

The background of the cover is a photograph of the interior of a large, ornate dome, likely the Georgia State Capitol. The dome features a series of arched windows or clerestories around its upper edge, through which light is streaming. The architecture is classical, with visible columns and decorative moldings. The title 'Georgia Bar Journal' is overlaid on the upper portion of the dome. The word 'Georgia Bar' is in a smaller, orange serif font, while 'Journal' is in a much larger, bold orange serif font. A small blue square logo with a white scales of justice icon is positioned between 'Georgia Bar' and 'Journal'. Below the title, the text 'June 2007 ■ Volume 12 ■ Number 7' is printed in a smaller orange font.

# Georgia Bar Journal

June 2007 ■ Volume 12 ■ Number 7

Inside the  
2007 Legislative Session

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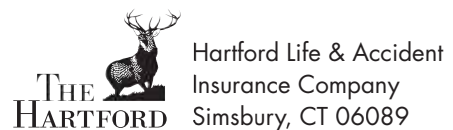
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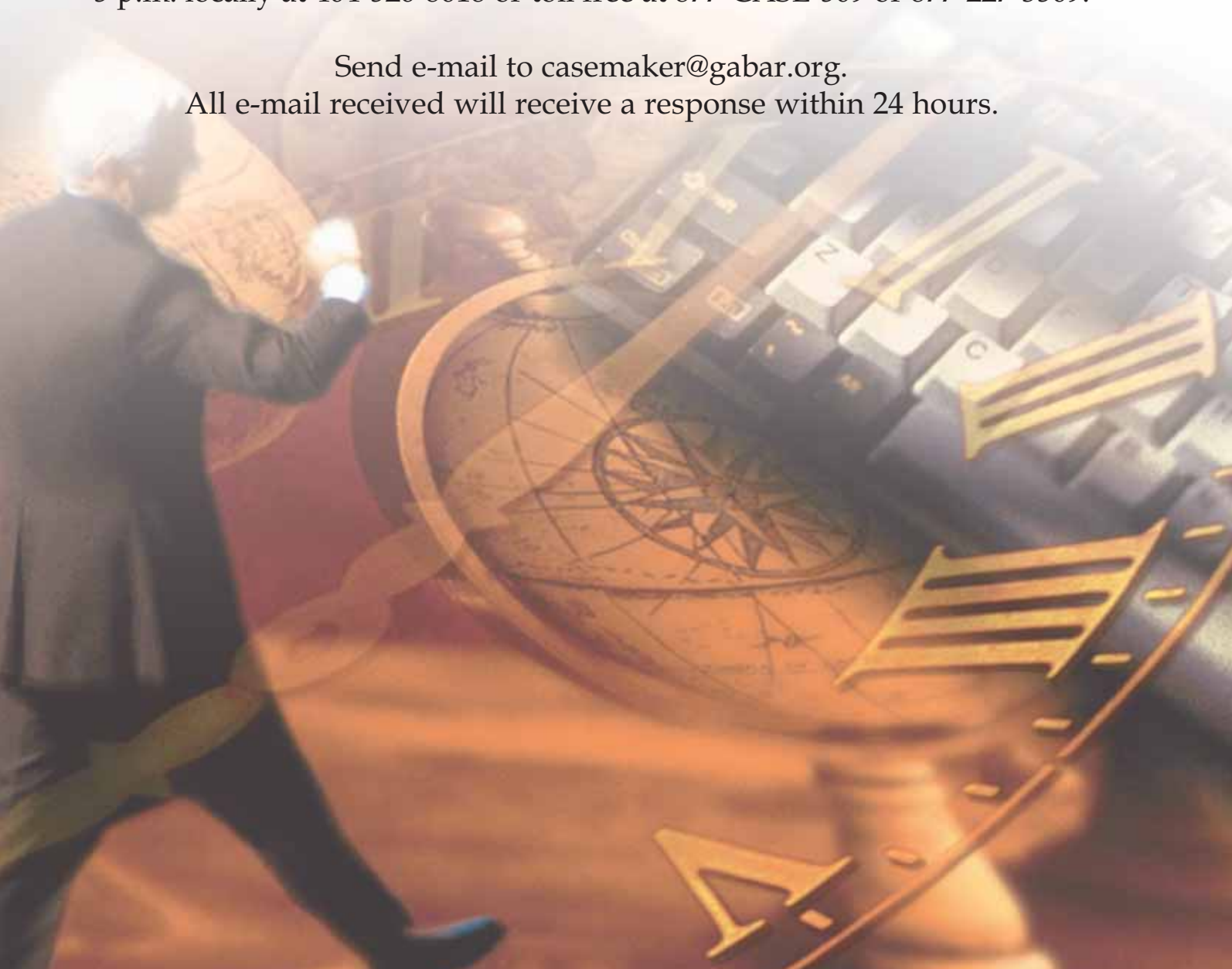
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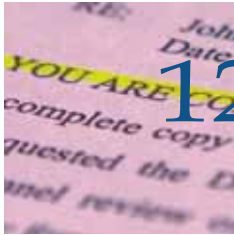
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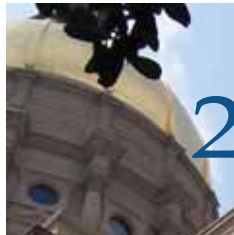
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Photo by Hollis Ellison

by Jay Cook

# The Time Has Come for Lawyers to Lead

Thomas Jefferson said, “I know of no safe depository of the ultimate powers of the society but the people themselves, and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion.”

James Madison said, “Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.”

Benjamin Franklin said, “This will be the best security for maintaining our liberties. A nation of well-informed men who have been taught to know and prize the rights which God has given them cannot be enslaved. It is in the religion of ignorance that tyranny begins.”

These quotes leave no doubt that our founders believed a public educated about their rights was critical to preserving American democracy. So why is it that today, most Americans can’t name the three branches of government, can’t explain the meaning of “separation of powers,” and don’t know what the phrase “independent judiciary” means—let alone how it functions to protect our constitutional democracy? Who is to blame for this rampant ignorance which, as the founders predicted, now threatens our American way of life? Is it the government? Is it the schools? Is it the apathetic public? How did we lose our way and, more importantly, how do we get back on track?

I began my term as Bar president this year by quoting former U.S. Supreme Court Justice George Sutherland, who said, “The saddest epitaph which can be carved in memory of a vanished liberty is that it

was lost because its possessors failed to stretch forth a saving hand while yet there was time.”

You may recall that I followed the quote with this call for action: *If there is yet time, let us not waste a moment of it!*

“We must use every nexus where we touch the public to gain confidence, approval and respect—and to consistently communicate this underlying message: *the process works!*”

And you answered me—with unfailing support and courage. You became true believers in the power of values-based messaging. You admirably demonstrated your commitment to our duty—both as individual lawyers and the organized Bar—to defend the Constitution, to remind the public of our founding principles, and to push back some of the attacks on our state and federal judiciary.

And we made a difference. Together, we presented a unified voice in defense of the judiciary. Together, we raised the level of public discourse in Georgia about the role of the courts in preserving and protecting our democracy. Together, we prevented outside forces from tipping the balance of our courts in favor of powerful special interests.

But we must keep pressing on. We must be vigilant, as former U.S. Supreme Court Justice Sandra Day O'Connor has urged. We must use every nexus where we touch the public to gain confidence, approval and respect—and to consistently communicate this underlying message: *the process works!* We must look at these situations not as lawyers, but as trusted messengers. We must see them as opportunities, not insurmountable problems. We must look for ways to reconnect our values and American values in the public mind. We must do everything possible to not only win the public's hearts and minds, but to rekindle their love affair with founding principles, including an unshakeable belief in fair play, the Rule of Law and the right to be heard. And perhaps most importantly, we must make a full-court press to improve civics education in this state, inside and outside the classroom.


We have made a good start with our Bar Center programs—the Law Museum, Mock Courtroom and Mini Law School—which provide school children with a day of hands-on learning and role playing that corresponds with mandat-

ed curriculum standards. Teachers are given materials and teachers' guides to use in conjunction with the visit.

This program is effective and engaging, but is limited in its reach because the schools must come to us. So I have asked Linda T. Muir of the Saylor Law Firm to head a Civics Education Committee, under the rubric of the Foundations of Freedom, to explore ways to make the Bar's civic education efforts more ubiquitous.

Why, you may ask, should we lawyers take this on? My answer: Why not? Lawyers are the only professional group (except for elected officials, of course) sworn to uphold the Constitution. But lawyers have never before taken the lead, in an integrated fashion, to instill in the body politic the knowledge our founders believed essential for the Constitution's survival.

Surely what is essential to the Constitution's survival is essential

to our own. The time has come for lawyers to take the lead! 

**Jay Cook** is the president of the State Bar of Georgia and can be reached at [jaycook@mindspring.com](mailto:jaycook@mindspring.com).

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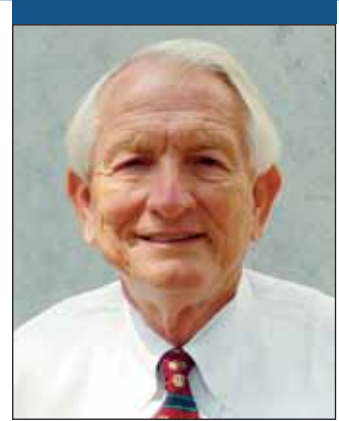
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by Cliff Brashier



# Volunteers Are the Substance of the Bar

**F**rom the calls and e-mails I receive, it appears that there are some misconceptions about the State Bar of Georgia's disciplinary

process. Some believe that the Office of the General Counsel (OGC) has the power to disbar lawyers. This isn't the case. Instead, the Supreme Court of Georgia, assisted by the investigation and recommendations of volunteer attorneys, is responsible for all disbarments.

The majority of the work that occurs during the disciplinary process rests in the hands of volunteers—Bar members who make up both the Investigative Panel and the Review Panel. In addition to the Investigative Panel and the Review Panel, another active volunteer

arm in the disciplinary process are the special masters, one of whom is appointed to each case by the Supreme Court if the case goes to prosecution.

The Investigative Panel is vested with the powers to investigate members of the Bar for violations of the Georgia Rules of Professional Conduct set forth in Bar Rule 4-102. Half of the members of the Investigative Panel are appointed by the Bar president and the remaining members are appointed by the Supreme Court. The panel consists of two members from each of the 10 judicial districts; two members-at-large; six lay members, all of whom are appointed by the Supreme Court; the president-elect of the Bar; and the president-elect of the Young Lawyers Division (YLD).


The Review Panel consists of three members from each the northern district, the middle district and the southern district; four lay members, who are also all appointed by the Supreme Court; the past president of the Bar; and the past president of the YLD. With exception to the past presidents, the members of this panel are appointed by the Supreme Court on even years and by the Bar president on odd years.

**“Without the hard work of these volunteers, who are simply a regular group of practicing attorneys, we would not be the State Bar of Georgia.”**

Between the Investigative Panel, the Review Panel, special masters, OGC attorneys and Supreme Court justices, numerous people are involved in each disciplinary case. Simply put, all the Bar does, with the help of its volunteers, is make recommendations to the Supreme Court on disciplinary action. At that point, the Supreme Court can accept, modify or outright reject the Bar's recommendations. The disciplinary process is designed so that volunteers accomplish the bulk of the work.

So in its disciplinary system and all other programs, the Bar is really you, the members. We are an organization that runs on a countless number of volunteers, from the Executive Committee and the Board of Governors to all of our committees and sections. "The use of volunteers in the disciplinary process is essential," General Counsel Bill Smith said. "They bring a diversity of experience that enables the panels to produce a

superior product." Without the hard work of these volunteers, who are simply a regular group of practicing attorneys, we would not be the State Bar of Georgia. Our programs succeed because volunteers engage in the process, and they are vital to the day-to-day decisions of the Bar.

I hope that this explanation sheds some light on the disciplinary process, and the importance of our volunteers in general. Please join me in thanking them for their service to our profession. As always, your thoughts and suggestions are welcome. 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 [cliff@gabar.org](mailto:cliff@gabar.org).



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by Jonathan A. Pope

# Happy 60<sup>th</sup> Birthday YLD

**H**appy birthday, Young Lawyers Division! On May 31, the YLD celebrated 60 years of service to the public and the Bar. The past 60 years have seen enormous growth in the mem-

bership and programs of the YLD. With more than 8,800 members and 27 committees, I am glad to report the YLD is in very good health.

One of the original goals of the YLD was to provide young lawyers an "opportunity to have an impact on the profession and provide a training ground for future leaders of the Bar." Many past leaders of the YLD have gone on to become leaders in our profession and the Bar, including: Griffin Bell, Kirk McAlpin, Frank Jones, Chuck Driebe, Matt Patton, Bob Brinson, Jim Elliot, Charlie Lester, Jim Pannell, Bill Barwick, Donna Barwick, Stan Brading, Rachel Iverson, Tina Shadix Roddenbery and many others. My father, Marion Pope, was even a member of what was then known as the Younger Lawyers Section Executive Council sometime in the 1950s.

The YLD has accomplished many significant endeavors in its 60 years of existence. However, there are two

that I believe stand out. In 1968, the YLD initiated a study to address the need for legal services among the poor in Georgia. The study concluded "there was a distressing disproportion between the actual need for legal services by those who could not afford them and the present supply of legal services available to them." Ultimately, the YLD created the Georgia Legal Services

Program (GLSP) in 1971. A fully independent and thriving program, GLSP now provides legal services to Georgians who could not otherwise afford them.


In 1987, the YLD created the Georgia High School Mock Trial Committee to coordinate mock trial competitions among high schools throughout Georgia. This is by far the largest and most active of all the current YLD committees. Furthermore, this committee involves more non-lawyers in the legal system than any other committee of the State Bar of Georgia.

Whether it is providing disaster relief assistance to victims of hurricanes or tornadoes, working on a re-write of the Georgia Juvenile Law code, helping the elderly understand their legal rights, focusing on the issues of minorities and women in the legal profession, or simply having a really good party where young lawyers can socialize and get to know one another, the YLD is getting it done.

The theme for the 2007-08 Bar year is "Celebrating 60 Years of Service." The celebration starts at the 60th Anniversary of the YLD Gala Celebration, which will take place on June 15 during the State Bar of Georgia's 2007 Annual Meeting in Ponte Vedra Beach, Fla. At

**"The past 60 years have seen enormous growth in the membership and programs of the YLD. With more than 8,800 members and 27 committees, I am glad to report the YLD is in very good health."**

the gala, we will honor the past YLD presidents and celebrate the YLD's accomplishments over the past 60 years.

On a final note, I have had a wonderful year as YLD president. I want to thank Deidra Sanderson, director of the YLD, for all of her support and assistance in making this a successful and memorable year. I want to also thank the YLD officers, directors and executive council members for all of their support, ideas and hard work. Finally, I want to thank my family—my wife Amy and my two children, Andrew and Caroline. Simply put, you can't do this job well without the support of your family and I had it all the way. My past nine years of YLD involvement have resulted in many wonderful friendships and memories that I will always cherish. 

**Jonathan A. Pope** is the president of the Young Lawyers Division of the State Bar of Georgia and can be reached at [jpope@hpb-law.com](mailto:jpope@hpb-law.com).



Counterclockwise from front row far left: Betsy Hodges (1992-93); Rachel Iverson (1993-94); Tina Shadix Roddenbery (1994-95); Bill Barwick (1984-85); Marcus Calhoun (1952-53); Donna Barwick (1988-89); James Hyder (1997-98); Stan Brading (1990-91); James Pannell (1979-80); Richard deMayo (1982-83); Matt Patton (1970-71); John Sammon (1987-88); Felton Jenkins (1972-73); Leland Malchow (1991-92); W.G. Elliott (1964-65); Bob Brinson (1973-74); Chuck Driebe (1963-64); Dana Miles (1989-90); Henry Walker (1996-97); Kirk McAlpin (1953-54) and Ross Adams (1998-99). Photo taken at the 50th Anniversary Gala at Capital City Grille in 1997.

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# Best Practices for Issuing Subpoenas

## Depositions of Georgia Residents in Cases Pending Out of State

by Rebecca B. Phalen

**T**oday's litigation, in which the facts of a case see no geographical boundaries, requires a more expansive subpoena power to properly cross those boundary lines to reach certain witnesses and evidence. While this subpoena power has been easily extended in federal court,<sup>1</sup> it remains a lumbering process in state courts.

This article will set forth the best practices for issuing a subpoena in Georgia for a case pending in another state (the "foreign state"). Although this process has not been fleshed out in Georgia cases and remains driven by the clerk of court for each county, there are certain steps that will remain relatively constant. Because it is not settled law that only Georgia procedure would apply to a subpoena issued in Georgia, it is recommended that attorneys err on the side of caution and follow the more restrictive procedure as between Georgia and the foreign state. The degree to which an attorney follows this more conservative approach will vary depending on cost, anticipated cooperation of the deponent and opposing parties, and strategy in the underlying case.

Georgia has adopted the Uniform Foreign Depositions Act (the "Act"),<sup>2</sup> which allows Georgia courts to issue subpoenas for cases pending out of state. Although the Act was meant to simplify the process of deposing a Georgia resident for an out-of-state case, the courts have developed their own and varied procedures for issuing subpoenas. The courts are within their rights to do so because the Act is "a statute of empowerment, not requirement."<sup>3</sup>

### Preparing to Issue the Subpoena

Before the court issues the subpoena, the Georgia attorney and out-of-state counsel need to lay some groundwork as follows.

#### Run a conflict check.

Run a conflict check on all parties to the case and the non-party deponent. Because the issuance of a subpoena has the potential to result in a motion to quash or motion to compel, the Georgia attorney must be fully informed of who the parties are, particularly if the attorney may be called upon to defend the issuance of the subpoena in court.

#### Determine whether out-of-state counsel is seeking testimony, documents, or both.

The Georgia Civil Practice Act, unlike the Federal Rules of Civil Procedure, only provides for subpoenas to issue for deposition, and not for documents alone.<sup>4</sup> A

subpoena for deposition can, however, command the deponent to produce and permit inspection of documents.<sup>5</sup> If out-of-state counsel is only seeking documents, those documents may be obtained with signed authorizations or through the parties' cooperation. Otherwise, the documents need to be obtained through a subpoena for deposition with a request for documents. The deposition can always be cancelled if the documents are obtained before the deposition.

**Review the specific information sought in the subpoena to determine whether any privileged, confidential, or irrelevant information is sought.**

The goal is to serve a subpoena that will be able to withstand scrutiny if enforcement is sought in a Georgia court. However, the level of scrutiny that courts give to subpoenas issued for out-of-state cases varies; courts take different positions on both the scope of their power to review substantive issues (such as privilege and relevancy) and which state's law applies to any review.<sup>6</sup> A court may apply its own substantive law and quash a subpoena that it determines is overbroad or seeks privileged material.<sup>7</sup>

A court may also apply the foreign state's law in limiting the scope of discovery sought by the subpoena. In *Barnes v. A Confidential Party*,<sup>8</sup> the deponent's state court allowed the deponent to invoke a privilege of the foreign state in refusing to answer certain questions at a deposition finding that "the foreign state's *substantive law of privilege*, as well as its procedural rules should be applied to depositions taken under commission in another state."<sup>9</sup> A deponent's state court may even be willing to issue a ruling on the relevancy of the information sought by the subpoena if the party seeking discovery can establish the relevancy of the information.<sup>10</sup>

On the other hand, some courts have held that their review of a

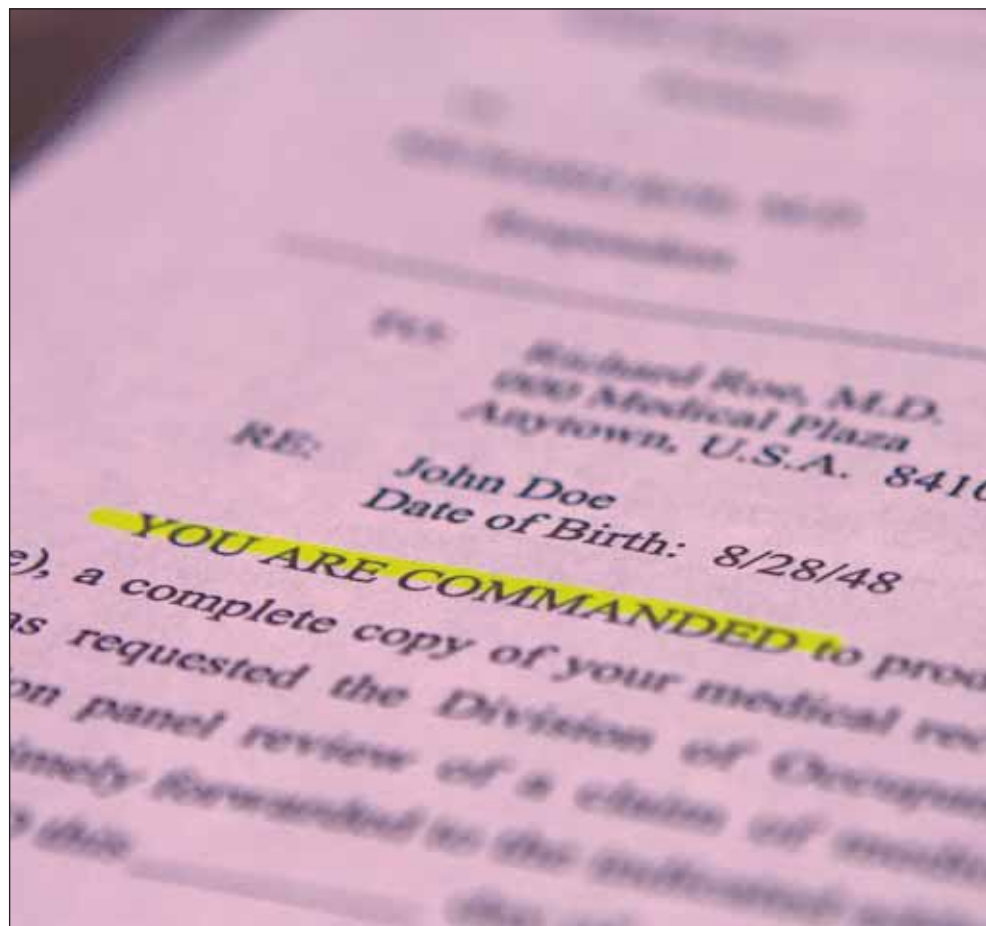
challenged subpoena issued for an out-of-state case is limited to compelling the deponent to attend and imposing sanctions for failure to attend. This position suggests that these courts do not think that they have the power to rule on issues that go to the heart of the subpoena.<sup>11</sup> In playing such a limited role, the deponent's state court may defer to the ruling of the foreign court on substantive issues.<sup>12</sup>

With this background, because there is the possibility that the Georgia court will examine the substance of the subpoena for privilege and relevancy issues, the substance and breadth of information sought in the subpoena should be examined by Georgia counsel. The Georgia counsel should advise the out-of-state counsel if there is any information sought that could be considered privileged, confidential or irrelevant under Georgia law. This analysis will allow the out-of-state attorney to either modify the subpoena to comply with Georgia

substantive law or to modify the commission to reflect that the foreign state's law should apply. Although a statement to that effect in the commission may not be binding, it can be persuasive to a court should the subpoena be challenged.<sup>13</sup>

**Comply with the more restrictive notice requirement governing service of subpoenas.**

Although Georgia law does not mandate a particular time period in which a subpoena may be served, it does allow a deponent to object to discovery for "good cause shown," including asking the court to allow the discovery only "on specified terms and conditions, including a designation of the time or place."<sup>14</sup> When giving notice of a deposition under O.C.G.A. § 9-11-30, the party requesting the deposition "shall give reasonable notice in writing to every other party to the action."



Once the deposition location is established, the appropriate Georgia clerk of court should be contacted regarding that court's procedures for issuing an out-of-state subpoena. The importance of this communication cannot be overstated.

While not expressly applicable to serving subpoenas, "reasonable notice" is the guiding principle. Additionally, "the person to whom a subpoena is directed may, within 10 days after the service" serve a written objection to the subpoena.<sup>15</sup> While this statute does not mandate a time period for service of the subpoena, but rather a time for the objection,<sup>16</sup> this 10-day period serves as partial time-frame. Finally, if the foreign state requires a subpoena to be served a certain number of days before the deposition, that requirement should be observed since it is not clear which state's procedure would prevail on a motion to quash or motion to compel.

### Provide notice of the deposition in accordance with the Georgia ethical requirements.

The Georgia State Disciplinary Board has advised that a subpoena should only be issued "for depositions which have been actually scheduled by agreement between parties or where a notice of deposition has been filed and served upon all parties, and should not be issued when no deposition has been scheduled."<sup>17</sup> This requirement is to prevent the misuse of subpoenas by misleading non-party witnesses into releasing confidential or privileged information without the non-party's having an opportunity to object to the production of that material.<sup>18</sup> To comply with this requirement, the out-of-state counsel should either schedule the deposition by agreement or serve the notice of deposition before having the subpoena issued in Georgia.

### Determine where the deponent can be compelled to attend a deposition.

For a deposition in an out-of-state case, the Georgia clerk of any court of record where the deposition is to be taken can issue the subpoena.<sup>19</sup> However, there are only certain places where a deponent can be compelled to attend a deposition: 1) in the county where he resides or is employed, 2) in the county in which he was served with the subpoena, and 3) at any place not more than 30 miles from the county seat of the county where the deponent resides or is employed.<sup>20</sup> The deposition should be arranged in a county where the deponent can be compelled to attend.<sup>21</sup>

Once the deposition location is established, the appropriate Georgia clerk of court should be contacted regarding that court's procedures for issuing an out-of-state subpoena. The importance of this communication cannot be overstated. While some counties' clerks are very familiar with this request, others may at first refuse the request to issue an out-of-state subpoena. To the extent that the clerk's information differs from this article, follow the clerk's suggestions. If the clerk is unfamiliar with the procedure, the approach in this article can be suggested. If the clerk's requirements are impractical, the location of the deposition can be changed to a different county—assuming there is another county where the deponent can be compelled to attend the deposition.

