: Reflections & Reforms," was moderated by Ed Bean, editor, *Fulton County Daily Report*. Panelists included the Hon.

Sara L. Doyle, judge, Court of Appeals of Georgia; the Hon. Edward H. Lindsey Jr., (R-Atlanta), District 54, Georgia House of Representatives, Goodman McGuffey Lindsey & Johnson LLP; Tamela L. Adkins, attorney; Christopher J. McFadden, attorney; and Michael M. Sheffield, attorney. In this session, the panelists discussed their reactions to the 2008 Georgia judicial elections and the status of proposed legislation.

The session that generated the most buzz of the day was "When Guilt is Not So Much the Issue: Notes from the Nichols Case." Don Plummer, public information officer for the Fulton County Superior Court, chaired the panel charged with taking a fresh look at the Brian Nichols murder trial from the perspective of journalists, judges, lawyers and victims who lived it. The Hon. Hilton M. Fuller, senior judge, Superior Court, Stone Mountain Judicial Circuit; the Hon. James G.

We wish to express our sincerest appreciation to those who volunteered to serve as attorney coaches, regional coordinators, presiding judges and scoring evaluators during our state mock trial season.

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(Left to right) Judge Willis B. Hunt Jr. and attorney Craig Gillen during one of the many humorous moments of the Gold Club panel.



(Left to right) Judge Jim Bodiford and Judge Hilton Fuller served as panelists for a discussion of the Brian Nichols murder trial.

Bodiford, judge, Superior Court, Cobb Judicial Circuit; Kellie Stevens Hill, lead Nichols case prosecutor, chief assistant, Fulton County District Attorney's Office; Robert L. McGlasson, Nichols case defense attorney; Richard L. Robbins, Nichols case witness, RobbinsLaw LLC; Jeff Dore, WSB-TV; and Steve Visser, *Atlanta Journal-Constitution*, made up this remarkable panel.

This session was followed by two alternative small group breakout sessions. One continued the discussion from the Nichols panel.

The other was a continuation of the first session dealing with the open government audit. Carolyn Carlson, Kennesaw State University, chaired the panel made up of students who were participants in the audit. Viviana Arboleda, Emory University; Salina Cranor, Georgia State University; Kara Hooper, Armstrong Atlantic State University; Ansley Rice, Kennesaw State University; Aditya Shajikumar, Mercer University; and Joanna Turner, University of Georgia, gave anecdotal accounts

of their experiences in making their open government requests.

The final session of the day was "Improving Georgia Justice: Court Futures Revisited." In the early 90s, Georgia joined a nationally coordinated but locally driven effort to engage the public—not just lawyers and judges—in an effort to identify needed improvements to the state's courts. The panelists talked about whether another such initiative might be needed and what it might take to succeed. The Hon. Harold Melton, justice, Supreme Court of Georgia; the Hon. A. Quillian Baldwin Jr., judge, Superior Court, Coweta Judicial Circuit; Samuel S. Olens, chair, Cobb County Board of Commissioners, Ezor & Olens, P.C.; Jeffrey O. Bramlett, president, State Bar of Georgia, Bondurant, Mixson & Elmore, LLP; and Charles C. Clay, Brock Clay Calhoun & Rogers, PC, filled the panel which was led by Mary McQueen, president and CEO, National Center for State Courts. McQueen and the panel covered the key critical issues facing the courts: structure, communication, court automation, indigent defense, customer service and funding.

The Georgia First Amendment Foundation's eighth annual Weltner Freedom of Information Banquet was held at the Commerce Club following the conclusion of the conference. A highlight of the banquet is the presentation of the Weltner Award, honoring the memory of former Supreme Court of Georgia Chief Justice Charles L. Weltner, a champion of freedom of information and ethics in state government. This year's Weltner Award honoree was Supreme Court of Georgia Chief Justice Leah Ward Sears. GBJ



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

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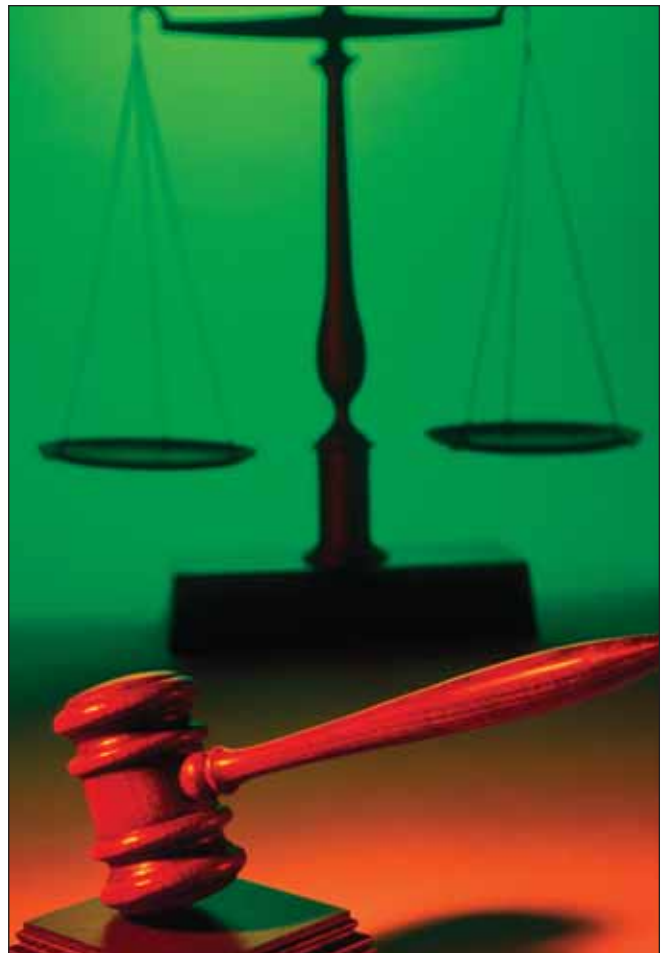
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Report on the Georgia Business Court Pilot Program

by Mary C. Gill and Kerry K. Vatzakas

Three years ago, Georgia joined the ranks of numerous other states in establishing a dedicated business court.¹ The business court pilot program was authorized on June 3, 2005, through the adoption of Atlanta Judicial Rule 1004 (Rule 1004) by the Supreme Court of Georgia.² Rule 1004 authorized the judges of the Fulton County Superior Court to create a Business Case Division (Business Court), which began operations on Oct. 11, 2005.

The Business Court was established to provide an efficient and dedicated forum to resolve complex commercial and business cases, with heightened efficiency and judicial case management. The anticipated benefits of the Business Court included the development of a judicial bench with a particular focus and expertise in complex commercial and business law issues and customized case management. Rule 1004 provides that the Business Court is to be comprised of up to three senior judges. The current designated senior judges are Judge Alice D. Bonner and Judge Elizabeth E. Long.



During the past three years, over 83 cases have been transferred to the Business Court, with over 200 lawyers representing the litigants. Surveys conducted of the lawyers who have appeared before the Business Court reflect strong support for the Business Court and indicate satisfaction with the timeliness and quality of decisions from the Business Court. The docket of the Business Court became significantly more active in 2007 after the adoption of the Amended Rule 1004, which allowed for the assignment of cases to the Business Court by motion of one party or at the request of the superior court judge assigned to the case.³ Prior to this amendment, assignment to the Business Court required the consent of all parties.⁴

When the Business Court was formed in 2005, it was contemplated that it would operate first as a test program for several years. After that time, there would be an evaluation of the Business Court, based upon the number and types of cases filed, the time to disposition, the perception among the bench and bar and with consideration given to the continuation of, possible changes to, or expansion of the Business Court. In July 2008, Jeffrey O. Bramlett, president of the State Bar of Georgia, formed the Business Court Committee of the State Bar (the Committee).⁵ The Committee has been tasked with evaluating the Business Court pilot program to date, analyzing proposed changes to the rules governing the Business Court and considering future growth options for the Business Court.

The most immediate challenge addressed by the Committee concerned the funding of the Business Court. In August 2008, the state of Georgia imposed certain budget cuts, which included reduction of the operating budget of the Council of Superior Court Judges and the subsequent elimination of funding for senior judges.⁶ In response, the Committee proposed an amendment to Rule 1004 that would (1) implement a fee of \$1000 to transfer a case to the Business Court,⁷ and (2) eliminate the requirement that only senior judges serve on the Business Court.⁸ Both of these measures should reduce the funding shortfall currently facing the Business Court.

The Committee currently is discussing potential growth options for the Business Court, based upon a review of business courts in other jurisdictions.⁹ The Committee is focusing its efforts on evaluating three primary options: first, an incremental approach whereby county courts (superior and/or state) create their own business court divisions, much like they have created "family" divisions, on a case-by-case basis; second, the creation of a single, unified business court with statewide jurisdiction; and third, the creation of business courts in targeted locations in major metropolitan areas in Georgia. The Committee will continue to discuss the relative merits and challenges presented by each of these models during the next several months. The Committee will focus on issues such as the demand for business courts outside of the metropolitan Atlanta, how business courts would best be established within the current county-based court system and the necessity

for legislative and/or Constitutional changes to implement a recommended approach.

The Committee is interested in input from the Bar regarding these alternative models. Please direct any inquiries and comments regarding these options to Mary C. Gill, chair, Business Court Committee, at 404-881-7276 or mary.gill@alston.com, or other members of the Business Court Committee. 



Mary C. Gill is a partner in the Securities Litigation Group at Alston & Bird LLP and is the chair of the Business Court Committee of the State Bar of Georgia.



Kerry K. Vatzakas is an associate in the Securities Litigation Group at Alston & Bird LLP.

Endnotes

1. For a detailed discussion of the Fulton County Business Court and other business court models, see Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477 (2007).
2. The current version of Rule 1004 is attached hereto at Appendix A, with proposed amendments in redline.
3. The caseload more than doubled from 2007 to 2008.
4. Atlanta Judicial Rule 1004 was adopted in its initial form on June 3, 2005, by the Supreme Court of Georgia. Amended Rule 1004 was adopted on June 6, 2007.
5. Members of the Committee are: Mary C. Gill, chair; Wade W. Herring II, vice-chair; Joel O. Wooten Jr., vice-chair; M. Gino Brogdon; Thomas Reuben Burnside III; Michael Cates; Anthony L. Cochran; Philip S. Coe; Bobby Lee Cook; Dwight J. Davis; Gerald M. Edenfield; Lester B. Johnson III; Jennifer Auer Jordan; Nancy Ingram Jordan; Stephen Thomas LaBriola; Benjamin Arthur Land; W. Fred Orr II; Jill A. Pryor; Brian DeVoe Rogers; Richard H. Sinkfield; Michael A. Sullivan; and Elizabeth V. Tanis. Advisors to the Committee include: William D. Barwick; Jeffrey O. Bramlett; Raymond D. Fortin; and James Conrad Snyder Jr.
6. The budget cuts resulted in a restriction on the use of senior judges. Funds have been secured, however, to allow for the continued role of the senior judges on the Business Court for the remainder of fiscal year 2009.
7. The fee is only payable by the parties moving for transfer.
8. The redlined proposed amendments to Rule 1004 are attached hereto at Appendix A. The proposed amendments have been approved by the Fulton County Superior Court Judges and will be submitted to a vote by the Board of Governors at the March 2009 meeting.
9. The Committee would like to thank, in particular, Michael Cates, King & Spalding LLP, and Anne Tucker Nees, staff attorney to the Business Court, for their work in compiling information on the alternative growth options for the committee.

APPENDIX A

RULE 1004-AMENDED (Proposed Amendments in Redline)

BUSINESS CASE DIVISION

1.

The judges of the Fulton Superior Court hereby create a Business Case Division (hereinafter referred to as the Division).

2.

The purpose of the Division is to provide judicial attention and expertise to certain complex Business Cases.

3.