### Issuing the Subpoena

In order to issue the subpoena, the clerk of court generally requires

the subpoena and a certified copy of a commission (also called a letter rogatory).<sup>22</sup> The commission is a request from the out-of-state court, signed by the foreign judge, requesting that the Georgia court issue the subpoena. The clerk of court may require that the commission include certain specifics about the deposition (*e.g.*, name of deponent or time, date, and location of deposition).<sup>23</sup>

The commission should not request the Georgia court to issue an *order* compelling the production of documents or the appearance of the deponent. One Georgia court has held that such a request from a foreign court is not entitled to full faith and credit because the foreign court did not have personal jurisdiction over the Georgia non-party.<sup>24</sup> The commission should simply request that the Georgia court issue the subpoena. As discussed above, out-of-state counsel may also wish to modify the commission to reflect that the foreign state's law should apply. A sample commission and subpoena are included at the end of this article.

The out-of-state counsel should determine the best method for obtaining a commission. The parties may submit a joint motion to the foreign court or, if the opposing party will not consent, a motion to request the commission could be submitted.

### Serving the Subpoena

Georgia law permits a variety of methods to serve a subpoena; however, the foreign state's law may be more restrictive. The parties should follow the more restrictive rule to avoid any complaints of improper service that the deponent may

raise. For example, if the foreign state only allows personal service of a subpoena, then the subpoena should be personally served, even though Georgia law allows other methods of service.

Under Georgia law, once the subpoena is issued, it may be served anywhere in the state.<sup>25</sup> Subpoenas can be served by personal service, registered or certified mail or statutory overnight delivery.<sup>26</sup>


Witness and mileage fees are also required in certain circumstances. If the deponent lives outside the county where the deposition is to be taken, service of the subpoena must include the statutory witness fee of \$25 per day and the mileage fee of 20 cents per mile (calculated from the deponent's residence and back).<sup>27</sup> If counsel does not know where the deponent lives, it is better to err on the side of including the statutory witness fee and mileage fee (or any higher witness or mileage fees required by the foreign state).

## Taking the Deposition

Depending on your involvement in the out-of-state case, you may be asked to take the deposition. If you do so, inquire of the out-of-state attorney whether the foreign state requires you to be admitted *pro hac vice*. If out-of-state counsel will be taking the deposition, there is no requirement under Georgia law that he be admitted *pro hac vice*.<sup>28</sup> The out-of-state attorney should also be informed that the Georgia rules impose a time limit on depositions—"one day of seven hours."<sup>29</sup> Again, if the foreign state allows less time, then, unless the deponent agrees otherwise, it is recommended that the parties follow the more restrictive rule.

## Conclusion

As discussed above, when assisting out-of-state counsel with serving a subpoena on a Georgia witness for an action pending out of state, there are many issues to consider. After evaluating the issues raised in this article, and any case-

specific considerations with which you are confronted, you should be ready to send the subpoena to the clerk to issue it, to serve the subpoena, and then—finally—to take the deposition. 



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## Endnotes

1. FED. R. CIV. PROC. 45(a)(3).
2. O.C.G.A. § 24-10-111 states:

- Whenever any mandate, writ, or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.
3. *In re Deposition of Turvey*, 2002 WL 31455155 at \*2 (Ohio Ct. App. Nov. 5, 2002). There may also be additional legislative attempts on the horizon to formulate a more detailed uniform approach to interstate depositions. Currently the National Conference of Commissioners on Uniform State Laws is drafting the Uniform Interstate Depositions and Discovery of Documents Act. For more information on the Drafting Committee and the latest versions of the draft, see



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[CASE CAPTION]

TO: THE CLERK OF THE SUPERIOR COURT OF [county name] COUNTY, STATE OF GEORGIA

**WHEREAS**, this Court has determined that good cause exists for the oral deposition of **[deponent's name]** and for the production of certain documents in this case;

[deponent name and address]

Dated: \_\_\_\_\_

Judge [foreign state]

[CASE CAPTION FROM FOREIGN CASE]

## SUBPOENA DUCES TECUM FOR DEPOSITION

GREETINGS:

FAIL NOT UNDER PENALTY OF THE LAW.

This \_\_\_\_\_ day of \_\_\_\_\_, 2007.

Clerk, Superior Court of [ ] County, Georgia

<http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=246>.

4. O.C.G.A. § 9-11-45(a)(1)(A) (2006). Although the Evidence Code allows subpoenas to issue for documents, *see id.* § 24-10-20(b), the context of that code section indicates that it should be used for purposes of a hearing or trial. *Id.* § 24-10-21. The Uniform Foreign Deposition Act would not authorize the use of O.C.G.A. § 9-11-34(c) to request documents from a nonparty in Georgia for use in a case pending out of state without a subpoena.
5. *Id.* § 9-11-45(a)(1)(C).
6. Although it is unclear what level of review a court in Georgia might apply when faced with a challenge to a subpoena for an out-of-state case, one case suggests that a Georgia court is willing to look at the underlying proceedings in the foreign court to determine the appropriateness of the subpoena. *See Carr v. Farmer*, 213 Ga. App. 568, 445 S.E.2d 350 (1994) (stating that the trial court erred in issuing a subpoena to a Georgia healthcare facility when the underlying proceedings in the out-of-state case did not comply with federal law regarding the procedure to obtain records from the Georgia healthcare facility).
7. *See, e.g., Kirkland & Ellis v. Chadbourne & Parke LLP*, 670 N.Y.S.2d 753, 756 (Sup. Ct. 1998) (deponent's state court applied its law in quashing subpoena that sought attorney work product).
8. 628 So. 2d 283 (Miss. 1993).
9. *Id.* at 288. In reaching this conclusion, the deponent's state court also relied on 1) language in the subpoena stating that the foreign state's civil practice act applied and 2) its own choice of law principles that dictated applying the law of the foreign state. *Id.* at 289.
10. *See Chatinsky v. Dubrow Elec. Indus.*, 27 Pa. D. & C.2d 486, 488 (1962) (ruling that before certain documents are produced, the proponent of the discovery has the burden to establish the relevancy of the documents in the underlying action).
11. *See, e.g., Fischer Brewing Co. v. Flax*, 740 N.E.2d 351, 355 (Ohio Ct. App. 2000) (deponent's state court upheld finding that lower court

did not have the authority to quash the foreign subpoena or grant protective orders on the issues of attorney-client privilege, particularly when foreign court had already ruled on the issues).

12. *See In re Ayliffe & Cos.*, 564 N.Y.S.2d 297 (App. Div. 1990) (deponent's state court upheld lower court's refusal to quash a subpoena based on deponent's argument that the subpoenas sought unnecessary and duplicative testimony, stating that those arguments should be addressed to the foreign court).
13. *See Barnes*, 628 So. 2d at 287 (in applying foreign state's law, noted language in the commission that stated that the deposition was taken in accordance with the foreign state's civil practice act).
14. O.C.G.A. § 9-11-26(c)(2) (2006).
15. *Id.* § 9-11-45(a)(2).
16. An objection may still be made if the subpoena is served with less than 10 days for compliance. *Id.*
17. Ga. State Disciplinary Bd., Advisory Op. 40 (Sept. 21, 1984).
18. *Id.*
19. O.C.G.A. § 9-11-45(a)(1).
20. *Id.* § 9-11-45(b).
21. The United States Postal Service has a useful website for determining a county by the address: <http://zip4.usps.com/zip4/welcome.jsp>.
22. Communication with the clerk is necessary because certain courts may require additional information to be submitted, including multiple copies of the commission, the order from the foreign court permitting the commission to issue, the notice of deposition, or a motion to the court requesting the subpoena to be issued.
23. If the clerk requires the specifics of the deposition logistics to be

included in the commission, use language such as "or at such other date and time as shown in a notice of deposition." That additional phrase may serve to prevent the out-of-state counsel from having to obtain a new commission if the deposition is rescheduled.

24. *Carr v. Farmer*, 213 Ga. App. 568, 569, 445 S.E.2d 350, 352 (1994). In *Carr*, the order from the foreign court requested that the Georgia court "issue an order to [the nonparty] compelling production of said documents." *Id.* at 352.
25. O.C.G.A. § 9-11-45(a)(1)(C) (referring to procedure found in O.C.G.A. § 24-10-21). O.C.G.A. § 9-10-12(b) defines "statutory overnight delivery."
26. *See id.* (referring to procedure found in O.C.G.A. § 24-10-23).
27. *Id.* (referring to procedure found in O.C.G.A. § 24-10-24).
28. *See GA. UNIF. SUPER. CT. R. 4.4*. Rule 4.4 only speaks to an out-of-state attorney "seeking to appear in a proceeding pending in this state" and directs the attorney to "file a verified application with the court where the litigation is filed." Therefore, because there is no pending case in Georgia, this Rule does not apply. However, if the out-of-state attorney wishes to argue in a subsequent motion to compel or motion to quash filed in the Georgia court, this Rule would then apply. *See also GA. R. PROF'L CONDUCT 5.5(c)* (describing certain legal services that may be provided by a "Domestic Lawyer" (defined generally as a lawyer from another United States jurisdiction but not authorized to practice law in Georgia) on a temporary basis).
29. GA. UNIF. SUPER. CT. R. 5.3.



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# Inadvertently Produced Privileged Documents Under the New Federal Rules of Civil Procedure

You Ask for It Back, But Then What?

by David Hrick



**A**mendments to the Federal Rules of Civil Procedure went into effect in December 2006. Among them were new rules designed to clarify and simplify the process for document production by allowing a party who produces a privileged document to “claw it back” from the recipient. These new rules also encourage the use of agreements to reduce or eliminate disputes over whether production of a privileged document waived the privilege and, if so, to what extent. This article describes the new rules and explains why, despite the amendments, due care remains a critical aspect of document production and why agreements between parties are not always a satisfactory solution.

## The Background to the Amendments

Litigators know that privilege must be protected, or it can be lost. Most courts hold that privilege is waived where a document is disclosed to an adversary intentionally or without taking due care. Some courts even apply “subject matter waiver” and hold that not only is privilege waived concerning the actual communication disclosed, but it is also waived as to all communications on the same subject.

Taken together, those principles mean that at all times, but particularly for document production during discovery, parties must be extremely careful to avoid disclosure of privileged documents, lest privilege over the document itself and perhaps all communications on the “same subject matter” be waived.

The need to protect against waiver has led parties in document-intensive cases to engage in “privilege reviews,” which can be extremely expensive. In the past, lawyers in such cases have often made “clawback” agreements with opposing counsel that allow a party who produces a privileged document during discovery to obtain its return to avoid subject matter waiver or to avoid entirely the contention that production waived privilege. It is against this background that two new provisions were added to the rules.

### Two New Rules

New Rule 26(b)(5)(B) provides a process for “clawing back” a privileged document produced during discovery:

If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must

promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

The rule thus allows a party who believes that it has produced a document that is protected by either privilege or work product protection to ask for it back. The recipient must not use the information until the “clawback” request is resolved and must take reasonable steps to retrieve any distributed copies.

Another provision added to Rule 26(f) encourages lawyers during their conference to discuss “any issues relating to claims of privilege or of protection as trial preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order.”<sup>1</sup>

The Advisory Committee Notes not only encourage parties to agree on privilege waiver, but also provide possible terms. For example, the notes suggest that parties can agree that production will not waive any privilege. They even suggest that, to save money, parties may agree that documents can be made available for an initial “quick peek” before making documents available for inspection, and then review for privilege only the documents actually requested by the other party. The notes include this seemingly comforting statement: “In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege

or of protection as trial preparation material.”

Despite implying that all is well, the notes expressly state that the rules do not (and, for obvious reasons, cannot) control “whether the privilege or protection that is asserted after production was waived by the production.”<sup>2</sup> Instead of the rules, the substantive law of privilege waiver controls. Although the rules create a procedure for seeking return of documents and encourage parties to agree that production does not waive privilege,<sup>3</sup> they do not control whether any agreement is enforceable.

### Can Agreements Override the Common Law of Waiver? Does It Matter?<sup>4</sup>

Three distinct issues should be addressed despite the comfort of the Advisory Committee Notes. The first has nothing to do with whether privilege will be maintained, and may be a far more important question: “Does it matter that privilege will remain when client confidences have been disclosed?” The second: “Can a non-waiver agreement be enforced between the parties?” The third: “Can an agreement prevent third parties from nonetheless claiming that inadvertent production waived privilege?”

### Does It Matter Whether Everyone Is Bound and Privilege Is Protected?

Even though new Rule 26(b)(5)(B) requires that the disclosed document be returned, and even assuming that an agreement will bind everyone (parties to the agreement, and not), the fact is that damage can be done by disclosure of privileged information, whether or not the information will be admissible at trial later. The bell cannot be unrung. The recipient will know the content of the docu-

ment and that in and of itself could harm the client.

The basic obligation of lawyers to take due care during document production persists whether or not privilege will be preserved. But there remain significant questions as to whether it will be, particularly with respect to third-parties.

## Does the Agreement Preserve Privilege Even Between the Parties?

Many courts have upheld and encouraged nonwaiver agreements between parties, and they have long been used.<sup>5</sup> The Advisory Committee Notes correctly suggest that those courts that have addressed them have approved nonwaiver agreements. Not all courts have addressed them, however, and a few courts that have done so have denied their enforcement in some circumstances. One court explained that their enforcement “could lead to sloppy attorney review and improper disclosure which could jeopardize clients’ cases.”<sup>6</sup> Counsel may need to ensure that the particular court will uphold nonwaiver agreements, even as between parties, before putting too much trust in them.

## Third Parties Likely Are Not Bound

Basic contract law suggests that an agreement between parties to a lawsuit that the production of privileged information does not waive privilege does not impact third parties. Accordingly, production of a privileged document in a case with a “clawback” agreement likely will not impact the ability of a non-party to claim that production waived privilege.<sup>7</sup> The majority view is that voluntary disclosure to an adversary waives privilege even if it is accompanied by a nonwaiver agreement.<sup>8</sup> Even if the nonwaiver agreement prevents a party to it from arguing that inadvertent production by the other party to the agreement waived privilege, it is unclear


whether third parties will be prevented from doing so.<sup>9</sup> Again, this demonstrates that the obligation to take due care persists, particularly where documents are being produced in litigation which is likely to be followed by related lawsuits.

## Conclusion

The best protection against harm to clients remains the exercise of due care. Nonwaiver provisions may provide some additional protection, but it is not yet certain to what extent they will be enforced.

What, exactly, should such an agreement say? Case law suggests that it should *not* be limited to “inadvertent” production, since that leads to litigation over what was, or was not, “inadvertence.”<sup>10</sup>

Although the precise language will vary depending on the case and circumstances, consider this as a model to improve from:

Production of any document that, prior to production, was subject to work product immunity or the attorney client privilege shall not constitute a waiver of the immunity or privilege, provided that the producing party complies with Fed. R. Civ. P. 26(b)(5)(B) by notifying the party that received the information of the claim and the basis for it. The foregoing applies so long as the producing party in its notice states that production had not been an intentional and knowing relinquishment of the claim of privilege. 



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## Endnotes

1. Fed. R. Civ. P. 26(f)(4). *See also* Rule 16(b)(6) (allowing district courts to include any agreement in a scheduling order).
2. 2006 Committee Note to Rule 26(b)(5)(B).
3. *See Hopson v. Mayor and City of Baltimore*, 232 F.R.D. 228, 234 (D. Md. 2005).
4. The notes recognize that the “courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information.” Advisory Committee Note to Rule 26(b)(5)(B). Unfortunately, that law is not uniform or well-settled. Those jurisdictions that have addressed the issue (many have not) have adopted varieties of three common approaches: strict waiver (holding that no matter how great the precautions against inadvertent production were, once disclosed privilege is waived); strict non-waiver (holding that only intentional relinquishment can waive privilege, and that inadvertence is never sufficient to do so); and a middle-ground balancing test (which looks to all of the facts to determine whether the production was made despite the exercise of due care). *See* 8 Wright, Miller & Marcus, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* 2D § 2016(2) (2005) (canvassing the various approaches).
5. *See id.* at 234-35 (citing cases dating back to the 1950s that upheld non-waiver agreements between counsel or parties).
6. *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109, 118 (D. N.J. 2002).
7. *See In re Chrysler Motors Corp.*, 860 F.2d 844 (8th Cir. 1989).
8. *In re Columbia/HCA Healthcare Corp.*, 293 F.3d 289, 296 (6th Cir. 2002) (collecting cases).
9. *See Hopson v. Mayor and City of Baltimore*, 232 F.R.D. 228, 233-35 (D. Md. 2005) (engaging in a thorough analysis of the uncertainty as to whether even parties to the nonwaiver agreement will be bound by it).
10. *See In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 418 (N.D. Ill. 2006) (litigating meaning of protective order); *VLT, Inc. v. Lucent Techs., Inc.*, 2003 WL 151399 (D. Mass. Jan. 21, 2003) (same); *U.S. Fid. & Guar. Co. v. Braspetro Oil Serv. Co.*, 2000 WL 744369 (S.D.N.Y. June 8, 2000) (same).



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# What is Reasonable Service?

by Joseph G. Mitchell

**W**hen you read a title like the one above, your first thought is probably related to the timeliness of service you receive while sitting for a meal. At a fast food restaurant, for instance, your response may be that you would want to receive your meal in five minutes or less after ordering. At a nicer restaurant, it would probably be no more than 30 minutes after ordering. But what if the question is related to the timeliness of service of a summons and a complaint? What then would be considered reasonable? Specifically, if a summons and complaint are filed prior to the running of the statute of limitations but are served after such date, will the service be considered reasonable, and therefore valid?

According to O.C.G.A. § 9-11-4(c), when serving a summons and complaint in Georgia, the process server must do so within five days following his receipt of the summons and complaint (which usually occurs within a day after the filing). However, the section also specifically states that “failure to make service within the five-day period will not invalidate a later service.”<sup>1</sup> In certain situations, service of the summons and complaint after the five-day period may “relate back” to the date of the original filing. So under what circumstances could this happen? Like many issues that arise in the law, it depends.

## Service of the Summons and Complaint After the Five-Day Period

When service of a summons and complaint occurs after the five-day period prescribed in Section 9-11-4(c), the correct test for determining if service will relate back to the time of filing is whether the plaintiff “acted reasonably and diligently to ensure that proper service was made as quickly as possible.”<sup>2</sup> The burden is on the plaintiff to show that he was not at fault in unreasonably delaying service and was not guilty of laches.<sup>3</sup> The trial court will analyze all the facts involved in perfecting the service of the summons and complaint and ascertain whether the plaintiff failed to

exercise due diligence.<sup>4</sup> The determination as to whether the plaintiff was guilty of laches in failing to perfect service of the summons and complaint after the expiration of the statute of limitations is an issue that is within the trial court's discretion and will not be overturned on appeal in the absence of abuse of such discretion.<sup>5</sup>

Upon review of a litany of Georgia cases decided in the past decade regarding timeliness of service (see the chart, right), it becomes clear that if the statute of limitations has expired prior to service of the summons and complaint and the plaintiff waits more than a couple of weeks between his attempts to perfect service, he runs a substantial risk of having the summons and complaint dismissed by the court. Of these cases, in only a few did the court uphold the plaintiff's service of the summons and complaint outside the applicable statute of limitations and allow such service to relate back to the time of filing the summons and complaint.

*Jackson v. Nguyen*<sup>6</sup> and *Lee v. Kim*<sup>7</sup> were cases decided on almost identical facts. In each case the plaintiff sued the defendant less than a week prior to the running of the applicable statute of limitations. The summons, complaint and return of service were delivered to the sheriff within a day thereafter, and the plaintiffs in each case provided the sheriff's office with the defendant's proper address. However, the sheriff's offices in *Jackson* and *Lee* did not serve the defendant until 22 and 13 days, respectively, after the plaintiff filed suit, and 17 and 11 days, respectively, after the statute of limitations had run. Because the plaintiffs in these cases reasonably relied on the sheriff to perform his duty to make service within five days of receiving the summons and complaint, and because the sheriff (and not the plaintiffs) had caused the delay in service, the Court of Appeals ruled that the plaintiffs had acted with sufficient

Case	Time to Serve Defendant (after expiration of statute of limitations)	Longest Period of Inactivity
<i>Walker v. Bord</i> , 225 Ga. App. 242 (1997)	3 months	43 days; 10 days after notice
* <i>Jackson v. Nguyen</i> , 225 Ga. App. 599 (1997)	17 days (22 days after complaint filed)	22 days
<i>Mitchell v. Hamilton</i> , 228 Ga. App. 850 (1997)	3 months	22 days
<i>Wilson v. Ortiz</i> , 232 Ga. App. 191 (1998)	5 months	4 months
<i>Wade v. Whalen</i> , 232 Ga. App. 765 (1998)	8 months	47 days
<i>Farahi v. Jordan</i> , 238 Ga. App. 63 (1999)	45 days	30 days
<i>Zeigler v. Hambrick</i> , 257 Ga. App. 356 (2002)	21 days after refileing suit	21 days
<i>Williams v. Bragg</i> , 260 Ga. App. 377 (2003)	36 days	30 days
<i>Barabont v. Villanueva</i> , 261 Ga. App. 839 (2003)	Never personally served	51 days
* <i>Feinour v. Ricker Co.</i> , 269 Ga. App. 508 (2004)	5 1/2 months	2 weeks
* <i>Lee v. Kim</i> , 275 Ga. App. 891 (2005)	11 days (13 days after complaint filed)	13 days
<i>Harris v. Johns</i> , 274 Ga. App. 553 (2005)	45 days (2 months after filing)	41 days
<i>Kelley v. Lymon</i> , 279 Ga. App. 849 (2006)	Never served	Never served
<i>Patterson v. Lopez</i> , 279 Ga. App. 840 (2006)	Never served	30 days
<i>Duffy v. Lyles</i> , 281 Ga. App. 377 (2006)	6 months	3 months
<i>Cohen v. Allstate Insur. Co.</i> , 277 Ga. App. 437 (2006)	2 years after filing	20 months

\* Cases in which court allowed relation back to date of original filing.

diligence and the service of the summons and complaint related back to the time the plaintiffs filed their suits.

The Court of Appeals of Georgia also upheld service after the five-day period in *Feinour v. Ricker Co.*<sup>8</sup> In *Feinour*, the plaintiff filed her lawsuit five days prior to the running of the applicable statute of limitations. Within four days of filing the lawsuit, the Cobb County sheriff tried to serve the defendant at his home, but he had moved to Fulton County. The Fulton County sheriff then attempted service nine days later and continued to attempt service over the next four weeks. When these attempts went unsuccessful, the plaintiff hired a private process server and later had the court appoint a process server, both of whom made numerous attempts to serve the defendant over the next two and a half months. Eventually, the court-appointed process server succeeded in serving the defendant (who admittedly was attempting to evade service) at the same address that the plaintiff had provided to the Fulton County Sheriff's Department. The court found that the plaintiff had done everything she possibly could do and had exercised the "greatest possible diligence in attempting to locate and serve" the defendant.<sup>9</sup> Therefore, service, although perfected more than three months after the statute of limitations had run, was held to be valid and related back to the time of the plaintiff's filing.

*Mitchell v. Hamilton*<sup>10</sup> and *Zeigler v. Hambrick*<sup>11</sup> were cases in which service was held to be invalid due to the plaintiff's lack of diligence. In *Mitchell*, the plaintiff sued the defendant one month prior to the running of the applicable statute of limitations, but she did not verify the defendant's current address prior to filing the lawsuit. Instead, she directed the sheriff to serve defendant at the address listed on the police report, which had been prepared nearly two years earlier. When it turned out the defendant had moved, the plaintiff made sev-

eral more attempts, each about 30 days apart, and ultimately served the defendant three months after the running of the statute of limitations. The Court of Appeals upheld the dismissal of the plaintiff's lawsuit, finding that her reliance on stale information showed a lack of diligence under the circumstances.

In *Zeigler* the Court of Appeals also upheld the dismissal of the plaintiff's lawsuit for lack of diligence. This is a scary case for a plaintiff's attorney. The plaintiff dismissed her case without prejudice from Fulton County State Court and re-filed a timely renewal action in DeKalb County State Court. The marshal served the defendant 21 days after the plaintiff filed her renewal complaint, and in the meantime the statute of limitations expired. However, since the plaintiff did not show by affidavit that the marshal's office was having trouble serving the defendant or that she made any inquiries of the marshal's office during the 21 day period, the Court of Appeals held that she had not acted "as quickly as possible" and upheld the dismissal of plaintiff's complaint.<sup>12</sup>

## Practice Pointers

These cases provide some key practice pointers to plaintiffs' attorneys concerned with making sure service of the summons and complaint is held to be valid:

1. Always attempt to file the complaint early enough so that the sheriff's office has plenty of time to serve even an elusive defendant prior to the expiration of the statute of limitations.
2. Determine that the address provided to the sheriff's office is the defendant's actual current address, not simply one transcribed from the police report or elsewhere. Methods used to locate the defendant's current address may include: (i) hiring a private investigator; (ii) sending a certified letter to defendant's former address to determine the

defendant's forwarding address (but you must make sure to check the box on the certified letter form—for an additional fee—to receive the forwarding address); (iii) telephoning defendant's family members or employer; (iv) serving interrogatories on the defendant's employer requesting his current address; and (v) using internet search sites (e.g., [www.anywho.com](http://www.anywho.com)). If you become aware of any changes of address prior to service, inform the sheriff's office (or other process server) as soon as possible.

3. Follow up frequently (at least once per week) with the sheriff's office to ensure proper service.
4. If after one to two weeks the sheriff's office has not perfected service, hire a private process server and/or have a process server appointed by the trial court to perfect service of the summons and complaint. You also may want to hire more than one process server to perfect service.
5. Document all activities and the specific dates in attempting to perfect service. Merely averring that you have acted in a reasonable and diligent manner is not enough.<sup>13</sup> You need to have supporting affidavits that specify all actions that you took to perfect service.

## A Way to Fix the Delay Issue

If your client has filed a complaint but then you have not been diligent in making sure the defendant was served, and in the meantime the statute of limitations has expired, all hope may not be lost just yet. O.C.G.A. § 9-2-61(a) provides:

When any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dis-

misses the same, it may be recommenced in a court of this state ... within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later, ... provided, however, if the dismissal or discontinuance occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once.


In *Hobbs v. Arthur*,<sup>14</sup> the Supreme Court of Georgia applied the statute to a case in which the plaintiff perfected service two months after the statute of limitations had run, dismissed the action, and then re-filed the suit. The court held that such a renewal suit was permitted under the statute, but it clarified that the “‘privilege’ of dismissal and renewal does not apply to cases decided on their merits or to void cases, but does allow renewal if the previous action was merely voidable.”<sup>15</sup> Because the plaintiff perfected service, the suit was merely voidable and not void, and re-filing was therefore proper.

*Hobbs* can be a lifesaver for the plaintiff. If your client has been lax about serving the defendant in a case filed within the statute of limitations, you should still go ahead and serve the defendant. You can then dismiss the case without prejudice and file within the six-month renewal period, but it is better practice to re-file the matter soon after

dismissing without prejudice. Once re-filed, the defendant cannot take advantage of your lack of diligence in the first case as a defense. The key point to remember is that you must perfect service prior to dismissal, or the first case will be deemed void instead of merely voidable.

The biggest danger a plaintiff must be aware of prior to dismissing the matter without prejudice is the statute of repose. The renewal provisions of O.C.G.A. § 9-2-61 cannot be employed to defeat the statute of repose.<sup>16</sup> So if there is an applicable statute of repose and the plaintiff's renewed claim is outside that time period, the saving provisions provided in *Hobbs* cannot be used.

## Conclusion

Service of the summons and complaint will relate back to the time of filing the lawsuit if the plaintiff acts with reasonable diligence in his efforts to perfect service. The plaintiff's attorney, then, needs to act timely and document each attempt to perfect service of the summons and complaint upon the defendant. Cases have shown that waiting more than 10 days between attempts to serve the defendant can cause a dismissal of the plaintiff's case. In the event the plaintiff is not reasonably diligent, he should nevertheless still perfect service, dismiss without prejudice (as long as there is no statute of repose to worry about), and re-file the lawsuit, as provided in *Hobbs v. Arthur*. 



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## Endnotes

1. O.C.G.A. § 9-11-4(c) (2006).
2. Zeigler v. Hambrick, 257 Ga. App. 356, 357 (2002) (quoting Douglas v. Seidl, 251 Ga. App. 147, 148 (2001)).
3. Devoe v. Callis, 212 Ga. App. 618, 619 (1994). The “doctrine of laches” is defined as “neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as a bar in court of equity.” BLACK’S LAW DICTIONARY 875 (6<sup>th</sup> ed. 1990).
4. Patterson v. Lopez, No. A06A0297 (Ga. Ct. App. June 16, 2006).
5. Duffy v. Lyles, No. A06A1377 (Ga. Ct. App. Aug. 30, 2006).
6. 225 Ga. App. 599 (1997).
7. 275 Ga. App. 891 (2005).
8. 269 Ga. App. 508 (2004).
9. *Id.* at 511.
10. 228 Ga. App. 850 (1997).
11. 257 Ga. App. 356 (2002).
12. *Id.* at 357.
13. *See id.*
14. *Hobbs v. Arthur*, 264 Ga. 359 (1994).
15. *Id.* at 360.
16. *See Siler v. Block*, 204 Ga. App. 672 (1992).

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# Good Leadership Results in Successful 2007 General Assembly

by Mark Middleton

**R**elying once again on important leaders in the House and Senate, and supported by strong State Bar of Georgia leadership, the Bar once again enjoyed a productive and successful legislative session. Several important matters that the Bar supported passed both legislative chambers and await action by Gov. Sonny Perdue. Equally important, other bills opposed by the Bar were either defeated or deferred.

In the Senate, Sen. Preston Smith, R-Rome, again served as chairman of the Senate Judiciary Committee, and was also the Senate Appropriations subcommittee chair for the judicial budget. Sen. Michael Meyer Von Bremen, D-Albany, served as the chairman of the Senate Special Judiciary Committee, and provided leadership and support on a number of Bar positions, including SB 234, the Business Law Section initiative. Sen. Bill Cowsert, R-Athens, a rising star in the state Senate, authored SB 234, and carried HB 386, the Real Property Law Section bill, through the Senate.

In the House of Representatives, Rep. Wendell Willard, R-Dunwoody, and Rep. David Ralston, R-Blue Ridge, again provided leadership as chairmen for the two House Judiciary Committees. Chairman Willard authored HB 119 and HB 120, relating to judi-

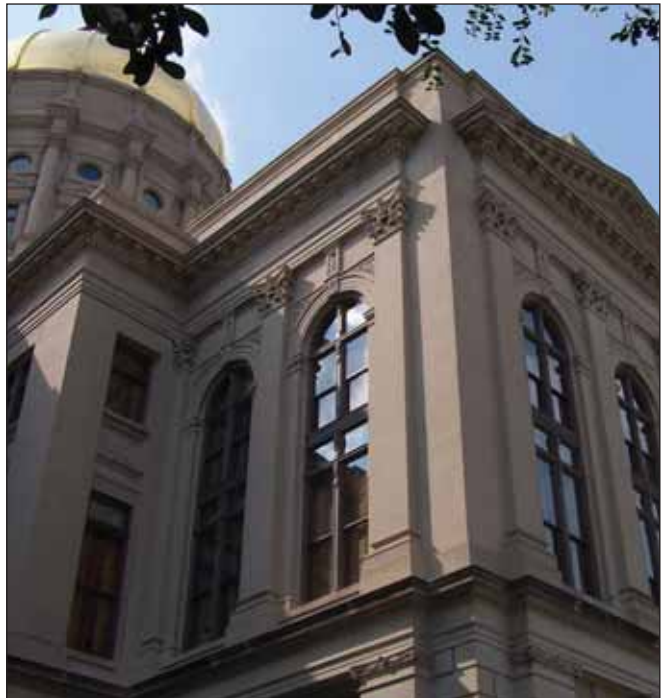


Photo by Jake Walker

cial pay and service that the Bar supported. Rep. Chuck Martin, R-Alpharetta, filled a new role as the Appropriations subcommittee chair for judicial funding, and was supportive of Bar initiatives. Rep. Roger Lane, R-Darien, authored HB 386 and carried SB 234 in the House, and was once again one of the Bar's most effective advocates.

Many other legislators also supported positions of the Bar, including Senate President Pro Tem Eric Johnson, R-Savannah, Appropriations Chairs Sen. Jack Hill, R-Reidsville, and Rep. Ben Harbin, R-Evans, Majority Leaders Sen. Tommie Williams, R-Lyons, and Rep. Jerry Keen, R-Saint Simons. Finally,

the Bar is grateful for the leadership of Lt. Gov. Casey Cagle and Speaker of the House Glenn Richardson.

Bar leadership was also outstanding. Section leaders such as Patrise Perkins-Hooker (Real Property Law Section) and Cass Brewer (Business Law Section) devoted numerous hours presenting their section's bills to the legislative committees. Advisory Committee on Legislation (ACL) Chair Tom Stubbs and Vice Chair Matt Patton skillfully managed the ACL process and joined President Jay Cook and President-Elect Gerald Edenfield in representing the Bar at various legislative functions during the session.

## State Bar Agenda

Each year, the Bar creates an agenda of legislative and appropriations positions that are advocated at the General Assembly. These matters are developed by the various sections and presented to the ACL for consideration to be recommended to the Board of Governors, which must be approved by a super majority vote. The Executive Committee determines whether an agenda position is required for bills that are introduced during the legislative session. This year, the following matters comprised the agenda.

## Legislation

The State Bar's legislative agenda included the following bills:

- **SB 234** was the Business Law Section's bill that provided technical changes to the section's initiative last year that permits the conversion of Georgia corporations, Georgia limited partnerships, and Georgia limited liability companies into foreign corporations, foreign limited partnerships, and foreign limited liability companies. SB 234 provides a means to alert the secretary of state that a Georgia entity has converted to a foreign entity. The bill passed both the House

and Senate and awaits the governor's signature.

- **HB 386** was the Real Property Law Section bill that creates an affirmative duty for the Superior Court clerk to cross-index real estate cancellations, and authorizes an additional fee for clerks that cross reference cancellations of security instruments filed in real property records. The bill passed the House and Senate, and awaits the governor's signature.
- **HB 120** was the result of the Commission on Judicial Service's recommendations. This bill creates a travel allowance for appellate judges that live outside the metropolitan area. This bill passed the House and Senate, and awaits the governor's signature.
- **HB 119** is the judicial salary increase that passed the House and will be considered next year by the Senate.
- **HB 221** was added to the agenda during the session by the Executive Committee. This bill benefits practitioners by allowing for a professional affidavit in a malpractice case to be filed within 45 days after filing of the case under certain circumstances when the statute of limitations has run. This bill passed the House and Senate, and awaits the governor's signature.
- **HB 586** was also added to the agenda during the session. This bill limits the obligation of the Georgia Public Defender Standards Council (GPDSC) in providing attorneys and fees and specifies that the county must pay any additional costs. This bill passed the House and Senate, and awaits the governor's signature.

The State Bar took a position opposing the following bills.

- **HB 115** would allow persons not graduating from an ABA-accredited law school to sit for


the Bar exam. The bill did not pass the House Judiciary committee. Also, the Supreme Court has established a committee to review the issues raised by alternative legal education.

- **SB 271** would shorten the period of time within which a tax deed would ripen by prescription. This bill remains in a House Ways and Means subcommittee.
- **HB 89** was amended to eliminate the principle of vicarious liability. The Bar opposed that amendment and the vicarious liability section was removed from HB 89.
- **SB 143** would expand the opt-out provisions of the Indigent Defense Act of 2003. The bill did not pass out of the Senate Judiciary committee.

## Appropriations

The General Assembly supported the Fiscal Year 2008 budget appropriations for programs whose requests were supported by the State Bar:

- Legal services for victims of domestic violence, \$94,279 increase for 2008
- Appellate Resource Center, continuation of \$800,000 appropriation
- GPDSC, \$35.4 million for 2008
- CASA program, \$225,000 increase for 2008
- Business Court pilot program, continuation of \$100,000

The General Assembly is expected to re-convene in a special session to address the governor's veto of the supplemental budget. The Bar supports a \$9.5 million appropriation in that budget for the GPDSC. 

The State Bar legislative representatives are **Tom Boller, Rusty Sewell, Wanda Segars** and **Mark Middleton**. Contact them at 404-872-2373 for further legislative information or visit the State Bar's website at [www.gabar.org](http://www.gabar.org).

# Georgian to Georgian

by Jennifer R. Mason

Once again, the doors of the State Bar of Georgia opened to the international community as a delegation from the Georgian Bar Association (GBA) of the Republic of Georgia visited the Bar Center as part of the Open World Program, a citizen exchange program sponsored by the National Peace Foundation and the Open World Center for Leadership Development at the Library of Congress. The program was established in 1999 to increase U.S.-Russian understanding and to expose Russian leaders to American democratic and economic institutions.

The distinguished group arrived March 5, accompanied by W. Scott Henwood, partner at Hall, Booth, Smith & Slover (hosting law firm for the delegation), and included Kakhaber Aslanishvili, GBA chair; Vakhtang Mchedlishvili, coordinator of the Training Center for Advocates under the new GBA; Zvia Gabisonia, member of the GBA executive committee; and Giorgi Turazashvili, member of the GBA Ethics Commission. With Ia Meurmishvili and Sophie Bzishvili interpreting, the delegation met with several key individuals, each of whom passed on knowledge

and information about their specific role in the Bar and related organizations.

The morning began with a look at the organization of the Bar and lawyer discipline. Leading the discussion was Senior Assistant General Counsel Jenny Mittelman. After giving an overview of the role of the Office of the General Counsel and the disciplinary process, Mittelman entertained a wide range of questions from the delegates, including:

- Where do you get your funding?
- What should the function of our disciplinary committee chair be?
- What does the Bar do to create confidence in the fairness of the disciplinary process?
- Do you use volunteers or paid staff in the process?
- What is the most common complaint/violation?
- What is the most serious violation?

Mittleman said that she was impressed with the energy and optimism of the Georgian lawyers. "They're determined to construct a unified bar association that will serve both lawyers and the public."

The portion of the morning dedicated to Bar admissions was next on the agenda, and Sally Lockwood, director of the Office of Bar Admissions, was equal to the task. As with the Chinese delegation that visited the Bar in January, Lockwood made clear to the group that bar admissions in the United States are handled state-by-state and jurisdiction-by-jurisdiction. Her discussion then focused on the Bar admissions process and the role of the Supreme Court of Georgia in regulating the practice of law. Lockwood spent the majority of her time reviewing the Bar exam and its structure, as well as speaking to the educational requirements for taking the

exam, the fitness application and process, and problem areas that are encountered and how the applicant can address those problems. She concluded her presentation by reviewing the requirements and processes of licensing foreign law consultants, which was of particular interest to the delegates.

Following a well-deserved lunch break, the afternoon session began with Larry Jones, director of the Institute for Continuing Legal Education of Georgia (ICLE). His goal was to educate the Georgians about the purpose and processes of ICLE.

With examples in hand, he navigated the delegates through the fast-paced world that brings continuing legal education (CLE) programming to thousands of attorneys across the state of Georgia and beyond. According to Jones, "The delegates were particularly interested in the Beginning Lawyers Program, which contains a mentoring component and a CLE component." Some of the statistics he shared with the delegates included:

- ICLE conducts more than 160 original live programs each year in all areas of law;
- Most programs are done in conjunction with one of the Bar's 39 sections;
- Around 20 programs are sent by satellite around the state annually;
- ICLE is self supporting and does not receive any Bar dues; and
- Seminar tuition and book sales are the sole revenue sources for ICLE.

Shortly after Jones concluded his remarks, Avarita Hanson, executive director of the Chief Justice's Commission on Professionalism (CJCP), spoke to the delegates about the CJCP, highlighting its origin, mission and emphasis. Hanson began by stating that the CJCP was the first entity of its kind in the nation when the Supreme Court of Georgia created the organization in 1989. She empha-



Back row: Mike Monahan, Phyllis Holman, Sharon Bryant, Ia Meurmishvili, W. Scott Henwood, Sophie Bzishvili, Larry Jones, Avarita Hanson, Jenny Mittelman. Front row: Giorgi Turazashvili, Zvia Gabisonia, Kakhaber Aslanishvili, Vakhtang Mchedlishvili.


Photo by Jennifer R. Mason

sized that professionalism is a higher standard of attorney behavior than ethics and includes competence, civility, pro bono work and community service, which led to a discussion about some of the programs that the CJCP sponsors, including administration of the CLE requirement and approval of nearly 1,000 CLE programs annually. Specifically, she shared that the CJCP deals with different types of CLE, most notably in creating innovative types of programs. Hanson also explained how the CJCP works with many other bar, court and legal entities to foster professionalism throughout the profession. She ended her portion of the afternoon by providing the delegates with a wealth of materials for their use in instituting a professionalism program within their organization.

Phyllis Holmen, Georgia Legal Services Program (GLSP) executive director, and Mike Monahan, director of the Pro Bono Project, closed out the afternoon with a short discussion about the provision of free legal services for civil legal problems of low-income persons by GLSP and also by pro bono lawyers around the state. Holman and Monahan received a bit of education themselves as the delegates shared information about the

GBA's efforts to set up services for indigent criminal defendants.

Prior to coming to the state of Georgia, each member of the delegation was asked, "What knowledge and experience would you like to gain from your participation in the program?" While each answer differed slightly, the common theme was a desire to increase the efficiency of attorneys' work and to enrich and deepen their knowledge of the U.S. legislative and court system. The combination of speakers that shared their experiences with this group was certainly able to accomplish that mission.

Only recently established in January 2006, the Georgian Bar Association is a unified bar that has more than 2,000 members. The delegation's trip to Atlanta also included time at Emory University, several Atlanta law firms, the Court of Appeals of Georgia, the Supreme Court of Georgia and the Atlanta Bar Association. 



**Jennifer R. Mason** is the assistant director of communications for the State Bar of Georgia. She can be reached at [jennifer@gabar.org](mailto:jennifer@gabar.org).

# Bar Foundation Holds Second Children at Risk Symposium

by Len Horton

**O**n March 21 the Georgia Bar Foundation held a Children at Risk Symposium in the Georgia Forestry Association building in Forsyth. A total of 39 people representing 35 different organizations in the Forsyth area were present. Former Chief Justice Harold Clarke was the moving force behind bringing the symposium to Forsyth after he attended the Bar Foundation's first Children at Risk Symposium, which occurred in Atlanta last December.

"I was impressed with Rudolph Patterson's idea that helping children at risk in a new way is one of the most needed ideas in all Georgia," said Justice Clarke. "After attending the first symposium and seeing the reaction of the leaders of many organizations already helping children, I volunteered Forsyth to be the first Georgia community to try out these ideas."

With the enthusiastic assistance of Monroe County Bank President Bill Bazemore, the Georgia Bar Foundation's Children at Risk Symposium became a

major event in Forsyth. Held in the Georgia Forestry's auditorium with the support of Steve McWilliams, this event attracted people from most of Forsyth's organizations already trying to solve the problems of children at risk.

According to Georgia Bar Foundation President Rudolph Patterson, "I didn't want this to be a typical meeting or a typical approach to helping children. And I wanted it to reach more than just children already in trouble with the law. I wanted us to touch children positively before bad influences touched them negatively."

The Georgia Bar Foundation's new approach to helping children at risk is Ed Meniffee. Known for his successful BASICS program that prepares people inside transition and diversion centers for life outside confinement, Meniffee actually began BASICS relying on his knowledge of how to help children at risk derived from 33 years experience running SouthWest Atlanta Youth Business Organization (SWAYBO).

Teaching business principles has been his key ingredient in making SWAYBO the creative force behind hundreds of youth who have gone on to stellar careers inspired by a blossoming entrepreneurial spirit. From Yale Law School graduates to entrepreneurs who created successful businesses ranging from fine dining restaurants to maid services, "young people with the right ideas in their heads can accomplish great things." Meniffee went

on to captivate his audience of Forsyth professionals with his powerful motivational style.

He explained how it is close to impossible for a youth or anyone else to consider starting a business if he or she has never heard of the idea before and knows no one who has ever started a business. Not one of Menifee's almost 1,000 SWAYBO graduates has ever gotten in trouble with the law. The application of similar principles to help people about to be released from prison boasts a recidivism rate of approximately 16 percent, which is less than half the recidivism rate of prisoners who do not go through BASICS. Menifee is on to something, and State Bar leaders know it.

Terry Walsh, creator of the Truancy Intervention Project (TIP), drove from Atlanta to Forsyth to participate in the symposium, and he brought along Jessica Pennington, the director of TIP. Walsh is widely known for getting important things done efficiently and without wasting time. He attended the Bar Foundation's first symposium last year.

Joshua Menifee told the attendees how he had applied what he learned in SWAYBO to his burgeoning career in the management of musical groups. His confidence and effectiveness when speaking demonstrated how the principles of SWAYBO had prepared him for pretty much anything. The fact that he is Ed Menifee's son ensured that he is well educated and motivated in applying the entrepreneurial principles promoted during the children at risk symposium.

"A number of nonprofits in the state are focusing on the problems of children and how to keep them out of trouble with the judicial system. I wondered if we needed to start working with children even earlier, when they are most vulnerable to peer pressure," said Patterson. "My idea was to bring children's organizations together, Georgia Bar Foundation grantees and non-grantees, to share ideas and do some brainstorming."



The six leaders who made the Forsyth Symposium possible include (left to right) Joshua Menifee, who started a business based on what he learned participating in a similar children at risk program; Bill Bazemore, president of Morris County Bank, the major sponsor of the event; Rudolph Patterson, president of the Georgia Bar Foundation and creator of the children at risk symposium concept; former Chief Justice Harold Clarke, who spearheaded the symposium in Forsyth; Ed Menifee, who created the concepts that are the basis of the symposium; and Terry Walsh, creator of the Truancy Intervention Project and supporter of programs to help children at risk.


Pens and pencils were moving rapidly as the attendees absorbed the ideas Menifee presented. What if a child could make \$150 a day reselling donuts? What if a child could learn to see business opportunities everywhere and create a thriving business from an original idea implemented with passion? This is not impossible for a child to do, so why don't more children understand that hard work can take them to a successful place in the world? Because, as Menifee says, you cannot do what the mind has never been exposed to. His program exposes the child to setting goals and finding ways to achieve those goals. With clear ideas about what is possible, children not only stay out of trouble but surprise parents, teachers, friends and sometimes themselves at their accomplishments.

These ideas aren't just for children at risk, but they are for all Americans who want to take advantage of the free enterprise system that is America. Soon it became apparent to attendees that this information should be taught somewhere whether in the schools, in other nonprofit groups or in SWAYBO-like organizations everywhere.

The symposium reviewed the nature of the problem of children

at risk in Georgia. One child in five lives below the poverty line; a large percentage of them drop out of high school. More than 20,000 children need drug abuse treatment. Clearly anything that can be done to reduce those figures will make a big difference in their lives.

The Georgia Bar Foundation's Children at Risk Symposium is a first step in trying to stimulate thinking to solve this multifaceted problem. Judging from the reaction of the Forsyth attendees, the ideas introduced at the meeting have a bright future.

The symposium was made possible by Georgia's lawyers and bankers, who through Interest On Lawyers Trust Accounts (IOLTA) under the direction of the Supreme Court of Georgia generate significant revenues to the Georgia Bar Foundation. Annually the Georgia Bar Foundation provides grants to Georgia organizations working to solve law-related problems throughout the state. 



Len Horton is the executive director of the Georgia Bar Foundation. He can be reached at [hortonl@bellsouth.net](mailto:hortonl@bellsouth.net).

# The National Bar Association Comes to Atlanta in August

by Keisha Lance Bottoms and Avarita L. Hanson

**T**he National Bar Association (NBA) returns to Atlanta for its 82nd Annual Convention July 28-Aug. 4. It has been 25 years since the nation's largest and oldest association of predominantly African-American lawyers and judges convened in the city. It is expected that this year's convention will be one of the most well attended in the history of the NBA.

The Gate City Bar Association will serve as the official host chapter of the convention. "As the official host of the National Bar Association Convention, Gate City will play a crucial role in planning and hosting numerous events and programs," said Harold Franklin Jr., president of Gate City and King & Spalding LLP associate.

These events will include more than 50 seminars, offering 110 continuing legal education hours, as well as numerous social activities.

The NBA was founded in 1925 when there were less than 1,000 African-American lawyers in the nation. As the result of legal and *de facto* segregation, there were few professional organizations in which African-American lawyers could participate during that time. Today, there are more than 20,000 members of the



Photo by Johanna B. Merrill

NBA. As the membership of the organization has grown, so has its scope and influence. While the original mission of the NBA was geared towards helping structure the struggle of the African-American race in

America, today, according to the NBA's website, one of the objectives of the organization is to promote legislation that will improve the economic condition of all American citizens, regardless of race, sex or creed.

Atlanta has long been considered a pivotal place for change in America. This is due in large part to its rich cultural and Civil Rights history, it being in the forefront of establishing the "modern tradition" of African-American city leadership, as well as the presence of the historically black Atlanta universities. For these reasons and more, the return of the convention to Atlanta is monumental.

Franklin said, "Atlanta played a critical and pivotal role in galvanizing voting power, gaining access to public facilities and institutions, and increasing opportunities for African-Americans. Gate City Bar members, such as the late Donald L. Hollowell and others, attended a National Bar Association Meeting with President Kennedy to discuss the nation's civil rights problems in 1963."

It was also in Atlanta in 1971 that the Judicial Council of the NBA was founded. It was created to give African-American judges across the country a forum by which they could address their unique experiences as people of color serving on courts in America.

"At our founding, it was stated that black judges could have met in a telephone booth," said Fulton County Superior Court Judge Thelma Wyatt Cummings Moore, chair of the Judicial Council Convention Committee and a 30-year member of the Judicial Council. "Upon our founding, it was proclaimed, 'The eyes of American justice can no longer be blinded to the unequal treatment accorded the poor and minorities under the law.'"

The Judicial Council currently represents approximately 1,600 black judges in the United States and foreign countries. "We are


privileged to host the honorable judges of the Judicial Council as we deliberate, fellowship and conduct enlightening educational seminars, all to the end of strengthening of our judicial role in ensuring justice for all," said Judge Moore.