(a) For purpose of this rule, Business Cases include actions in which the amount in controversy (or, in a case of injunction relief the value of the relief sought or the cost of not getting the relief) exceeds \$1,000,000 and which are brought pursuant to the following:

- (i) Georgia Securities Act of 1973, as amended, O.C.G.A. § 10-5-1, et seq.;
- (ii) Uniform Commercial Code, O.C.G.A. § 11-1-101, et seq.;
- (iii) Georgia Business Corporation Code, O.C.G.A. § 14-2-101, et seq.;
- (iv) Uniform Partnership Act, O.C.G.A. § 14-8-1, et seq.;
- (v) Uniform Limited Partnership Act, O.C.G.A. § 14-9A-1, et seq.;
- (vi) Georgia Revised Uniform Limited Partnership Act, O.C.G.A. § 14-9-100, et seq.;
- (vii) Georgia Limited Liability Company Act, O.C.G.A. § 14-11-100, et seq.; and
- (viii) any other action that the parties to the action ~~and~~ or the Court believes warrants the attention of the Division, including large contractual and business tort cases as well as other complex commercial litigation.

(b) Notwithstanding anything contained herein to the contrary, cases that include the following claims shall not be classified as a Business Case without the consent of all parties:

- (i) Personal injury;
- (ii) Wrongful death;
- (iii) Employment discrimination; and
- (iv) Consumer claims in which each individual plaintiff's claims are in the aggregate less than \$1,000,000.

4.

The Division is to be comprised of ~~up to three senior one or more~~ judges who manage, administer, and try the cases assigned to this Division, ~~or such other number of senior judges~~ as the chief judge shall designate (the "Division Judge" or "Division Judges"). The

Division judges may select a judge to serve as the head of the Division (the Division Leader), who will be in charge of addressing issues with regard to case assignment, creating and implementing Division policies, representing the Division to the public, and performing all other functions that are necessary for the administration of this Division.

5.

A Business Case filed in the Fulton County Superior Court shall be eligible for assignment to the Division based upon: (1) the parties' joint request; (2) the motion of a party; or (3) a request submitted by the Superior Court Judge currently assigned that case, with notice to the parties. By filing a motion to transfer a case into the Division pursuant to subsections (1) or (2) above, the movant(s) agrees pursuant to O.C.G.A. § 15-6-77(l) to pay, pro rata, a transfer fee in the amount of \$1,000.00 ("Transfer Fee"). In the event that a superior court judge requests that a case be assigned to the Division pursuant to subsection (3), no such Transfer Fee shall be required. The motion or request shall be directed to the chief judge of the Fulton County Superior Court and the Business Case Division Committee to determine, after allowing the parties twenty (20) days for briefing of the issue, whether the case is a Business Case Division case and whether it should be accepted for assignment into the Business Case Division. If so accepted, the court administrator shall reassign the case to a ~~senior~~ division judge within the Business Case Division.

6.

Upon a motion or request, if the chief judge, a member of the Business Court Committee and a ~~senior~~ division judge to whom the case may be assigned deem the case appropriate for assignment to the Division, the court administrator shall assign the case to the Division. Within the Division, the court administrator shall assign the Division's cases in rotation, taking into account, reasonably estimated discovery, dispositive motions, availability of the ~~senior~~ division judge, the ~~senior~~ division judge's current case load, and trial time, as far as practicable, and as agreed to by the superior court judges. The court administrator shall make every effort to fairly assign the case load within the Division.

7.

When an active judge's case has been reassigned to a division judge as a Business Case, the court administrator shall make such additional assignments to the active judge as are necessary to comply with these rules.

8.

The chief judge/district administrative judge shall select or re-select all division judges from those ~~senior~~ judges, considering their experience, training, and other relevant factors, who volunteer for such assignment for a period of two years. At the end of each two year term, the chief judge/district administrative judge shall decide the continuation of such assignment if the division judge volunteers for continued service. The chief judge/district administrative judge may reassign

such division judge at any time in the best interests of the court and the division.

9.

The Business Cases assigned to the Division shall be governed by applicable law, including the Georgia Civil Practice Act, O.C.G.A. § 9-11-1, et seq., and the Uniform Superior Court Rules.

10.

The division judges, in consultation with all parties and pursuant to applicable law, shall have the ability to modify the schedule for the administration of Business Cases, including the schedule for conducting discovery, filing dispositive motions, conducting pre-trial procedures, and conducting jury and non-jury trials.

11.

In particular, the division judges, pursuant to O.C.G.A. § 9-11-5(e) may modify the procedure for filing papers with the court, including allowing such filings to be made by facsimile or by e-mail with the court. Upon the written consent of all parties and upon any necessary waivers as may be required by law, the division judges may allow for service of papers filed with the court by electronic means, including by facsimile or by e-mail. In the event that any procedures are modified pursuant to this paragraph, an electronic signature shall be deemed an original signature.

12.

The division judges, in consultation with all parties, shall have the ability to order nonbinding mediation, arbitration, or other means of alternative dispute resolution as dictated by the needs of a particular Business Case. The division judges themselves, with the consent of all parties, may conduct such non-binding mediation, arbitration, or other means of alternative dispute resolution.

13.

The calendar for the Division shall be prepared under the supervision of the Division Judges and shall be made available to all parties with Business Cases pending in the Division. Pursuant to agreement of the parties and the court, the court may notify parties of such calendar by electronic means, including by facsimile or by e-mail.

14.

Subject to the rules of evidence, the Division encourages the parties to use electronic presentations and technologically generated demonstrative evidence to enhance the trier-of-fact's understanding of the issues before it and to further the convenience and efficiency of the litigation process.

15.


Within thirty (30) days of a Business Case being assigned to the Division, or such shorter or longer time as the division judges shall order, the parties shall meet with the division judge to whom the Business Case is assigned to discuss the entrance of a case management order, including the following issues: (i) the length of the discovery period, the number of fact and expert

depositions, and the length of such depositions; (ii) a preliminary deposition schedule; (iii) the identity and number of any motions to dismiss or other preliminary or pre-discovery motions which shall be filed and the time period in which they shall be filed, briefed, and, if appropriate, argued; (iv) the time period after the close of discovery within which post-discovery dispositive motions shall be filed, briefed, and, if appropriate, argued; (v) the need for any alternative form of dispute resolution; (vi) an estimate of the volume of documents and electronic information likely to be the subject of discovery from the parties and non-parties, and whether there are means by which to render document discovery more manageable and less expensive; (vii) and modifications to the rules under the Civil Practice Act or the Uniform Superior Court Rules as may be applicable to a particular case; (viii) such other matters as the division judge may assign to the parties for their consideration. Within ten (10) days of such a meeting, the parties shall submit a proposed case management order to the division judge for consideration.

16.

In an effort to reduce the length of discovery and quickly resolve any discovery disputes, the division judges shall be available to the parties to resolve disputes that arise during the course of discovery.

17.

In addition to telephone conferencing pursuant to Rule 9 of the Uniform Superior Court Rules, by mutual agreement between the parties and the division judges, counsel may arrange for any hearing or other conference to be conducted by video conference, subject to the same rules of procedure and decorum as if the hearing or conference were held in open court. In addition to charging the parties for other costs associated with Business Cases pending in the Division, the clerk may charge the parties a fee for such video conferencing or may include the costs of such video conferencing in any standard fee charged to parties participating in Business Cases pending in the Division. 

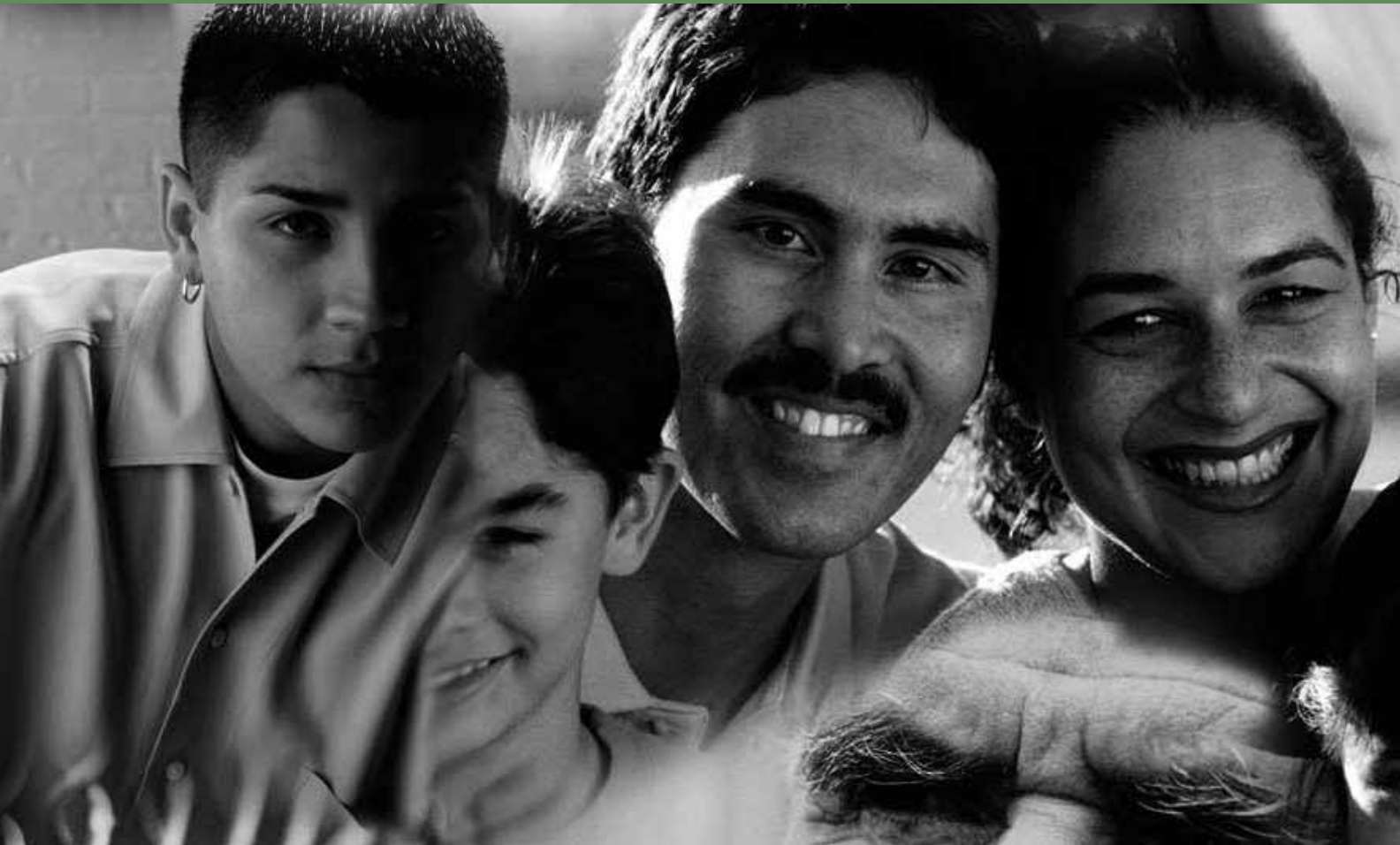
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Brewster



Henn



Beck



Chadwick

Kilpatrick Stockton announced that **Bill Brewster** was named to Lawdragon's prestigious **2008 500 Leading Lawyers in America** guide. The 500 guide features the most "talented, respected and influential professionals handling the biggest legal matters of the year." Also, **Miles Alexander, Stan Blackburn, Susan Cahoon, Richard Cicchillo, Steve Clay, Randy Hafer, Rick Horder** and **Diane Prucino** were selected as Leading Lawyer finalists for their remarkable achievements in 2008.

Charlie Henn, a partner in the firm's intellectual property department, was named one of "**Atlanta's 40 Under 40 Leaders**" by the *Atlanta Business Chronicle*. The publication's annual listing includes the top "Up and Comers" among the Atlanta business community. Henn was also named one of *Lawyers USA's 2008 Lawyers of the Year*. Only six attorneys nationwide were honored.