Fulton County State Court Judge Myra Dixon, current chair of the Judicial Section of the Gate City Bar Association, also thinks that the NBA Convention is an important gathering for African-American judges across the nation. "The National Bar Association Convention provides a unique forum for judges throughout the nation to gauge what progress has been accomplished in making 'Equal Justice Under Law' a true reality. It is anticipated that the bench and bar in the various forums will exchange ideas, network and develop solutions in their efforts to resolve relevant issues."

More than 140 African-American judges in Georgia will also play an important role in this year's convention. "As one of the only statewide judicial sections in Georgia, we acutely understand that the NBA Convention presents a tremendous opportunity to gather the best minds in both the legal and African-American communities to discuss relevant and thought-provoking issues of our day. We look forward to what will be an incredible week," said Judge Penny Brown Reynolds, founding chair of the Judicial Section of the Gate City Bar Association.

Avarita L. Hanson, a past president of Gate City, said that history is often made at the National Bar Association conventions. "In Atlanta during the summer of 1982, the Hon. Dennis Archer was elected as president-elect. Archer went on to sit on the Supreme Court of Michigan, serve as the mayor of Detroit, and as the first African-American president of the American Bar Association. He exemplifies the growth and development of African-American

lawyers in the bar and the outstanding contributions of one to his community, state and nation."

Organizers anticipate that Atlanta's reputation as a "mecca" for African-American professionals will play a large part in making this year's conference, not only one of the most well attended, but one of the most successful as well. Most of the NBA activities will take place at the Westin Peachtree Plaza. For registration information, please go to [www.nationalbar.org](http://www.nationalbar.org). 



**Keisha Lance Bottoms** is an Atlanta attorney who serves as a Fulton County Magistrate Judge. She also has worked as a journalist and legal analyst.



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# Diversity Program's Business Development Symposium

by Marian Cover Dockery

**O**n May 2, the State Bar of Georgia Diversity Program launched its second annual business development symposium. Participating companies and municipalities, including Cox Communications, City of Atlanta, United Parcel Service, Genuine Parts and Fulton County, greeted more than 30 minority and women attorneys who were selected by the participants' in-house counsels. During the symposium, held at the Bar Center, the attorneys, who were from both majority- and minority-owned firms, capitalized on this unique opportunity to market their skills to company representatives for future business opportunities.

The registration was free for members of the State Bar of Georgia Diversity Program, but all other attorneys' firms were required to pay a fee, which was determined by the size of their firm. Participating companies who were not members of the Diversity



Photos by Sarah I. Coole and Johanna B. Merrill

Rick Rufolo, Vice President, Legal, UPS, greets Charlena Thorpe, patent attorney for Alston & Bird. Fulton County's Willie Lovett (not pictured) and City Attorney Beth Chandler and Deputy Counsel Jerry DeLoach (not pictured) also met with attorneys during the symposium.

Program or not government municipalities paid a registration fee to participate as well.

## Program Objective

The objective of the program was to "level the playing field" for women and minority attorneys by affording them opportunities to meet in-house counsel. This was beneficial for all firms, since the selec-

tion process is not limited to attorneys who work only at minority firms. The program also afforded companies and municipalities opportunities to identify a population of attorneys who they want to meet, but cannot easily identify. Companies are now seeking more diverse outside counsel, and this is one way for these entities to achieve this goal.

## The Selection Process

More than 50 attorneys registered online this year, completing applications that the company representatives reviewed prior to making their selections. The executive director of the Diversity Program had no input into the selection process. In-house counsel chose attorneys from both minority and majority firms as well as from large firms and solo practices. Company representatives used their own selection criteria, which included an attorney's area of practice, experience, and in some cases, familiarity with a candidate as well as their firms.

These meetings offered no guarantee for future business. Last year, attorneys did secure work as a result of the meetings and we expect the same results this year; however, attorneys did not apply with the expectation that they would be selected, nor did they expect to secure business immediately. Instead, this was an opportunity to develop a relationship with a prospective business client who in the future may consider one of these talented individuals when their skills are needed for legal work.

## Expansion of Future Programs

Next year, the Diversity Program will, previous to launching the online registration, present a panel of company representatives at the State Bar offices, who will meet with attorneys outlining what they look for when reviewing applications. This will also create a forum for attorneys to ask ques-



Chris Galla, Associate Counsel for Genuine Parts Company, poses with Kwame Brown, attorney with Seyfarth Shaw before their meeting at the Diversity Symposium. Attorneys also met with the City of Atlanta, Fulton County, UPS and Cox Communications.



Kwame Brown of Seyfarth Shaw greets Sherrod Dixon of Huff, Powell & Bailey while Eric Burroughs, 2007 law graduate of the University of Tennessee and Gerald Wells of DLJ Piper look on before meeting with Cox's in-house counsel, Marcus Delgado (not pictured).

tions relative to the selection process. This will enhance not only the marketing of this new program, but will also help prospective applicants develop a better understanding of the program's objectives. Be sure to visit our website at [www.gabar.org](http://www.gabar.org) in November 2007 when we announce the details of the 2008 program.

## Networking Reception

Following the meetings, attorneys and representatives engaged in casual conversation at a networking reception. Steering Committee members of the Diversity Program also joined the group to discuss upcoming events including the Summer Associates

and Judicial Reception, which Kilpatrick Stockton will host in June (date to be decided). Also, on Sept. 26, the State Bar of Georgia Diversity CLE and Luncheon, attended by almost 300 attorneys in 2006, will be held at the Bar Center. GBJ



**Marian Cover Dockery** is an attorney with a background in employment discrimination and the executive director of the State Bar of Georgia Diversity Program. For more information on the Diversity Program, go to [www.gabar.org/programs/georgia\\_diversity\\_program](http://www.gabar.org/programs/georgia_diversity_program).

# Life for Sale

## 16th Annual Fiction Writing Competition Winner

by Lisa Siegel

### 16th Annual Fiction Writing Competition

The Editorial Board of the *Georgia Bar Journal* is proud to present "Life For Sale," by Lisa Siegel of Atlanta, as the winner of the 16th Annual Writing Competition.

The purposes of the competition are to enhance interest in the *Journal*, to encourage excellence in writing by members of the Bar and to provide an innovative vehicle for the illustration of the life and work of lawyers. As in years past, this year's entries reflected a wide range of topics and literary styles. In accordance with the competition's rules, the Editorial Board selected the winning story through a process of reading each story without knowledge of the author's identity and then ranking each entry. The story with the highest cumulative ranking was selected as the winner. The Editorial Board congratulates Siegel and all of the other entrants for their participation and excellent writing.

twisted the handle open on the office door. Painted across the smoky pane glass were the words "Fraud Unit." We occupied the corner at the end of the hallway on the first floor of the State Judicial Building—Office of the State Attorney General. But behind the empowering titles were two beleaguered assistant attorneys. Ray "Hawk" Hawkins, a veteran of state government for 28 years (two shy of vested retirement for anyone asking), commandeered the window office with the overheating steam radiators. My office served as both law library and copy room, but it came with its own metal desk and swivel chair. I was one year out of night law school, but first in my class. So I didn't expect much and tried to be grateful. Overhead ancient air ducts filled the confining interior space with the odor of day old coffee grounds and reheated mackerel that seeped in from the break room.

In the early morning hours, the office quiet soothed me. Hawk arrived every day at the last stroke of 9 a.m. From what I could tell he spent most of days chewing on the butt end of an unlit cigar and doing crossword puzzles. In 28 years he'd seen fraud coming every which way but Sunday. But now he admitted to "coasting." He had a clear case of burnout. If he had worked at a silk stocking firm, he'd be getting executive coaching and life balance counseling. Instead he refueled by playing the Friday afternoon dart tournament with the guys in Eminent Domain.

We'd gone through five secretaries and it was only March. Sema, a native of Iran ("Persia" she insisted), came to us from Temp World. She was a transient hire, looking for a full-time position with benefits. However, her lack of typing skills and familiarity with the English language posed a small problem. She made a mean pot of tea in the afternoon, though, so I'd endorsed her with Human Resources. Besides, I preferred typing my own pleadings. It gave me a sense of control in an otherwise chaotic world.

By the time the whole fraud unit assembled for another grinding day, I was on my third cup of Joe. While I swirled the dry compound that Purchasing referred to as "creamer" into my mug, Sema forwarded a call to me.

"Miranda. Caller on two claims she's has been vindlered."

"Swindled," Hawk corrected through his open door.

"You want I should give her number of Insurance Commissioner?"

Sema didn't have English down, but she was a quick study on the inter-workings of state government. She played "pass the buck" with the bravado of a tenured bureaucrat.

"Put her through," I said.

I heard Hawk flipping the pages of his *Daily Report* as I took the call.

Sema announced Mrs. Hilda Moore of Pinesville.

"Honey I don't know where to turn," Mrs. Moore's ancient voice

squeaked from Metamucil overload. I could already hear the death rattle. *Scam artists preying on the elderly again*, I jotted on my yellow legal pad. She continued.

"That nice man Billy Esposito came to see me after I sold my house. Billy used to work at the bank. My late husband—may he rest in peace—did business with him. I moved into a small condo after Mr. Moore died. Anyway, I had a little money left over. Nothing big, mind you. A few hundred thousand..."

I whistled under my breath. I'd heard this before. Billy Esposito knew just where to invest her money. We usually referred these cases to the district attorney. But I kept listening for patience sake.

"He suggested I invest in his brother's business. Insurance investments. The name was Southern Viatical."

I stopped doodling on my legal pad. I hadn't heard that term since the bar exam. Buying death payouts on life insurance policies. Legal, and to date, unregulated. I wasn't first in my class for nothing.

"Billy said not to put all my money in the bank."

"Good bank employee that Billy," I quipped.

"Anyway, he said I should invest it. Money should make money. That sort of thing."

"Make money for Billy and his brother rather," I said.

She paused to hack up some congestion while I waited, cringing.

"He showed me some paperwork on Southern Viatical. Said I could buy the right to be the beneficiary on someone else's life insurance policy. I could use my money to help those less fortunate. People that didn't have long to live. They'd use the money to take a nice vacation or make themselves more comfortable. In turn I'd buy their right to receive the death benefits when they died. Billy said there were only two sure things in life—death and taxes. Well, he was only right about the taxes part. I haven't seen a dime on my investment.



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Billy doesn't return my phone calls. Southern Viatical is registered as a business, but they don't answer their phone either. Just some automated voice directing you to a lot of numbers, but none for people with complaints. I've called everyone I can think of, but I just get the same story. They simply push me onto someone else."

I grimaced at that one. But who could help her? She'd been swindled out of her life savings. The story had been around longer than I had; only the scams changed.

"Can you help me, Miss Plotkins?" Mrs. Moore asked.

I hesitated. The Fraud Unit operated on a shoestring as it was. My redwell folders were bulging and tattered. Five days a week I juggled 64 active investigations. Weekends I did my own filing. The investigator assigned to our unit also handled wrongful deaths for Torts, prisoner abuse for Civil Rights and professional malfeasance for Licensing. He was so overworked he kept a desk in Death Penalty Appeals where no staffers dared to tread. Now old lady Moore from Pinesville thought I was her personal attorney.

"Mrs. Moore. I'm afraid I cannot help you. You need to hire a personal attorney."

"Honey, I can't afford an attorney. Billy took every cent I have. I'm living on \$650 a month in Social Security. I've had two strokes. The eye doctor says I have macular degeneration. And I have very bad feet."

"Perhaps a relative—"

"I don't have anyone left." Her voice cracked as she paused, "Look, I know my money is gone. I know you can't get it back for me. But these people are crooks. You still stop crooks don't you?"

I glanced through the doorway at Hawk who was still penning the crossword in ink. Without looking up, he shook his head.

"Yes, Mrs. Moore, we still stop crooks." *Some of us do that is.* "I'll look into it, but I can't promise you anything."

Hawk boxed his ears and squeezed his eyes shut.

After we hung up, I called out to Sema to open a new file under the heading "Southern Viaticals."

"Spell it," she ordered.

Hawk did it for me. I shot him a quizzical look.

"Just because I don't use it, doesn't mean I ain't got it."

"Whatever," I replied.

He rose from his swivel chair and came into my office where he plopped into a vacant armchair with a ripped vinyl seat covering.

"You may be the brains of this operation, but I've been around longer." He swung his stubby legs onto the end of my desk and crossed his feet. While I stared at the soles of his black lace-ups, he continued, "Viaticals were booming in the late '80s. AIDS cases brought in a whole era of sudden and totally expected death. Viaticals sold those death policies faster than a greased pig at the county fair. Problem was some shysters got to the AIDS patients and clean-sheeted the policy applications. Had them fill out the application as if they'd had a clean bill of health. Then before the ink was dry the viaticals swooped in like the Angel of Death and bought the policies—especially the phony ones."

"What about contesting the claims?" I asked.

"Two year statute of limitations. By the time the insurance companies figured out what was going on, the statute had run," he replied.

"So who made the money?"

"The brokers paid 50 percent on the policy to the real beneficiary. Then they sold the policy to people like little old Mrs. Moore for another upcharge. All perfectly legal by the way. Except for the clean sheeted apps, of course. On those they paid 10 percent on the policy. Guy's dead of AIDS in a few months and the viatical collected the whole benefit."

I bit the end of a roller ball pen and started to make some notes. "So why's Mrs. Moore out her investment?"

"Protease inhibitors."

"The AIDS cure?"

"Not exactly. But death was forestalled to the unforeseeable future."

"And Southern Viatical still had to pay the premiums." I scribbled so fast I couldn't read my own handwriting. Hawk waited.

"So now how do they pay the premiums?" I asked.

"My guess is a Ponzi scheme. They're taking Mrs. Moore's money and using it pay premiums instead of investing for a return."

Suddenly, two interesting frauds appeared on the horizon. Today was starting to look promising. I'd just about exhausted all the fun that could be had in chasing podiatrists for trumped up Medicare reimbursed bunion exfoliations. I shifted in my seat toward Hawk.

"Are you interested in looking into this?"

He shook his bald head. "I got two years to retirement. I officially announced I was coasting last year. Eminent Domain even threw me a party celebrating. I ain't got it in me."

I shrugged. In his day, he had pinched more white-collar criminals than a combined staff of nine trial lawyers. But that was back when Fraud still had some glory days. Now that an insurance fund had replaced governmental immunity, the tort lawyers were the office darlings. I was out of luck if I was ever going to see that side of Hawk Hawkins. He had the bitter look of a man who had swallowed something distasteful, and it still wasn't sitting well with him.

"Okay then. Just tell me what happened to the clean-sheeted applicants. Did anyone serve any time?"

"You think the state was going to round up a bunch of AIDS patients that already had the Grim Reaper knocking at their door? That'd make bad press for the office. Would overwork the prison docs too, no doubt. Nah, we gave our files to the insurance companies. They had their own fraud

units. We let them sort it out. They just raised the premiums for the rest of us schmucks."

"Don't tell me it was the viaticals that made you a permanent cynic?"

"Yep," he said, throwing his legs back to the floor and rising from his chair. "That and the boys in the state legislature that let them do business every day. Well, good luck to you is all's I can say."

I unraveled a paperclip absently. "Luck's about all I get around here," I said to myself.

\$

Billy Esposito climbed the cracked concrete steps of the tenement building in the west end. The smell of burning trash wafted down the alley corridor. A dog wailed from behind a chain link fence. Two thugs sped by in a juiced Impala and flicked a spent cigarette at Billy's heel as they passed. The

screen door opened. A scowling white man with salt and pepper chest hair poking through a sleeveless undershirt stepped outside and spat tobacco juice off the steps.

"Come in," the man said to Billy.

Billy wiped his feet on the tattered mat and entered the dark room. The room stank of stale beer and vomit. Billy swallowed hard and tried to keep from gagging. He offered his hand. "You're Mr. Johnson?" he asked, trying to seem pleasant.

Johnson nodded, and then eyed him with suspicion. After a moment, Johnson motioned to two filthy straight-back chairs in the kitchen—the only room that offered a single-bulb overhead light.

After seating himself at the Formica table, Billy pulled the paperwork and a Mont Blanc pen out of his breast pocket. He slid the papers across the table to Johnson, uncapped the pen, and handed it to him, cap first.

"Where do I sign?" coughed Johnson. Billy smiled again. He'd trained himself to be a smooth professional in all environments, and goodness knows he'd seen some strange places. Still, he felt the insincerity of his forced smile as he clinched his jaws. The man's surly nature clung to him like a bad odor. *I've got to get this signed and get out of here*, thought Billy.

"Well first, Mr. Johnson, you have to answer a few questions." Billy pointed to the row of numbered questions at the top of the insurance application.

"This here?" questioned Johnson, pointing to the top of the row.

"And all the way down."

Johnson read silently. Then he looked up. "How should I answer these? I wouldn't be doing this if I didn't know I was a goner with my liver."

Billy nodded with serious concentration. "I can only tell you if you've given a good or bad answer."

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Johnson shrugged and moved to darken the “yes” circle under question two. From experience Billy knew it read, “Have you been diagnosed with any disorder?”

Billy reached over and touched his arm. “That’d be a bad answer,” he said.

Johnson squinted at him. His eyelids were blue-tinged; and his eyes when open were blood-shot and phlegmy. His voice had the harsh crackle of too many nights spent swilling Tequila and smoking weed.

“How do I know they won’t come here asking questions?” Johnson asked.

Billy crossed his arms against his chest. “The death benefit here is very low. Mutual Life doesn’t ask questions about \$50,000.”

Johnson held the pen over the paperwork. “You got my check?”

Billy patted his breast pocket. “Five thousand,” he assured him.

Outside the dog howled and pawed at its chain link fence. Johnson bent over the paperwork, concentrating as he darkened a string of “no” circles.

After a few minutes, Johnson raised his head. “Whose the beneficiary?”

“Your Aunt Gladys,” said Billy. He was parched, but would never drink a glass of water in this place.

“I don’t have an Aunt Gladys,” he replied.

“Doesn’t matter. In a few weeks you are going to change it to Southern Viatical.”

“Why not put down Southern Viatical? Save me the paperwork.”

“Red flag,” he answered. “We just need this to get stamped ‘approved.’” Billy made air quotes over his head. “Some other department handles the change of beneficiaries.” He pulled another document from his breast pocket. “I brought the Change of Beneficiary form for you to sign today as well. We’ll mail it in for you.”

As Johnson finished the paperwork, Billy felt beads of sweat roll down the back of his starched white shirt. His head throbbed with an oncoming tension headache.

He had recently begun to frequent the halfway houses and tenement dwellings where the drug addicts and alcohol abusers maintained a low residence. He paid \$10 to a 12-year-old foster kid who gave him the names of chronic abusers. Charity Hospital routinely took them in for a detox, a shave and a hot meal. He never imagined that this would get worse than the AIDS epidemic. But it was AIDS that made him greedy.

He and his brother Antonio had set up Southern Viatical in their basement while juggling day jobs in banking and finance. The obit page of the *Daily Report* spawned the idea. Day after day, death announcements of young men took up space in the column usually assigned to the elderly. Antonio understood how the viatical industry worked. He set up the accounting balance sheets while Billy made friends in the gay community. At first it had been too easy. Mutual Life, Benefits Inc., U.S. Indemnity—none of the big insurers raised a head at the claims. He and Antonio got cocky. Billy traded in his Honda Civic for a BMW series. Antonio traded in his wife for a younger model; then he got a Mercedes. They took west coast golf trips, bought tailored suits, paid private school tuition, and relaxed with hot stone massages. The wives had standing facial appointments. The decorator was on speed dial. They were living the good life until the death rate started to slow down.

Outside Billy could barely catch his breath. The stench in the tenement room had nearly done him in. His cell phone buzzed.

“Billy, it’s me,” said his older brother Tony. “Some broad from the State Attorney General’s office is calling. Seems old Mrs. Moore’s been complaining again. I thought I told you to take care of that.”

Billy hesitated. “I never returned her phone calls. I thought she’d be dead by now.”

“Well she’s not dying of old age anytime soon.”

“How do you want me to take care of it?” His voice notched an octave higher with irritation.

“What do we owe her?” Tony asked.

“One hundred and seventy five,” Billy replied.

“Geez Louise,” Tony whistled. “No can do. What other ideas you got? We don’t need lawyers asking questions.”

“What do you want me to do?”

“Get rid of the problem,” Tony said.

Billy coughed. Tony always talked a big game, but he was useless on specifics. “How?”

“I think it’s her time that’s all.”

“Time for what?”

“Time for Mrs. Moore to take a dirt nap,” Tony said.

\$

“You kid? Right?” asked Sema. She was gathering her coat for the end of the day. I had it on good authority that Sema was trying to get hired in Torts as a file clerk. But who could blame her for the chance of getting a benefit package against being our temporary employee?

“Well, I’ve tried to call Mrs. Moore back to do a further intake investigation, but she hasn’t answered the phone. Which is odd, because last week she called every day. I’m driving out to her house after work.”

As we were putting on our coats, Hawk entered the smoky glass pane door. He had returned from the dart tournament a little jazzed. I figured his pockets must be flush, and he was itching to get to Manuel’s for a few brews and another take at the dartboard.

“Hawk. You talk her. She crazy.” Sema grabbed him by the elbow and flailed at his chest with the other hand. She was melodramatic given her nearly certain departure from our unit next week.

He gave me an impatient look. “What’s the matter, Sema? You trying to stop First in Her Class from spending Friday night playing in an online chess match?”

While he chuckled to himself, Sema blurted out, "She driving to old lady's house. One who buys the dead men."

Hawk's face drained of color.

I tossed a nonchalant shrug. "She won't answer the phone."

"Look here. You're going too far."

"You'd have done the same thing in your day."

"Leave my days out of this."

I walked past him with my briefcase in hand. "I'm going."

As he followed me, I tried to keep from smiling. I didn't actually know he'd come, but I'd always hoped he hadn't entirely checked out and turned in his key. "I'm coming with you then," he said.



What frightened me were moments when I didn't know what was on the other side of the door. My life had often been like that as a child. One alcoholic parent. Another battling mental illness. No one knew enough to call it bipolar disorder back then. Closed doors frightened me. Too much silence frightened me. I longed for a world of order over clutter; rules over anarchy; reason over emotion; and the straight narrow path of logical reasoning. I didn't even mind being alone so often in my ordered life. It was being abandoned on the other side of a closed door that could still make me shiver.

My hands shook as I knocked on the door. "Mrs. Moore," I called out.

"God, you've picked a bad time to be timid," Hawk came up beside me and pounded on the door. "State attorneys," he bellowed from behind the wood. The lights inside were dim. A brisk evening wind rustled the elderberry bushes by the front steps.

He gave me a hard look. "Now it ain't like we've got any authority to go busting in. So I suggest you get on the phone there and call the local police."

I was peering through the glass side panes. Two orthopedic shoes pointed toward the low ceiling in

the den. "Oh my God," I called out. "She's on the floor!"

"I'm busting in!" Hawk hurled his body against the door. It didn't budge.

"Move over!" I shouted to him as he nursed his shoulder. I took out a hairpin from my purse and jimmied the lock. "Let's hope she wasn't one for deadbolts." The lock gave and we let ourselves in.

I raced to Mrs. Moore and felt for a pulse. She was cold and stiff. Hawk put a hand to his mouth. "She's been here a few days. I'll call the police."

Something about her lying there made me a shudder again. I had never actually seen death before. I had only feared seeing death. Sometimes I would find one or both of my parents flung across the sofa in a state of intoxicated stupor, fast asleep with their mouth hanging wide open. I imagined that was death; but later in the day they would rouse and struggle to the bathroom to puke. Death never took them; but he was frequently invited to stay for dinner.

Alone with Mrs. Moore while Hawk stepped outside to telephone the Pinesville Police, I bent down to get a closer look. Something about her body disturbed me. I had the overwhelming sensation that she had not expired calmly of heart failure on her way to the kitchen to reheat a can of soup. Her head was bent backwards; and her gray hair lay about the sides of her wrinkled face. The waddle of flesh under her chin was purplish. I pulled back the collar of her shirtdress. Peering closer, I saw markings on her neck from some type of coiled cord. Quickly, I stood up and looked around the room. A black dial phone—without its cord—sat askew on a table by the sofa. Mrs. Moore had been killed. And whoever had done it had used the one thing Mrs. Moore had left in this isolated world. The telephone. Her last connection to a complicated world.

"Hawk," I called as I bolted out the front door where he was stand-

ing on the porch, a cell phone to his ear. "Tell the police it's a homicide." His mouth dropped as I heard the dispatch on the other end call out, "Sir. Sir?"



That Monday morning Attorney General McGarmon gave us subpoena power over the viatical industry. By the way our unit's phone rang off the hook I could tell the fraud unit was having a resurgence of its glory days. Even Sema seemed unsure about finalizing her transfer. But despite the office buzz, Hawk and I had hunkered down in his back office for a game plan. We compared notes from a morning's worth of telephone calls.

"The coroner says a few more days and decomposition would have set in. The marks on her neck would have been impossible to note in an autopsy," Hawk advised, not looking up from his legal pad.

"Somebody knew she didn't have any next of kin to look in on her, I bet."

"And they underestimated our Miss First in Her Class." He looked up at me, grinning finally. I hadn't seen him smile in three days. We'd spent Friday night knocking back beers at a tavern on the south end of the county. Both of us gearing up for what looked to be an ugly investigation. By downing some liquid courage, I guess we thought we could fortify our own limited emotional strength for the task. Not that we admitted it to one another, much less ourselves.

Saturday morning we'd dropped a subpoena on the First Bank of Pinesville to get the records of Mrs. Moore. The sheriff had driven the box of records up to my office that morning.

"Hawk," I interrupted as he was speed-dialing, "Check this out." I passed him the ledger sheets. He studied it while I snapped a No. 2 pencil. While he was reading, I summed it up.