Reneae Bailey and **Elizabeth Thomas** are 2008 graduates of the Women in Technology's **Careers in Action Program**. The program is designed for management-level women to develop critical skills they need to be most effective in their roles in their organization and is presented by some of Atlanta's most high-profile executives.

Partner **Joe Beck** was named to the **2009 BTI Client Service All-Star Team**. A select group of 176 attorneys nationwide were recognized with this client-nominated distinction for delivering the absolute best client service to Fortune 1000 clients. Beck was one of only 22 attorneys to receive this distinction two years in a row.

Ray Chadwick, a partner in the litigation department, received the **3rd Annual Robert L. Allgood Service Award** at the Augusta Bar Association's annual meeting in January. The award recognizes one member of the Bar each year who has exhibited exemplary service and commitment to the bar and community over a substantial period of time.

Twenty Kilpatrick Stockton attorneys earned recognition as *Georgia Trend's 2008 "Legal Elite:"* **Miles Alexander, Stan Blackburn, Jay Bogan, Bill Brewster, Richard Cicchillo, Greg Cinnamon, Ted Davis, Lynn Fowler, Charla Hall, Charlie Henn, Andy Kauss, Alfred Lurey, Scott Marrah,**

Todd Meyers, George L. Murphy Jr., John Pratt, Diane Prucino, Earle Taylor, Bailey Teague and **David Zacks**.

- > **Ford & Harrison LLP** was recognized as a **2008 Diversity Leader** by the Law Department of Sodexo Inc., a leading foodservice and facilities management company with an objective to integrate diversity and inclusion into all aspects of its business approach. Ford & Harrison is one of four law firms to earn this first annual distinction from Sodexo.



Joia M. Johnson, executive vice president, general counsel and secretary of Hanesbrands Inc., joined the **Client Advisory Council** of **Lex Mundi**. The council is a distinguished group of senior in-house counsel from some of the world's leading companies which provides advice and guidance in a variety of areas that enhance member firms' ability to serve their clients better and to meet the needs of in-house counsel.



Charles Kuck was installed as the **president** of the **American Immigration Lawyers Association** for the 2008-09 term. Kuck is managing partner of the Atlanta immigration law firm of Kuck Casablanca LLC.





Rep. Earl Hilliard Jr., (D-Birmingham) was named **Freshman Legislator of the Year** by the **Alabama House Democratic Caucus**. Hilliard was recognized for his legislation regarding the implementation of safety initiatives for schools and his work with the Alabama Commission to Reduce Poverty. The awards are also based on leadership, voting history and participation during the previous session.



The **U.S. Department of Veterans Affairs** announced that attorney **George Bradford** was selected for the **Leadership VA program (LVA)** for 2009. LVA identifies leaders in the Department of Veterans Affairs who exhibit leadership talent and potential and provides an enrichment of their career development through an intense leadership training experience. Bradford is an attorney in the VA Office of Regional Counsel in Decatur where he handles a wide range of issues and is a subject matter expert in appropriations law.

- > **Hunton & Williams LLP's** Atlanta office, which recently celebrated its 20th anniversary, received the "2008 Law Firm of the Year Award" from the **Pro Bono Partnership of Atlanta (PBPA)** for handling the most legal matters referred by the PBPA in the past year, including assisting nonprofits with reviewing contracts, registering trademarks, drafting bylaws and updating human resources policies.
- > The **U.S. District Court for the Northern District of Georgia** announced the reappointment of the **Hon. Alan J. Baverman** to a second term as a full-time U.S. magistrate judge. The reappointment was effective February 2009. U.S. magistrate judges are appointed for eight-year terms by the U.S. district judges of their district.
- > **Jones Walker** was once again ranked in *The National Law Journal's* **NLJ 250**. The firm was ranked as the nation's 163rd-largest law firm in 2008, up from 182nd in 2007, reflecting the firm's growth of nearly 15 percent in 2008. The NLJ 250 ranks law firms by number of total attorneys, and also provides data about the number of partners, associates and other data about the top 250 law firms in the United States.

- >  **Bovis, Kyle & Burch, LLC**, announced that **Gregory T. Presmanes**, partner, was inducted as a fellow into **The College of Workers' Compensation Lawyers**. Fellowship is extended by invitation only to workers' compensation attorneys who have demonstrated the highest professional qualifications, ethical standards, highest level of character, integrity, professional expertise and leadership, as well as sustained, exceptionally high-quality services and distinguished accomplishments in their field.


- >  The **Hon. Chris Hughes** of Fitzgerald, was elected **superior court judge** for the **Cordele Judicial Circuit**. Hughes had previously served as juvenile court judge for the circuit since 1998.
- > Atlanta attorney **John C. Bruffey Jr.** was awarded **Campbell University's Alumni Service Award** in recognition of his service and support. Bruffey, a partner at Drew, Eckl & Farnham, is a 1984 graduate of the Norman Adrian Wiggins School of Law at Campbell University. He was selected in part for his influential work in the law school's fall 2009 move from rural Buies Creek, N.C., to Raleigh.


On the Move

In Atlanta

- >    **Parker, Hudson, Rainer & Dobbs LLP** announced that Atlanta attorneys **Keith R. Blackwell**, **Robert M. Brennan** and **Jonathan E. Bush** were elected to the

partnership. Blackwell is a member of the firm's litigation department and his practice focuses on information security, government investigations and commercial litigation. Brennan is a former federal prosecutor and member of the firm's litigation department, where his practice focuses on complex civil litigation, defense of white collar crimes and other regulatory offenses and representing victims of white collar crimes. Bush is a member of the firm's commercial finance department and his practice focuses on the documentation, negotiation and closing of syndicated and non-syndicated commercial loan transactions. The firm's Atlanta office is located at 285 Peachtree Center Ave., 1500 Marquis Two Tower, Atlanta, GA 30303; 404-523-5300; Fax 404-522-8409; www.phrd.com.


- >  **Amy Levin Weil**, long-time federal prosecutor and former chief of the Appellate Division of the U.S. Attorney's Office for the Northern District of Georgia, announced the opening of **The Weil Firm**, a law firm specializing in appellate practice. The firm is located at 511 E. Paces Ferry Road NE, Atlanta, GA, 30305; 404-581-0000; Fax 404-869-0704; www.theweilfirm.com.

- >  **Ford & Harrison LLP** announced the addition of **Paul R. Beshears** as **partner** in the firm's Atlanta office. Beshears, a former partner of Nelson Mullins Riley & Scarborough LLP in Atlanta, represents employers in labor relations and employment law matters. The firm's Atlanta office is located at 1275 Peachtree St. NE, Suite 600, Atlanta, GA 30309; 404-888-3800; Fax 404-888-3863; www.fordharrison.com.

- > **Mary Anthony Merchant** joined **Ballard Spahr Andrews & Ingersoll, LLP**, as **partner** in the intellectual property department in the firm's Atlanta

office and as leader of the biotechnology team in the patent group. Most recently a partner at Troutman Sanders, Merchant is a seasoned attorney whose work focuses on procuring and protecting the intellectual property assets of her clients. The firm is located at 999 Peachtree St., Suite 1000, Atlanta, GA 30309; 678-420-9300; Fax 678-420-9301; www.ballardspahr.com.


- >   **Jones Day** named product liability lawyer **John F. Yarber** as **partner** and environmental lawyer **Christine M. Morgan** as **of counsel** in the Atlanta office. Both were formerly associates. Yarber has focused on defending national clients in product liability litigation. Morgan practices environmental law, with emphasis on environmental counseling on compliance and transactional issues. The firm is located at 1420 Peachtree St. NE, Suite 800, Atlanta, GA 30309; 404-521-3939; Fax 404-581-8330; www.jonesday.com.

- >  The **Fulton County Board of Commissioners** appointed **David Ware** to serve as **county attorney** for Fulton County Government. The Office of the County Attorney provides legal counsel and representation to the Fulton County Board of Commissioners and various Fulton County departments and agencies. Since 2004, Ware has served in the Office of the County Attorney as a senior trial attorney. The office is located at 141 Pryor St. SW, Atlanta, GA 30303; 404-612-0246.

- >  **Womble Carlyle Sandridge & Rice, PLLC**, announced that **Lisa Thiel** was invited to become a **member** of the firm. Thiel's practice focuses on capital markets transactions, including syndicated loan transactions, senior debt financings, letter of credit-backed industrial bond financings and structured finance transactions. The firm's Atlanta office is located at One Atlantic Center, Suite 3500, 1201 W. Peachtree St., Atlanta, GA 30309; 404-872-7000; Fax 404-888-7490; www.wcsr.com.

- > **Reid H. Harbin** and **Jennifer M. Miller** announced the opening of **Harbin & Miller, LLC**. The firm assists clients in all aspects of commercial and residential real estate concerns. The office is located at 3085 E. Shadowlawn Ave., Atlanta,

GA 30305; 404-446-4995; Fax 404-446-4994; www.harbinmillerlaw.com.

- >  **Hawkins & Parnell, LLP**, announced that **Jack N. Sibley** was appointed the new **managing partner** of the firm. A prominent trial attorney with an extensive practice in complex litigation, Sibley has been with the firm for over 20 years. The firm's Atlanta office is located at 4000 SunTrust Plaza, 303 Peachtree St. NE, Atlanta, GA 30308; 404-614-7400; Fax 404-614-7500; www.hawkinsparnell.com.

- > **Miller & Martin PLLC** announced that corporate lawyers **A. Josef DeLisle**, **Chris A. Schwab** and **Christopher T. Henderson** joined the firm's Atlanta office. DeLisle, who joined the firm as a **member**, concentrates his practice on mergers, acquisitions and divestitures, private debt and equity and venture capital transactions, securities laws, corporate formation and governance, shareholders', partnership and joint venture agreements, service agreements, and other general business and commercial matters. Schwab, who joined the firm as **of counsel**, advises clients on various corporate and business matters, including complex corporate mergers, acquisitions and divestitures, secured and unsecured loan transactions, technology and intellectual property licensing agreements, outsourcing and procurement agreements and sales and service agreements. Henderson, who joined the firm as an **associate**, works with clients on various corporate and business matters. The firm's Atlanta office is located at Suite 800, 1170 Peachtree St. NE, Atlanta, GA 30309; 404-962-6100; Fax 404-962-6300; www.millermartin.com.

- >    **McKenna Long & Aldridge LLP** announced that former state lawmaker **Matt Towery** returned as a **member** of the firm's government affairs practice. Towery will continue in his role as CEO of InsiderAdvantage/Poll Position, one of the nation's leading polling and market research companies.

Richard B. Hankins and **Alston D. Correll** joined the **partnership** of the firm's employee relations practice in the Atlanta office. Both previously practiced at Kilpatrick Stockton LLP. The firm's Atlanta

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office is located at 303 Peachtree St. NE, Suite 5300, Atlanta, GA 30308; 404-527-4000; Fax 404-527-4198; www.mckennalong.com.


- > **Derick C. Villanueva** announced that **The Villanueva Law Firm, LLC**, relocated its offices to the Buckeye Tower building in Atlanta. The Villanueva Law Firm, LLC, continues to provide quality and affordable representation to individuals and businesses in bankruptcy, domestic relations, business law, immigration, criminal defense and workers compensation. The firm's new address is Buckeye Tower, Suite 335, 3300 Buckeye Road, Atlanta, GA 30341; 770-220-0818; Fax 770-220-0814; www.vlawfirmllc.com.

- >  **Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**, announced that **Ruth Anne Collins Michels**, an attorney in the firm's Atlanta office, was elected a **shareholder**. Michels practices exclusively in the area of employee benefits law.


Michels

The firm also added two new employment law attorneys. **Patrick F. Clark** joined as a **shareholder** and **Amie M. Willis** joined as **of counsel**. Both attorneys previously served at Epstein, Becker & Green, P.C. The office is located at Bank of America Plaza, 600 Peachtree St. NE, Suite 2100, Atlanta, GA 30308; 404-881-1300; Fax 404-870-1732; www.ogletreedeakins.com.