"Last Tuesday she deposited a check for \$5,000 in her checking account."

"Which had been overdrawn," he said, flipping the pages.

"The payor on the check was our friend, Southern Viatical."

He dropped the ledger sheets on his metal desk. "So Mrs. Moore figured out how to get Southern Viatical to return her phone calls."

"Yep. She offered her life for sale."

"Literally." He leaned back in his swivel chair and laced his fingers behind his head.

"What do we do now?" I knew we were on the cusp of a full-throated explosion, but I hesitated to call the first move.

"We drop in on Southern Viatical this afternoon. With a subpoena."

"Sema," I called out from our sanctuary, "Start typing."



Despite Southern Viatical's documented financial struggles, they apparently still kept up their rental payment on prime real estate in the business district of the city. Hawk and I stood in the Grand Lobby of the 1300 Atlantic Plaza Building. Curved oak staircases flowed down to plush Oriental carpets. Sconce lighting on the wood paneled walls illuminated reprints of eighteenth century oil paintings from the Old Masters. Delicately hidden in the back, the elevator banks trilled their passage to the upper regions. Security kept us from going straight up.

"Someone will be down to meet you," said the security guard. Underneath his pressed blue uniform, he had the buff arms of a nightclub bouncer.

An attractive young woman wearing a smartly tailored pantsuit and carrying a clipboard greeted us as she crossed the Oriental carpet.

"Susan Devlin. Southern Viatical," she said, extending her hand.

"Ray Hawkins. Here's a subpoena." He shoved the paper into her

extended palm. "Now if you'll see us upstairs."

She stopped smiling immediately. "I'm sorry I can't do that. You'll have to schedule an appointment."

I intervened. "No. We don't have to schedule an appointment. You have to comply with a subpoena."

She blocked our path to the elevator bank. "I've been instructed by Mr. Esposito to have you wait on our lawyer. He'll be arriving shortly. You'll be very comfortable in the lobby."

Hawk pushed past her, and as he did so, her high-pitched voice called out, "Security!"

Before I could plant my sensible low-heeled shoes on a patch of tile floor leading to the elevator bank, two security guards appeared with whistles and bully clubs. "Hold up," they called from behind. Hawk and I stopped in our tracks.

Hawk flashed his government credentials. Unfortunately, a laminated nametag does not convey the authority of a badge.

"We're here on a subpoena," I said, "State attorney general. And all of you are interfering with a fraud investigation."

A booming baritone hollered from the parking garage entrance. "Stand aside gentlemen and ladies." We all turned in unison as T. Reginald Rowland entered the Grand Lobby. He wore a black cashmere trench coat and a fedora hat. His hair was cotton white, and he flashed a toothy smile. I had seen him before as a talking head on the cable legal shows that I was fond of watching in the evenings. His antics as a criminal defense attorney were legendary. From behind me, I heard Hawk let out a long sigh.

Rowland moved toward Hawk and extended his gloved hand.

"And I was sure they'd retired you by now, ole chap. How's it going?"

Hawk didn't budge with a smile, but he did offer a firm grip to the outstretched hand. "I'd be doing better if I could do my job today," he said.

Rowland turned to the minions clustered around us. "I've got it from here," he said.

"Let me see that subpoena." He took it from the Girl Friday, and she quickly scampered back upstairs.

Rowland removed his reading glasses from his coat pocket and scanned the document.

"Not enforceable," he said. "The state has no jurisdiction over this private company. Licensed to do business in the state, I might add."

"Take it up with the court," said Hawk.

"Violation of the civil rights of the sole shareholders, as well."

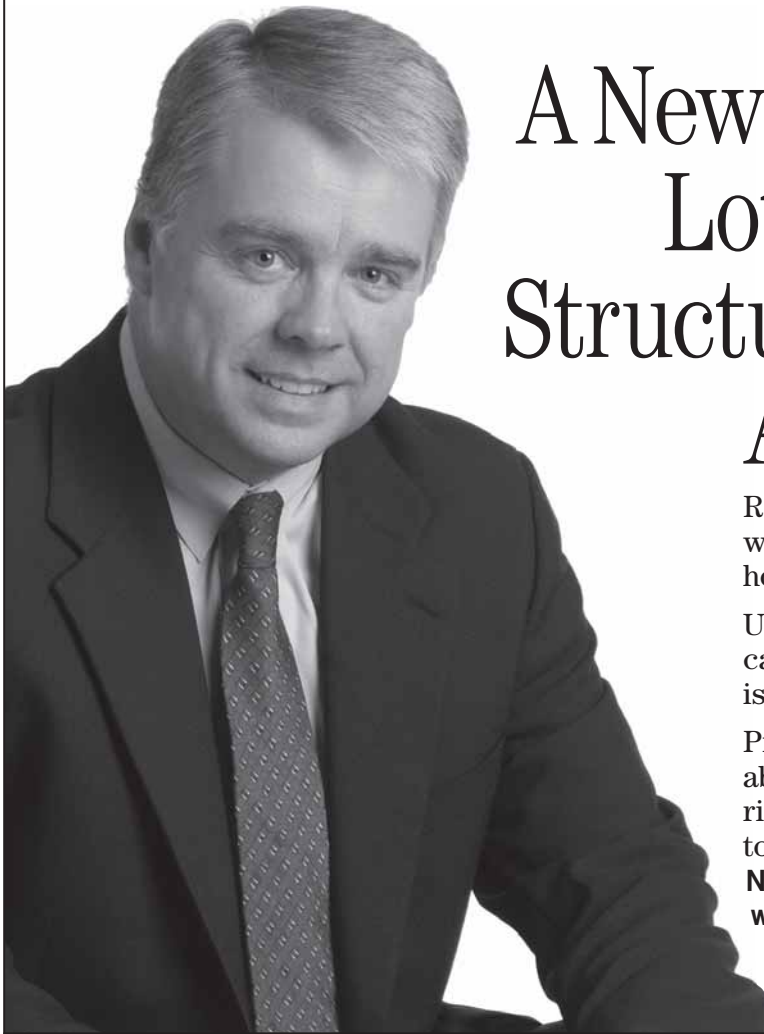
"Cry me a river, Rowland. I'm going upstairs."

"Hawk Hawkins," Rowland called out, sauntering after him. "You move to take any documents out of this building and I will have your job." Then as an afterthought, he turned to look at me. "Both of your jobs."

Hawk turned to stare him down. The two men faced one another in the Grand Lobby. Hawk stood slump-backed, his loose brown suit jacket hanging off his rounded shoulders. Rowland, by contrast, in his tailored cashmere double-breasted trench, had the erect posture of a Citadel graduate.

Hawk leaned toward Rowland, "You need to realize that taking my job is not a threat." With that he turned and motioned me to follow. Rowland flipped his cell phone and held it to his ear. "I'm instructing my clients not to comply," he yelled out to us.

"Show me an order!" called Hawk as entered the elevator. As the doors closed, Hawk let out a tremendous sigh. Then he looked at me and winked. "What's the worst that could happen? Fancy Pants goes to the legislature and keeps Appropriations from raising our salaries for 20 years." He laughed. "Oh, I forgot. They've done that already." I hadn't heard him laugh since I started at the department. For the first time in a long while, I broke into a genuine smile.



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Southern Viatical had a long history of clean-sheeting AIDS patients. But true to form, as protease inhibitors extended their life span, the Espositos moved into new territory. Drunks and drug users.

\$

On the 19th floor of the Atlantic Plaza building, we waited behind the locked office lobby doors of Southern Viatical. With our ears pressed to the polished wood double doors, we could hear the paper shredder ripping it up. Footsteps scrambled back and forth. The Esposito brothers shouted to their underlings. The office telephone line rang repeatedly and no one answered.

When our GBI back up appeared, Attorney General McGarmon came with them. He'd pulled a Death Penalty lawyer off a Supreme Court appeal to handle the emergency motion to quash our subpoena. Plus, some of the guys in Eminent Domain had stayed up all night to review the Mutual Benefits documents—which according to the attorney general were rampant with clean-sheeting fraud. That alone was enough to bust the Espositos even without their blatant document shredding. As we entered the office suite, Attorney General McGarmon personally slapped the cuffs on the Esposito brothers. He'd brought along a *Daily Report* photographer and a reporter to document the moment. Hawk and I stood to the side like a couple of rubber-neckers at a traffic accident.

\$

In the end, we got what we needed. Southern Viatical had a long history of clean-sheeting AIDS patients. But true to form, as protease inhibitors extended their life span, the Espositos moved into

new territory. Drunks and drug users. When that segment of the population proved less than compliant, they started using new investments to pay the premiums on the death policies. People like Mrs. Moore handed their money over, and it went to pay off old debts in a standard Ponzi operation. With the good press generated by that *Daily Report* photo, the attorney general put pressure on the legislature to place viaticals under the regulatory arm of the Insurance Commission. Hawk petitioned for a pay raise for the staff as well, but the Speaker of the House said we were all “getting a little too big for our britches.” Of course, upon the advice of T. Reginald Rowland the Espositos weren't talking. But a secretary they'd hired from Temp World had some interesting testimony about a conversation she'd overheard. Something about “Mrs. Moore taking a dirt nap.”

\$

I was in my office sorting through the detritus of our final investigation when Sema (who was now a permanent hire of the Fraud Unit) called out from her desk.

“Miranda. Virtual Benefits. Something about a tuna fishery.”

I took the call. It was Mutual Benefits calling about a beneficiary.

“Yes, I know Mrs. Moore,” I said. “She filed a citizen complaint with our department a few months ago. I understand she'd recently changed the beneficiary of a life insurance policy she had with Mutual Benefits.” I figured Mutual Benefits would be glad to know

their payout to Southern Viatical would be stalled in the court system indefinitely. I tried to explain the legal ramifications, but the adjuster interrupted me.

“But Southern Viatical is not the named beneficiary, Miss Plotkins.”

I stopped my train of thought for a minute. “Well, there is no Aunt Gladys either, I'm afraid.”

“You don't understand, ma'am.”

“I know it's complicated. Just send us the paperwork.” I started to hang up when she said, “You're the beneficiary.”

“Excuse me?” My voice did a double take.

The woman on the other end continued. “Mrs. Moore did change the beneficiary to Southern Viatical. But the very next day she signed another change of beneficiary form. Our lawyers have reviewed it; and the handwriting matches Mrs. Moore. She named you ma'am. You are Miranda Plotkins, assistant state attorney general?”

After I coughed out a “yes,” she asked me where I wanted the check for \$200,000 deposited.

The thing was—people rarely surprise me. I don't like to think I'm an old cynic like Hawk and the guys in Eminent Domain, but unselfish good gestures were not acts I'd had a great deal of exposure to in my relatively young life. I'd carved out a careful existence for myself. A nice law practice that served my sense of justice. A quiet life undisturbed by the emotional upheavals of husband and children. I lived as a solitary creature; happiest at home with my books, my Irish setter and the remote control. Lonely had always been preferable to opening that door and finding the wrenching havoc on the other side. That one might open that door just a tad and find the kind heart of another lonely soul had not occurred to me.

When I entered Hawk's office, he was on his hands and knees sorting through the paperwork in a backlog of Medicaid fraud cases.

He did a once over when he saw the look on my face.

"What's up First in Your Class? Some silk stocking firm offer you ninety gees?"

"More surprising. I've come into some money."

He looked genuinely pleased. "Well no one deserves that more than you. Where from?"

"Mrs. Moore. Seems she sold her life insurance to Southern Viatical. Took their \$5,000 and executed a change of beneficiary form to them." He nodded, waiting.

"Then the next day she mailed out another form. Naming me as the beneficiary."

He whistled low. "She scammed the scammers."

"Why me, Hawk?"

He studied me carefully. "She knew you were the sort of good person who'd come looking for her if anything ever happened."

"But I'm not. I didn't want to even take her call."

"But you did take her call. You take all the calls."

I sat down in one of his broken armchairs. "I just can't believe she left me that money."


"You can't believe that there are good people still out there in this heartless world. You're all but-toned up, First in Your Class. That's not the worst thing in the world for old-timers like me. But you—you're young—you ought not give up just yet." He rose unsteadily from the floor and took a seat behind his desk. "None of my business. But your life's been on hold. Here's your shot. Go do something. Believe in yourself."

I laughed. "Hang out my shingle. Miranda Plotkins, Attorney at Law. Something like that?"

"Not the most daring proposal I ever heard, but it's a thought."

"Or I could just stay here. Thirty years as state fraud lawyer isn't the worst thing."

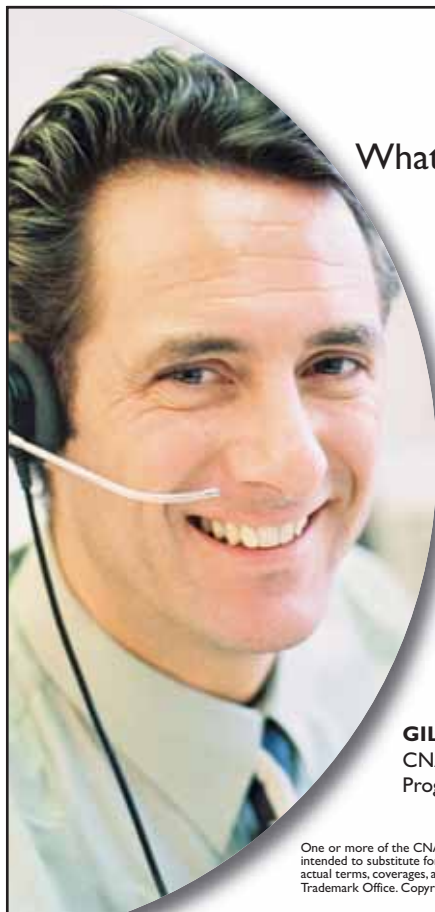
"Well, it's your life," he said.

I left his office and shut the door behind me. For the first time, I felt that the path of my own life might not be such a narrow bridge after all—with a cliff of hazards on both sides. Maybe my life's path was a meandering trail sheltered by live oak trees and the overgrowth of scented vines. I only had to accept a different view. If there's anything this viatical investigation had shown me, it's that all lives have a price tag. And the value on mine was going up. 



**Lisa Siegel** is a former assistant attorney general for the Georgia Department of Law. She is currently in private practice in

Atlanta where she does contract legal writing for attorneys. Her short stories have been published in *Carve Magazine*, the *GSU Review*, the *Emrys Journal*, the *pacificReview*, and the *Pig Iron Press*.



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## Kudos

> **Constangy, Brooks & Smith, LLC**, presented its second annual **Diversity Scholars Award** for the state of Georgia to Emory University School of Law student **Andrea V. Arias**. Constangy initiated the award in order to recognize the achievements of deserving law students and help defray the considerable expense of law school, while promoting diversity in the legal profession.


> **Franklin & Hubbard** announced that **Brooks Franklin** was elected president of the Board of Directors of the Georgia Innocence Project, which exonerates people who have previously been convicted of crimes. The Georgia Innocence Project is a recipient of a grant from the Georgia Bar Foundation.

>  **Susan H. Colussy**, program director for immigration services at Catholic Charities of the Archdiocese of Atlanta, was presented an **Inspiration Award** for "Unsung Devotion to Those Most in Need" by the Emory School of Law Public Interest Committee in February. Colussy has served Catholic Charities for 21 years.

>  The **Atlanta Business League** named **E. Jewelle Johnson** to "Atlanta's Top 100 Black Women of Influence." Johnson is a partner at Fish & Phillips LLP specializing in employment litigation defense.

>   **Kilpatrick Stockton LLP** announced that Intellectual Property partners **Jim Ewing** and **Mitch Stockwell** have been named to the prestigious *International Who's Who of Patent Lawyers 2007*. Ewing focuses his practice on intellectual property strategy, patent litigation and patent portfolio prosecution and management. Stockwell's practice focuses on intellectual property dispute resolution, with special emphasis on patent infringement, trade secret and related intellectual property litigation and licensing transactions.


> **Fish & Richardson P.C.** was recently **ranked No. 1** in IP Law360's survey of the most sought-after patent litigation law practices in the United States. This is the second year that IP Law 360 has conducted its survey and the second time that Fish & Richardson has topped the list.

>  **James P. Kelly III** was appointed by Gov. Sonny Purdue to represent the Sixth Congressional District on the **State Board of Juvenile Justice**. Kelly is the founder and president of the Georgia Community Foundation, Inc., and director of international affairs for the Federalist Society for Law and Public Policy Studies.

> **Rich Kaye** has been named **chair** of the **Atlanta Bar Association International Law Section**. As a leader within the international law practice at Smith Moore LLP and the Atlanta Bar Association, Kaye has been instrumental in international outreach to China.

> **Kilpatrick Stockton LLP** was recognized by the *2007 PLC Which Lawyer? Yearbook* as a leading law firm in intellectual property and labor and employee benefits. The firm also received recognition for its leadership in corporate real estate; corporate/mergers and acquisitions; dispute resolution; finance: banking and debt finance; restructuring and insolvency; and tax. The following Kilpatrick Stockton attorneys achieved special recognition as leaders in their field: **Miles Alexander**, **Joe Beck**, **Bill Brewster**, **John Pratt** and **Jerre Swann** (intellectual property); **Bill Boice** and **Susan Cahoon** (dispute resolution); **Richard Boisseau**, **James Coil** and **William Vesely** (labor and employee benefits); **Tim Carssow** (corporate real estate); **Hilary Jordan** (finance: banking and debt finance); **Alfred Lurey** and **Joel Piassick** (restructuring and insolvency).


> **Sutherland Asbill & Brennan LLP** attorney **David W. Adams** is one of just 40 young lawyers statewide chosen to participate in **The Leadership Academy**, a new mentorship program developed by the Young Lawyers Division of the State Bar of Georgia. The new initiative will match each young lawyer with experienced lawyers and judges throughout Georgia, who will provide them with specialized mentoring in areas that are vital to them becoming effective leaders of the Bar and the state. These areas include Bar activities, the judiciary, professionalism, community and public service, and lawyers as elected officials.


>  **Kilpatrick Stockton LLP** Intellectual Property partner **Joe Beck** was selected by *The Hollywood Reporter, Esq.*, as one of the nation's **top mediation specialists for entertainment disputes**. The publication's inaugural list of power mediators serves as a referral guide to the most influential mediation professionals for entertainment cases based on recommendations by neutral industry professionals.

>  **Nelson Mullins Riley & Scarborough** honored Atlanta associate **Matthew Lerner** with the **Renaissance Associate Award** for outstanding achievement in six categories. The award is given to an attorney who demonstrates achievement in client service, training, pro bono, marketing, recruiting and productivity. Lerner was cited for his work for clients in litigation, product liability and commercial cases. He also was commended for his pro bono work.

> **Kilpatrick Stockton LLP** was recognized by the prestigious *Legal 500 US Volume II* and *Managing IP Magazine*. The firm's intellectual property department was recognized by *Legal 500* in copyright and trademarks/litigation and dispute resolution categories. *Managing IP Magazine* World IP Survey (U.S. firms) ranked Kilpatrick Stockton's trademark prosecution practice among the top 16 firms nationally, and the firm's trademark/copyright contentious practice ranked among the top 10 nationally.

The firm also announced that **Thomson Financial** ranked its mergers and acquisitions practice among the top 20 nationally as published in the Corporate Scorecard of the April 2007 issue of *The American Lawyer*. The firm ranked 14th for the value of deals completed in 2006, which totaled over \$90 billion.

>  **The City of Johns Creek** appointed **William F. Riley** as **city attorney**. Riley, a founding partner in the Marietta law firm of Riley Lewis & McLendon, helped draft the Johns Creek incorporation legislation and represented the Governor's Commission for the city of Johns Creek.

>  **Kilpatrick Stockton LLP** partner **Rupert Barkoff** was once again named a *Legal Eagle* by the leading publication *Franchise Times*. Barkoff was chosen as one of the franchise attorneys considered "the rainmakers; the go-to-lawyers; the ethical problem solvers who are respected by their peers, adversaries and clients alike."

## On the Move

### In Atlanta

> **James K. Creasy** and **Lucian Gillis Jr.** announced the formation of **Gillis & Creasy, LLC**. The firm will concentrate on business, tort and insurance litigation and real estate transactions. The firm is located at 2 Ravinia Drive, Suite 270, Atlanta, GA 30346; 770-394-3127; Fax 770-394-3117; [www.gilliscreasy.com](http://www.gilliscreasy.com).

## Georgia Bar Foundation Awards \$400,000 Emergency Grant to the Georgia Legal Services Program

by Len Horton

On April 11, at the Board of Governors meeting of the State Bar of Georgia, Georgia Bar Foundation President Rudolph Patterson presented a check for \$400,000 to Phyllis Holmen, executive director of the Georgia Legal Services Program.



Georgia Bar Foundation President Rudolph Patterson presents a check for \$400,000 to Phyllis Holmen, executive director of the Georgia Legal Services Program.


"The Georgia Bar Foundation has always tried to be there for our grantees when they have an emergency," said Patterson. "I am pleased that we could provide urgent funding in time to prevent the loss of additional legal talent so badly needed to serve the legal needs of Georgia citizens outside the Atlanta area." The money will be used to retain lawyer positions either laid off or scheduled to be laid off.


In accepting the award, Holmen said, "This major sum will make a significant difference in our ability to serve Georgia's poor who reside outside the Atlanta area. We will put the money to good use."



The award followed a suggestion by Patterson, newly appointed member of the State Bar of Georgia's GLSP Funding Task Force, chaired by Lamar Sizemore. In a comment to the committee, Patterson said that, if GLSP's need for funding is so urgent that it can be convincingly documented as an emergency, then Holmen should apply for an emergency grant award from the Georgia Bar Foundation in accordance with the Bar Foundation's emergency grant application procedure. Holmen was also asked to discuss this matter with Steve Gottlieb, executive director of Atlanta Legal Aid, to make sure that he had no objection to it. Gottlieb had no objection, and both Gottlieb and Holmen agreed that this is a one-time possible grant award and that any future funding awards from the Georgia Bar Foundation will continue to be divided as in the past between the two programs in accordance with the poverty population in each service area. The vote on the grant application was unanimous.

The Georgia Bar Foundation is the named recipient of Interest On Lawyer Trust Account (IOLTA) funds by order of the Supreme Court of Georgia. Interest from IOLTA accounts supports a number of law-related programs throughout the state of Georgia.


> **Schiff Hardin LLP** added **Robert E. Lesser** and **Preston C. Delashmit** as **partners** and **Randolph R. Smith Jr.** and **Danielle R. Doerhoff** as **associates** in the employee benefits and executive compensation group and corporate securities group. The four join the firm from Epstein Becker & Green, PC, where Lesser and Delashmit were partners and Smith and Doerhoff were associates. Lesser has a general corporate focus with an emphasis on the design and implementation of employee stock ownership plans (ESOPs). Delashmit focuses on corporate, securities and venture financing, with an emphasis in mergers and acquisitions. Smith focuses on corporate and securities, mergers and acquisitions, and international business transactions. Doerhoff focuses on corporate and securities with an emphasis on ESOP-related transactions and financings. The firm's Atlanta office is located at One Atlantic Center, Suite 2300, 1201 W. Peachtree St. NW, Atlanta, GA 30309; 404-437-7000; Fax 404-437-7100; [www.schiffhardin.com](http://www.schiffhardin.com).

>  **Buckley & Klein LLP** announced that **John F. Beasley Jr.** is now **of counsel** to the firm. Beasley specializes in the representation of employees in both the public and private sectors. Buckley & Klein is located at Atlantic Center Plaza, 1180 W. Peachtree St., Suite 1100, Atlanta, GA 30309; 404-781-1100; Fax 404-781-1101; [www.buckleyklein.com](http://www.buckleyklein.com).

>  **Parker, Hudson, Rainer & Dobbs LLP** announced that **Arnold C. Moore Jr.** has joined the firm's commercial real estate team as **of counsel**. Moore's practice focuses on the development and financing of office, retail, hotel and mixed-use projects. 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](http://www.phrd.com).

>   **Julye Johns** and **Rod Dixon** were named **partners** of **Huff, Powell & Bailey, LLC**. Johns focuses her practice on healthcare litigation and the defense of professional liability lawsuits. Dixon focuses his practice on civil litigation, with particular emphases in the areas of medical malpractice defense, general tort and personal injury litigation, employment litigation and products liability.

The firm's office is located at 1355 Peachtree St., Suite 2000, Atlanta, GA 30309; 404-892-4022; Fax 404-892-4033; [www.huffpowellbailey.com](http://www.huffpowellbailey.com).

>  **Antavius M. Weems** announced the formation of **The Weems Firm, P.C.** The new firm will focus on civil litigation and trial practice, construction law, family law and real estate. Weems served as a prosecutor for the city of Atlanta, and most recently sat as a child advocate attorney for nearly four years at Fulton County Juvenile Court. The office is located at 260 Peachtree St., Suite 2200, Atlanta, GA 30303; 770-621-7755; Fax 770-621-7760; [www.theweemsfirm.com](http://www.theweemsfirm.com).

>   **Schulten, Ward & Turner** added an **environmental law section** headed by **Martin A. Shelton** and aided by **Holly P. Cole**. Shelton's practice areas primarily focus on environmental litigation as well as environmental compliance concerns. He also aids clients who need assistance with compliance and enforcement issues connected with governmental agencies such as state and federal environmental protection agencies. Since 2000, Cole has practiced environmental and land use law in private practice, as well as at the Southern Environmental Law Center and the Henry County State Court Office. The firm is located at 260 Peachtree St. NW, Suite 2700, Atlanta, GA 30303; 404-688-6800; Fax 404-688-6840; [www.swtlaw.com](http://www.swtlaw.com).