- >  **Jackson Lewis LLP** announced that **Raazia K. Hall** joined their Atlanta office as a **partner**. Hall was formerly a partner in the business immigration practice group at Ford & Harrison. She now joins the Jackson Lewis global immigration practice and will focus her attention on the needs of employers in the region and throughout the country. The office is located at 1155 Peachtree St., Suite 1000, Atlanta, GA 30309; 404-525-8200; Fax 404-525-1173; www.jacksonlewis.com.


- >  **Bovis, Kyle & Burch, LLC**, announced that **Benjamin A. Leonard** was named **of counsel**. Leonard continues his practice of workers' compensation defense. The firm is located at 200 Ashford Center North, Suite 500, Atlanta, GA 30338; 770-391-9100; Fax 770-668-0878; www.boviskyle.com.


In Macon

- >  **Donald L. Johstono**, formerly with the U.S. Attorney's Office, announced the opening of his own practice. Johstono's areas of concentration include criminal defense and asset forfeiture. The firm is located at 3318 Vineville Ave., Macon, GA 31204; 478-254-2493; Fax 478-254-2923; www.donaldjohstono.com.

- > **Mary Beth Hand** was named the newest **partner** at **Sell & Melton, LLP**, where she has practiced law since 2003. Hand's practice is focused on civil litigation, including eminent domain, constitutional litigation and business litigation. The office is located at 577 Mulberry St., Suite 1400, Macon, GA 31201; 478-746-8521; Fax 478-745-6426; www.sell-melton.com.

In Valdosta

- >  **Coleman Talley LLP** announced that **Andrew V. Thomas II** joined the firm as an **associate** in its litigation practice. The firm's Valdosta office is located at 910 N. Patterson St., Valdosta, GA 31601; 229-242-7562; Fax 229-333-0885; www.colemantalley.com.

- >  **Langdale Vallotton, LLP**, announced that **Katherine A. Gonos** joined the firm as an **associate**. Prior to joining Langdale Vallotton, Gonos worked as an assistant public defender in the Waycross Judicial Circuit and the Southern Judicial Circuit in Moultrie. Her practice is concentrated in criminal defense and domestic relations. The firm is located at 1007 N. Patterson St., Valdosta, GA 31601; 229-244-5400; Fax 229-244-0453; www.langdalevallotton.com.

In Chattanooga, Tenn.

- >   **Miller & Martin PLLC** announced associates **Neil A. Brunetz** and **Ian K. Leavy** to **member** status. Brunetz concentrates his practice on courtroom representation of clients in civil litigation matters. Leavy concentrates his practice in the area of labor and employment law. The firm is located at Suite 1000, Volunteer Building, 832 Georgia Ave., Chattanooga, TN 37402; 423-756-6600; Fax 423-785-8480; www.millermartin.com.

In Kansas City, Mo.

Shook, Hardy & Bacon LLP announced that **Leonard Searcy** was elected to the **partnership** of the Kansas City office. Searcy's practice areas include intellectual property prosecution & counseling and international litigation & dispute resolution. The office is located at 2555 Grand Blvd., Kansas City, MO 64108; 816-474-6550; Fax 816-421-5547; www.shb.com.

In Louisville, Ky.

Fisher & Phillips LLP announced that **Craig P. Siegenthaler** joined the firm as a **partner** to open Louisville's first nationwide labor and employment firm. Siegenthaler was formerly a partner in the labor and employment practice group of the Louisville-based law firm of Greenebaum Doll & McDonald PLLC. The firm is located at Suite 2000, 220 W. Main St., Louisville, KY 40202; 502-561-3990; Fax 502-561-3991; www.laborlawyers.com.

In San Francisco, Calif.

Jay W. Brown was named **partner** at the law firm of **Clapp, Moroney, Bellagamba and Vucinich**, a personal injury defense firm located in the San Francisco Bay area. Brown has been with Clapp, Moroney since 2000. The firm is located at 6130 Stoneridge Mall Road, Suite 275, Pleasanton, CA 94588; 925-734-0990; Fax 925-734-0888; www.clappmoroney.com.

If you have information you want to share in the Bench & Bar Section of the *Georgia Bar Journal*, contact Stephanie Wilson at stephaniew@gabar.org.

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Goodman McGuffey**Lindsey & Johnson, LLP**

Charles R. Beans

Edward H. Lindsey Jr.

C. Wade McGuffey Jr.

**This is not a complete list of all State Bar of Georgia members included in the publication. The information was compiled from Bench & Bar submissions from the law firms above for the April Georgia Bar Journal.*

Ford & Harrison LLP

Joycelyn L. Fleming

Patricia G. Griffith

C. Lash Harrison

Thomas J. Kassir

Georgia Rising Stars

This list recognizes the top up-and-coming attorneys in the state – those who are 40-years-old or younger, or those who have been practicing for 10 years or less.*

Bovis, Kyle & Burch, LLC

Benjamin A. Leonard

Fisher & Phillips LLP

Tiffani Hiudt Casey

E. Jewelle Johnson

Joseph P. Shelton

Shanon Stevenson

Goodman McGuffey**Lindsey & Johnson, LLP**

Samantha R. Johnson

Robert A. Luskin

Teri A. Zarrillo

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Ford & Harrison LLP

Reneé A. Canody

Joelle C. Sharman

No More Mr. Nice Guy:

Ethically Collecting on Overdue Accounts

by Paula Frederick

“**D**id you know we’ve got over \$1 million in unpaid receivables?” your assistant asks as she enters your office. “We need that money! Take a look at these letters I’ve drafted to the clients with accounts that are 60 days overdue.”

“With those letters and \$4, I could buy a cup of coffee,” you grouse. “Times are hard. It’s easy to put the lawyer’s bill at the bottom of the stack.”

“That’s why I think we need to kick it up a notch — let them know we mean business. I’m adding interest to any account that is past due. These letters threaten to send the really old files to a collection agency and to report the default to the credit bureau. And if the collection agency can’t collect in two months, we sue!”

“There goes our repeat business,” you respond. “There’s gotta be a better way!”

Fee collection has always posed problems for lawyers; it’s a classic conflict that pits the lawyer’s personal interest in being paid against the obligation of loyalty to the client. Revealing otherwise confidential information about the client can be distasteful to a lawyer, even though an exception to the Confidentiality Rule (Ga. Rule of Professional Conduct 1.6) allows limited revelation of otherwise-protected information when necessary to collect a fee. As a result, many lawyers are uncomfortable taking action against a slow- or no-paying client.

How does the ethical lawyer go about collecting past-due fees?



It all begins with good communication. A written fee agreement goes a long way towards letting the client know what to expect. You may also be able to prevent problems by sending regular bills during representation, even for contingency matters, and billing the client

for costs as they are incurred. Provide sufficient detail in the bill so that the client understands you have done real work on the case.

If the client questions the amount of the bill, ask whether his failure to pay stems from a belief that you have charged too much. If so, the Bar's Fee Arbitration Department may be able to help.

Once an account becomes past due, act quickly. Let the client know the consequences of failing to pay—whether you intend to withdraw from representation, add interest to the bill or send the account for collection.

If you do plan to withdraw, the sooner the better. Bar Rule 1.16 prohibits withdrawal where there will be "material adverse effect" on the interests of the client. The Rule requires reasonable notice to the client and allowing time for employment of other counsel.

A lawyer may ethically charge interest on an overdue bill, even

where there is no prior agreement with the client to do so. Formal Advisory Opinion 45 requires the lawyer to notify the client on the face of the bill that interest will be charged on amounts unpaid after a designated period of time. Of course the lawyer's notices and disclosures must comply with all applicable state and federal law such as the Truth in Lending and Fair Credit Billing Acts.

Using a collection agency to collect past-due accounts is not *per se* unethical, as long as the lawyer protects confidential information. On the other hand, "fee collection programs" that buy fee bills from lawyers are prohibited because they do require the lawyer to reveal confidential information about the client and the case. See Formal Advisory Opinions 49 and 95-1 for more information.

A relatively new Opinion, 07-1, further defines the lawyer's ability to reveal confidential information

in attempting to collect a fee. The Opinion distinguishes between direct collection methods, such as using a collection agency or bringing suit, and indirect methods, such as reporting the client to a credit bureau. It prohibits use of indirect methods because they are not specifically aimed at collecting the fee and they appear punitive.

As a last resort, the Rules of Professional Conduct do not prohibit a lawyer from suing a former client over a past-due account. Do so with caution, however; clients tend to file malpractice claims or Bar grievances in response to what they perceive as aggressive collection efforts. GBJ



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

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Discipline Summaries

(December 12, 2008 through February 13, 2009)

by Connie P. Henry

Disbarments

James A. Elkins

Columbus, Ga.

Admitted to Bar in 1965

On Jan. 26, 2009, the Supreme Court of Georgia accepted the petition for voluntary surrender of license of James A. Elkins (State Bar No. 243200). In the representation of a client, Elkins failed to keep the client informed of the status of the case, he lied about the status of the case, he failed to respond to a motion for summary judgment and he failed to inform his client timely that the motion had been granted and the case dismissed. Elkins has seven prior disciplinary infractions.

Earl Dean Clark Jr.

Athens, Ga.

Admitted to Bar in 2001

On Jan. 26, 2009, the Supreme Court of Georgia disbarred Earl Dean Clark Jr. (State Bar No. 126787). The Court considered four Notices of Discipline against Respondent. In each case Respondent abandoned his clients after doing little or no work on their cases, he failed to communicate with those clients about the status of their cases, and he failed to withdraw from representation. Clark was properly served with a Notice of Investigation in each case, but he failed to answer the Notice. He was properly served with the Notices of Discipline, but failed to reject

those Notices. The Court found in aggravation that Clark had multiple violations in multiple cases evidencing a pattern and practice of wrongful behavior.

Martha F. Dekle

Brunswick, Ga.

Admitted to Bar in 1986

On Feb. 9, 2009, the Supreme Court of Georgia disbarred Martha F. Dekle (State Bar No. 216740). Dekle filed two civil complaints on behalf of different clients in federal district court. She failed to keep her clients informed about the status of the cases and failed to properly prosecute the actions. In one case she failed to respond to discovery and failed to inform her client that her deposition had been scheduled. In the other case she failed to respond to a motion for summary judgment and terminated her representation without notifying the client or taking action to protect her interests. One complaint was dismissed for failure to prosecute and the other resulted in the entry of summary judgment against Dekle's client.

Dekle was served with each Notice of Investigation and each formal complaint, but failed to file or serve answers.

John M. Shinall

Greensboro, Ga.

Admitted to Bar in 1969

On Feb. 9, 2009, the Supreme Court of Georgia disbarred John M. Shinall (State Bar No. 642800). The fol-

lowing facts are deemed admitted by his default: Shinall was retained by a client and paid \$5,000. Shinall failed to file discovery responses, however, and did not notify his client of the motion for sanctions filed by the opposing party due to that failure. Shinall did not respond to the motion and the court entered an order directing him to respond to discovery and assessing attorney's fees, but Shinall did not advise his client about the order. Shinall did not file discovery and did not appear at the compliance hearing scheduled by the court, which led the court to strike his client's answer and counterclaim and award a default judgment against the client. Shinall did not notify his client of the judgment nor did he return any of his client's calls.

Neal Harley Landers
Duluth, Ga.

Admitted to Bar in 1998

On Feb. 9, 2009, the Supreme Court of Georgia disbarred Neal

Harley Landers (State Bar No. 433398). The following facts are deemed admitted by his default: Landers conducted real estate closings for Old Republic National Title Insurance Company. In connection with five closings handled in 2006 and 2007, Landers received funds in a fiduciary capacity. He failed to promptly notify the third parties that he had received funds and failed to forward the funds promptly or at all. He also failed to maintain complete records of the funds, he did not maintain funds held in a fiduciary capacity in an account separate from his own property; and he failed to record promptly the deeds regarding the closing. He failed to keep his clients informed and did not act with reasonable diligence in representing his clients. In one case, he failed to record the deeds in the order intended by the parties, and in another case, he failed to purchase title insurance contrary to the closing documents and the intent

of the parties. After Old Republic terminated his agency, Landers failed to return property belonging to Old Republic, failed to respond to requests for information and failed to disclose information regarding title policies and premiums for title insurance that he held in a fiduciary capacity.

James F. Stovall III
Marietta, Ga.

Admitted to Bar in 1973


On Feb. 9, 2009, the Supreme Court of Georgia accepted the voluntary surrender of license of James F. Stovall III (State Bar No. 685950). Stovall pled guilty in federal court to conspiracy to commit offenses against the United States and wire fraud.

Suspension

Lester Christopher Solomon
Tifton, Ga.

Admitted to Bar in 2001

On Jan. 26, 2009, the Supreme Court of Georgia accepted the peti-



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tion for voluntary discipline of Lester Christopher Solomon (State Bar No. 666665) for a six month suspension from the practice of law. Prior to being admitted to the bar, Solomon was a minister at a church and he agreed to help manage the financial affairs of a disabled person by receiving title to his real property, securing a mortgage loan on the property, paying himself a commission, paying the mortgage payments and himself a monthly stipend with the annuity income and allowing this person to continue to live in the home. After Respondent was admitted to the bar, he continued to handle the now client's financial matters but did not separate his funds from the client's or deposit the client's funds into an attorney trust account. The Court found that at the time Respondent was relatively inexperienced in the practice of law and that his violation was not intentional. Justices Melton, Hunstein and Thompson dissented.

Suspension and Review Panel Reprimand

Bradley J. Taylor
Atlanta, Ga.

Admitted to Bar in 1977

On Jan. 26, 2009, the Supreme Court of Georgia ordered that Bradley J. Taylor (State Bar No. 699662) be suspended from the practice of law for a period of six months and that he receive a Review Panel reprimand. In October 2005, Taylor agreed to hold \$45,644.80 for a client as part of a real estate transaction. He deposited that amount into his escrow account and, due in part to personal, psychological and emotional stresses, he withdrew most of the funds and used them for personal and business expenses. Taylor advised his client of his unethical behavior in February 2006, he repaid the funds, and thereafter continued to represent the client.

The Court noted in mitigation that Taylor voluntarily informed

“He who is his own lawyer has a fool for his client.”

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his client about his conduct; he repaid the money he had misappropriated; his client continued to vouch for Taylor's professionalism and integrity; Taylor was remorseful for his error in judgment; his conduct was at least partially caused by personal problems of a non-recurring nature; he had no prior discipline; and he cooperated with disciplinary authorities.

Public Reprimand


Mara Sacks Dewrell
Naples, Fla.

Admitted to Bar in 2000

On Jan. 26, 2009, the Supreme Court of Georgia accepted the petition for voluntary discipline of Mara Sacks Dewrell (State Bar No. 621936) for a public reprimand. Respondent participated in the formation of a real estate closing practice that became a large multi-state practice. In mitigation, the Court found that Respondent failed to ensure that her staff used only lawyers to close Georgia real

estate transactions. Less than 10 transactions per year involved a non-lawyer closing, Respondent did not commit any other crime and she accepted responsibility for her actions.

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, 2008, one lawyer has been suspended for violating this Rule, and one lawyer has been reinstated. 



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

Effective Management Moves for Lawyers in a Recessed Economy

by Natalie R. Kelly

With the continued economic crisis in our country, law firms have come to realize that their once “recession-proof” profession has taken a hit, and in order to survive and maintain financial stability and security, the firm must be more careful in their business management maneuvers. From more efficiently using technology to stepping up key marketing efforts, modern firms realize the necessity of making effective management decisions. Here are some detailed moves that can work well against the backdrop of a tumultuous economy.

Money Moves

Monitor Accounts

Beyond logically checking balances to see how much money you have in the bank, you should also make sure you are in compliance with Bar rules on trust accounts—no commingling; knowing how much of the trust balance belongs to which client and how much of the balance is a nominal amount for account maintenance charges to start. Looking at numbers can also help identify trends in client costs as well as fee income by lawyer and staff timekeepers. You can use this information to plan future expenditures and the like.



Manage Billing

Set up effective and flexible payment arrangements for clients even though it is usually most appropriate to get fees upfront when and where you can. Send out bills on time and get caught up on collections activity by making sure your accounts receivables are being managed appropriately. Accounts that have been due for more than 30 days are trouble accounts, and communicating with the client about the bill is absolutely necessary at this stage.

Budget

Be sure that you project real operating numbers for up to two years out. Manipulate figures for worst-case

scenarios. With a written budget, you can easily forecast firm “what-if’s” across line items. Pay close attention to items that could change easily with further shifts in the overall economy.

Staffing and HR Moves

Check Your Team

Look closely at your team and analyze the work that needs to be done. Consider who is doing the work in your firm—is there a match with the skill set required for work output and is there room for improvement, or will added personnel be needed to accommodate any anticipated work shifts?

Update Policies and Procedures

Fine-tuning procedures and making sure that firm policies make sense is an easy place to start when working on firm improvements. Just reviewing policies and procedures for a match with the reality of your current situation can be enough to improve a practice. Another simple tip is to always write out your policies and procedures.

Fine Tune Benefits and Compensation Packages

Pay close attention to what’s working and what’s out of synch with reality in terms of the pay and benefits being afforded workers in the firm. Be flexible and realistic with your system so that you are retaining good workers and rewarding your producers.

Client Relations Moves

Monitor Your Level of Service

Do a client satisfaction survey and check on all feedback you receive about how you have helped clients with their legal needs. Work toward delivering exceptional customer service in all cases by addressing each concern you see or hear about concerning your practice. Another way of monitoring your level of service is to pay atten-

tion to comments coming from staff and other internal contacts.

Do Something About Clients’ Referrals

Go beyond the normal thank you for clients and others who refer you to potential clients. Think of creative and ethical ways to say thanks and to keep the door open for even more referred business in the future.

Communicate With All Clients

If you have been remiss in staying in touch with clients on a regular basis, make sure that you take time to complete a full client sweep, contacting all of your clients. It’s always good to touch base with each client, even if all you have to report is that nothing is going on with the case.

Technology Moves

Monitor Office Systems for Effectiveness

With services carrying a heavier price tag in terms of time lost to inefficiency, it is imperative that you make sure your systems are adequate and working properly. Do an inventory and check all current systems. This will enable you to determine if an upgrade or change is needed, and you can then account for it in the short term.


Get Trained Up

Make sure to take advantage of opportunities to expand your skills. Lawyers and staff should seek out ways to do things more efficiently. For example, if you are already very familiar with your current office system, take the time to learn more about the advanced features. This will provide you with a higher degree of knowledge about the particular product, possibly enabling you to increase your work productivity.

Look to the Next Level

Learn about the latest trends in legal technology and compare them with what is in your arsenal.

Do you need to upgrade or convert any of your current systems? If so, when looking at the latest and greatest products, be sure to have a written plan that takes into account your firm’s needs and the inherent upgrade cycle for technology which dictates that you will usually have to make serious technology moves every two to three years.

Weathering tough economic times, while not pleasant, can present an opportunity to fine-tune, prune and even eliminate management techniques that get in the way of the firm’s overall progress and success. Take advantage of these times and contact us for help with specific resources to keep your firm going and advancing in spite of what’s happening with the economy. 



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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Rife with Positive Possibilities

by Bonne D. Cella

Just as trees are bursting forth with the promise of new life and beauty, there are many positive and progressive happenings within the State Bar community. The South Georgia Office has hosted Bar and community programs, and area attorneys and local bars have been busy with personal triumphs and community activities.

State Bar President Jeffrey O. Bramlett and YLD President Joshua C. Bell led a Bar Leadership Conference at the South Georgia Office on Jan. 16. Leaders from seven circuits attended the gathering and left with fresh ideas and a renewed commitment to service. Tom Boller, legislative consultant from Capitol Partners Public Affairs Group, Inc., was also on hand to provide a legislative update. He advised and encouraged the Bar leaders to develop a rapport with their congressmen. With looming legislative issues such as tort proposals, judicial reform, attorney advertising and electronic filings, Boller stated that it is imperative for attorneys to communicate with their representatives. Bramlett will conduct this same agenda in Savannah for local bar associations in the coastal area. There is no doubt this program provides a great opportunity to enhance leadership skills that ultimately impact the profession of law and the community-at-large.



Photos by Bonne D. Cella

(Left to right) YLD President Joshua C. Bell and State Bar President Jeffrey O. Bramlett lead the Bar Leadership Conference at the South Georgia Office Jan. 16.

The South Georgia Office also hosts a number of community programs. One such program is the Department of Human Resources Fatherhood Program. This program began in 1997 and is an integral part of the Office of Child Support Services. The program has engaged more than 3,000 non-custodial parents through training. These parents have increased their earning potential with job training, education and vocational certificates. The Fatherhood Program is used to help non-custodial parents to make timely payments and if there are barriers, to overcome them. Barriers can include a lack of a high school diploma or GED, no driver's license or transportation, alcohol and substance abuse, criminal records and mental health



Judge Melanie Barbee-Cross holds the newest member of her family, son Brooks, after her swearing-in ceremony.

issues. The program works with the non-custodial parents who are willing, yet unable to pay their support regularly. The Fatherhood Program generally takes three to six months to complete and serves both fathers and mothers who are non-custodial parents. The participants are required to work at least 20 hours per week while enrolled in the program and pay child support. Upon completion of the program, participants receive assistance in obtaining full-time employment at a livable wage. Georgia's Fatherhood Program is the largest state-operated fatherhood program in the United States. Neal Edalgo, Fatherhood agent in the South Georgia area is committed to his work and infuses a positive "can do" energy to the participants even in these difficult economic times.

The South Georgia Office and the Tift Judicial Circuit welcomed the first female superior court judge. Tifton native Melanie Barbee-Cross, a *magna cum laude* graduate of The University of Georgia and Mercer University's Walter F. George School of Law, was elected to the position. Barbee-Cross worked in private practice for 16 years before seeking the position of superior court judge. Her husband, Ray, and sons, Conner, Bryce and Brooks, supported her all the way. "Although I have not previously served in a judicial position, I feel this is a job I have



The Camden County High School Mock Trial Team pictured with their coaches. (Front Row, left to right) Rich Gamble, teacher coach; Glenda Kessler, teacher coach; Annette Perry, law clerk volunteer; and Michael Perry, attorney coach.

been training for my entire life, beginning in high school when I interned with attorneys. Every judge elected to the bench starts with no experience in that aspect of their career, but they all have the ability to listen, learn, adapt and apply their cumulative experience to each situation that arises. As my 16 years in private practice have taught me, no two cases are alike and each day presents new opportunities to learn and positively impact peoples' lives," she stated.


Robert Guy, president of the Camden County Bar Association, shared information about recent activities from the 25-member bar. The bar, which meets every month, has established a scholarship for a senior who writes the best essay titled, "A Law or Lawyer Who Has Made a Lasting Impact on Society." Camden bar members also volunteer as coaches for local mock trial competitions and have joined together to remodel the local women's shelter. They have also planned a day-long Family Law CLE which will be hosted by the South Georgia Office to accommodate their membership.

Another active local bar making a positive impact in the community is the Houston County Bar Association (HCBA). President Susan McNally has held meetings to fine-tune plans to award six scholarships to high school seniors.

McNally proudly revealed that Tomieka Daniel, HCBA member, is a recipient of the Justice Benham Award for Community Service. Additionally, Mercer University's Walter F. George School of Law has announced that Daniel will be the first recipient of its Law and Public Service Program Award for Outstanding Public Service by a Recent Graduate.

Daniel is employed by Georgia Legal Services and previously worked on domestic violence cases. She is extremely dedicated to her community and serves on the board of the Boys and Girls Club, volunteers for the R.E.A.D. Foundation and is an active member of Alpha Kappa Alpha Sorority.

We salute all of these dedicated people for planting the seeds, growing the ideas and harvesting the bounty of positive results.