> **Robert J. Muething** joined **Schiff Hardin LLP** as a **partner** in the tax group. Prior to joining Schiff Hardin, he was a partner at Hunton & Williams. Muething focuses on federal income taxation matters. The firm's Atlanta office is located at One Atlantic Center, Suite 2300, 1201 W. Peachtree St., Atlanta, GA 30309; 404-437-7000; Fax 404-437-7100; [www.schiffhardin.com](http://www.schiffhardin.com).

> **Hall Booth Smith & Slover, P.C.**, announced that State Representative **Michael J. Jacobs**, D-Atlanta, joined the firm's business transactions and litigation practice group. Jacobs was recently re-elected for his second term in the General Assembly. Prior to joining HBSS, he worked as a litigator with the firms of Alston & Bird and Krevolin & Horst. The firm's Atlanta office is located at 1180 W. Peachtree St. NW, Atlantic Center Plaza, Suite 900, Atlanta, GA 30309; 404-954-5000; Fax 404-954-5020; [www.hbss.net](http://www.hbss.net).



Haunson

Jones

Roth

**Howell Haunson, Jackson Jones and Keri Mason Roth** were named **partners** of **Morris Hardwick Schneider**. Haunson joined the firm in 1986. In addition to his new role as partner, he will continue serving as vice president of LandCastle Title and director of education. Jones joined the firm in 2004 and has extensive experience handling residential real estate closings, with an emphasis on investment transactions. Prior to his promotion, he served as managing attorney for the firm's Buckhead office. Roth joined the firm in 2001. She focuses her practice on residential real estate transactions and REO work. The firm's support services office is located at 7000 Central Parkway, Suite 1220, Atlanta, GA 30328; 678-298-2100; Fax 770-804-9643; [www.closingsource.net](http://www.closingsource.net).



**Richard W. Bell** joined the tax department of **Baker, Donelson, Bearman, Caldwell & Berkowitz, PC**, as **of counsel**. Formerly, Bell was senior tax counsel for BellSouth Corporation. The firm's Atlanta office is located at Six Concourse Parkway, Suite 3100, Atlanta, GA 30328; 678-406-8700; Fax 678-406-8701; [www.bakerdonelson.com](http://www.bakerdonelson.com).



**Needle & Rosenberg P.C.** announced the promotion of **Kean J. DeCarlo** to **shareholder**. DeCarlo, who was previously an officer at the firm, leads the firm's mechanical patent and medical device practice groups. The firm's Atlanta office is located at 999 Peachtree St., Suite 1000, Atlanta, GA 30309; 678-420-9300; Fax 678-420-9301; [www.needlerosenberg.com](http://www.needlerosenberg.com).



**Clark Sullivan** joined **Arnall Golden Gregory LLP** as a **partner** in the firm's healthcare/life sciences practice. Sullivan is a patent lawyer and primarily represents pharmaceutical and life sciences companies. The firm is located at 171 17th St., Suite 2100, Atlanta, GA 30363; 404-873-8500; Fax 404-873-8501; [www.agg.com](http://www.agg.com).



**Alembik, Fine & Callner, P.A.**, announced that **Seth A. Litman** and **Charla E. Stawser** have been made **stockholders** and **Leslie J. Suson** and **Kynna M. Duncil** have been made **associates** with the

## Government in Action

Bar Association Hosts the Court of Appeals



(Left to right, standing): Judge Bob Ruppenthal, Judge Fletcher Sams, District Attorney Scott Ballard, Sheriff Randall Johnson, County Clerk Shelia Studdard, Judge Johnnie Caldwell, Commissioner Jack Smith, Judge Chris Edwards, Judge Charles S. Murray, Jason B. Thompson (President, Fayette County Bar Association), Christy Dunkelberger (Fayette County Bar Association), Judge Martha Stephenson. (Left to right, sitting): Judge Herbert Phipps, Judge Ed Johnson, Judge Charles Mikell (Georgia Court of Appeals).

On April 18, the Fayette County Bar Association hosted the Court of Appeals for a session of court in front of 750 local students, judges, attorneys and members of the Fayette County community.

This program was born from an idea presented by Chief Judge Anne Barnes at a local bar association meeting in 2006. When the Fayette County Bar Association learned that the Court of Appeals has been known to hold sessions of court outside, the local bar leadership decided to create an educational environment so that the local students could see "government in action," according to Jason B. Thompson, president of the Fayette County Bar Association.

Partnered with the Fayette County Board of Education, the local bar association hosted over 600 high school government students to witness the court session. Prior to attending, the students and their teachers reviewed the briefs that were to be argued. After the court session, the Fayette County Bar Association hosted a luncheon for Judges Ed Johnson, Herbert Phipps and Charles Mikell of the Court of Appeals.

firm. The firm is located at 303 Peachtree St. NE, SunTrust Plaza, 37th Floor, Atlanta, GA 30308; 404-688-8800; Fax 404-420-7191; [www.afclaw.com](http://www.afclaw.com).

>



McClusky



Lambremont

**Little Mendelson** announced that former associates **Charlotte McClusky** and **Jack Lambremont** were named **shareholders** to the firm. McClusky's practice focuses primarily on federal employment discrimination litigation. Lambremont represents and counsels management clients in connection with all types of labor and employment matters arising under federal and state law. The firm's Atlanta office is located at 3348 Peachtree Road NE, Suite 1100, Atlanta, GA 30326; 404-233-0330; Fax 404-233-2361; [www.littler.com](http://www.littler.com).

>



**Lord, Bissell & Brook LLP** announced that **Philip A. Cooper** joined the firm as a **partner**. Cooper, formerly with McKenna Long & Aldridge, concentrates his practice on general corporate counseling, mergers and acquisitions, joint ventures and commercial financings. The firm's Atlanta office is located at The Proscenium, Suite 1900, 1170 Peachtree St. NE, Atlanta, GA 30309; 404-870-4600; Fax 404-872-5547; [www.lordbissell.com](http://www.lordbissell.com).

## In Alpharetta

>



Kass



Seidler

**Meriwether & Tharp LLP** announced that **Sarah L. Kass** and **Rena K. Seidler** joined the firm as **associates**. The office is located at 3560 Old Milton Parkway, Alpharetta, GA 30005; 678-879-9000; Fax 678-879-9001; [www.mtlawoffice.com](http://www.mtlawoffice.com).

## In Brunswick

>

**Gilbert, Harrell, Sumerford & Martin, P.C.**, named **Chase LeRoux** and **Jay Roberts** as new **partners** of the firm, and **Deborah Pond** as **of counsel**. LeRoux focuses on residential real estate closings and commercial real estate transactions. Roberts is a member of the firm's litigation and governmental practice groups. Pond is in the firm's corporate practice group. Before joining the firm, she was an associate in the litigation group at Troutman Sanders in Atlanta. The firm's Brunswick office is located at Bank of America Plaza, 777 Gloucester St., Suite 200, Brunswick, GA 31520; 912-265-6700; Fax 912-264-3917; [www.gilbertharrellllaw.com](http://www.gilbertharrellllaw.com).

## 2007 Solo and Small Firm Lifetime Achievement Award



The American Bar Association General Practice, Solo & Small Firm Division awarded Charles J. "Chuck" Driebe the 2007 Solo and Small Firm Lifetime Achievement Award during its Spring meeting in Washington, D.C. The award recognizes

exceptional achievement by a solo practitioner who has consistently achieved distinction.

Driebe was president of the Younger Lawyers Section when the State Bar of Georgia was unified in 1964. In 50 years as a member of the Bar, Driebe has served as the conscience of the solo/small firm practitioner on a variety of committees, including the Board of Governors, the Georgia Bar Foundation, the Disciplinary Rules & Procedures Committee, the Judiciary Committee and the Formal Advisory Opinion Board.

## In Camilla

> **Patrick N. Millsaps** announced the opening of **The Millsaps Law Firm**. Millsaps will continue to operate a general practice country law firm and serves as local counsel in the South Georgia region for many Atlanta based lawyers. The firm is located at 76 E. Broad St., Camilla, GA 31730; 229-336-7425; Fax 229-336-9587; [www.camillalaw.com](http://www.camillalaw.com).

## In Conyers

>



D. Wood



M. Wood

**David A. Wood** and **Maureen E. Wood** announced the opening of the **Law Offices of Wood & Wood, LLP**. The firm specializes in commercial and residential real estate closing transactions, foreclosures, landlord/tenant law, family law, estate planning, contracts and general civil litigation. The firm is located at 1080 Iris Drive SW, Suite 201, Conyers, GA 30094; 678-509-1191; Fax 678-509-1192; [www.woodandwoodllp.com](http://www.woodandwoodllp.com).

## In Decatur

> **Laurel E. Henderson**, formerly of Laurel E. Henderson, P.C., in Decatur, and **Kelly Michael Hundley**, formerly a partner with Elarbee,

Thompson, Sapp & Wilson, LLP, in Atlanta, announced the formation of **Henderson & Hundley, P.C.** The firm focuses on representing government entities on all facets of liability issues as well as representing private parties on labor and employment matters and commercial litigation. The firm is located at 315 W. Ponce de Leon Ave., Suite 912, Decatur, GA 30030; 404-378-7417; Fax 404-378-7778.

- > **Mawuli Mel Davis** and **Robert O. Bozeman** have formed **The Davis Bozeman Law Firm**, focusing on personal injury, criminal defense and wrongful death claims. The firm is located at 4153 Flat Shoals Parkway, Building B, Suite 204, Decatur, GA 30034; 404-244-2004; Fax 404-244-2020; [www.mawulidavis.com](http://www.mawulidavis.com).

### In Lawrenceville

- > **Jammie Taire** announced the opening of the **Law Office of Jammie Taire, LLC**. The firm's practice areas include family law, wills and probate, collection and landlord/tenant. The office is located at 600 S. Perry St., Lawrenceville, GA 30045; 770-682-3066; Fax 770-682-3065; [www.tairelaw.com](http://www.tairelaw.com).

### In Saint Marys

- > **Charlie Smith** and **Jan Mallory**, formerly of Smith & Floyd, P.A., have joined **Gilbert, Harrell, Sumerford & Martin, P.C.**, as of counsel. Smith concentrates his practice in commercial and residential real estate, business law and estates. Mallory is a member of the real estate practice group. The firm's Saint Marys office is located at 1815 Osborne Road, Saint Marys, GA 31558; 912-882-5678; Fax 912-882-3758; [www.gilbertharrellllaw.com](http://www.gilbertharrellllaw.com).

### In Chattanooga, Tenn.

- >  **Clifton R. Henry** joined **Miller & Martin PLLC** as an associate. He previously worked with Gilbert, Harrell, Sumerford & Martin, P.C., in Brunswick. Henry concentrates his law practice in the areas of real estate development, commercial lending and environmental law. The firm's Chattanooga office is located at Suite 1000, Volunteer Building, 832 Georgia Ave., Chattanooga, TN 37402; 423-756-6600; Fax 423-785-8480; [www.millermartin.com](http://www.millermartin.com).

## 2007 Georgia Super Lawyers

Georgia Super Lawyers is published in *Atlanta Magazine*, which has a readership of 255,000, and Georgia Super Lawyers, which is mailed to Georgia attorneys, the lead corporate counsel of the Russell 3000 companies and the ABA-approved law school libraries, for a total readership of 29,000. Super Lawyers names Georgia's top lawyers as chosen by their peers and through the independent research of *Law & Politics*. 2007 Georgia Super Lawyers is based on the survey of more than 23,000 attorneys across the state.\*

### Chamberlain Hrdlicka

David D. Aughty  
Gary S. Freed  
Thomas E. Jones Jr.

James M. Kane  
William D. Montgomery  
Jimmy L. Paul

### Fisher & Phillips LLP

D. Albert Brannen  
F. Kyrle Frye III  
Christine E. Howard  
David R. Kresser

Ann Margaret Pointer  
Roger Quillen  
Thomas P. Rebel  
John E. Thompson

### Kilpatrick Stockton LLP

Miles Alexander  
William Barkley  
Rupert Barkoff  
Joseph Beck  
Stanley Blackburn  
James Bogan III  
William Boice  
Richard Boisseau  
William Brewster  
Susan Cahoon  
Tim Carsow  
Richard Cheatham  
Steve Clay  
James Coil III  
Brian Corgan  
Kimbrough Davis  
Theodore Davis Jr.  
Scott Dayan  
Randy Eaddy  
James Ewing IV  
Lynn Fowler  
Peter Glass  
Jamie Greene  
Randall Hafer  
Richard Hankins

Joseph Henner  
Richard Horder  
Hilary Jordan  
M. Andrew Kauss  
Larry Ledbetter  
Alfred Lurey  
Suzanne Mason  
Dennis Meir  
Todd Meyers  
George Murphy Jr.  
Matthew Patton  
Mindy Planer  
William Poplin Jr.  
John Pratt  
Diane Prucino  
Susan Richardson  
Paul Rosenblatt  
Debra Segal  
George A. Smith  
David Stockton  
Neal Sweeney  
Earle R. Taylor III  
Virginia Taylor  
William Vesely Jr.  
David Zacks

### Needle & Rosenberg P.C.

Jeffrey H. Brickman  
Gregory J. Kirsch  
William H. Needle

Lawrence K. Nodine  
David G. Perryman  
Sumner C. Rosenberg

### Nelson Mullins Riley & Scarborough

Richard B. Herzog  
Stanley S. Jones Jr.  
Caroline C. Kresky  
Wade S. Malone  
Kenneth L. Millwood

Kamyar Molavi  
Daniel M. Shea  
Anita W. Thomas  
Charles D. Vaughn

*\*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 Georgia Bar Journal.*

# Not Grounds for Discipline

## Filing a Claim That Turns Out to Be Unfounded

by Paula Frederick

“Judge Morefield will never trust me again,” you moan, cringing at the memory of your latest in-court debacle. “I can’t believe I fell for that ‘poor abused little me’ performance by Mr. Jones! Everything in my petition for TPO turned out to be a lie. He pretty much admitted it after the hearing.”

“Well, Jones did seem terrified when he came in this morning,” your partner reminds you. “And how were you to know those scratches on his face were from a bad shaving job and not from an abusive ex?”

“Yeah, but imagine how I felt at the hearing when his ex-wife’s lawyer introduced the records from the previous cases! He’s got multiple stalking convictions, and there’s already a protective order in place against him. I could tell by the way Judge Morefield was looking at me that he thought I was trying to put something over on him. When I think about all the misstatements in the petition that I signed—the judge will probably report me to the Bar for lying to the court.”


“I’m pretty sure you haven’t done anything wrong,” your partner reassures you. “You really thought you were dealing with an emergency! All of us fell for it! We thought we were ensuring Jones’ safety by getting him a TPO.”

Bar Rule 3.1 prohibits a lawyer from filing a claim that is unwarranted, or that would serve merely to harass another. Because the ethics rules prohibit a lawyer from filing a pleading that she knows contains false information, a lawyer’s signature on a pleading is generally considered a representation that the contents of the document are true, so far as the lawyer can determine.

What should a lawyer do when there isn’t time to verify the client’s claim?



Formal Advisory Opinion 87-1, “ethical propriety of filing a lawsuit in order to be within the statute of limitations, but before sufficient information is acquired to determine if a legitimate cause of action exists,” provides guidance for these situations.

The opinion clarifies that the mere act of filing a claim that later turns out to be unfounded is not grounds for disciplinary action. Once the lawyer determines that the lawsuit has no merit, the opinion suggests that the lawyer should dismiss the lawsuit with the client’s permission. If the client refuses to permit the dismissal, the lawyer must withdraw from the representation in order to avoid a possible violation of Rule 3.1. 



**Paula Frederick** is the deputy general counsel for the State Bar of Georgia and can be reached at [paula@gabar.org](mailto:paula@gabar.org).

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Pledge payments are due by December 31st. Pledges of \$500 or more may be paid in installments with the final installment fulfilling the pledge to be paid by December 31st. Significant gifts will be included in the Honor Roll of Contributors in the Georgia Bar Journal.

# Discipline Summaries

(Feb. 15, 2007 through April 12, 2007)

by Connie P. Henry

## Suspensions

### Femi Gbaja

Surulere, Lagos, Nigeria  
Admitted to Bar in 2001

On Feb. 26, 2007, the Supreme Court of Georgia ordered that Femi Gbaja (State Bar No. 288330) be suspended from the practice of law for 36 months. In his Petition for Voluntary Discipline, Gbaja requested the imposition of a 24-month suspension but would accept a suspension of up to 36 months. Gbaja accepted payment of \$25,000 as settlement of a client's personal injury claims, deposited those funds in his attorney trust account in January 2003, failed to promptly disburse those funds to his client, withdrew those funds for his own use, closed his practice and moved out of the country. Gbaja ultimately paid the \$25,000 to his client in 2006. In mitigation of discipline Gbaja cooperated fully with disciplinary authorities, repaid his client and is extremely remorseful.

### Robert N. Wilson Jr.

Ayer, Mass.  
Admitted to Bar in 1994

On March 26, 2007, the Supreme Court of Georgia ordered that Robert N. Wilson Jr. (State Bar No. 768995) be suspended from the practice of law in Georgia until he has been reinstated to the practice of law in Massachusetts. Wilson assented to the suspension of his law license in the Commonwealth of Massachusetts for unspecified conduct. Wilson acknowledged service of the Notice of Reciprocal Discipline but did not object in any way.

## Suspension and Public Reprimand

### Eric Robert Johnson II

Atlanta, Ga.  
Admitted to Bar in 2003

On Feb. 26, 2007, the Supreme Court of Georgia ordered that Eric Robert Johnson II, (State Bar No. 393410) be suspended from the practice of law for 30

days with conditions and be administered two public reprimands.

In March 2005 Johnson was working as an assistant public defender in DeKalb County, but represented two clients in separate criminal matters in DeKalb Records Court and accepted payments from both. He failed to inform either client that she might be eligible for a court-appointed public defender or inform the judges hearing the matter that he was appearing in a private capacity rather than as public defender. He also failed to inform his superiors of the representations, and was terminated from his employment because of these actions. The Court ordered that Johnson be suspended for 30 days, receive a public reprimand, and that his reinstatement be conditioned upon providing proof that he has refunded to both clients the fees received.

In a separate case, the Court ordered that Johnson be administered a public reprimand because he took no remedial measures after learning that a client had testified falsely.

## Public Reprimand


### James Franklin Taylor

Mt. Carmel, Tenn.  
Admitted to Bar in 1997

On March 26, 2007, the Supreme Court of Georgia ordered that James Franklin Taylor, (State Bar No. 700241) be administered a public reprimand as reciprocal discipline based on his receiving a public censure in Tennessee. Taylor acknowledged service of the Notice of Reciprocal Discipline, but did not object in any way. Taylor was paid \$3,700 to represent a client on aggravated assault charges. The fee contract provided that if the "services of the attorney are terminated or dispensed with for any cause other than the attorney's inability to perform the fee paid remains deemed earned and no part returned. If some unforeseen event should develop which prevents the attorney from continuing to represent the client, such portion of the fee

paid that exceeds services rendered shall be returned. . ." Taylor appeared at a bond reduction hearing, filed a motion for discovery, arranged for a transcript, secured a plea deadline date, and negotiated a plea offer. The client rejected the plea and insisted upon going to trial. Taylor withdrew and did not refund any fees. Taylor stated his reason for withdrawal was the client's dissatisfaction with his services and claimed he was entitled to keep the entire fee. The client claimed that Taylor did not respond to his letters or calls. The Tennessee Board of Professional Responsibility concluded that Taylor was obligated to allow the matter to proceed to trial, even if that was against his advice.

### 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 Feb. 14, 2007, one lawyer has been suspended for violating this Rule, and three lawyers have been reinstated. 



**Connie P. Henry** is the clerk of the State Disciplinary Board and can be reached at [connie@gabar.org](mailto:connie@gabar.org).

If you have any questions, or would like information about an attorney's public disciplinary history, please contact the Office of the General Counsel at 404-527-8720.

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# 20 "Secret" Services Offered by Law Practice Management

by Natalie Thornwell Kelly

**E**ven though the Law Practice Management (LPM) Program has been around for more than 12 years, some members don't know much about many of the services LPM offers. I hope this article will pull back the curtain to expose some of the most underutilized and interesting things our members can take advantage of right now.

## Free Online Practice Management Forms

Practice management forms for case review and management, as well as operational forms for financial management and the like are all available under the LPM Program area of the Bar's website. Just look for the Sample Forms listing area under Programs/Law Practice Management at [www.gabar.org/programs](http://www.gabar.org/programs).

## Online Tip and Website of the Week

We are always hearing about or finding interesting websites and tips. Like [www.technorati.com](http://www.technorati.com) or Edit/Paste Special for word processing. We offer tips and sites like these weekly online. Go to the Law Practice Management area of the Bar's website for these at [www.gabar.org/programs](http://www.gabar.org/programs).

## eNewsletter

LPM offers eSource, our online newsletter. Published quarterly, it contains detailed articles on topics of interest in law practice management and you can even discover what the department is accomplishing and the resources we have acquired or reviewed. Look for our e-newsletter online under Law Practice Management at [www.gabar.org/programs](http://www.gabar.org/programs).

## Online Law Practice Management Discussion Board

This is probably the number one underutilized service of our department. Under the *Members Only* area of the Bar's website there is a discussion board for law practice management issues and concerns. You can visit to see discussion threads and subscribe to e-mail notifications of new posts to the board. If you are interested in leading certain topics, or just have a quick question, make use of our online discussion board.

## Management Issue Research

Ever wonder what the appropriate ratio of lawyers to staff should be or what percentage of your budget should be allocated for training or even how to set up a budget for your office? Our staff can research these and any other issues you have and give you some assistance. While the research is focused on practice management concerns (we do not provide legal advice), we can usually point you in the right direction if we do not have specific answers for you. Give us a call or send us a fax or e-mail with any of your management issues.

## Discounted Products and Services Through the ABA

Many State Bar of Georgia members are not American Bar Association (ABA) members. However, our Bar members can get discounts via the ABA on many products and services as if they were ABA members. For instance, IBM and Dell are both ABA Member Advantage members and the discounts that they offer are for the full legal community, not just ABA members. Georgia is also usually signed up as a Program Promoter for ABA Techshow. Members can use a special code for discounted registration to this nationally recognized conference.

## Discounted ABA Books

The LPM Program participates in an ABA Book Distributorship Program that allows State Bar of Georgia members to purchase ABA books and online resources at a discount. Members can go onto the ABA Webstore and order discounted materials with the Georgia code: PAB5EGAB.

## Quote/Proposal Review

If your firm gets a quote for hardware or services, you can send us a copy. We can review it for completeness and competitiveness in terms of pricing and service.

## Hands-on Computer Training Courses at the Bar Center

On a regular basis, our staff conducts training at the Bar Center on specific legal practice management, time billing and legal research products. You can currently sign up for training on TimeMatters, Amicus Attorney and Casemaker. The full schedule and registration information is available on the Bar's website.

## Free Office Start Up Advice and Resources

Members can get a free office start-up kit and make an appointment with our staff to review their business plan. Even members looking to go into partnership can take advantage of this free assistance.

## Technology Plan Review

If you are wondering whether or not to upgrade, what software you should be using or how to go paperless, we can work with you in analyzing your technology needs. From looking at the appropriate infrastructure to getting assistance with website design to purchasing software, we can help with every aspect of your technology planning.

## Software Demonstrations

The LPM software library is a collection of programs that are available for review in our offices. Members can set an appointment to review many of the programs with

the guidance of a staff consultant. This free service is helpful for members looking to make a decision about purchasing software.

## Discounted Legal Specific Software

For those products that we have a certified consultant, we offer discounted pricing direct from the vendor to members who are choosing to utilize our onsite technical consulting services. So if you have seen a demonstration of a product or service for which you plan to both purchase and receive training, you can use this discount.

## Computer Training in Your Office

Technical consultations are set up for Bar members who pay a discounted fee to the LPM Program for training on several legal specific programs. The LPM staff uses a certified consultant for the products on which it trains.

## Review/Audit of Your Office

General consultations are onsite visits that result in a written report of ways to enhance and improve your practice. Consultations are available by member request and are confidential. The general topics covered are office operations, marketing, financial management and any other self-identified concerns.

## Trust Accounting Booklet

We publish a booklet on how to set up and maintain trust accounts. This complimentary booklet is available by request, and is also included in the office start-up kit. The booklet also includes a copy of the Notice to Financial Institution form that is needed by your bank to set up the trust account. Contact us for copies.

## Local CLE/General Programs

We will work with all of the local and specialty bars and groups to provide both CLE and non-CLE programming. We can visit and participate in any educational programs you provide. Contact us to

make arrangements. (We can even make special arrangements for law firms and legal departments.)

## Casemaker


Casemaker is free for all Bar members, and LPM offers guidance with any questions you have about this online legal research tool. The Casemaker helpline and training are also offered to you free of charge at the Bar Center by our staff.

## Online Vendor Directory

Our staff maintains the Bar's online vendor directory who offer products and services in the legal arena. Many of these vendors provide discounts to all members. If you are using a service or product that you think should be in the directory, please let us know.

## Resource Library

Books, videos, CDs and DVDs are available for a two-week check-out period by Bar members and their staff. These practice-management-focused materials run the gamut from marketing to how to get the most out of your practice. You can see the full list of materials and make a check-out request on the Law Practice Management area of the Bar's website. Postage is billed, but materials can be picked up and dropped off free of charge. There are also reference materials that can be used while visiting our office.

LPM's services are confidential, and with the exception of onsite consulting and some of the hands-on training, most of our services are free of charge. Additionally, most of the services are available to you, the member, and your staff. So, give us a call and we won't be a secret any longer. 



**Natalie Thornwell Kelly** is the director of the State Bar of Georgia's Law Practice Management Program and can be reached at [natalie@gabar.org](mailto:natalie@gabar.org).

# Announcing a New Look and Expanded Search Abilities

by Jodi McKenzie

**A**t the end of November 2006, Casemaker began to expand its library to contain legal libraries for all 50 states. Casemaker is still enlarging its current selection of State Libraries to include all appellate case law, state constitutions, rules of court, current statutes, as well as other selected items.

Casemaker's state appellate decisional case law content will equal the content found in either Westlaw or LexisNexis back to 1950. And it will far exceed the state appellate case law content of any of the other legal publishers, worldwide. These developments make Casemaker the fastest growing online legal research service in the country.

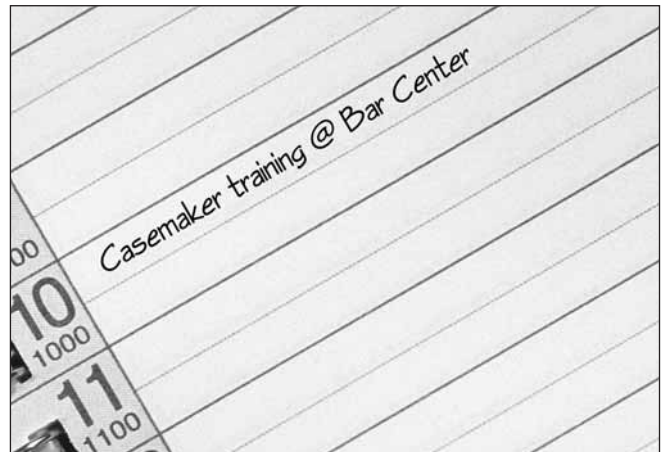
Casemaker will also enhance its Federal Library to include Federal Appellate decisional law, which will contain all decisions from the U.S. Supreme Court. The U.S. Circuit Court libraries will include all decisions post-1949.

Casemaker will also soon be sporting a new look with a site redesign, which will present a "cleaner" appearance. However, there are more important changes ahead than the look of the site.

Casemaker users will find expanded and simpler search capabilities that will be even more user-friendly. Users will continue to search using Boolean operators as well as natural language. Searching in Casemaker will continue to be as easy as typing a question.

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# Reducing Citation Clutter

by Karen J. Sneddon and David Hricik

**R**eading legal documents is hard work. Particularly where the subject matter is complex, lawyers should strive to make reading easier and, therefore, more informative and persuasive.

Cases and statutes are the principal form of legal authority. The rule of law is provided by the common law or by a statute, and obviously it is necessary in legal writing to cite these sources. Though it might be easy to read, a brief without citation to any authority would not only be odd, but also fail to persuade a court. Commenting on the lack of citation in briefing, one federal district court remarked that the drafting attorneys:

obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed.

*Bradshaw v. Unity Marine Corp.* 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001).

Though necessary, citations can clutter a brief and distract the reader from the merits of the argument. Even when presented in a clear, non-distracting (and properly formatted) fashion, citations may be presented in a way that takes up space but yet does not further an argument. Lawyers should strive to avoid citation clutter while still providing the reader with the neces-



sary citation information. This installment of Writing Matters tackles part one of this two-part challenge: avoiding clutter. The next installment will address how to effectively use citations.

The most direct way to avoid citation clutter is to avoid using case names or statutes as the subject of sentences. Here is an example of a case, and then a statute, used as the subject of a sentence:

The Supreme Court of Georgia in *Critser v. McFadden*, 593 S.E.2d 330, 333 (Ga. 2004), held that a jury charge in a negligence case “should clearly inform the jury that it is their duty to determine not only whether the act or acts were committed, but also, if committed, whether the same amounted to negligence, and if so, whether such negligent act or acts proximately caused plaintiff’s injuries.”

Under Texas Government Code § 3101.010(a)(1) (Vernon 2001), it is a crime for a person to cause

“pecans to fall from a pecan tree by any means, including by thrashing, unless the tree is located on... land owned by the person causing the pecans to fall.”<sup>1</sup>


In each sentence, the use of the citation as the subject of the sentence emphasizes the case name and statutory provision and forces the reader to wade through them to get to the substance. (Did you read the actual citations?) By putting the citation at the end of the sentence, the message, not the messenger, is emphasized, and each sentence is also shortened:

A jury charge in a negligence case “should clearly inform the jury that it is their duty to determine not only whether the act or acts were committed, but also, if committed, whether the same amounted to negligence, and if so, whether such negligent act or acts proximately caused plaintiff’s injuries.” *Critser v. McFadden*, 593 S.E.2d 330, 333 (Ga. 2004).

It is a crime in Texas for a person to cause “pecans to fall from a pecan tree by any means, including by thrashing, unless the tree is located on... land owned by the person causing the pecans to fall.” Tex. Gov’t Code § 3101.010(a)(1) (Vernon 2001).

Footnotes do not solve the citation dilemma. There is an argument in legal writing circles about whether citations should always be in footnotes.<sup>2</sup> We personally think that citations generally belong in the text, because forcing the reader’s eyes to jump down from the text to the footnotes (or, worse, to endnotes at the back of a document), and then back up again is both distracting and, if citations are generally not used as the subjects of sentences, largely unnecessary to avoid clutter.

Obviously, cases and statutes may sometimes need to serve as

the subjects of sentences. For example, one would expect a brief about the scope of *Roe v. Wade* to mention that case in the text of a sentence, but that is because the message of that brief would be about *Roe’s* meaning. More commonly, if the writing is actively comparing the facts of two cases, or is comparing the facts of a prior decision to the facts of the case at bar, then using the citation in a sentence would be efficient. But, absent a reason to do so, cases and statutes should not be the subject of sentences. Considering whether the case or statute should be the subject of the sentence helps avoid citation clutter. 

## Practice Problems

1. In *Sears v. Bayoud*, 786 S.W.2d 248, 250-53 (Tex. 1990), the Texas Supreme Court analyzed the ambiguity of a prepositional phrase to determine whether a candidate was eligible to run for the state supreme court.
2. Georgia Code Annotated § 2-8A-4 (11) (2000 & 2006 Supp.) classifies Christmas trees as an emerging crop.
3. Under Fed. R. Civ. P. 12(c), as interpreted by the 11th Circuit in *Max Arnold & Sons, LLC v. W.L. Haley & Co.*, 452 F.3d 494 (6th Cir. 2006), “the mere presentation of evidence outside of the pleadings, absent the district court’s rejection of such evidence, is sufficient to trigger the conversion of a Rule 12(c) motion to a motion for summary judgment.”

## Suggested Answers to Practice Problems

1. Although this is a close one—what if the sentence before it was “Courts have sometimes had to analyze prepositional phrases in construing statutes”—but probably a better way to write it is: “The Texas Supreme Court analyzed

the ambiguity of a prepositional phrase to determine whether a candidate was eligible to run for the state supreme court. *Sears v. Bayoud*, 786 S.W.2d 248, 250-53 (Tex. 1990).”

2. In Georgia, Christmas trees are an emerging crop. Ga. Code Ann. § 2-8A-4 (11) (2000 & 2006 Supp.).
3. The 11th Circuit has interpreted Fed. R. Civ. P. 12(c) to mean that “the mere presentation of evidence outside of the pleadings, absent the district court’s rejection of such evidence, is sufficient to trigger the conversion of a Rule 12(c) motion to a motion for summary judgment.” *Max Arnold & Sons, LLC v. W.L. Haley & Co.*, 452 F.3d 494, 503 (6th Cir. 2006).



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Mercer’s Legal Writing Program is consistently rated as one of the top two legal writing programs in the country by U.S. News & World Report.

## Endnotes

1. This is a real statute. It does have other exceptions, so there is more freedom to thrash pecans in Texas than we portray to be the case here. But, be careful when doing so.
2. See generally, Helen A. Anderson, *Are Citations on the Way Down? The Case Against Footnotes*, 2001 Wash. B. J. (Dec. 2001), available at <http://www.wsba.org/media/publications/barnews/archives/2001/dec-01-citations.htm>.

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# Sections Host Events for Members

by Johanna B. Merrill

**O**n May 1 the **Environmental Law Section** hosted a brown bag discussion luncheon at the Environmental Protection Agency's (EPA) offices in the Sam Nunn Federal Center in Atlanta. The topic of discussion was "*Environmental Defense et. al. v. Duke Energy Corp et. al.*: What Will it Mean for Georgia Air?" Blan Holman, senior attorney at the Southern Environmental Law Center, and Alan Dion, acting branch chief, Air, Toxics and General Law, region 4, EPA, spoke during the luncheon. The event was well-attended with more than 30 guests; attorneys in attendance received one CLE credit hour.

The **Technology Law Section** hosted two events this spring: a quarterly CLE luncheon at the offices of Arnall Golden Gregory LLP on the topic of "Antitrust vs. Proprietary Rights: Ripe for Supreme Court Review?" with guest speaker Ross Wofford of Kilpatrick Stockton LLP; the second was a happy hour open house at Gordon Biersch Brewery on May 15, where section members, and prospective members, had the opportunity to learn more about the section, its activities and how to get involved.


On May 16 the Litigation Committee, chaired by Tina McKeon, of the **Intellectual Property Law Section** hosted a lecture luncheon at the Bar Center on the topic of



Photo by Johanna B. Merrill

On May 16, Andrew Crain of Thomas, Kayden, Horstemeyer & Risley, Jeffrey Morgan of Troutman Sanders and Stephen Schatzel of King & Spalding spoke at an Intellectual Property Law Section luncheon sponsored by the section's Litigation Committee. The trio discussed patent litigation in light of the Supreme Court's decision in the case of *Microsoft v. AT&T*.

"Patents with Borders: The Supreme Court's *Microsoft v. AT&T* Decision." Jeffrey Morgan of Troutman Sanders, Stephen Scheatzel of King & Spalding and Andrew Crain of Thomas, Kayden, Hortsemeyer & Risley served as panelists for the discussion.

Reminder: As most sections move toward electronic-only delivery of meeting announcements, section events and newsletters, it's important to keep the Bar updated with your current e-mail address. You may update your profile at [www.gabar.org](http://www.gabar.org). 



**Johanna B. Merrill** is the section liaison for the State Bar of Georgia and can be reached at [johanna@gabar.org](mailto:johanna@gabar.org).

## Congratulations!

Jonesboro High School earned Georgia's third national mock trial title at the National High School Mock Trial Championship in Dallas, Texas!

### Team Members

Brian Cunningham, Lindley Curtis, Kayla Delgado, Matthew Mitchell, Braeden Orr, Laura Parkhouse, Kyle Skinner, Britt Walden timekeeper, Jayda Hazell, Joe Strickland, Lindsay Hargis, Jurod James, Sandra Hagans and Tabias Kelly.

Teacher coaches: Anna Cox and Andrew Cox;

Attorney coaches: Hon. John Carbo, Hon.

Deborah Benefield and Tasha Mosley; Student

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# Diversifying Georgia's Legal Profession

## A Professionalism Cause to Appreciate

by Jennifer N. Ide

*The following article was adapted from remarks at the State Bar of Georgia Women and Minorities in the Profession Committee's Commitment to Equality Awards Program, Jan. 23, 2007.*

Three trailblazers in the movement to diversify Georgia's legal community are honored tonight by the State Bar's Women and Minorities in the Profession Committee. The late Ben F. Johnson Jr., who served as dean of the Emory University School of Law and Georgia State University College of Law, Supreme Court of Georgia Chief Justice Leah Ward Sears, and Ralph B. Levy, former managing partner of King & Spalding LLC, are the recipients of the 2007 Commitment to Equality Awards.

Honoring these individuals is a truly inspirational event. As the co-chair of the event and as a lawyer and a mother of three preschool-age children, I thank Chief Justice Sears and Mr. Levy for all they have done, and continue to do, to make the legal profession more welcoming and fulfilling for women like me who are walking the tightrope of trying to excel as a lawyer and at the same time, wanting to be present and engaged as a mother, wife and caregiver. It is people like the late Ben Johnson Jr., our Randolph Thrower Lifetime Achievement Award recipient, who have made it possible for me to even be standing here tonight and for women and minorities to have made the great strides they have in the legal profession.



Photo by Stephanie Wilson

(Left to right) Allegra Lawrence-Hardy, chair, WMPC; Hon. Orinda D. Evans, judge, U.S. District Court (N.D.GA); and Hon. M. Yvette Miller and Hon. Herbert Phipps of the Court of Appeals of Georgia enjoy each other's company at the reception following the Awards Program.

Last year's American Bar Association survey, which quantified women's status in various settings of the legal profession,<sup>1</sup> showed that women make up 30 percent of lawyers in the United States. Over 20 percent of U.S. District Court judges are female. Nearly 30 percent of the judges on the state courts of last resort are women, and nearly a third of chief justices are women. Women now hold a slight majority over men in law school entrance. These are things we should all be proud of and grateful to the forerunners in our profession, such as the individuals recognized tonight for making them possible.

We all know there is much work left to do. Women still make up less than 20 percent of partners at major firms and general counsels at Fortune 500 companies. Another recent ABA study addresses minority representation in the profession.<sup>2</sup> As to racial and ethnic diversity, total minority representation among lawyers is less than 10 percent, compared to 20 percent for accountants, 25 percent for doctors, and 18 percent for university professors. Minorities make up less than 5 percent of part-

ners at major law firms and general counsels of Fortune 1000 companies. The numbers are even worse for minority women.

The fight for equality today is taking place, for the most part, on a subtler battlefield. Yes, women and minority lawyers are unfortunately still subject to racist and sexist remarks and overt discrimination in hiring and promotions. Thankfully, my generation experiences less of this than the female and minority pioneers in our field. What my generation does find itself up against is conduct and attitudes that are less obvious and less iniquitous on the surface, but still result in holding women and minorities back from full participation in the legal workplace.


It is the exclusion from a client golf outing because the male lawyers assumed that you did not play and did not think to organize a more inclusive client development event. It is being left off a trial team because the partner assumed that you wouldn't want to travel or would be distracted by being away from family. It is the inclusion on teams, committees or client events to boost the numbers of women and minorities for reporting purposes, but not for substantive input. It is the assumption that lawyers who work a reduced-hour schedule are less committed to the firm even if they are meeting all the requirements of their arrangement. It is women being told not to put too many family pictures in the office because they won't be perceived as being serious about their careers. It is the consideration that men have a family to support, but women are the family's second (and thus less important) income earner in making promotion decisions. It is derogatory comments made about women lawyers who are assertive where the same conduct in their male counterparts would be applauded as hard-hitting and aggressive.

Unfortunately, these are deep-rooted attitudes and behaviors. Many lawyers would say these

## What my generation does find itself up against is conduct and attitudes that are less obvious and less iniquitous on the surface, but still result in holding women and minorities back from full participation in the legal workplace.

practices are not intended to marginalize women and minorities, and some would even question whether they have that effect. Rather, they would say that "the practice of law today is a business, and to succeed in the business, you've got to 'fit in.' You can't expect the business to accommodate everyone's personal needs and differences."

I, for one, don't buy it. I won't pretend that I am not a mother as well as a lawyer. In fact, I would go so far as to say that being a mother makes me a better lawyer.

Fortunately, there are people like Mr. Johnson, Mr. Levy and Justice Sears who recognize that the practice of law is not a business. It is a profession, and a noble one at that. As part of this profession, we are called to identify injustice and inequality and do what we can to fight against them. In answering this call, we need to not only look outward to our community and our clients, but also inward to our places of practice, and our profession as a whole. We are thankful to have these three trailblazers to honor for their demonstrated commitment to equality in Georgia's legal community. 



**Jennifer N. Ide**, an associate with Atlanta's Sutherland Asbill & Brennan LLP, is a member of the State Bar's Women and

Minorities in the Profession Committee. She received her J.D. with highest honors from Emory University School of Law, 1999. Her practice encompasses a broad range of civil litigation, with a

particular focus on energy litigation, tax controversies and complex commercial matters.

### Endnotes

1. American Bar Association, Commission on Women in the Profession, *A Current Glance at Women in the Law 2006*, available at <http://www.abanet.org/women/CurrentGlanceStatistics2006.pdf>. (last visited April 12, 2007).
2. American Bar Association, Commission on Racial and Ethnic Diversity in the Profession, *Executive Summary of Miles to Go 2000: The Progress of Minorities in the Legal Profession*, available at <http://www.abanet.org/minorities/publications/milessummary.html> (last visited April 12, 2007).



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**Judge John Sammons Bell** died in December 2006. Bell had a distinguished record of service to his country and his state. He graduated from Gordon Military College in 1932, where he was senior ranking cadet officer. He then secured his undergraduate degree from Mercer University in 1937. In June of that year, he married Evelyn Dame of Macon. Bell served bravely as a Major in the U.S. Army during WWII, earning many honors and commendation medals including a Bronze Star and a Purple Heart for his bravery during combat in the Northern and Southern Solomon Campaigns.

Wounded in action, he returned to Georgia and graduated with honors from Emory University School of Law. He passed the bar after a single year at Emory and began his law practice in 1946. He was elected chairman of the Georgia State Democratic Party in 1954, a position he held for six years. In 1960 Bell was appointed to the Georgia Court of Appeals by Gov. Ernest Vandiver; he became presiding judge in 1963, and served as chief judge from 1969 until his retirement in 1979. An avid scholar, Bell devoted much of his time to the study of Southern history, particularly the Civil War.

Bell was preceded in death by his wife, Evelyn Dame and is survived by his daughter Julee Fleming; granddaughter Carrol Fleming and grandson Dr. Frank Bell.

**Judge Ogden Doremus** died in April 2007. An Atlanta native, he was born in 1921 to Estes Doremus and Mary (Dolly) McAdory Doremus. In 1960, he moved to Savannah from Atlanta and established the law firm Doremus and Karsman. He and his wife Carol moved to Metter in 1972, where he was a partner in the Metter law firm of Doremus, Jones and Smith. He was Candler County State Court judge for four terms ending in 2004. He received his J.D. from Emory University in 1949.

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Doremus, a World War II veteran, served in the U.S. Army Air Corps from 1942-46. Called "Georgia's Hero" by the state's environmental community, he was one of the first trustees of the Georgia Conservancy and was instrumental in legislation declaring marshes to be state property resulting in the Marshland Protection Act. He spoke at Georgia's first Earth Day event and served as executive committee member of the Georgia chapter of the Sierra Club.

Doremus co-founded the Georgia Center for Law in the Public Interest. He was appreciated for his tireless work in the environmental community and was a mentor to the current leadership of these organizations. Doremus was a member of Metter United Methodist Church and

Doremus was preceded in death by his wife, Carol, and he is survived by a son and daughter-in-law, Frank and Lisa Doremus of Westport, Mass.; two daughters, Celia J. Doremus of Arlington, Mass.; Dale M. Doremus of Santa Fe, N.M.; and a granddaughter, Carolyn Dixie Doremus of Westport, Mass.

**Samuel Johnson Gardner Jr.** died in March 2007. Gardner was born in Albany in 1920. His parents moved to Savannah one year later, where he lived until beginning his law career in Moultrie in 1947. He was a graduate of Armstrong State University in Savannah, Emory University and the University of Georgia Law School. He also studied at Harvard Business School.

Throughout his life, he was active in all lay activities of the United Methodist Church. At First United Methodist Church he served as Sunday school teacher, member of the Board of Stewards and on the "sidewalk committee." He was a member of Kiwanis International, serving the Moultrie chapter as president on several occasions. He enjoyed working with the citizens of Moultrie and Colquitt County through his law

practice. It was thought that he was generous with his time and his love for the people of that area. He was privileged to serve in the Georgia State Senate in 1961-62, representing the citizens of Colquitt, Tift and Cook counties. His interest in people and the ease with which he met them seemed to make him friends wherever he went.

He was preceded in death by his wife, Julia Florence Gardner; his daughter, Ann Gardner; and his grandson, Kirk Blackburn Oliver Jr. Survivors include a son, Samuel J. Gardner III of Charlotte, N.C.; two daughters, Florence Gardner Calhoun of Jacksonville, Fla., and Caroline Gardner Oliver of Athens; three grandchildren; sisters and brothers-in-law; and many nieces, nephews and cousins.

**Naiyareh Karimimanesh** died in April 2007. A native of California, she attended Tulane University and Emory University, graduating from Emory with a B.A. in History. Karimimanesh earned her J.D. from Georgia State University College of Law in 2005. While pursuing her law degree, she received Honor's Designation in Litigation, was a finalist in the Lonestar Classic Mock Trial Tournament in Texas, was involved in the Student Trial Lawyers Association, was active in the Jessup International Moot Court, and was president of the International and Comparative Law Society.

She worked at the Prosecuting Attorneys' Council of Georgia as a research assistant while studying for the bar exam, and continued to be involved with the Student Trial Lawyers Association at Georgia State. Karimimanesh took a staff attorney position with the Council after passing the bar, and most recently accepted a position with Sharon Ware and Associates. Karimimanesh was active in the Bahá'í community in Atlanta.

She is survived by her parents, Carelle and Mahmood, of San Mateo, Calif.; maternal grandmother Elcyne; sister Alexis Carter;

nephews Vincent and Chase Carter; and many aunts, uncles and cousins.

**Frank C. Vann** died in April 2007. Vann received his B.A. from the Virginia Military Institute. He began law school at the University of Florida, then transferred to the University of Georgia where he earned his J.D. Upon finishing law school, he returned to Camilla to open his law practice. Two years later, he attended JAG training at the University of Virginia and served in the Korean War. Upon returning, Vann reopened his law practice in Camilla.

In addition to practicing law, Vann farmed for many years, including partnering with his son, Scott. Vann was active in his community and state. Positions held included: District Governor of the Lions Club, president of the Mitchell County Bar Association, founding chair of the International Section of the State Bar of Georgia, and executive secretary of the Mitchell County Democratic party. Vann also served one term as State Senator for the 10th District of Georgia, where he received the honor of Most Outstanding Freshman Senator. Vann was a member of Camilla Methodist Church, where he taught Sunday school. He was an avid orchid grower and gardener.

Vann is survived by his wife, Janie Cagle Vann; two sons, Frank Cochran Vann Jr. of Camilla, and Scott Emory Vann and his wife Staci of Baconton; two daughters, Elizabeth Janie Vann of El Paso, Texas, and Mary Georgia Vann Hamilton and her husband, George of Atlanta; three grandchildren and numerous nieces, nephews and cousins.

**Judge Clarence Roland Vaughn Jr.**, died in March 2007. Vaughn was a lifelong resident of Rockdale County. In June 1942, after graduating from North Georgia College he married the late Doris Henson Vaughn. He entered the armed forces as a second lieutenant and

was promoted to the rank of captain. He served four years during World War II; including 26 months overseas in the European Theater, 6th Calvary; third Army under the command of General George Patton. He received the bronze star for meritorious service. Upon his return, he graduated from the University of Georgia Law School and began practicing with his father, Clarence R. Vaughn Sr.

He served in the Georgia General Assembly as state senator for one term in 1959. In 1960, he was elected to the House of Representative and served for 22 years. During his tenure as representative, he was floor leader for the governor, and served as Majority Leader of the House of Representatives from 1974-82. Vaughn was elected the first Superior Court judge of the newly formed Rockdale Judicial Circuit and began service January 1982. He served the circuit as chief judge.

Vaughn was a lifelong member of the Conyers First United Methodist Church, where he served on the board and as superintendent of Sunday school for 18 years. He was a trustee and chairman of the Vaughn-Jordon Foundation, a member of the Rotary Club, VFW, American Legion, and a 32nd degree Mason. He will be remembered for his generous gifts to the community, including the Conyers Rockdale Council for the Arts, the Rockdale County Historical Society, and the Rockdale Medical Center. In addition to his love of his family, law, and community, Vaughn was known for his love of flowers.


He is survived by sons, Alvin H. Vaughn, C. Roland Vaughn III; daughters-in-law, Paula Vaughn and Susan Vaughn III; and niece, Harriet R. Powell. Other survivors include grandchildren and great-grandchildren.

**Andrew J. Whalen Jr.**, senior judge of the Superior Courts of the

Griffin Judicial Circuit, died in April 2007. Whalen served as Superior Court judge of the Circuit from 1969 until taking senior judge status in 1999. When the circuit grew from a single judge to four judges, Whalen became its chief judge. He was known for his strict policies in the courtroom and stiff, but fair, sentences for the guilty.

Prior to his appointment to the bench, Whalen served from 1954-69 as solicitor general. Born in Albany in 1923 to Andrew J. Whalen Sr. and Katie Wells Whalen, the family moved to Griffin in 1928. Whalen graduated from Griffin High School in 1940, attending North Georgia College from 1940-42. At the outset of WWII, Whalen joined the Army, serving briefly in the cavalry before volunteering for the Army Air Corps, with assignment in Hawaii. Returning to civilian life in 1946, Whalen entered the University of Georgia, graduating with a degree in Business Administration. He then entered Emory University School of Law, from which he graduated in 1950. He immediately began practicing law in Griffin with former Congressman John J. Flynt Jr.

In addition to his service on the bench, Whalen served as administrative judge to the Sixth Judicial Administrative District and served the bar and judiciary in many capacities, including the Judicial Council of Georgia, and the ICJE; both of which he chaired. He was influential in legal circles and helped guide the profession as a mentor to many new judges. Whalen was a lifelong member of the First United Methodist Church of Griffin.