For assistance planning and implementing programs or CLEs for your local bar association, please send an e-mail to bonnec@gabar.org or call 800-330-0446. 



Bonne 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.

Forty Practice-Specific Sections Are Available to Bar Members

by Derrick W. Stanley

The State Bar of Georgia has 40 practice-specific sections to provide members with a range of benefits including lunch-and-learn programs, CLE institutes and social functions.

The dues for the sections are included on your Dues Notice where you have the ability to add as many sections as you would like. The sections you are currently a member of will be listed on the notice with a list of all available sections.

Sections provide you an opportunity to network with peers in the same field of practice. Whether you are renewing your section membership or joining for the first time, be sure to include your dues in the total amount you remit to the Bar.

Administrative Law Section

Provides a forum for attorneys to become better acquainted with the Georgia Administrative Procedures Act and the numerous administrative agencies of the state government. The annual dues are \$15.

Agriculture Law Section

Seeks to increase the awareness and further the knowledge of members of the Bar and general public in agricultural law issues. The annual dues are \$20.

Antitrust Law Section

Facilitates awareness and compliance with the federal antitrust laws. It does so primarily through meetings and programs that alert section members to recent antitrust developments and allows them to get together with other antitrust practitioners in the private bar and the Atlanta offices of the Antitrust Division and the FTC. The annual dues are \$20.



Appellate Practice Section

The purpose of the section is “to foster professionalism and excellence in appellate advocacy and to encourage improvements in the appellate process.” The work of the section involves sponsoring programs and seminars, encouraging appellate pro bono representation, providing a forum for dialogue between the appellate bench and bar of this state and, when appropriate, advocating improvements in appellate practice and procedure through legislation. The annual dues are \$15.

Aviation Law Section

Offers opportunities to members of the Bar to acquire and share knowledge of aviation-related topics in order to foster a better understanding of the issues that are unique to aviation law. The annual dues are \$15.

Bankruptcy Law Section

Serves all members of the Bar whose practice involves debtor-creditor issues in the consumer or commercial law areas by its sponsorship of seminars, publications and networking opportunities throughout the state. The annual dues are \$35.

Business Law Section

Hosts standing committees on the Corporate Code, the UCC, Securities, Partnerships, Legal Opinions and Publications and continues to consider legislative proposals and monitor legislative developments in their respective areas. The annual dues are \$20.

Consumer Law Section

Fosters professionalism and excellence in consumer law advocacy, both through individual and class actions and to promote improvements in laws governing consumer transactions and fair or

deceptive business practices. The annual dues are \$25.

Corporate Counsel Law Section

Comprised of Bar members engaged in corporate law practice with corporations, associations and law firms, the section annually sponsors a two-day Corporate Counsel Institute covering topics of interest to corporate counsel. The annual dues are \$25.

Creditors' Rights Section

Seeks to provide learning opportunities for its members and to serve the needs of attorneys practicing in the area of collections and commercial litigation. The annual dues are \$15.

Criminal Law Section

Conducts activities to help keep members updated in the finer points of criminal law and disseminates information on matters

affecting criminal practice. The annual dues are \$20.

Dispute Resolution Section

Facilitates the methods for resolving legal disputes other than through litigation and plans continuing education seminars. The annual dues are \$15.

Elder Law Section

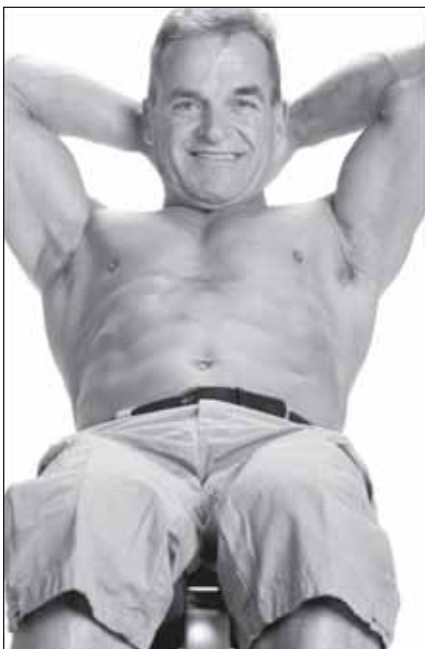
Promotes the development of substantive skills of attorneys working with older clients by offering continuing education programs. The annual dues are \$20.

Eminent Domain Section

Organized to promote education relating to the law of eminent domain in the state of Georgia. The annual dues are \$35.

Entertainment & Sports Law Section

The section goals are to educate and promote networking among



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members and guests. Members, as well as the Bar at large, enjoy learning and socializing in a relaxed atmosphere. The annual dues are \$25.

Environmental Law Section

The section provides its members with a unique opportunity to get to know other lawyers from industry, federal and state government, public interest organizations and private law firms who practice environmental law on a day-to-day basis. Membership in the section also enables members to stay informed on current environmental subjects, including legislative and regulatory developments, through its quarterly newsletter. The annual dues are \$25.

Equine Law Section

Organized as an association of licensed attorneys in the state of Georgia, the section has members who desire to develop their knowledge and professional abilities in equine matters of law in order to render better service to their clients and the general public. The annual dues are \$20.

Family Law Section

Keeps domestic relations practitioners informed of changes in applicable statutory and case law that impact us every day. The section promotes this continuing education process through seminars, meetings and a newsletter, which is invaluable to all family law practitioners. The section also monitors legislation in an attempt to improve the administration of family law justice in Georgia. The annual dues are \$35.

Fiduciary Law Section

Has as its primary goal the improvement of skills of lawyers who practice in the fiduciary area by sponsoring seminars such as the Fiduciary Law Seminar, the Estate Planning Institute in Athens, the Basic Estate Planning Seminar and other programs. The annual dues are \$30.

Franchise and Distribution Law Section

Formed to promote the education and best practices of franchise and distribution law among section members. The annual dues are \$20.

General Practice & Trial Law Section

Benefits of membership include *Calendar Call*, luncheons, liaison to other sections and the American Bar Association and a web presence. Section seminars focus on trial practice, law staff training, office technology, mediation and basic corporate practice. Members enjoy inexpensive access to an extensive audio cassette and videotape library. The annual dues are \$35.

Government Attorneys Section

Formed in recognition of the significant number of attorneys engaged in government service. The purpose of this section is to provide a forum for government attorneys and to promote their interest before and participation in the Bar. The annual dues are \$10.

Health Law Section

Deals with a wide variety of health care law issues relevant to attorneys for hospitals, physicians, insurers, employers, patients and government agencies. The section conducts educational seminars during the year and also sponsors health law projects among the various Georgia law schools. The annual dues are \$20.

Immigration Law Section

Provides education, advice and disseminates information regarding current conditions relating to the practice before various government agencies including Department of Homeland Security, U.S. and state Department of Labor, etc., to its members in the area of U.S. immigration law. The annual dues are \$15.

Individual Rights Law Section

Serves the Bar through educational activities intended to protect and promote the rights of individuals. During the legislative session the section monitors legislation likely to have a significant impact on members. The section sponsors community service projects, hosts informal gatherings for its members and special guests. The annual dues are \$15.

Intellectual Property Section

The section provides networking and educational opportunities to its members. The section also fosters networking and education for intellectual property attorneys and professionals nationwide, including co-sponsoring the annual IP Institute. The annual dues are \$35.

International Law Section

Endeavors to provide a forum for its members to exchange ideas and experiences related to representation of domestic or foreign clients in connection with matters involving more than one national jurisdiction. The annual dues are \$25.

Judicial Section

Fosters professionalism and excellence in the judiciary, encourages improvements in judicial process and court operations, solicits input from non-judicial bar members upon judicial procedures and court operations and encourages interaction between the bench and bar. The annual dues are \$10.

Labor and Employment Law Section

Focuses attention on all areas of labor/management employee/employer relationships through continuing legal education. The annual dues are \$20.

Legal Economics Law Section

Provides information and assistance on the administrative, business and practical aspects of the

practice of law. The section works with the Law Practice Management Program of the Bar and co-sponsors seminars. The annual dues are \$10.

Local Government Law Section

Provides a forum for attorneys representing local governments to exchange ideas and experiences. The Local Government Institute for City and County Attorneys is held annually in Athens. The annual dues are \$10.

Military/Veterans Law Section

Formulates plans for the benefit of military and veterans. The section actively works to develop Pro Bono options for members of the military. The annual dues are \$15.

Product Liability Law Section

Co-sponsors two seminars annually. Members receive newsletters featuring case summaries, articles, section member profiles and a calendar of section events, which includes meetings in Rome, Savannah and Macon. The annual dues are \$25.

Real Property Law Section

Promotes continuing legal education by co-sponsoring with ICLE each year, a commercial real property law seminar in the fall, a basic real estate practice seminar in the winter and a Real Property Law Institute in May. The section monitors legislation at the state and federal level that impacts its members. The section maintains a listserve for members to post questions and receive real time responses, with helpful guidance from other practitioners. The annual dues are \$25.

School and College Law Section

Provides section members with opportunities to interact with those actively engaged in practicing school and college law. The section co-sponsors annually, with the ICLE, a seminar on school and

college law issues. The annual dues are \$15.

Senior Lawyers Section

Informs lawyers of retirement opportunities, options and benefits, support and assistance to senior lawyers in continuing their careers, improved representation for the disadvantaged, increased pro bono work, encouraging the development of alternate provisions of dispute resolution, advancement of substantive elder law and professional collegiality. The annual dues are \$10.

Taxation Law Section

Pursues the continuing education of the members of the Bar in the field of federal and state taxation; maintains liaison with the Internal Revenue Service, the State Department of Revenue and the Georgia State University Tax Clinic; monitors state legislation affecting taxation; and makes recommendations concerning legislative and administrative rules. The annual dues are \$20.

Technology Law Section


Provides a forum for lawyers to discuss legal issues related to technology. The section holds periodic lunch-and-learn programs and maintains a website for its members. The annual dues are \$25.

Tort & Insurance Practice Section

Has five main functions: (1) to further the education of its members by providing seminars on insurance-related legal topics; (2) to keep its members abreast of current developments in insurance law, such as case law, legislation or regulations; (3) to provide a forum for the exchange of views on the insurance-related aspects of the practice of law; (4) to influence for the better, when appropriate, those activities which relate to insurance and affect lawyers; and (5) to develop a relationship with the State Insurance

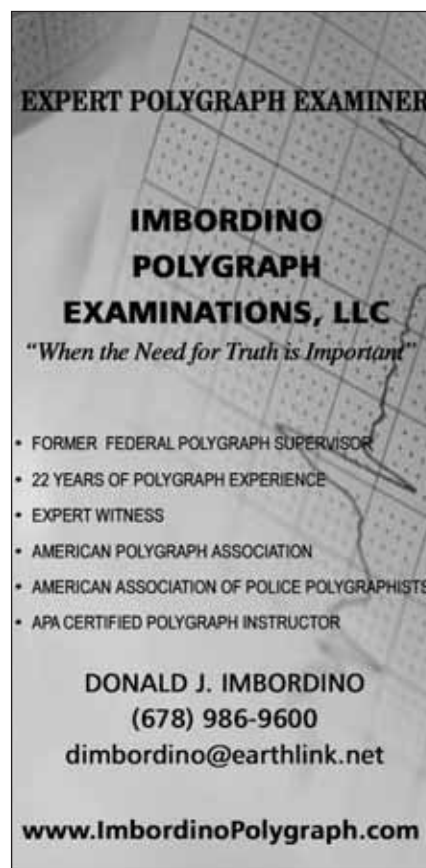
Commissioner's Office that will enhance the interests of the members of the section. The annual dues are \$15.

Workers' Compensation Law Section

Seeks through its work to keep its members fully informed in the area of workers' compensation. The section works closely with the State Board of Workers' Compensation to convey information regarding new rules changes and statutes to its members. It actively participates in and supports workers' compensation seminars and continuing legal education. The annual dues are \$25. 