He is survived by his wife, Jacqueline Williams Whalen; sons, Andrew J. Whalen III and his wife, Jan; Timothy J. Whalen and his wife, Jean; and a daughter, Susie and her husband, Rick Blackshear, all of Griffin. He had six grandchildren and two great-grandchildren. 



## Memorial Gifts

The Lawyers Foundation of Georgia furnishes the *Georgia Bar Journal* with memorials to honor deceased members of the State Bar of Georgia.

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For information regarding the placement of a memorial, please contact the Lawyers Foundation of Georgia at (404) 659-6867 or 104 Marietta St. NW, Suite 630, Atlanta, GA 30303.

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# June-August

**JUN 5** NBI, Inc.  
*Child Custody and Shared Parenting*  
Atlanta, Ga.  
5 CLE Hours

**JUN 5** Lorman Education Services  
*The 8 Greatest Estate Planning Techniques*  
Atlanta, Ga.  
6.7 CLE Hours

**JUN 5** Atlanta Bar Association  
*Judicial Elections*  
Atlanta, Ga.  
1 CLE Hours

**JUN 6** Ct Corporation System  
*Merger Filings in the 21st Century*  
Atlanta, Ga.  
2.8 CLE Hours

**JUN 6-7** Georgia Society of Certified Public Accountants  
*Georgia Federal Tax Conference*  
Atlanta, Ga.  
14 CLE Hours

**JUN 7** NBI, Inc.  
*Estate Administration Procedures – Why Each Step Is Important*  
Atlanta, Ga.  
6.7 CLE Hours

**JUN 8-9** Georgia Defense Lawyers Association  
*GDLA Summer CLE*  
Atlanta, Ga.  
6 CLE Hours

**JUN 11** Institute of Continuing Judicial Education of Georgia  
*20 Hour Office Software Application for Beginners*  
Athens, Ga.  
4 CLE Hours

**JUN 12** NBI, Inc.  
*Practical Guide to Zoning and Land Use Law*  
Atlanta, Ga.  
6 CLE Hours

**JUN 13** Lorman Education Services  
*Accounting and Auditing Standards Update – 2007*  
Atlanta, Ga.  
6.7 CLE Hours

**JUN 14** Ali-Aba  
*Occupational Exposures Associated with Petroleum – Derival Products*  
Atlanta, Ga.  
1 CLE Hours

**JUN 15** NBI, Inc.  
*Building Your Civil Trial Skills*  
Atlanta, Ga.  
6 CLE Hours

**JUN 15** Lorman Education Services  
*Document Retention and Destruction*  
Atlanta, Ga.  
6.7 CLE Hours

**JUN 19** NBI, Inc.  
*Your Guide to Georgia LLC*  
Atlanta, Ga.  
6.7 CLE Hours

**JUN 20** Lorman Education Services  
*Fundamentals of Real Estate Closings*  
Atlanta, Ga.  
6 CLE Hours

**JUN 21** State Bar of Georgia  
*Casemaker Training*  
Atlanta, Ga.  
2 CLE Hours

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**JUN 21-24** ICLE  
*Georgia Trial Skills Clinic*  
 Athens, Ga.  
 See [www.iclega.org](http://www.iclega.org) for locations  
 24 CLE Hours

**JUN 22** ICLE  
*DUI Trial Practice Update Video Replay*  
 Tifton, Ga.  
 See [www.iclega.org](http://www.iclega.org) for locations  
 6 CLE Hours

**JUN 22** ICLE  
*Defending Drug Cases*  
 Atlanta, Ga.  
 See [www.iclega.org](http://www.iclega.org) for locations  
 6 CLE Hours

**JUN 22-23** ICLE  
*Southeastern Admiralty Law Institute*  
 Amelia Island, Fla.  
 See [www.iclega.org](http://www.iclega.org) for locations  
 10 CLE Hours

**JUN 23-29** Prosecuting Attorneys' Council  
 of Georgia  
*2007 Basic Litigation Course*  
 Forsyth, Ga.  
 29 CLE Hours

**JUN 27** Lorman Education Services  
*Real Estate Development From  
 Beginning to End*  
 Savannah, Ga.  
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# November-December

<b>JUN 28</b>	State Bar of Georgia <i>Casemaker Training</i> Atlanta, Ga. 2 CLE Hours	<b>JUL 24</b>	NBI, Inc. <i>Rules and Procedures for Federal Court Success</i> Atlanta, Ga. 6 CLE Hours
<b>JUL 12-14</b>	ICLE <i>Fiduciary Law Institute</i> St. Simons Island, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for locations 12 CLE Hours	<b>JUL 27</b>	State Bar of Georgia <i>Casemaker Training</i> Atlanta, Ga. 2 CLE Hours
<b>JUL 11</b>	Institute of Continuing Judicial Education of Georgia <i>Magistrate Court Clerks and Secretaries Seminar</i> Brasstown Valley, Ga. 10 CLE Hours	<b>JUL 27-28</b>	ICLE <i>Environmental Law Institute</i> Amelia Island, Fla. See <a href="http://www.iclega.org">www.iclega.org</a> for locations 8 CLE Hours
<b>JUL 12</b>	NBI, Inc. <i>Protecting Residential Landlords From Civil Liability</i> Atlanta, Ga. 5 CLE Hours	<b>AUG 9-10</b>	Institute of Continuing Judicial Education of Georgia <i>20 Hour Domestic Violence Retreat</i> Braselton, Ga. 8 CLE Hours
<b>JUL 13</b>	Lorman Education Services <i>Legal Ethics</i> Atlanta, Ga. 6 CLE Hours	<b>AUG 8-9</b>	ICLE <i>Real Property Law Institute Video Replay</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for locations 12 CLE Hours
<b>JUL 17</b>	NBI, Inc. <i>Road and Access Law – Researching and Resolving Common Disputes</i> Atlanta, Ga. 6 CLE Hours	<b>AUG 10</b>	ICLE <i>Franchising</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for locations 6 CLE Hours
<b>JUL 18</b>	Lorman Education Services <i>Litigation Skills for Legal Staff</i> Atlanta, Ga. 6 CLE Hours	<b>AUG 16</b>	NBI, Inc. <i>Drafting Commercial Real Estate Leases</i> Atlanta, Ga. 6 CLE Hours
<b>JUL 20</b>	State Bar of Georgia <i>Casemaker Training</i> Atlanta, Ga. 2 CLE Hours	<b>AUG 24</b>	ICLE <i>Contract Litigation</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for locations 6 CLE Hours

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- AUG 24** ICLE  
*Nuts & Bolts of Family Law*  
Savannah, Ga.  
See [www.iclega.org](http://www.iclega.org) for locations  
6 CLE Hours
- AUG 24** NBI, Inc.  
*Deposition A-Z*  
Atlanta, Ga.  
6.1 CLE Hours
- AUG 30** ICLE  
*Residential Real Estate – Video Replay*

- Atlanta, Ga.  
See [www.iclega.org](http://www.iclega.org) for locations  
6 CLE Hours
- AUG 30** ICLE  
*Future Practice of Law – Video Replay*  
Atlanta, Ga.  
See [www.iclega.org](http://www.iclega.org) for locations  
3 CLE Hours
- AUG 31-SEP 1** ICLE  
*Urgent Legal Matters*  
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# Supreme Court Issues Formal Advisory Opinion No. 05-4 Pursuant to Rule 4-403(d)

The second publication of this opinion appeared in the October 2005 issue of the Georgia Bar Journal, which was mailed to the members of the State Bar of Georgia on or about October 5, 2005. The opinion was filed with the Supreme Court of Georgia on October 18, 2005. The State Bar of Georgia filed a request for discretionary review with the Supreme Court of Georgia on October 18, 2005, pursuant to Rule 4-403(d). On March 19, 2007, the Supreme Court of Georgia issued an Order, with comment, granting the State Bar's request for discretionary review and adopting Formal Advisory Opinion No. 05-4, pursuant to Rule 4-403(d), retracting Formal Advisory Opinion No. 91-3. Following is the full text of the Supreme Court Order and Formal Advisory Opinion No. 05-4. In accordance with Bar Rule 4-403(e), this opinion is binding upon all members of the State Bar of Georgia, and the Supreme Court shall accord this opinion the same precedential authority given to the regularly published judicial opinions of the Court.

## STATE BAR OF GEORGIA FORMAL ADVISORY OPINION NO. 05-4 Approved And Issued On March 19, 2007 Pursuant to Bar Rule 4-403 By Order Of The Supreme Court Of Georgia With Comments Supreme Court Docket No. S06U0797

### COMPLETE TEXT FROM THE ORDER OF THE SUPREME COURT OF GEORGIA

We granted a petition for discretionary review brought by the State Bar of Georgia asking the Court to adopt an opinion of the Formal Advisory Opinion Board ("Board"). At issue is Formal Advisory Opinion ("FAO") 05-4, which is a redrafted version of FAO 91-3. Although both FAO 91-3 and FAO 05-4 address the ethical propriety of a lawyer paying nonlawyer employees a monthly bonus from the gross proceeds of the lawyer's firm, the board reached contrary conclusions in these opinions based on ethical rules in place at the time. For the reasons which follow, we agree with the board that under current

Georgia Rule of Professional Conduct 5.4, the payment of a monthly bonus by a lawyer to nonlawyer employees based on the gross receipts of his or her law office in addition to the nonlawyer employees' regular monthly salary is permissible; and that it is ethically proper to compensate nonlawyer employees pursuant to a plan that is based in whole or in part on a profit-sharing arrangement.

In 1990 this Court issued FAO 91-3 addressing the same issue under former Standard 26 of Bar Rule 4-102 (and identical Directory Rule 3-102), which, in pertinent part, prohibited a lawyer from sharing fees with a nonlawyer except that "a lawyer or law firm may include nonlawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing agreement." Former Standard 26(c). In 2000 the Court issued the Georgia Rules of Professional Conduct, effective January 1, 2001, to replace the former Standards of Conduct. Rule of Professional Conduct 5.4 supercedes Standard 26(c) and enlarges the circumstances under which a lawyer or law firm may share legal fees with a nonlawyer.<sup>1</sup> In pertinent part, Rule 5.4(a)(3) provides:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that . . .

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

The board reviewed FAO 91-3 to determine what impact, if any, application of the Rules of Professional Conduct would have on the opinion and concluded that the substance and conclusions reached in FAO 91-3 are no longer in compliance with current ethical considerations. As a result, the board drafted FAO 05-4. That opinion was published in the April and October 2005 issues of the *Georgia Bar Journal*; no comments were received in response to the publications, see Rule of Professional Conduct 4-403(c); and the State Bar sought and was granted discretionary review by this Court. Rule of Professional Conduct 4-403(d).

The distinction between Rule 5.4(a)(3) and Standard 26(c) is that the former permits a nonlawyer employee to participate in both a *compensation and retirement* plan, whereas the latter permitted nonlawyer compensation only in the context of a *retirement* plan. We agree with the board that the support for FAO 91-3 has changed due to the adoption of the Rules of Professional Conduct and that FAO 91-3 no longer provides an accurate interpretation of the applicable rules of ethics. In contrast, FAO 05-4 is consistent with current Rule of Professional Conduct 5.4(a)(3) in that it allows compensation to a nonlawyer employee in the form of a monthly bonus paid from the gross receipts of the law firm under the rule that a nonlawyer employee may participate in a compensation plan, even though based in whole or in part on a profit-sharing arrangement. Accordingly, we adopt proposed FAO 05-4 and retract FAO 91-3.<sup>2</sup>

Formal Advisory Opinion 05-4 approved. All the Justices concur.

## FORMAL ADVISORY OPINION NO. 05-4

### QUESTION PRESENTED:

Ethical propriety of a lawyer paying his nonlawyer employees a monthly bonus from the gross receipts of his law office.

### SUMMARY ANSWER:

The payment of a monthly bonus by a lawyer to his nonlawyer employees based on the gross receipts of his law office in addition to their regular monthly salary is permissible under Georgia Rule of Professional Conduct 5.4. It is ethically proper for a lawyer to compensate his nonlawyer employees based upon a plan that is based in whole or in part on a profit-sharing arrangement.

### OPINION:

Correspondent asks whether a lawyer may pay nonlawyer employees a monthly bonus which is a percentage of gross receipts of the law office.

Georgia Rule of Professional Conduct 5.4 necessitates the modification of Formal Advisory Opinion No. 91-3, which was based largely on Standard No. 26 of Georgia Bar Rule 4-102. Georgia Rule of Professional Conduct 5.4 replaces the former standard and provides as follows:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the

payment of money, over a reasonable period of time after his death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer or law firm who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer who undertakes to complete unfinished business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

Georgia's Rule of Professional Conduct 5.4 is analogous to its counterpart in the ABA Code of Professional Responsibility. In 1980, the ABA amended DR 3-102(A) to add an additional exception regarding the sharing of fees with nonlawyer employees: "A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan even though the plan is based in whole or in part on a profit sharing arrangement." (emphasis added). ABA DR 3-102(A)(3). The Georgia Rules of Professional Conduct are consistent with the ABA's principles of fee sharing with non-attorneys.

As the Comment to the Model Rule 5.4 of the ABA Model Rules of Professional Conduct states, the policy underlying the limitation on the sharing of fees between lawyer and layperson seeks to protect the lawyer's independent professional judgment. The Comment cautions that if a layperson, not guided by professional obligations, shares an interest in the outcome of the representation of a client, the possibility exists that he or she may influence the attorney's judgment.

In light of all of the foregoing, we conclude that the payment of a monthly bonus payable to nonlawyer employees based upon a plan that is in whole or in part on a profit-sharing arrangement does not constitute a sharing of legal fees in violation of Georgia Rule of Professional Conduct 5.4.

1. Rule 5.4 is now analogous to its counterpart in the American Bar Association Code of Professional Responsibility. ABA DR 3-102 (A) (3).
2. By our approval of FAO 05-4, it becomes "binding on all members of the State Bar [of Georgia]." Rules of Professional Conduct 4-403 (e).

# First Publication of Proposed Formal Advisory Opinion Request No. 05-R6

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

State Bar of Georgia  
104 Marietta Street, N.W.  
Suite 100  
Atlanta, Georgia 30303  
Attention: John J. Shiptenko

An original and twenty copies of any comment to the proposed opinion must be filed with the Formal Advisory Opinion Board by July 15, 2007, in order for the comment to be considered by the Board. Any comment to a proposed opinion should make reference to the request number of the proposed opinion. After consideration of comments, the Formal Advisory Opinion Board will make a final determination of whether the opinion should be issued. If the Formal Advisory Opinion Board determines that an opinion should be issued, final drafts of the opinion will be published, and the opinion will be filed with the Supreme Court of Georgia.

## PROPOSED FORMAL ADVISORY OPINION REQUEST NO. 05-R6

### QUESTIONS PRESENTED:

Is a lawyer obligated to notify a client's creditors or other third persons when the lawyer receives the proceeds of the client's settlement or judgment? If the lawyer is obligated to notify a third person, is the lawyer then obligated to pay that third person, even over the client's objection?

### SUMMARY ANSWER:

A lawyer has a duty to notify those third persons who have an interest in the funds or property when the lawyer receives the funds or property. The lawyer must notify the third person only if: (1) the lawyer has actual knowledge of the claim; (2) the claim arises out of, or relates to, the subject matter of the lawyer's representation of the client; and (3) the claim is *prima facie* valid. A lawyer has a subsequent duty to pay a third person only if the claim is actually valid and the person is entitled to receive the funds. If so, the lawyer shall pay the funds. If the claim is invalid, the lawyer should not pay

the funds. If the claim is reasonably disputed, the lawyer may pay out any undisputed funds and must separate and safeguard the disputed funds. If the third person and client cannot reach an agreement, the lawyer should interplead the funds in a court of proper jurisdiction.

### OPINION:

This issue is governed by Georgia Rule of Professional Conduct 1.15(I)(b), which provides:

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Comment 3 to Rule 1.15 gives further guidance:

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. . .

Regarding third persons,<sup>1</sup> the Rule identifies the following two relevant separate duties:<sup>2</sup> (i) the duty to notify a third person who has an interest in the funds or property; and (ii) the duty to pay a third person the funds that person is entitled to receive.

A lawyer does not have a duty to notify every possible creditor of a client when the lawyer receives the proceeds of a client's settlement or judgment. The duty to notify applies to third persons who have an interest<sup>3</sup> in the funds or property and is limited by three factors. First, the lawyer must have actual knowledge of the claim.<sup>4</sup> Second, the claim must arise out of, or at least relate to, the subject matter of the lawyer's representation of the client.<sup>5</sup> Third, the claim must be *prima facie* valid.<sup>6</sup> If all three factors are met, the lawyer has a duty to notify the third person that the lawyer has received

the funds or other property in which the third person has an interest.

Notifying a third person whom a lawyer believes has a *prima facie* valid claim arising out of, or related to, the subject matter of the representation does not violate the duty of confidentiality owed to the client. Such disclosure is authorized under Georgia Rule of Professional Conduct 1.6(a) which excepts from confidentiality "disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the Court." Furthermore, the lawyer's duty of confidentiality may not be used to "assist the client to conceal the property from the third person."<sup>7</sup>

The duty to pay differs from the duty to notify in that the duty to pay extends only to claims that are actually valid and to which the third person is legally entitled. For example, such legal entitlement may result from a perfected lien or court order.<sup>8</sup>

If the lawyer determines that the claim is actually valid and the person is legally entitled to receive the funds, the lawyer shall disburse them to the third person. If the lawyer determines the claim is invalid or the third person is not entitled to payment thereon, the lawyer does not have a duty to pay the third person. If the lawyer reasonably questions the validity of the claim or reasonably believes the client's objections have merit, the lawyer should not disburse any disputed funds. The lawyer may disburse any undisputed funds to the client and third person but must segregate and safeguard any disputed funds. The lawyer may then attempt to resolve the dispute between the client and the third person, but if unsuccessful, the lawyer should interplead the funds in a court of proper jurisdiction. This course of action follows Formal Advisory Opinion No. 94-2 (1994) which states:

In those cases where it is not possible to ascertain who is entitled to disputed funds held by the lawyer, the lawyer may hold such disputed funds

in the lawyer's trust account for a reasonable period of time while endeavoring to resolve the dispute. If a resolution cannot be reached, it would be appropriate for a lawyer to interplead such disputed funds into a court of competent jurisdiction.

1. Usually a third person with an interest is a creditor, such as a medical facility that has provided medical services to the client, an insurance company, or a lawyer who has provided legal services to the client.
2. Actually, the attorney also has a duty to render a "full accounting." We express no opinion herein on the scope of any such duty.
3. The term "interest" is not defined by the Rules of Professional Conduct. For the purposes of the notification aspect of this opinion, a third person with a presumptively enforceable claim has an "interest."
4. Actual knowledge may be inferred from the circumstances. See Terminology, Rules of Professional Conduct. In some instances, a creditor's compliance with filing requirements provides the requisite legal notice to all affected persons. See, e.g., O.C.G.A. §44-14-471 where "the filing of the claim or lien shall be notice thereof to all persons, firms, or corporations liable for the damages, whether or not they received the written notice provided for in this Code section."
5. Alaska Bar Ass'n Ethics Comm., Op. 92-3 (1992) (There may be other claims unrelated to the subject matter of the representation; for instance child support, alimony, restitution for criminal conduct and so on. A client is capable of and responsible for payment of his or her own obligations. Unless the claim in question has been reduced to a valid assignment or perfected lien, a creditor has no more special "entitlement" to those funds than does the client.) D.C. Bar Legal Ethics Comm., Op. 293 (1999). (In general, a "just claim" that the lawyer must honor pursuant to Rule 1.15 is one that relates to the particular funds in the lawyer's possession, as opposed to merely being (or alleged to be) a general unsecured obligation of the client.)
6. A lawyer may treat a writing evidencing such a claim as *prima facie* evidence of the claim's existence and validity.
7. Restatement of the Law Third, The Law Governing Lawyers, §44(h) (2000).
8. Certain private agreements may also be included. See Colo. Bar Ass'n Ethics Comm., Op. 94-94 (1994); Utah Ethics Advisory Op. Comm., Op. 00-04 (2000).

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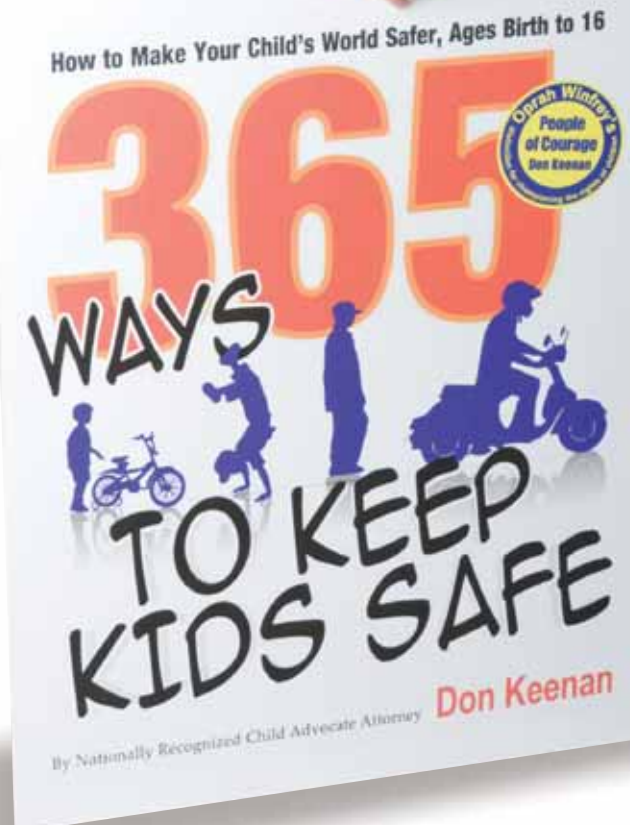
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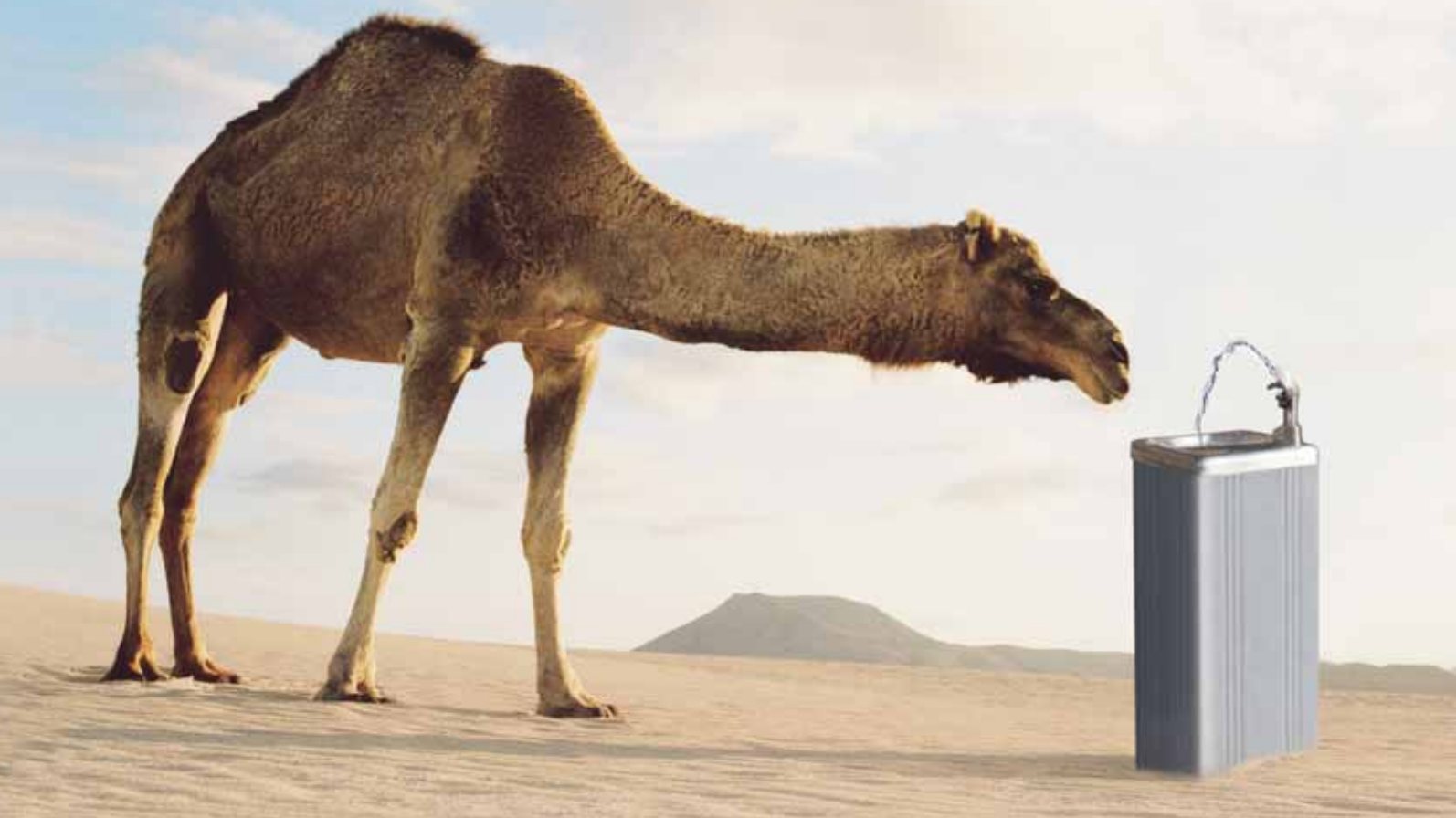
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