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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Welcome to Casemaker 2.1

by Kimberly White

Casemaker has launched a new and improved online legal research database, Casemaker 2.1. Because the State Bar of Georgia is a member of the Casemaker Consortium, Bar members have immediate access to Casemaker 2.1 at no cost. Casemaker 2.1 has added many new beneficial features that will assist with conducting a more comprehensive search.

When logging into Casemaker 2.1, you are automatically placed in the State Bar of Georgia's Library Menu. This library menu gives you complete access to Attorney General Opinions, Case Law, Code & Acts, Constitution, Federal Court Rules, *Georgia Bar Journal*, Georgia State University Law Review, Rules & Regulations and State Court Rules (see fig. 1).

In the new Casemaker 2.1 toolbar, you have the option to choose "Home," which will direct you to Casemaker's home page; "State Libraries," which will take you to the library menu option for all 50 states; "Federal Library," which will take you to the Federal Library Menu; "Legal Forms," which will allow you to obtain certain legal forms; or "Help," which directs you to the Casemaker user manual and frequently asked questions (see fig. 2). Additionally, with Casemaker 2.1, you have the option to click "Print," which will allow you to print documents in PDF, Microsoft Word and HTML format (see fig. 3).

Casemaker has also upgraded their "CASEcheck" option. Not only can you gain access to subsequent cases that are citing the initial case you are looking at from your state's library, but you are also provided

with the same subsequent case information from other states (see fig. 4).

When researching Case Law, you have more basic and advanced search options. You can choose to "Browse" or "Search" from the Case Law menu, and you have the option of conducting an "Intersection Search" or an "Inclusion Search" (see fig. 5). "Search Tips" are also provided at the bottom of the Case Law search screen (see fig. 6).

Another new feature is that the radio buttons from Casemaker 2.0 have been removed. With Casemaker 2.1, you simply type the information in the correct search query field. There are far too many new features and benefits of Casemaker 2.1 to discuss in one article. We will begin with a breakdown of the "Basic Search Functions" in the June issue of the *Georgia Bar Journal*.

Casemaker has become the country's most prized member benefit. Why pay so much for online legal research when one of the most trusted online legal research databases is available to you for *free*? The Bar is here to assist you with navigating Casemaker 2.1. We offer Casemaker training classes four times a month and we also offer Casemaker webinars to interested members. 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.

For more assistance with using Casemaker, please contact the Law Practice Management Department, at 404-527-8772 or 800-334-6865. 



Kimberly White is the member benefits coordinator of the State Bar of Georgia and can be reached at kimberlyw@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.

Prewriting and the Two Pile Technique

by Karen J. Sneddon and David Hricik

No matter how eloquent a brief is, the brief can be eviscerated by opposing counsel if the legal research that goes into the brief is incomplete or inaccurate. Even when research itself is complete, in that all relevant cases are found, lawyers (particularly, in our experience, young lawyers) can fixate on language that a court used in an isolated passage, rather than the actual holding and reasoning of the case. This can result in an inaccurate portrayal of the law.

To ensure that briefs¹ are both eloquent and accurate, this installment focuses on the steps of processing research. It presents a simple but effective prewriting technique² to understand and organize case law.

Step One: Focus on Results, Not Words or Facts

When reviewing the legally pertinent cases, the first step is to focus on the *result* the court reached. Categorizing cases solely on identifying the “good” cases (*i.e.*, those with a result that favored the client) and the “bad” cases (*i.e.*, those with a result that did not favor the client) creates two piles of cases. So, for example, if the issue is whether a client might obtain mental



anguish damages for breach of contract, cases holding that the plaintiff was entitled to such recovery (the “good” cases) would go into one pile, and cases holding that the plaintiff was not entitled to such recovery (the “bad” cases) would go in another pile.

We realize this sounds basic. Experienced attorneys instinctively categorize cases this way. However, a toppling stack of print-outs and books, a hectic schedule

and the rigors of law practice can make anyone overlook some things. Perhaps this explains why in practice we repeatedly opposed briefs from “good” law firms that relied heavily on cases that had bad results for their clients.³

Inattention to this basic first step appears to us to be a growing problem. This increase may be attributable to the increased use of electronic research tools, such as Westlaw and Lexis. (Don’t get us wrong, we love and regularly use electronic research tools!) When using these tools, it’s easy to type in “mental anguish damages are not recoverable in contract” and find cases that repeat those words. However, the writer may fail to scroll down and see that, a few screens later, the court explained that while the general rule was that the damages were not recoverable, “they were when....”

We don’t know it to be a fact, but we suspect some lawyers may be reading screenshots rather than cases. A screenshot is an incomplete picture. Reading the entire case and placing the cases in piles by result helps the lawyer place the cases in context.

Step Two: Identify the Bad Cases that are Easy to Distinguish and the Bad Cases that are Difficult to Distinguish; Repeat with the Good Cases

The second step is to read⁴ each case, starting with the bad pile. As each case is reviewed, the order within each pile will reflect the role each case may play in the brief.

Some bad cases will be easily distinguishable on their facts. When reading, the lawyer can jot a note on each case and put it in the bottom of the bad pile. A case with easily distinguishable facts and a bad result is weak, even when used by a competent opponent.

Some bad cases have somewhat similar facts and yet reached a bad



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Legal Services Corporation Notice of Availability of Competitive Grant Funds for calendar year 2010

The Legal Services Corporation (LSC) announces the availability of competitive grant funds to provide civil legal services to eligible clients during calendar year 2010.

A Request for Proposals (RFP) and other information pertaining to the LSC grants competition will be available from www.grants.lsc.gov on April 10, 2009. In accordance with LSC’s multiyear funding policy, grants are available for only specified service areas. The listing of service areas for each state and the estimated grant amounts for each service area will be included in Appendix-A of the RFP. Applicants must file a Notice of Intent to Compete (NIC) in order to participate in the competitive grants process. The NIC will be available from the RFP. Please refer to www.grants.lsc.gov for filing dates and submission requirements. Please e-mail inquiries pertaining to the LSC competitive grants process to competition@lsc.gov.

result. Those go on the top of the bad pile. Those cases could be difficult to distinguish and so present one of the most powerful weapons for the opposing counsel. They deserve additional attention. If a sentence or two can explain why the case facts justify a different result from “our” facts, the lawyer should write that distinction on the case. If it takes more than a sentence or two, then that case should end up at the very top of the bad pile. It’s one of the cases that the opponent could do the most damage with: a case with similar facts, but a bad result.

Then the lawyer should repeat the process with the good pile. Again, some have “easy” facts to support the right result, while others are less “easy” and perhaps closer to the client’s facts. The cases with facts that more easily justify a good result are going to be weak cases to rely on because the opposing counsel could easily distinguish them. But, the cases with the most similar or analogous facts and the right result or with “weaker” facts than the client’s facts but with the right result will be more difficult for the opposing counsel to distinguish. Those cases go on the top of the good pile. Those are the “white knight” cases: right result on similar or even “weaker” facts.

Step Three: Use the Piles to Inform Your Approach to Writing


By the time Step Two is complete, writing the brief is well on its way. The cases provide the pertinent legal “rules” and are already arranged to show which cases could best be used to support the client’s case and which cases would most need to be distinguished to support it. Obviously, this facilitates an efficient approach to writing.⁵

As with all prewriting techniques, there is no rigid formula to follow. Below are some helpful tips to using the piles to guide your writing.

One effective approach is to address all bad cases in the open-

ing brief. The easily-distinguished bad cases can be brushed away in a footnote. The footnote could read, “In very different circumstances, courts have denied mental anguish damages where the facts simply did not support them.” Following the sentence could be the signal “see, e.g.,” and a string of pertinent cases with pithy parentheticals making each bad case sound perfectly right, but readily distinguishable. A case that is particularly similar, but bad, requires more explicit consideration than the brush-away footnote. An in-text paragraph or two could transform such a case into an ally—a case whose result was mandated by different facts—not an enemy of illogic or ineptitude.

In the text of the opening brief, the lawyer could focus on the most similar cases with the right result. The less pertinent good cases likewise can fall into a string cite footnote, again with pithy parentheticals explaining their pertinence and result.

Thus, the two pile prewriting technique can inform your approach to writing. It may be simple, but it’s one prewriting technique that works. 



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.

Mercer’s Legal Writing Program is currently ranked as the number one legal writing program in the country by U.S. News & World Report.

Endnotes

1. This installment is focused on persuasive writing. However, this prewriting technique is useful for

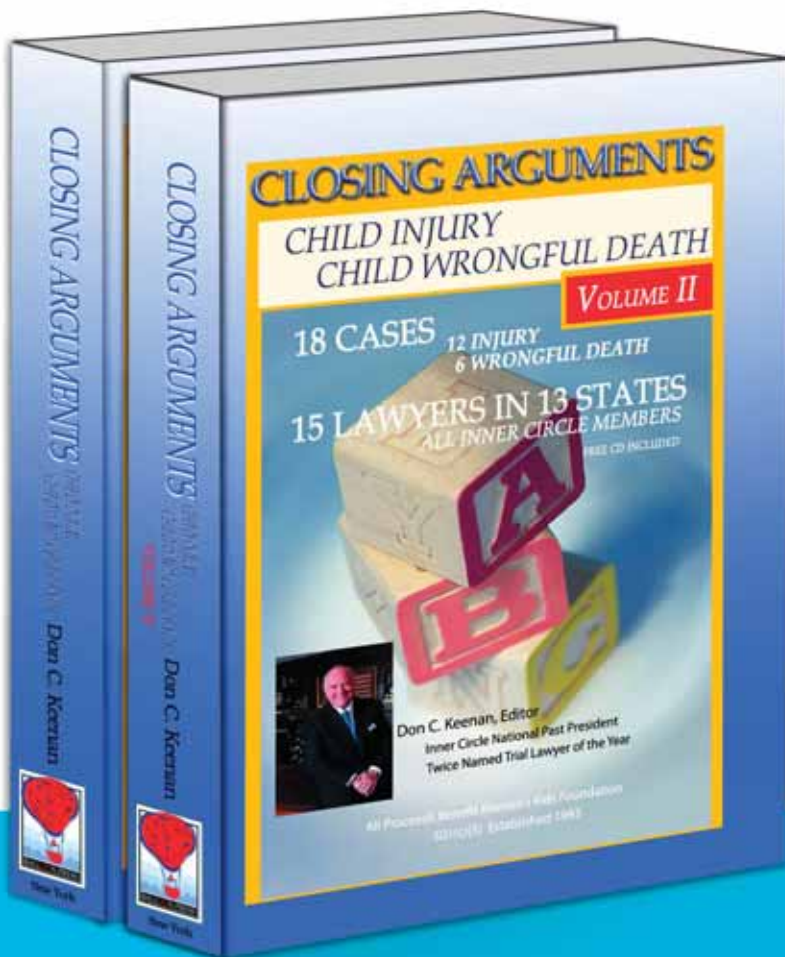
both predictive and persuasive writing.

2. All prewriting techniques can play a part in the recursive process of writing. Other helpful prewriting techniques include brainstorming, freewriting, clustering, charting and outlining.
3. Having in a reply brief to distinguish the cases the party cited in its opening brief is not effective advocacy. For example, if the defendant in seeking summary judgment argues that the *Smith* case controls, it is not good if the plaintiff’s responsive brief can agree that *Smith* controls but point out that *Smith* upheld an award of mental anguish damages under weaker facts. The defendant is then left arguing that *Smith* is different, not the same. A busy judge or law clerk may find the ineptitude distracting, to say the least.
4. For information about reading strategies, see Ruth Ann McKinney, *READING LIKE A LAWYER: TIME-SAVING STRATEGIES FOR READING LAW LIKE AN EXPERT* (2005); Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 SEATTLE U. L. REV. 603 (2007).
5. Of course, in some respect, this is a grossly simplified take on the process because this process must often be done element-by-element. So, for example, in the case of mental anguish damages, if there are three exceptions to the general rule that mental anguish damages are not recoverable for breach of contract, then this process has to be repeated for each exception. If one exception has three elements to it, this approach should be repeated for each of the three elements.

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Professionalism and Collaborative Law in Family Law Practice

by Avarita L. Hanson

This article is an adaptation of a paper originally submitted for presentation at "For Children's Sake," A Summit on Marriage and Family, presented by the Supreme Court of Georgia and the Institute for American Values, Nov. 19-20, 2008, Atlanta, Ga.

The Supreme Court of Georgia, under the leadership of Chief Justice Leah Ward Sears and her co-host, Justice Harris P. Hines, held its first Supreme Court Summit on Children, Marriage and Family Law (the Summit), Nov. 19-20, 2008. The premise of the conference was this:

Every year, nearly three quarters of a million Georgians get divorced, and almost four out of every 10 babies in this state are born outside of marriage. Of course, many hardworking single parents do an excellent job of raising their children. However, we cannot ignore the substantial body of research revealing that when adults fail to build lasting, stable marriages, children suffer—children of divorced and of never-married parents suffer disproportionately from emotional and physical illness; more of them drop out of school and fewer attend college; they earn less income; they develop more addictions to drugs and alcohol; and they are more likely to engage in violence or suffer it in their homes. Moreover, a recent report on the taxpayer costs of divorce and unwed childbearing estimated that cost to taxpayers of family breakdown in

Georgia exceeds nearly \$1.46 billion a year. But many Georgians aren't aware of the effect that the increase in family fragmentation has had on our court systems. Fragmenting families are flooding our court dockets. They account for 65 percent of all civil cases in Georgia heard at the superior court level, and they outnumber all felony and misdemeanor criminal cases combined. Indeed, family fragmentation is a significant factor contributing to judicial backlog and overstretched budgets in courts all over the country. Thus, we believe that building a healthy marriage culture in Georgia is a legitimate concern for our legal system.¹

Co-sponsored by the Institute for American Values, the Summit called upon national and local experts to discuss marriage and its importance to children and even its website nomenclature suggests the strong theme: www.getmarriedstaymarried.org.

For this conference, I was asked to moderate a discussion on the ethics of collaborative law. Collaborative law, a process in which lawyers and clients contractually agree to pursue non-adversarial, out-of-court means of resolving disputes and reaching agreement has been hailed by some as a revolutionary alternative to the traditional litigation paradigm in divorce and other domestic relations cases. They say that this approach facilitates a civil post-divorce relationship between the separating parties, and it lessens the adverse impact



Chief Justice Leah Ward Sears addresses attendees at the first Summit on Children, Marriage and Family Law. The Summit focused on marriage and its importance to children.



Gov. Sonny Perdue welcomes attendees to the Summit, presented by the Supreme Court of Georgia and the Institute for American Values.

Photos by Ashley Stollar, Administrative Office of the Courts

experienced by any children involved in the divorce. Others argue, however, that the collaborative law approach violates the legal rules of ethics because an attorney's required commitment to a joint problem-solving approach conflicts with the obligation to zealously advocate on behalf of one's client. Colorado found collaborative practice impermissible on other grounds, but agreed that advance agreements that limit representation are ethical.² There has been some tension between the traditional adversarial model used in divorce cases and newer approaches to divorce law that seek to foster cooperation, positive negotiation and full disclosure between the parties. There are also questions of whether a lawyer's ethical responsibilities to the client include an obligation to warn the client about all of the animosity and potentially harmful outcomes for children commonly associated with the divorce process.

As mothers and fathers part, they often allow their own interests to separate them from their children. Consider this e-mail from a colleague:

Aggressive family law attorney with criminal experience needed

ASAP. Custody battle has escalated to both parents violating court orders and filing charges which has lead to incarceration.

Could that request have read?

A powerful attorney whose presence and approach to dispute resolution is needed to calm things down between divorcing parents with custody concerns.³

Can a lawyer be professional and practice collaborative law? "Professionalism," says Ray Persons, past president of the Atlanta Bar Association, is "what we ought to expect and demand of ourselves as lawyers."⁴ The ideals of professionalism for Georgia lawyers are well set forth in the Lawyers Creed and Aspirational Statement of Professionalism, developed in 1989 by the Chief Justice's Commission on Professionalism.⁵ Arguably, these guidelines lend some support for Georgia lawyers to practice collaborative law. For example, the Aspirational Statement says in relevant part:

In our practices we should remember that the primary jus-

tification for who we are and what we do is the common good we can achieve through the faithful representation of people who desire to resolve their disputes in a peaceful manner and to prevent future disputes. We should remember, and we should help our clients remember, that the way in which our clients resolve their disputes defines part of the character of our society and we should act accordingly.⁶

The Lawyers Creed defines optimal relationships of lawyers to their clients, opposing parties and their counsel, the courts, colleagues in the practice of law, the profession and the public. These ideals apply well to the collaborative legal process, as set forth regarding clients, opposing parties and their counsel:

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

To the opposing parties and their counsel, I offer fairness, integrity and civility. I will

While lawyers should “do the right thing” under the Rules of Professional Conduct, professionalism requires that lawyers “do the right thing right.”

seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.⁷

Persons defines professionalism as: “An approach to the practice of law that minimizes conflict which is unnecessary for the effective representation of clients and maximizes the quality of service that the judicial system is able to provide.”⁸ Effective representation of clients may be expanded by collaborative law and alternative dispute resolution, services that the legal system can provide.

In acting for your client, remember your roles as an attorney. The consummate professional knows the importance of communication. You may have seen on some attorney’s letterhead after the name or the firm name the words: “Attorney and Counselor at Law.” I once had a secretary who in answering a client’s telephone call and request for a lawyer in the firm said, “we don’t have any lawyers, we only have attorneys here.” Well, she didn’t last long. But what is long lasting are our roles as attorneys and counselors.

While I was in law school, my husband was also in medical school. He taught me that “the patient has the disease.” So, I would say to you, “the client has the problem.” What should professionals do, particularly in the family law context? Professionalism requires civility—simply put: politeness and courtesy—often the opposite of the behavior of clients (and some attorneys) experiencing marital discord.⁹ Do we internalize the client’s problem and “act out” like the client would? The doctor would say: “No, the first thing you do is to take your own pulse.” Why is this perhaps even more important in the matrimonial law context? This is important because the opposing par-

ties have a special relationship—marriage. In that relationship they have had intimacy, love (maybe some hate but certainly a range of emotions), and they have most likely had experiences such as shared children, relatives and friends. If upon its dissolution the marital relationship is not repaired or reformed, the evidence and effects of personal, community and societal discord will be found.¹⁰ Collaborative law practice allows the legal professional to not only take your own pulse, but to take the pulse of your client, opposing counsel and the opposing party.

What is “collaborative law?”

Collaborative law originated in Minnesota in 1990, when a disgruntled family law attorney, Stuart Webb, decided that he had had (sic) enough of courtroom brawls and the ensuing family carnage. Along with some like-minded lawyers there, he began taking cases solely for negotiation. This idea spread to San Francisco in the early 1990s and throughout the United States, Canada and the globe over the past 15 years. Tens of thousands of divorces and other conflicts have been resolved using collaborative law.¹¹

Collaborative law is operating as a practice arena in several states, its merits having been vetted before the bar associations and entities responsible for lawyer conduct and discipline.¹²

Is there collaborative lawyering in Georgia? Yes. Following some ethical challenges to collaborative lawyering in some states, the American Bar Association responded by issuing an opinion allowing for collaborative lawyering.¹³ In relevant part, the opinion states:


Before representing a client in a collaborative law process, a lawyer must advise the client of

the benefits and risks of participation in the process. If the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process. A lawyer who engages in collaborative resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence.

While there may be some in the bar who do not support collaborating lawyering, the national trend appears to be most favorable to using it, particularly in resolving family matters.¹⁴ Notably, there is a model statute, The Collaborative Law Act, developed as an example for jurisdictions interested in codifying the use of collaborative law, further supporting the potential for its increased use as an appropriate means for dispute resolution.¹⁵

The Georgia Rules of Professional Conduct governing lawyer’s professional responsibilities and disciplinary measures for violation thereof do not expressly address the use of a collaborative law process and it appears that it is both permissible and perhaps desirable for Georgia lawyers to use it.¹⁶ Some members of the Bar have embraced collaborative lawyering and the numbers are growing. There are organizations that support collaborative law and collaborative practices throughout Georgia.¹⁷

Professionalism in Georgia, as Justice Robert Benham often recites, rests on four pillars: competence; civility; pro bono service; and community service. Professionalism is deemed a higher standard of lawyer conduct than that set out in the Rules of Professional Conduct. While lawyers should “do the right thing” under the Rules of Professional Conduct, professionalism requires that lawyers “do the right thing

right.” As part of Georgia’s professionalism movement, lawyers are required to become knowledgeable about alternative dispute resolution (ADR) and are encouraged to use ADR in their practices. Collaborative lawyering appears to be another tool in the arsenal of alternative dispute resolution methods and one could argue that professionalism requires its consideration. At a minimum, competence and civility—cornerstones of professionalism—support consideration of collaborative lawyering as a legal process when and where appropriate. 



Avarita L. Hanson is the executive director of the Chief Justice’s Commission on Professionalism and

can be reached at Ahanson@cjcpga.org.

Endnotes

- Supreme Court Commission on Children, Marriage and Family Law, *From the Co-Chairs*, available at <http://www.getmarriedstaymarried.org/>. (last accessed Feb. 20, 2009).
- Colorado Bar Association Ethics Opinion 115 (Feb. 24, 2007). Accessed online at <http://www.cobar.org/index.cfm/ID/386/subID/10159/CETH/Ethics-Opinion-115-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts-02/24/>. Last accessed Feb. 20, 2009. (“a lawyer may also provide a client with some, but not all, of the work normally involved in litigation. . . . Thus, an advance agreement with the client to terminate or limit the representation is ethical.”).
- Thanks to Lynita Mitchell-Blackwell for posing the request for representation and A. Thomas Stubbs, Esq. for his insights on the more positive side of Family Law Practice. He advises: “The path your colleague seeks will be more costly, may result in no better outcome, and is likely to poison the ability to resolve future disputes reasonably. (Nov. 12, 2008).
- W. Ray Persons, *President’s Page*, ATL. B. J. 3 (Aug. 2007).
- A Lawyers Creed and Aspirational Statement on Professionalism are available at: http://www.gabar.org/related_organizations/chief_justices_commission_on_professionalism/lawyers_creed/.
- Id.*
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Admitted 1958
Died September 2008

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Died January 2009

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Died June 2008

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Chester D. Walz

Houston, Texas
Stanford Law School (1948)
Admitted 1967
Died July 2008



Millard Dean Fuller

was born Jan. 3, 1935, in Lanett, Ala., then a small cotton-mill town. He graduated from Auburn University with a degree in economics in 1957 and entered the University of Alabama School of Law. He and Morris Dees Jr., another law student, decided to go into business together while in the law school. They set a goal: get rich. They continued to make money as law partners.

Fuller's life changed completely after his wife, the former Linda Caldwell, whom he had married in 1959, threatened to leave him. For the rest of his career, he talked openly about repairing the marriage. The Fullers went to Koinonia


Farm, a Christian community in Georgia, where they planned their future with Clarence Jordan, a Bible scholar and leader there. In 1968, they began building houses for poor people nearby, then went to Zaire in 1973 to start a project that ultimately built 114 houses.

In 1976, a group met in a converted chicken barn at Koinonia Farm and started Habitat for Humanity International. Hand-

written notes from the meeting stated the group's grand ambition: to build housing for a million low-income people. That goal was reached in August 2005, when home number 200,000 was built. Each home houses an average of five people.

Propelled by his strong Christian principles, Fuller employed Habitat to spread what he called "the theology of the

hammer" to develop a system of using donated money and material, and voluntary labor, to build homes for low-income families. The homes are sold without profit, and buyers pay no interest. Buyers are required to help build their houses, contributing what Fuller called sweat equity.

The homes now number more than 300,000 and are in more than 100 countries. 

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